IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FATMA MAROUF and BRYN ESPLIN, *Plaintiffs,* v. XAVIER BECERRA, in his official capacity as Secretary of the United States Department of Health and Human Services, *et al.*, *Defendants.*	Case No. 1:18-cv-378 (APM) Hon. Amit P. Mehta

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION[1]

Although the essential facts of this case are undisputed, Defendants' motions for summary judgment mischaracterize or misinterpret them, and fail to appropriately apply applicable law. What is not contested or contestable is that Federal Defendants[2] knowingly allowed the federally funded Unaccompanied Refugee Minors ("URM") Program to be administered in accordance with the religious beliefs of Defendant United States Conference of Catholic Bishops ("USCCB")—the grantee that is delegated the authority to operate the URM Program in the Dallas-Fort Worth area on Federal Defendants' behalf. Such administration discriminated against Plaintiffs Fatma Marouf and Bryn Esplin ("Plaintiffs")—a married same-sex couple residing in the Dallas-Fort Worth area by denying them an equal opportunity to foster Program children on account of USCCB's religious beliefs disfavoring married same-sex couples. Federal Defendants continue to so discriminate against Plaintiffs and other similarly situated couples.

Federal Defendants' recent Program modification does nothing to alter these essential facts and, indeed, only exacerbates the constitutional deficiencies of Federal Defendants' Program administration. In direct response to this litigation, Federal Defendants contracted with a new third party, the United States Committee for Refugees and Immigrants ("USCRI"), to pre-screen Program foster parent applicants in the Dallas-Fort Worth area for the purpose of referring them for further processing to either USCCB's subgrantee Catholic Charities of Dallas ("CCD") or alternative Program grantee Lutheran Immigration and Refugee Service's ("LIRS") subgrantee Upbring. Federal Defendants admit that if Plaintiffs were to seek to reapply to be Program foster

[1] Plaintiffs file this combined opposition to both Defendants' motions for summary judgment ("MSJ"). *See* Dkt. 109 (Federal Defendants' MSJ); Dkt. 106 (United States Conference of Catholic Bishops' MSJ).

[2] Plaintiffs collectively refer to the Office of Refugee Resettlement ("ORR"), the Administration for Children and Families ("ACF"), the United States Department of Health and Human Services ("HHS"), and the officials who lead them as "Federal Defendants."

parents following Federal Defendants' Program modification, it is "possible" that Plaintiffs would be referred by USCRI to CCD—in which case they would again be subjected to the very same religion-based discriminatory treatment they experienced in 2017. And even if USCRI consistently refers married same-sex couples solely to Upbring, such Program administration only compounds Federal Defendants' constitutional violations: Federal Defendants themselves, through their agent, now segregate married same-sex couples for unequal treatment—and do so by deliberate reference to a religious standard, for the sole purpose of permitting bias.

For the reasons set forth below and in Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment (Dkt. 107), Federal Defendants' administration of the URM Program continues to violate the fundamental guarantees of equal protection and due process and the constitutional prohibition against governmental religious discrimination, to the detriment both of married same-sex couples who wish to be Program foster parents and of Program children whose best interests would be served by placement with such couples. Hence, Defendants' assertion of mootness and arguments that they are entitled to judgment on the merits fail, and their motions should be denied.

FACTUAL BACKGROUND

A. The Undisputed Facts Demonstrate That Federal Defendants Administer the URM Program by Reference to USCCB's Religious Beliefs in a Manner That Discriminates Against Married Same-Sex Couples.

As explained in Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Motion") and accompanying Memorandum of Law and Statement of Undisputed Material Facts ("PMF") (Dkt. 107), which Plaintiffs incorporate by reference,[3] Federal Defendants administer the URM Program, a federally funded child welfare program that provides care for thousands of

[3] Plaintiffs refer to the evidence already in the summary judgment record by virtue of Plaintiffs' Motion, rather than reattaching that evidence to this opposition.

unaccompanied refugee children, including through placement in foster homes. *See* PMF ¶¶ 1-3.[4] Federal Defendants have delegated administration of the Program to their grantee USCCB, including such functions as recruitment and screening of prospective foster parents, training of foster parents, and placement of Program children with foster parents. *Id.* ¶¶ 5-6, 10. And USCCB, through its subgrantees, administers the Program on Federal Defendants' behalf, including by processing foster parent applications. *Id.* ¶ 8.

USCCB is a religious organization that holds the belief that "marriage is between one man and one woman." *Id.* ¶ 16. As a result, USCCB openly rejects couples as potential foster parents unless they are a married couple comprising one man and one woman. *See id.* ¶¶ 16-18. USCCB's agreements with its subgrantees require that the subgrantees administer grants in a manner consistent with USSCB's religious beliefs, including by not processing foster parent applications of, or placing foster children with, same-sex couples. *Id.* ¶¶ 15-20; *see also* USCCB's Statement of Undisputed Material Facts ("USCCBMF") ¶ 39 (Dkt. 106-2). Federal Defendants awarded USCCB its fiscal year ("FY") 2017 URM Program grant knowing that USCCB would administer the grant in accordance with its religious beliefs, including USCCB's religious objection to parenting by same-sex couples. PMF ¶¶ 10, 15-24.

In February 2017, Plaintiffs spoke with Dana Springer of USCCB's then-subgrantee Catholic Charities of Fort Worth ("CCFW") about fostering a Program child.[5] PMF ¶ 27; Fed.

[4] Pursuant to Local Civil Rule 7(h)(1) and the Court's summary judgment procedure order (Dkt. 87), Plaintiffs' Statement of Material Undisputed Facts was filed as an attachment to Plaintiffs' Motion. *See* Dkt. 107. Citations to Plaintiffs' Statement of Material Undisputed Facts are formatted as follows: (PMF ¶ _.). Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion was also filed as an attachment to Plaintiff's Motion ("PMSJ"). *See* Dkt. 107.

[5] Plaintiffs also spoke with Springer about foster parenting under the Unaccompanied Alien Children ("UAC") Program. PMF ¶¶ 26-27. USCCB is no longer a participant in the UAC Program in the Dallas-Fort Worth area. FDMF ¶¶ 73-75.

Defs.' Statement of Undisputed Material Facts ("FDMF") ¶ 39 (Dkt. 110-3). Springer informed Plaintiffs that CCFW would not accept their foster parent application because they do not "mirror the holy family." PMF ¶ 28; FDMF ¶ 41; USCCBMF ¶¶ 39-40. Marouf notified Federal Defendants of CCFW's refusal to accept Plaintiffs' application for that reason. PMF ¶ 29; *see also* Decl. of Fatma Marouf ("Marouf Decl.") ¶ 14 (Dkt. 108-3); Decl. of Bryn Esplin ("Esplin Decl.") ¶ 6 (Dkt. 108-2); FDMF ¶ 41; USCCBMF ¶ 41.

The discrimination Plaintiffs suffered directly resulted from: (1) Federal Defendants' failure to establish and maintain meaningful safeguards against USCCB's use, in the course of its administration of the URM Program, of a religious litmus test condemning married same-sex couples, despite express notice that USCCB would use such a test; and (2) Federal Defendants' failure, despite express notice, to redress USCCB subgrantee CCFW's use of that test against Plaintiffs when they sought to apply to be Program foster parents.

First, when Federal Defendants awarded the Program grant to USCCB, they did not prohibit or otherwise restrict USCCB from categorically turning away prospective foster parents who are married same-sex couples based on USCCB's religious beliefs. *See* PMF ¶¶ 6, 21-23. Nor did Federal Defendants implement any other safeguard to prevent USCCB from administering the grant in an impermissibly discriminatory manner. *Id.* ¶¶ 23-24.

The absence of safeguards has resulted in systematic discrimination against same-sex couples, including Plaintiffs. *See id.* ¶¶ 41-76 (identifying multiple instances of such discrimination). Moreover, Federal Defendants' ratification of USCCB's use of a religious litmus test has also resulted in discrimination against other classes on religious grounds. *See*, *e.g.*, Decl. of Catelyn Devlin ("Devlin Decl.") ¶¶ 10-12, 14-15 (Dkt. 108-5); *see also, e.g.*, PMF ¶¶ 169-79 (CCFW also discriminated against single individuals and non-Christian individuals who inquired

with CCFW about becoming Program foster parents). Such discrimination confirms that Federal Defendants have not established and maintained meaningful safeguards against USCCB's religious discrimination in the administration of the URM Program on Federal Defendants' behalf.

Second, after Marouf notified Federal Defendants of CCFW's refusal to accept Plaintiffs' application because they do not "mirror the holy family," Federal Defendants did nothing to meaningfully redress that religion-based discriminatory treatment of married same-sex couples under the URM Program. *See id.* ¶¶ 29-31. On the contrary, Federal Defendants continue to refer same-sex couples to USCCB or its subgrantees, despite knowing that they will be turned away on account of USCCB's religion-based rules for operating the Program. *See id.* ¶¶ 41-52.

B. The New Consortium Does Not Remedy the Constitutional Deficiencies of Federal Defendants' Program Administration—It Exacerbates Them.

In direct response to this litigation, Federal Defendants contracted with USCRI to conduct intake of Program foster parent applications in the Dallas-Fort Worth area. *Id.* ¶ 84; *see also* FDMF ¶¶ 89-91. USCRI solicits demographic information about the applicants—including whether they are a married same-sex couple—and then refers them for further processing to either CCD or Upbring. PMF ¶¶ 84-86. Upbring does not object to licensing same-sex couples as foster parents. *Id.* ¶ 83; FDMF ¶¶ 86-87. Federal Defendants refer to this arrangement as a "Consortium." FDMF ¶ 90.

Defendants are simply wrong in contending that the Consortium remedies the constitutional deficiencies of Federal Defendants' Program administration. For, while Federal Defendants assert that "[redacted]" Fed. Defs.' Statement of P. & A. in Supp. of Mot. for Summ. J. ("FDs' Mem.") at 9 (Dkt. 110-2), their own memorandum concedes that it is, at best, only "[redacted]" that Plaintiffs would not

suffer the very same discrimination again if they reapply to be Program foster parents through the Consortium. *Id.* at 14. And this concession is borne out by the summary judgment record: In sworn deposition testimony, Federal Defendants admitted that, notwithstanding the Consortium, it remains "possible" that the very same discrimination Plaintiffs suffered would happen again if they reapply to be Program foster parents. PMF ¶ 107. That Federal Defendants cannot assure otherwise is not surprising, because, as they admit, Consortium participants deliberately do not document the referral criteria that USCRI uses in processing applicants. *Id.* ¶¶ 87-89. And Federal Defendants have intentionally remained ignorant of USCRI's decision-making standards, conducting no governmental oversight and taking no steps to ensure appropriate safeguards. *See id.* ¶ 93. Thus, by their own design, Federal Defendants have placed themselves in a position where they cannot provide any assurance that prospective Program foster parents, who are married same-sex couples, will not be referred by USCRI to CCD (and then turned away by CCD on account of religious objections). *See id.* ¶ 107. Indeed, the Consortium's organizing documents contain a prospective, broad waiver providing for religious exceptions that have not even been sought by any Consortium member. *Id.* ¶ 108. That waiver does not adequately identify any substantial religious burden on a Consortium member, does not outline the scope of any purported religious accommodation, and does not take into account either the subversion of the Program's purpose or the burdens imposed on prospective foster parents and Program children. *See id*. Yet Federal Defendants themselves have described those sorts of waivers as overbroad and improper. *See* Ltr. to S.C. Gov. Henry McMaster from ACF (Nov. 18, 2021), *available at* https://www.acf.hhs.gov/sites/default/files/documents/withdrawal-of-exception-from-part-75.300-south-carolina-11-18-2021.pdf.

Even if USCRI referred all married same-sex couples to Upbring to avoid having the couples be turned away by CCD on account of religious objections, the Consortium does not remedy the constitutional deficiencies here. Rather, the Consortium compounds those deficiencies: Federal Defendants themselves, through their agent, now segregate married same-sex couples from other applicants to enable unequal treatment of these couples in accordance with religious standards. In other words, through their agent, Federal Defendants (1) are now themselves discriminating against married same-sex couples (in addition to enabling and ratifying discrimination by USCCB in USCCB's administration of the URM Program on Federal Defendants' behalf), and (2) have now adopted USCCB's religious beliefs as a determinant of governmental decision-making. *See* PMF ¶¶ 91-92.

This direct religion-based governmental discrimination materially disadvantages married same-sex couples, who not only have fewer options for participating in the Program—one agency as opposed to the two for different-sex couples—but are also relegated to what is, at least to date, the far more limited option. As a new subgrantee, Upbring lacks the capacity to screen, train, and license applicants and support child placements on anywhere near the scale that CCD does, so Upbring does not and cannot provide Program services equal to CCD's. *See id.* ¶ 102. Indeed, whereas CCD currently has approximately 50 Program children in its care, *id.* ¶ 105; FDMF ¶ 81, Upbring to date has *no* Program children in its care and is still attempting to hire the staff it needs to license foster families and arrange placements. PMF ¶ 102. Hence, Upbring currently has only a single licensed foster family in its network. *Id.* ¶ 103.

Moreover, the Consortium does not remedy—and indeed exacerbates—the "stigma, rejection, and humiliation" that Plaintiffs experienced. Marouf Decl. ¶ 20. When Plaintiffs were turned away by CCFW in February 2017, Esplin "was devastated." Esplin Decl. ¶ 5. She testified

that "[i]t was really painful to be rejected" as a result of the "discrimination" that Federal Defendants enabled. PMF ¶¶ 32-35, 37, 39-40. The Consortium's continuation of the discriminatory treatment of same-sex couples has only compounded the trauma and dignitary harm Plaintiffs suffered. As Marouf states:

> To us, it sounds like a thinly veiled attempt by the federal government to fashion a 'separate but equal' scheme, where same-sex couples are shunted through one door, while heterosexual couples are invited to apply through another. Even if a screen is placed over the segregation, we know it exists, and the screen itself symbolizes the stigma that we feel. We understand that USCRI's primary job is to identify same-sex couples in the pool of applicants and place them in a separate pile. Being segregated in this way is as upsetting and insulting as a blanket rejection. We had hoped that the federal government would address the discrimination we experienced. Instead, they set up a system that, shielded from public view, segregates same sex couples, thereby perpetuating discrimination.

Marouf Decl. ¶ 20. Plaintiffs are also aware that Upbring will not provide them with the same opportunities to foster a Program child, given its recent entry into the Program. *Id.* ¶ 21. Plaintiffs still wish to foster a Program child; they have not reapplied because of the ongoing discrimination that they would suffer at the hands of the Consortium, acting on behalf of Federal Defendants, if they were to do so. *See id*. ¶¶ 20-21; Decl. B, Marouf Supp. Decl. ¶¶ 2-6.

ARGUMENT

I. PLAINTIFFS' URM PROGRAM[6] CLAIMS ARE NOT MOOT.

A defendant asserting mootness bears the burden of establishing that the case is moot. *See Honeywell Int'l, Inc. v. Nuclear Regulatory Comm'n*, 628 F.3d 568, 576 (D.C. Cir. 2010). That burden is a "heavy" one. *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 459 (D.C. Cir. 1998) (internal quotation marks omitted). A case is not moot if a court can grant "any effectual relief whatever to the prevailing party." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)

[6] In light of USCCB's decision to no longer participate in the UAC Program in the Dallas-Fort Worth area, Plaintiffs are no longer pursuing their claims for injunctive and declaratory relief as they relate to the UAC Program.

(internal quotations and alteration omitted); *see* also *Pub. Employees for Env't Resp. v. Nat'l Park Serv.*, No. 19-3629 (RC), 2021 WL 1198047, *11 (D.D.C. Mar. 30, 2021) (mem. op.) (noting that this is a "low bar" for plaintiffs to clear).

Where, as here, a governmental defendant seeks to moot a case by purporting to voluntarily cease the challenged conduct, it must show that (1) it is "*absolutely* clear the allegedly wrongful behavior could not reasonably be expected to recur," *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (emphasis added); and (2) "intervening events 'have *completely and irrevocably* eradicated the effects of the alleged violation.'" *Ctr. for Biological Diversity v. Kempthorne*, 498 F. Supp. 2d 293, 296 (D.D.C. 2007) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)) (emphasis added). Any other rule would allow the government to frustrate "the 'public interest in having the legality of the [challenged] practices settled.'" *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).

It is not "absolutely" clear that the Consortium "completely" eradicates the constitutional deficiencies of Federal Defendants' Program administration. On the contrary, it only exacerbates them. Plaintiffs therefore continue to suffer concrete injuries that are redressable by the Court. What is more, Federal Defendants retain authority to reinstate the pre-Consortium URM Program at any time, so any ostensible cessation of the constitutional injuries is not "irrevocabl[e]." Accordingly, Defendants have not met their heavy burden, and Federal Defendants' modification of the URM Program does not moot this case.

A. The Consortium Only Exacerbates the Constitutional Deficiencies of Federal Defendants' Program Administration.

By Federal Defendants' admission, they fail the two-part test set forth above, and accordingly, this case is not moot. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289

(1982) ("It is well settled that a defendant's [purported] voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.")

Rather than being "absolutely clear" that the religion-based discriminatory treatment of married same-sex couples cannot reasonably be expected to recur, Federal Defendants have provided a path for it to continue: Under the Consortium, as designed, USCRI will segregate prospective Program foster parents who are married same-sex couples from other applicants, based on their sexual orientation and sex and the same-sex character of their marriages, as a direct result of USCCB's religious condemnation of the couples. *See* PMF ¶¶ 91-92; *See* FDMF ¶¶ 89-91, 93. Indeed, the Consortium is specifically designed to do just that—funnel prospective Program foster parents who are married same-sex couples away from CCD on account of USCCB's religious objections. PMF ¶ 81; *See* FDMF ¶¶ 91, 93. This Court has recognized that the dignitary harm of unequal treatment at the hand of one's own government is a cognizable injury. *See Marouf v. Azar*, 391 F. Supp. 3d 23, 33 (D.D.C. 2019); *see also, generally*, *Heckler v. Matthews*, 465 U.S. 728, 739-40 (1984) (dignitary harm from differential treatment stigmatizes members of the disfavored group as inherently inferior); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-94 (1954) (segregation generates feelings of inferiority, regardless of whether the tangible factors of the segregated programs are equal). By segregating married same-sex couples from others, the Consortium only exacerbates the "stigma, rejection, and humiliation" experienced by Plaintiffs on account of the unequal treatment. PMF ¶ 101.

As a matter of law, this governmental discrimination against married same-sex couples violates the fundamental guarantees of equal protection and due process. *See* PMSJ at 16-26; *see also Obergefell v. Hodges*, 576 U.S. 644, 681 (2015); *United States v. Windsor*, 570 U.S. 744, 774-75 (2013); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Romer v. Evans*, 517 U.S. 620, 631-36

(1996). That is especially so when, as here, the discrimination is designed to accommodate the bias of a third party. *See Romer*, 517 U.S. at 631-36 (private religious and moral disapproval of lesbian, gay, and bisexual people is not a rational basis for government-facilitated discrimination); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("private biases" are not "permissible considerations for" governmental action); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448-49 (1985).

Additionally, it is undisputed that, if the Consortium operates as intended and married same-sex couples all are sent by USCRI to Upbring for screening, they will continue to receive less favorable treatment than married different-sex couples on account of USCCB's religious beliefs. Unlike married different-sex couples, who can be referred to either agency and can enjoy the much greater services provided by USCCB's subgrantee, the government intends for married same-sex couples will to be referred only to a new subgrantee with significantly less capacity for screening, training, licensure, and support for placements. *See* PMF ¶¶ 102-106. This religion-based discrimination compounds Federal Defendants' violations of the Equal Protection, Due Process, and Establishment Clauses. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 553 (1996).

Notably, Federal Defendants cannot establish mootness based on Plaintiffs' ability to apply to be foster parents through the Consortium, when Federal Defendants have purposefully kept themselves ignorant of discriminatory processes that the Consortium employs. *See* PMF ¶¶ 87-88. Indeed, Federal Defendants expressly acknowledge that Plaintiffs might be steered by USCRI back to CCD, only to experience again the very same discriminatory rejection as in 2017. *Id.* ¶¶ 93, 107.

Federal Defendants' delegation to Consortium participants of the screening of married same-sex couples, under a structure that is specifically designed to adopt the religious litmus tests of the participants, also violates the Constitution for an additional independent: Federal Defendants may not adopt USCCB's religious beliefs as a determinant of governmental decision-making. *See*

PMSJ at 28-32. Yet the Consortium has been specifically designed to segregate and refer married same-sex couples by reference to USCCB's religious beliefs. PMF ¶¶ 81-108. Indeed, Federal Defendants have impermissibly ceded to USCCB the inherent governmental function of determining USCRI's referral criteria, with no safeguards against impermissible discrimination. *Id.*; *see also Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982). Moreover, under the Consortium, Federal Defendants have granted USCCB a prospective blanket waiver absolving USCCB of any requirement to carry out any task under USCCB's delegated governmental authority, regardless of whether it substantially burdens USCCB's religious beliefs or whether it harms prospective foster parents and Program children. PMF ¶ 108. The Consortium thereby impermissibly operates to further USCCB's religious beliefs at the expense of the rights and interests of married same-sex couples and those of Program children. *See Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005) ("An accommodation must be measured so that it does not override other significant interests."); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (policies that give "unyielding weighting in favor" of religious observers "over all other interests" violate the Religion Clauses).[7]

This Court has recognized that equal treatment is a touchstone of the relief that Plaintiffs seek.[8] *Marouf*, 391 F. Supp. 3d at 37 ("Ordering the Federal Defendants to develop a system that removes barriers to same-sex couples becoming foster parents and evaluates their eligibility *by the*

[7] As Plaintiffs have previously explained, Federal Defendants have elsewhere conceded that analogous blanket waivers are impermissible. *See* PMSJ at 38.

[8] USCCB's assertion that the Consortium satisfies "what Plaintiffs demanded . . . in the manner Plaintiffs themselves proposed" grossly mischaracterizes Plaintiffs' position. USCCB's Mem. of P. & A. in Supp. of Mot. for Summ. J. ("USSCB's Mem.") at 14 (Dkt. 106-1) (emphasis omitted). Simply stated, Plaintiffs seek what they are entitled to by law: fully equal treatment, not just with respect to a common Program entrance portal, but rather from screening through processing, licensure, and placement. *See* Ex. 1, May 15, 2019 Hr'g Tr. at 9:9-17, 11:5-10. The Consortium fails to afford Plaintiffs what they seek.

same criteria as any heterosexual couple or person will make Plaintiffs whole.") (emphasis added). Plaintiffs continue to suffer unequal treatment on account of Federal Defendants' furtherance of USCCB's religious beliefs through the Consortium, leaving Plaintiffs with constitutional injuries for which the Court can provide relief. *See Ctr. for Food Safety v. Salazar*, 900 F. Supp. 2d 1, 7 (D.D.C. 2012) (plaintiffs "need only show that some form of effective relief could be available to them should they prevail—however partial the remedy, however uncertain its potential to truly address Plaintiffs' concerns.") (emphasis added). Accordingly, Defendants cannot show that it is absolutely clear that Plaintiffs "no longer ha[ve] any need of the judicial protection that [they] s[eek]," *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000), or that the Consortium has completely eradicated their constitutional injury, *County of Los Angeles v. Davis*, 440 U.S. at 631.

B. Plaintiffs' Claims Are Also Not Moot Because Federal Defendants Can Reinstate the Pre-Consortium URM Program at Any Time.

Even if the Court could find that the Consortium has remedied all of the constitutional deficiencies at the core of this litigation—which it does not—the modification of the URM Program would not moot this case because Federal Defendants "retain authority to reinstate [the pre-Consortium URM Program] at any time." *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021); *accord Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (governor's directive to end an agency program did not moot challenge to program because State remained free to "revert to its [prior] policy"). Here, Federal Defendants' modification of the URM Program does not carry the force of statute or regulation, and current or future officials are "free to return to [the] old ways." *See Davis v. City of New York*, 812 F. Supp. 2d 333, 339 (S.D.N.Y. 2011) (quoting *City of Mesquite*, 455 U.S. at 289 n.10).

Federal Defendants make no attempt to argue that their unlawful Program administration will not recur. Rather, they continue to defend the lawfulness of the pre-Consortium URM Program. Courts routinely decline to find a case moot when defendants continue to defend the legality of the challenged policy. *Reeve Aleutian Airways, Inc. v. United States*, 889 F.2d 1139, 1143 (D.C. Cir. 1989) ("Indeed, DOD's very defense of [the] regulations makes it more likely that [the plaintiff] will be subject to the procedures."); *In re Ctr. for Auto Safety*, 793 F.2d 1346, 1351-53 (D.C. Cir. 1986) (where defendant officials vigorously assert legality of challenged conduct, it is legitimate for plaintiff and the court to expect repetition of that conduct).

For the foregoing reasons, Defendants have not sustained their heavy burden of proving mootness. This Court should reject their attempt to frustrate judicial review of their unconstitutional administration of the URM Program.[9]

[9] Federal Defendants assert that the Court should decline to award equitable or declaratory relief even if this case is not moot because, they say, that "[redacted]" and "[redacted]" Program children. FD's Mem. at 27-29. Federal Defendants have not, however, presented evidence showing that Plaintiffs' requested relief would have that, or any other, adverse effect on their ability to care for Program children, or that granting relief here would otherwise be detrimental to the public interest. On the contrary, the relief requested would fulfill the URM Program's core mission of serving the best interests of Program children, by ensuring that the children are not deprived of the full range of foster home options for a reason unrelated to child welfare. Indeed, Plaintiffs have presented substantial evidence that requiring child placement agencies to comply with nondiscrimination obligations would not reduce the availability of foster families for children in the foster care system. *See* PMF ¶ 132. Even if certain faith-based child placement agencies were to discontinue providing foster care services because they have religious objections to serving all qualified families, there is no evidence that this would cause a reduction in the number of available foster families or otherwise impair the government's ability to meet the needs of children in its care. *See, e.g.*, *id.* ¶¶ 133-51.

II. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THE MERITS.[10]

A. Defendants Are Not Entitled to Summary Judgment on Plaintiffs' Fifth Amendment Claims.

Defendants do not dispute that Federal Defendants' actions discriminate on the basis of sexual orientation, sex, and the exercise of the fundamental right to marry.[11] Nor do Federal Defendants dispute that the discrimination is subject to heightened scrutiny.[12] Under any level of judicial scrutiny, there is no adequate justification for the discrimination; Federal Defendants do not contend otherwise.[13] Instead, Defendants assert that Plaintiffs' Fifth Amendment claims fail

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[10] USCCB's motion for summary judgment is procedurally improper because Plaintiffs are not seeking relief against USCCB. *See* Fed. R. Civ. P. 56(b) (2009 amendment) ("A party *against whom relief is sought* may move . . . for summary judgment on all or part of the claim." (emphasis added)). Although Rule 56's text was revised in 2010, the Committee Notes indicate that the standard for granting summary judgment remains unchanged, and there is no indication that the Committee intended to authorize motions for summary judgment by nominal defendants that are neither seeking relief nor subject to claims for relief against them, which is the posture of USCCB here.

[11] USCCB mischaracterizes the liberty interest asserted by Plaintiffs as a right to be a foster parent. *See* USSCB's Mem. at 47. In doing so, USCCB disregards Plaintiffs' actual Fifth Amendment claims. Plaintiffs' due process argument is based on Federal Defendants' infringement of Plaintiffs' fundamental rights to marry, to have their marriage respected, and to family integrity and intimate association. Plaintiff's equal protection argument is based on Federal Defendants' discrimination against Plaintiffs based on the exercise of their fundamental right to marry (in addition to their sexual orientation and sex). *See* PMSJ at 16-24.

[12] USCCB asserts that because, in its view, Federal Defendants' conduct survives Plaintiffs' First Amendment claim, it necessarily follows that Plaintiffs' Fifth Amendment claims are subject to rational basis review. *See* USSCB's Mem. at 36. That is doubly wrong. First, as set forth in Plaintiff's Motion and above, Federal Defendants' conduct does not survive Plaintiff's First Amendment claim. Second, in *Conn. v. Gabbert*, on which USCCB relies, the Supreme Court held only that, when the Constitution "'provides an explicit textual source of constitutional protection, a court must assess a plaintiff's claims under that explicit provision and not the more generalized notion of substantive due process." 526 U.S. 286, 293 (1999) (internal quotations omitted). Because the texts of the Religion Clauses of the First Amendment do not explicitly protect Plaintiffs' right to equal protection under the law or their fundamental right to marry, their claims of transgressions of these constitutional rights are properly evaluated under the rubric of the Fifth Amendment, not that of the First Amendment.

[13] As for USCCB's contention, while the government has a constitutional obligation not to unjustifiably infringe an individual's religious liberty, accommodation principles, as explained in

because they concern "merely private conduct," not governmental action.[14] FDs' Mem. at 20 (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)).

Defendants are wrong. Just as in *Shelley*—the very case Federal Defendants cite—Plaintiffs here challenge as unconstitutional "the full coercive power of government" being put in service of USCCB's desire to exclude same-sex couples in a manner that deprives Plaintiffs of the "full enjoyment of [their] rights on an equal footing." 334 U.S. at 19. Plaintiffs brought this lawsuit against *Federal Defendants*; USCCB is joined as a nominal defendant only. Plaintiffs' claims are directed only at and seek relief only from *Federal Defendants*: Plaintiffs challenge: (1) *Federal Defendants'* award of a Program grant to USCCB despite knowing that USCCB would administer the grant in accordance with its religious beliefs, including its religious belief condemning married same-sex couples; and (2) *Federal Defendants'* failure to redress the exclusion of married same-sex couples from the Program by a Program grantee on account of its religious objections, despite knowing that the discrimination is ongoing. Confirming that this is so, Plaintiffs seek a declaration that *Federal Defendants* have violated the Constitution and an injunction that would enjoin only *Federal Defendants'* conduct. And Federal Defendants do not and cannot dispute that they are governmental actors. Accordingly, Defendants' assertions under the state-action doctrine have no bearing whatever. *See, e.g.*, *Barrows v. Becerra*, 24 F.4th 116, 137 (2d Cir. 2022) (affirming

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depth in Plaintiffs' opening brief, are not without limit. When, for example, a religious exemption from the law would harm third parties, it is not a permissible (much less required) religious accommodation. *See* PMSJ at 34-36. It is circular at best to argue that that very harm, which is at the heart of our Equal Protection and Due Process claims, can be justified by accommodation principles.

[14] USCCB asserts that no equal protection claim can lie because Federal Defendants have not intentionally discriminated against married same-sex couples. *See* USSCB's Mem. at 38. But, in addition to knowingly enabling, ratifying, and funding USCCB's religion-based discrimination, PMF ¶¶ 15-24, 30-31, 41-52, Federal Defendants created the Consortium, which is expressly designed to segregate married same-sex couples for unequal treatment according to USCCB's religious disfavor of these couples, PMF ¶¶ 92, 101.

rejection of state action defense where plaintiffs challenged Medicare classifications by Secretary of Health and Human Services).

At least one federal district court has rejected a similar state action defense in a case with similar facts. In *Dumont v. Lyon*, the plaintiffs sued the directors of two state agencies over their practice of permitting state-contracted, taxpayer-funded child-placing agencies to use religious criteria to screen prospective foster and adoptive parents for child placements. 341 F. Supp. 3d 706, 713 (E.D. Mich. 2018). Denying the defendants' motion to dismiss, the court held that "the 'gravamen' of Plaintiffs' Complaint is not the purely private decisions of the faith-based agencies in turning them away," but instead "the actions of Defendant state officials in entering into contracts for the provision of state-contracted services," which they undertook with full knowledge and acceptance "that certain faith-based agencies may elect to discriminate on the basis of sexual orientation in carrying out those state-contracted services, conduct that . . . the State could not take itself." *Id.* at 745; *see also Rogers v. U.S. Dep't of Health & Hum. Servs.*, 466 F. Supp. 3d 625, 642-43 (D.S.C. 2020) (denying motion to dismiss claims against state and federal entities brought by same-sex couple turned away by faith-based child placing agency; rejecting argument that "[e]ssentially . . . neither a state nor a federal agency can be held accountable for a grantee's known, and explicitly permitted, exclusion of persons from a government-funded program based on religious criteria"; and allowing claims to proceed where plaintiffs' allegations "show that the stigma and practical barriers to fostering were the result of the Defendants' conduct") (emphasis omitted).

Here, the governmental action is even more clear. *Federal Defendants* entered into a Program grant agreement with USCCB, and in doing so knowingly excluded Plaintiffs and other married same-sex couples from equal participation in the URM Program on account of religious

objections to the couples. And *Federal Defendants* created the Consortium, under which married same-sex couples are systematically segregated from other Program foster parent applicants for unequal treatment on account of religious objections. These actions are those of *Federal Defendants*, not any private entity. Because Plaintiffs seek redress from governmental agencies and officials, not from private parties, the state action defense must be rejected.

B. Defendants Are Not Entitled to Summary Judgment on Plaintiffs' First Amendment Claim.

As Plaintiffs have already shown, Federal Defendants have violated the First Amendment's Religion Clauses by repeatedly favoring USCCB's religious beliefs in the course of administering the URM Program on the government's behalf. *See* PMSJ at 25-38. Federal Defendants' constitutional violation continues to this day. *See supra* § I. Nothing in Defendants' summary judgment motions shows otherwise.

1. Defendants wrongly suggest that *Fulton* disposes of Plaintiffs' First Amendment claim.

The Supreme Court's decision in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), poses no obstacle to relief here. First of all, no Establishment Clause claim was before the *Fulton* Court, so the Establishment Clause could not and did not figure into the decision there. Rather, *Fulton* was a free exercise case involving what has come to be called the unconstrained discretion rule, under which the creation of a formal mechanism for unfettered grants of exceptions renders a policy not generally applicable by "invit[ing] the government to decide which reasons for not complying with the policy are worthy of solicitude." *Id*. at 1879 (internal quotations and alteration omitted). The Court held that Philadelphia's foster care program runs afoul of the Free Exercise Clause because the program formally permits a public official or designee to, entirely "in his/her sole discretion," grant individualized exceptions from nondiscrimination requirements, but the city categorically excludes religious objections as a basis for obtaining such an individualized

exception. *Id.* at 1878, 1882 ("On the facts of this case, [the city's] interest cannot justify denying [the child welfare agency] an exception for its religious exercise."). Thus, *Fulton*'s holding was narrowly limited by its facts and concerned only "individualized exemptions" weighed according to vague, overly flexible, unlimited, discretionary standards like "good cause," "necessity," or "reasonableness." As Plaintiffs explained in their opening brief, that type of unfettered discretionary exemption process is simply not at issue here. *See* PMSJ at 35-36. In *Fulton,* that no one had ever been turned away or otherwise harmed by the child welfare agency was central to the Court's decision; but that is manifestly not so here, where Plaintiffs *were* turned away—and Federal Defendants acknowledge that they might be again. *Fulton*, 141 S. Ct. at 1882.

2. Defendants misapply the Supreme Court's guidance in *Kennedy*.

Defendants note that Establishment Clause challenges are evaluated with reference to the First Amendment's "historical practices and understandings." FDs' Mem. at 16 (quoting *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407, 2428 (2022)); *see also* PMSJ at 25-38.[15] Yet, after acknowledging the Supreme Court's most recent guidance, Defendants go off on a tangent and do not seriously engage with those considerations.

The Establishment Clause claim here does not challenge the government's ability, as a general matter, to engage with religious organizations to provide secular services. The constitutional concern here is that USCCB is not merely providing secular services that "happen to coincide with [its] religious views." *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988); *accord* FDs' Mem. at 16-18 (quoting *Bowen*, 487 U.S. at 621). Instead, Federal Defendants are enabling and ratifying USCCB's administration of a government program (and use of taxpayer funds) to

[15] All parties agree that the Supreme Court has refined its Establishment Clause analysis. Hence, Plaintiffs have not relied on the test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in advancing their First Amendment claim. *See* PMSJ at 25-38.

discriminate against prospective Program foster parents who do not "mirror the Holy Family." PMF ¶ 28.

Federal Defendants miss the point when they assert that the Establishment Clause permits religious organizations to provide secular services under government programs without ceding their religious character. FDs' Mem. at 16. While the Establishment Clause permits religious organizations to operate government programs, they cannot use their religious character as a shield to avoid fulfilling the basic objective of the program, nor may they administer a government program on the government's behalf in a manner that the Constitution forbids the government itself to do. Federal Defendants may not discriminate against married same-sex couples on religious (or any other) grounds, so Federal Defendants must not acquiescence to USCCB's religion-based discriminatory treatment of married same-sex couples in a program operated on Federal Defendants' behalf. *See Norwood v. Harrison*, 413 U.S. 455, 463-67 (1973).

Further, government runs afoul of the First Amendment when, in the name of accommodating the beliefs of a religious entity, it shifts costs, burdens, or harms to nonbeneficiaries. *Caldor*, 472 U.S. at 709-10. Hence, as explained in Plaintiffs' opening brief, Federal Defendants cannot excuse and enable USCCB's discrimination against Plaintiffs and others similarly situated in a federal program by calling it a religious accommodation, on account of the significant harms to prospective foster parents and Program children—harms that are directly contrary to the core mission of the Program to make placements in the best interests of the children. *See* PMSJ at 32-38; *cf. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334-35 (1987) ("At some point, accommodation may devolve into 'an unlawful fostering of religion[.]' ") (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 145 (1987)).

As for Federal Defendants' invocation of *Amos*, that decision upheld a provision in the Civil Rights Act of 1964 that exempts religious organizations from the prohibition against employment discrimination based on religion. The Court concluded that the exemption does not constitute impermissible governmental favoritism but instead is a neutral measure that allows religious institutions to advance their faith on their own behalf. 483 U.S. at 337. Here, by contrast, Federal Defendants' putative accommodation of USCCB's religious beliefs is not a "[redacted]" FDs' Mem. at 17, but instead unlawfully fosters, underwrites, and imposes those specific religious beliefs in a government program, categorically depriving Plaintiffs and similarly situated married same-sex couples of an equal opportunity to serve as Program foster parents—and hence also depriving Program children of placement opportunities that might be in their best interests. As Plaintiffs have already detailed, Federal Defendants have elsewhere conceded that an exemption from nondiscrimination requirements in the foster care context is improper when it fails to take into account the harms to third parties. *See* PMSJ at 38 (describing Federal Defendants' withdrawal of exemption from nondiscrimination requirements because it applied to entities that had neither requested the exemption nor shown any substantial burden on their religious exercise that might warrant it).

USCCB's parade of horribles lends no support to Defendants' motions for summary judgment. *See* USSCBs' Mem. at 35. USCCB elides the critical distinction between receipt of federal funds, on the one hand, and delegation of federal authority, on the other. Plaintiffs do not argue that, whenever a private party merely receives federal funds, the constitutional restrictions on the government are necessarily imputed to that party. Nor is that what is going on here. Rather, Federal Defendants have delegated Program administration to USCCB in a manner that enables and ratifies religion-based discrimination against married same-sex couples in a government

program. The Constitution simply does not permit Federal Defendants to do indirectly what they may not do directly. *See Norwood*, 413 U.S. at 463–67.

Nor is there a passage of time without incident that creates a presumption here that unconstitutional conduct can never happen in the future; on the contrary, the unconstitutional conduct is ongoing. This is not, therefore, anything like *American Legion v. American Humanist Association* (cited at FDs.' Mem. at 16), in which "identifying [the] original purpose or purposes" of a static monument erected a century earlier was "especially difficult." 139 S. Ct. 2067, 2082 (2019). The recent and continuing express and impermissible religion-based rejection of married same-sex couples from a federal program, including the government's ratification and exacerbating of that discrimination under the Consortium, can hardly be compared to the old, passive display in *American Legion*. PMF ¶¶ 15-20. Federal Defendants knew that USCCB would administer its Program grant and turn away couples like Plaintiffs based on religious criteria, yet Federal Defendants awarded the grant to USCCB anyway, thus delegating to USCCB the authority to discriminate in the federal Program. *See id.* ¶¶ 10, 15-24. Any doubt about the consequences of USCCB's administration of its Program grant in accordance with its religious beliefs was eliminated when Marouf notified Federal Defendants of the religion-based discriminatory treatment Plaintiffs received from USCCB's subgrantee. There is no reason to presume that Federal Defendants' continuing delegation of authority to USCCB to act on its behalf, with knowledge of USCCB's religious litmus test and without meaningful (or any other) safeguards for prospective foster parents or Program children, can be squared with the government's constitutional obligations.

3. The specific governmental interest here—dealing with children as refugees and asylum seekers—is unique given the historical role and plenary power of the federal government when it comes to immigration.

As for proper consideration of history and tradition, both Federal Defendants and USCCB provide an oversimplified, incomplete, and therefore inaccurate account of the role of private organizations in the provision of foster care services; and they completely ignore the context and history of federal control over immigration and refugee children.[16]

The Program history on which Defendants purport to rely dates back *only to 1948*. Thus, even by Defendants' account, there is no relevant history that dates back to the time of the framing of the Constitution.

It is important to bear in mind that child welfare programs for *refugees and asylum seekers* represent a modern exercise of *Congress's plenary power over immigration*. Thus, they are *unique* creatures, distinct from other child welfare programs and their history.

The federal government's plenary authority over immigration goes back to the birth of the Nation. As early as 1798, with the United States on the brink of war with France, Congress acted on immigration by passing the Alien and Seditions Act of 1978. *Alien and Seditions Act*, Nat'l Archives (July 6, 1798), *available at* https://www.archives.gov/milestone-documents/alien-and-sedition-acts. The Alien and Sedition Acts allowed the President to imprison or deport aliens who were deemed dangerous to "peace and safety" (Alien Friends Act of 1798) or were citizens of a nation with which the United States was at war (Enemy Alien Act of 1798). Congress also increased the residency requirement for naturalization from five to fourteen years. *Id.*; *see also* Naturalization Act of 1798, 5 Cong. Ch. 54, 1 Stat. 566 (enacted June 18, 1798).

[16] It is noteworthy that the URM Program started out as partnerships with individual states, not private entities. The particular program at issue in this case was administered through the state of Texas until 2017, when Texas withdrew from the program. *See* FDMF ¶ 59. USCCB was substituted as "replacement designee" to fulfill those state duties. *See id.*

The Supreme Court has repeatedly held that the right to expel or welcome foreigners, as well as to define the steps for entrance into, and the terms of lawful presence in, the country, is exclusively a federal power; the states may not regulate in the area of immigration. *See Takahashi v. Fish & Game Comm'n*, 334 U.S, 410, 419 (1948); *see also Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893) (federal government has inherent sovereign power to admit foreigners "only in such cases and upon such conditions as it may see fit to prescribe[e]"); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) ("The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States.").

Against this background, Congress enacted the first refugee legislation in 1948, following the admission of more than 250,000 displaced Europeans after World War II. *See History*, ORR (Nov. 12, 2021), https://www.acf.hhs.gov/orr/about/history. This legislation provided for the admission of an additional 400,000 displaced Europeans. Later laws provided for admission of persons fleeing Communist regimes, including, in the 1960s, Cubans fleeing Fidel Castro *en masse*. *Id*. Federal Defendants' program for unaccompanied refugee children continues this effort to meet international humanitarian needs.

While it is true that many of these waves of refugees were assisted by private ethnic and religious organizations in the United States, which formed the basis for certain public-private partnerships in U.S. resettlement efforts today, these refugee programs—including that before this Court today—have been possible only through action by the federal government based on its plenary authority over immigration, which dates to the founding of the country but has been exercised to establish child welfare programs for refugees and asylum seekers only in modern

times.[17] No private organization, including USCCB, has independent authority to bring foreign children into the country or provide them refuge. Only the federal government can fill this unique role. Moreover, public-private collaboration cannot impair the principle—unchanged by *Kennedy*—that the government may not accomplish through private actors that which it is constitutionally forbidden to do itself. *Norwood*, 413 U.S at 465.

4. The government has played a substantial role in overseeing child welfare since the Nation's founding, including to safeguard against religious discrimination, proselytization, and coercion.

The government's substantial role in today's child welfare system can be traced to English policies adopted in the colonies in the 17th century. All colonies enacted some version of the Elizabethan poor laws, which made government responsible for the care of children in need, and adopted the doctrine of *parens patriae*, which provided the foundation for the state's active role in child welfare and the post-revolutionary creation of the "best interests of the child" standard. *See generally* William P. Quigley, *Work or Starve: Colonial American Poor Laws*, 31 U.S.F. L. Rev. 35, 48-54 (1996). These influences provide the basis for today's publicly managed system for caring for dependent children.

The long-standing doctrine of *parens patriae* also shaped colonial understanding of the government's responsibility for children, giving rise to the foundational principle that the government should care for "those who cannot protect themselves," *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1, 57 (1890); *see also Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (recognizing "the state as *parens patriae*" may "[act] to guard the general interest in youth's well being").

[17] Foster care programs for children—refugees or otherwise—as we know them today simply did not exist in the early days of the Nation, *see infra* at 26.

State thus had both the authority and the duty to determine the best interests of children, and to take action to promote children's welfare in accordance with these interests. Indeed, the "best interests of the child" emerged as a new legal concept born out of the *parens patriae* doctrine. *See Hiller v. Fausey*, 904 A.2d 875, 893 (Pa. 2006) (Newman, J., concurring). That concept gave courts "the power, if the best interests of the child require[d] it, to take [the child] away from both parents and commit the custody to a third person." *Dietrich v. Anderson*, 43 A.2d 186, 192 (Md. 1945). The government was recognized as "a guardian of all children and may interfere at any time and in any way to protect and advance their welfare and interests." *Id.*; *see also In re Toulmin*, 1 Charlton 489, 494–95 (Ga. 1836) (legal right of the parent must be made subservient to the true interests and safety of the child, and to the duty of the state to protect its citizens of whatever age); *Sohier v. Mass. Gen. Hosp.*, 57 Mass. 483, 497 (1849) (deeming it "indispensable" that the legislature be permitted to act in "[t]he best interest" of "infants . . . who cannot act for themselves"). Building on and reinforcing each other, the doctrines of *parens patriae* and the best interests of the child thus created from the outset a strong public interest in and authority over child welfare that continues to this day.

Notably, at the founding of the country, child welfare programs concerned placing children in institutions, and it was only subsequently, in the late 1800s, that we came to see early efforts to place children in homes (what we know today as foster care[18]), which underscored the need for

[18] Foster care, from its inception, has always been different from the institutional care that preceded it, growing more narrowly and concretely out of the fact that only the state can remove children from their parents and terminate parental rights, thereby making children wards of the state. Thus, foster care is necessarily a governmental function. More to the point here, care for refugee children is necessarily the domain of the federal government. Whatever Defendants may say about the historic role of private institutions in providing institutional services to orphaned children, it is categorically inapplicable to care for refugee children.

greater government involvement in child welfare efforts.[19] Accordingly, any historical practice from the early days of the Nation to which Defendants might point is inapposite.

From the Elizabethan poor laws to the establishment of public child welfare standards in America, the history of child placement—and particularly foster care—is one of continuous government involvement, oversight, and regulation.

* * *

In the end, it is specious to argue that Federal Defendants' refugee children program in Texas did not delegate a uniquely governmental function—without any constitutionally sufficient safeguard—to a religious organization for operation in accordance with the organization's religious beliefs, to the detriment of married same-sex couples and Program children alike. *See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 696-97 (1994) (delegating governmental powers to religious bodies without adequate safeguards impermissibly fuses governmental and religious functions); *Larkin*, 459 U.S. at 123 ("delegating a governmental power to religious institutions . . . inescapably implicates the Establishment Clause"). Federal Defendants impermissibly did this without consideration of the harm to third parties. *Cutter*, 544 U.S. at 722; *Caldor*, 472 U.S. at 709-10.

Kennedy is consistent with and reinforces Plaintiffs' position: The federal government may not delegate to religious organizations a core federal function such as regulation of and care for refugee children, without establishing safeguards to protect foster parents and children against religious discrimination, coercion, and harm. Federal Defendants have thus violated the Establishment Clause.

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[19] Ex. 2, Stephen O'Connor, *Orphan Trains: The Story of Charles Loring Brace and the Children He Saved and Failed*, 148-55, 168-70 (2001), available at https://archive.org/details/orphantrainsstor0000ocon_o7a7/page/n7/mode/2up.

CONCLUSION

For the foregoing reasons, Defendants' motions for summary judgment should be denied.

Dated: September 14, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on September 14, 2022, a true and correct copy of the foregoing document was filed using the Court's CM/ECF System, which will serve all counsel of record.

By: /s/ *Kenneth Y. Choe*
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FATMA MAROUF and BRYN ESPLIN, *Plaintiffs,* v. XAVIER BECERRA, in his official capacity as Secretary of the United States Department of Health and Human Services, *et al.*, *Defendants.*	Case No. 1:18-cv-378 (APM)

PLAINTIFFS' RESPONSE TO
DEFENDANT UNITED STATES CONFERENCE OF CATHOLIC BISHOPS'
STATEMENT OF UNDISPUTED MATERIAL FACTS
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Local Civil Rule 7(h), and this Court's August 23, 2021 Order (Dkt. 94), Plaintiffs Fatma Marouf and Bryn Esplin ("Plaintiffs"), by and through their undersigned attorneys, respectfully submit this response to Defendant United States Conference of Catholic Bishops' ("USCCB") Statement of Undisputed Material Facts (Dkt. No. 106-2) ("USCCBMF"). For ease of reference, Plaintiffs follows the same headings, format, and numbering used by USCCB in its statement of undisputed material facts. Plaintiffs' use of such headings, format, and numbering is in no way an admission of content or accuracy.

A. Unaccompanied Immigrant Children Programs

1. The Office of Refugee Resettlement ("ORR") is a component of the U.S. Department of Health and Human Services. (Fed. Def'ts' Answer to Amend. Compl. ¶ 10.)

Plaintiffs' Response: Admitted.

2. ORR administers grants and funding for the Unaccompanied Refugee Minor Program ("URM Program"). (Fed. Def'ts' Answer to Amend. Compl. ¶ 17; App. 8, 519–20.)

Plaintiffs' Response: Admitted.

3. The URM Program operates to care for children who are unaccompanied by a parent or guardian but have legal status in the United States. (App. 130, 451, 507–10; *see also* 8 U.S.C. § 1522.)

Plaintiffs' Response: Admitted.

4. Through the URM Program, children receive foster-care services and benefits, which may include long-term foster-care placements. (App. 130, 451, 507–12.)

Plaintiffs' Response: Admitted.

5. Eligible children include refugees, victims of trafficking, and asylees. (App. 130, 506, 508–09.)

Plaintiffs' Response: Admitted.

6. ORR administers the Unaccompanied Alien Children Program ("UC Program"). (App. 8, 362, 529; *see also* 6 U.S.C. § 279(g).)

Plaintiffs' Response: Admitted.

7. The UC Program operates to care for unaccompanied children who lack lawful immigration status. (App. 363–64, 528–29, 543–44, 546–47.)

Plaintiffs' Response: Admitted.

8. Like the URM Program, the UC Program provides eligible children with foster-care services and benefits, which may include long-term foster-care placements. (App. 191, 364, 530–37, 541–44, 546–47.)

Plaintiffs' Response: Admitted.

9. ORR does not provide foster-care services directly in its administration of either program. (App. 42, 484–87, 513–14, 521–23.)

Plaintiffs' Response: Admitted. *See also* Pls.' Statement of Undisputed Materials Facts ("PMF") ¶¶ 2-3 (Dkt. 107-01) (Program responsibilities, including recruitment and screening of prospective foster parents, training of foster parents, and placement of Program children with foster parents).

10. Instead, ORR issues grants to a network of public and private agencies to care and provide services for eligible children. (App. 8, 19–21, 69, 72–73, 79, 216, 248, 264, 322, 364, 506–10, 517–20, 530–33, 540–44, 546–47.)

Plaintiffs' Response: Admitted.

11. ORR's criteria for selecting grantees in the URM Program and the UC Program are secular and neutral. (App. 57–60, 119–23, 411–14, 464–67.)

Plaintiffs' Response: Denied. ORR awarded Program grants to USCCB despite knowing that it would administer them in accordance with its religious beliefs, including its religious belief condemning same-sex married couples. *See* PMF ¶¶ 15-22.

12. Faith-based organizations participate in both programs. (App. 8, 19–22, 32–33, 44–48, 63–64, 123, 275, 481, 496; *see also* 45 C.F.R. § 87.3(a).)

Plaintiffs' Response: Admitted.

B. USCCB and Its Historical Partnership with the Federal Government To Care for Unaccompanied Immigrant Children.

13. USCCB is an assembly of Catholic bishops that organizes and conducts religious and charitable activities in the United States and abroad. (App. 2)

Plaintiffs' Response: Admitted.

14. USCCB's religious mission includes, and has included for decades, "car[ing] for immigrants." (App. 2, 237.)

Plaintiffs' Response: Admitted, but see PMF ¶ 31; *see also id.* ¶¶ 16-17.

15. In executing its mission, USCCB became and continues to be one of the largest refugee-settlement agencies in the world. (App. 2.)

Plaintiffs' Response: Admitted.

16. USCCB has worked with the government on refugee resettlement since before ORR and the programs at issue were established. (App. 3, 62, 149–50, 156, 451.)

Plaintiffs' Response: Admitted.

17. ORR has regularly awarded grant funds to USCCB under the URM and UC Programs since their inception. (App. 3, 6, 8.)

Plaintiffs' Response: Admitted.

18. ORR awarded a grant to USCCB under the URM Program for the Fiscal Year 2017 grant period encompassing February 2017. (App. 6, 296.)

Plaintiffs' Response: Admitted.

19. Likewise, ORR awarded a grant to USCCB under the UC Program for Fiscal Year 2017 grant period encompassing February 2017. (App. 6, 34–35, 329, 456.)

Plaintiffs' Response: Admitted.

20. USCCB does not provide foster-care services directly. (App. 8.)

Plaintiffs' Response: Admitted, *but see* PMF ¶¶ 8-11.

21. Instead, it awards subgrants to various organizations for that purpose. (App. 8.)

Plaintiffs' Response: Admitted, *but see* PMF ¶¶ 8-11.

22. USCCB allocates funds provided by ORR in a manner consistent with its sincerely held religious beliefs. (App. 8.)

Plaintiffs' Response: Admitted.

23. Among other things, it would violate USCCB's sincerely held religious beliefs to fund any program that provides services contrary to Catholic teaching. (App. 6–8.)

Plaintiffs' Response: Admitted.

24. While USCCB may allocate funds to organizations that do not share its religious beliefs, USCCB will not and does not allocate funds to any organization that would use those funds to provide services contrary to the teaching of the Catholic Church. (App. 6–8.)

Plaintiffs' Response: Admitted.

25. Services contrary to the teaching of the Catholic Church, include, but are not limited to licensing or placing children with foster parents who are same-sex couples. (App. 6–8.)

Plaintiffs' Response: Admitted.

26. USCCB has no objection to serving, or allocating grant funds to organizations who will serve, all children in the URM and UC Programs, "including lesbian, gay, bisexual, and transgender (LGBT) populations." (App. 155, 247–48, 452.)

Plaintiffs' Response: Denied in that USCCB does not serve the best interests of Program children who would be best served by placement in a foster home headed by a married same-sex couple, and USCCB's subgrantee denied knowledge of any LGBT children in the Programs in its care. *See* PMF ¶¶ 119, 120, 126; *see also* Ex. 5, Dana Springer Deposition Transcript at 55:10 – 56:2.

27. One USCCB subgrantee (under both the URM and UC Programs) was Catholic Charities of Fort Worth ("CCFW"). (App. 7, 10.)

Plaintiffs' Response: Admitted.

28. CCFW provided foster services for unaccompanied refugee minors and unaccompanied alien children in Fort Worth, Texas. (App. 7, 10.)

Plaintiffs' Response: Admitted.

C. Texas Becomes First State to Withdraw from URM Program.

29. In January 2017, the State of Texas withdrew from the URM Program. (App. 85–88, 90)

Plaintiffs' Response: Admitted.

30. Texas's withdrawal required ORR to find a "replacement designee" to operate the URM Program in Texas on a "very short time frame." (App. 87–90, 92–93, 145–46.)

Plaintiffs' Response: Admitted.

31. Texas's size and the nature of the URM Program made the task of filling the role a "large undertaking." (App. 88–89, 92, 124.)

Plaintiffs' Response: Admitted.

32. ORR identified two organizations as capable of filling the "replacement designee" role. (App. 123–24, 129.)

Plaintiffs' Response: Admitted.

33. In ORR's view, of the two viable options, USCCB was "best equipped" for the role. (App. 123–24, 129.)

Plaintiffs' Response: Admitted.

34. On November 16, 2016, USCCB submitted an application to ORR to serve as replacement designee in Texas. (App. 461–62.)

Plaintiffs' Response: Admitted.

35. ORR approved a revised version of USCCB's application to serve as replacement designee in Texas in mid-January 2017. (App. 124–25, 254, 296, 474–77; *see also* App. 450–54 (final application for FY 2017).)

Plaintiffs' Response: Admitted.

D. Plaintiffs Cannot Foster Through CCFW Due to Its Religious Beliefs.

36. Plaintiffs Fatma Marouf and Bryn Esplin are a legally married same-sex couple. (App. 6.)

Plaintiffs' Response: Admitted.

37. Plaintiffs have lived in the Fort Worth, Texas area since August 2016. (App. 159.)

Plaintiffs' Response: Admitted.

38. On February 16, 2017, Plaintiff Marouf emailed CCFW about fostering a refugee child. (App. 342.)

Plaintiffs' Response: Admitted.

39. Like USCCB, CCFW believed that it could not, consistent with its religious beliefs, license or place foster children with same-sex couples. (App. 7, 10, 184–85.)

Plaintiffs' Response: Admitted.

40. Accordingly, CCFW informed Plaintiffs Marouf and Esplin that it would not accept their application to be foster parents. (App. 7, 160, 167, 171, 181, 353.)

Plaintiffs' Response: Admitted.

41. Plaintiffs emailed ORR's URM Program office about their interaction with CCFW. (App. 7, 161, 338–40.)

Plaintiffs' Response: Admitted. *But see* PMF ¶ 29 (Plaintiff Marouf sent the e-mail).

42. Plaintiffs' email came as a "surprise" to ORR. (App. 42–43, 104–05.)

Plaintiffs' Response: Denied in that ORR knew that USCCB would administer its Program grants in a manner consistent with its religious beliefs, including its religious belief condemning married same-sex couples. *See* PMF ¶¶ 18-21.

43. To ORR officials' knowledge, ORR had never before received a complaint about any provider refusing to place children with same-sex couples. (App. 36–37, 54–56, 104–05, 192–93, 218, 222–23, 261.)

Plaintiffs' Response: Admitted.

44. USCCB's URM grant application for fiscal year 2017 stated that it would have to "ensure that services provided under this application are not contrary to the authentic teaching of the Catholic Church, its moral convictions, and religious beliefs." (App. 8, 452.)

Plaintiffs' Response: Admitted.

45. USCCB's UC grant application for fiscal year 2017 stated that it would have to "ensure that services provided under this application are not contrary to the authentic teaching of the Catholic Church, its moral convictions, and religious beliefs in an approach that is consistent with the ACF Policy on Grants to Faith-Based Organizations." (App. 8, 456.)

Plaintiffs' Response: Admitted.

46. The sample Third-Party Agreement attached as Appendix A-8 to USCCB's UC Program grant application to ORR for fiscal year 2017 includes a provision entitled "Catholic Identity," which states that "USCCB/MRS must ensure that services provided to those serviced under this Agreement are not contrary to the authentic teaching of the Catholic Church, its moral convictions, and religious beliefs. Accordingly, USCCB/MRS expects that the Sub-recipient will provide services under this Agreement within certain parameters including, among other things,

that the Sub-recipient will not provide, refer, encourage, or in any way facilitate access to contraceptives or abortion services." (App. 8–9, 458–59.)

Plaintiffs' Response: Admitted.

47. Prior to Plaintiffs' inquiry, ORR had encountered USCCB's and its subgrantees' religious objections only in the context of the provision of certain services to children—namely, abortion and contraception. (App. 30–31, 38–39, 95, 98–99, 108–09, 202, 204, 240–41, 262–63.)

Plaintiffs' Response: Denied in that ORR encountered such objections as to all conceivable contexts when processing USCCB's grant application. *See also* PMF ¶¶ 60-76 (detailing instances in which ORR encountered such objections in the context of prospective Program foster parents who were a married same-sex couple and a lesbian individual).

48. Likewise, the application process for both the URM and UC Programs focused not on prospective foster parents, but rather on what services, if any, organizations could or could not provide to unaccompanied minors. (App. 130–31, 197–98, 212–15, 244–45.)

Plaintiffs' Response: Denied. (1) At the time that ORR awarded the grants to USCCB, ORR was aware that: (a) USCCB had stated that it would administer the Programs in accordance with its religious beliefs; and (b) USCCB's religious beliefs include a religious belief condemning married same-sex couples, and (2) delegated Program grant responsibilities include recruitment, screening, training, and licensing of Program foster parents, and the placing of Program children in foster homes that are in their bests interests. *See* PMF ¶¶ 8-11, 15-22.

49. Prior to the incident at issue in this case, there were no communications between USCCB and the Federal Defendants regarding the specific question of how the religious beliefs of USCCB or its subgrantees applied to the placement of children with foster parents who are same-sex couples. (App. 28–29, 59, 100–01, 122, 148, 202, 212–15, 263, 500.)

Plaintiffs' Response: Denied in that Federal Defendants knew that USCCB would administer its Program grants in a manner consistent with its religious beliefs, to the detriment of married same-sex couples and Program children. *See* PMF ¶¶ 18-21.

50. ORR was thus not aware that USCCB's and CCFW's adherence to their religious beliefs would result in the denial of same-sex couples as foster parents. (App. 43, 93–98, 102– 03, 139–44, 179–80, 212–15, 265.)

Plaintiffs' Response: Denied. (1) At the time that ORR awarded the grants to USCCB, ORR was aware that: (a) USCCB would administer the Programs in accordance with its religious beliefs; and (b) USCCB's religious beliefs include a religious belief condemning married same-sex couples, and (2) delegated Program grant responsibilities include recruitment, screening, training, and licensing of Program foster parents, and the placing of Program children in foster homes that are in their bests interests. *See* PMF ¶¶ 8-11, 15-22.

51. Due to a refocusing of its mission, CCFW no longer provides foster-care services. (App. 178, 186–88; 469–72.)

Plaintiffs' Response: Admitted.

52. As of July 1, 2019, USCCB began allocating funds received from ORR to Catholic Charities of Dallas ("CCD"), which has taken over services for unaccompanied alien children or unaccompanied refugee minors previously provided by CCFW. (App. 10, 186–88, 357, 469–72.)

Plaintiffs' Response: Admitted.

E. ORR Seeks Alternative Providers to Accommodate Plaintiffs.

53. To accommodate Plaintiffs' desire to foster immigrant children from the programs, ORR searched for organizations that could provide additional foster-care services in the Dallas-Fort Worth area. (App. 44–45, 53, 57, 115–16, 194–96, 206–07, 224–29, 252.)

Plaintiffs' Response: Admitted, but ORR has failed in its attempted accommodation. *See* PMF ¶ 91.

54. In May 2020, ORR appointed Lutheran Immigration and Refugee Services ("LIRS") as a second replacement designee for the URM Program in Texas. (App. 115–16, 252–54, 482, 494–95)

Plaintiffs' Response: Admitted.

55. LIRS provides services under the URM Program in the Dallas-Fort Worth area through its subgrantee, Upbring. (App. 115–16, 252–54, 275, 482, 494–95.)

Plaintiffs' Response: Admitted.

56. Around the same time, Baptist Children Family Services ("BCFS") received a grant for the UC Program in the same area. (App. 47–48, 194–95, 206–07.)

Plaintiffs' Response: Admitted.

57. Both programs are in operation today. (App. 47–48, 115–16, 194–95, 226, 252, 279, 491.)

Plaintiffs' Response: Denied. *See* Ex. 4, Anne Mullooly Deposition Transcript, May 18, 2022 at 52:7-53:3 (Upbring is less established than CCD, with fewer staff and resources available to license Program foster parents and support Program child placements); *see also* Ex. 6, Anne Mullooly Deposition Transcript, Dec. 8, 2020 at 77:19-78:16.

58. Both programs are willing to license and make placements with same-sex couples. (App. 52, 116, 206, 268, 491.)

Plaintiffs' Response: Admitted.

59. The government has also named "a neutral third party"—the U.S. Committee for Refugees and Immigrants ("USCRI")—"to field all inquiries from prospective URM foster parents in the Dallas/Fort Worth, Texas area." (App. 427, 444, 482.)

Plaintiffs' Response: Denied in that USCRI is not a "neutral third party" to the extent that it segregates married same-sex couples from other Program foster parent applicants for unequal treatment, and does so by reference to USCCB's religious belief condemning married same-sex couples. *See* PMF ¶¶ 84-85, 87-89, 91.

60. As of March 28, 2022, (Dkt. 102 at 1; App. 280, 481), USCRI works in consortium with LIRS and its subgrantee Upbring, as well as USCCB and its subgrantee CCD, to "ensure that all prospective foster parents in the Dallas-Fort Worth area have the opportunity to work with a URM provider." (App. 274, 284, 293.)

Plaintiffs' Response: Denied. Either (1) USCRI refers married same-sex couples to CCD, which refuses to work with them; or (2) USCRI segregates all married same-sex couples from other Program foster parent applicants for unequal treatment, and does so by reference to USCCB's religious belief condemning married same-sex couples. *See* PMF ¶¶ 91-92.

61. Specifically, USCRI is tasked with "establish[ing] a hotline and email address to receive inquiries from individuals or couples interested in fostering minors in the URM program in the Dallas/Fort Worth, Texas area"; "respond[ing] to all inquiries from individuals or couples interested in fostering minors in the URM program in the Dallas/Fort Worth, Texas area"; and "conduct[ing] initial intakes of the individuals or couples, to collect basic demographic and family composition information." (App. 285–87, 431–40, 442, 444, 482.)

Plaintiffs' Response: Admitted. *But see*, *supra*, resp. to USCCBMF ¶ 59.

62. Following intake, USCRI will "refer such prospective foster parents to either Catholic Charities Dallas or Upbring for training and licensing in accordance with applicable Texas law." (App. 285–87, 431–40, 442, 444, 481–82.)

Plaintiffs' Response: Admitted. *But see*, *supra*, resp. to USCCBMF ¶ 59.

63. USCRI's referrals are based on information collected during the intake process, including, "[d]emographic information, household and background information," as well as "criteria" established by each consortium partner, which can include religious objections. (App. 277–78, 281–82, 288–89, 434, 442.)

Plaintiffs' Response: Admitted. *But see*, *supra*, resp. to USCCBMF ¶ 59.

64. CCD and Upbring have committed to "refer all" prospective foster parents to USCRI, to "respond to referrals from USCRI" within established timeframes, and to "license all [prospective foster parents] that meet Texas state licensing, agency, accreditation, and home study requirements." (App. 276–78; 431, 442.)

Plaintiffs' Response: Denied in that CCD will not "license all [prospective foster parents] that meet Texas state licensing, agency, accreditation, and home study requirements" because it will not license such prospective foster parents who are married same-sex couples. PMF ¶¶ 84-85, 87-89, 91. Additionally, CCD is not required to send prospective foster parents to USCRI if they already are part of CCD's network, or enter its network because the applicants initially are interested in domestic foster care or the UAC Program. PMF ¶¶ 96-97.

65. In the event it becomes apparent that either CCD or Upbring is unable to work with certain prospective foster parents "for reasons unrelated to Texas licensing requirements," they will refer those individuals to the other subgrantee or back to USCRI. (App. 283, 290–92, 434.)

Plaintiffs' Response: Denied as to the factual assertion that CCD or Upbring will refer potential foster parents to other subgrantees in the event it becomes apparent that either CCD or Upbring is unable to work with those foster parents. *See* USCCB's App. 283: 8-14 ("If at any time the URM provider, whether it's Catholic Charities Dallas or Upbring makes the determination that they are not able to continue working with that individual or couple, *that they would then refer back to USCRI and then USCRI would then make a determination to refer to the other URM provider agency*.") (emphasis added).

66. The government has confirmed that neither USCRI nor LIRS (i.e., Upbring) has any "objection to working with same-sex couples seeking to foster children through the URM program." (App. 279, 491.)

Plaintiffs' Response: Admitted.

67. ORR has elected not to fund USCCB's long-term foster-care services in the UC Program as of February 28, 2021. (App. 3.)

Plaintiffs' Response: Admitted.

Dated: September 14, 2022

Respectfully submitted,

By: /s/ *Kenneth Y. Choe*

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2022, a true and correct copy of the foregoing document with attachments was filed using the Court's CM/ECF System, which will serve all counsel of record.

By: /s/ *Kenneth Y. Choe*

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