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

AIMEE MADDONNA, Plaintiff,	)	
v.	)	**Civil Action No. 6:19-cv-03551-JD**
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Children need and deserve loving homes. Plaintiff Aimee Maddonna had long dreamed of welcoming foster children into the loving home she and her family have made. Yet when she sought to begin the process through Miracle Hill Ministries—at the time the largest and most prominent child-placing agency (CPA) licensed and funded by South Carolina to administer foster-care services on the State's behalf in the region around Greenville, where the Maddonnas live, Mrs. Maddonna and her family were turned away. But not because of unsuitability to mentor or foster children. Quite the contrary: The CPA noted that Mrs. Maddonna seemed like the perfect person to help foster children, yet it refused to work with her and her family because the Maddonnas are Catholic. Although the CPA performed its foster-care duties on behalf of the State as part of a government program, it refused to work with any prospective mentors or foster parents who did not belong to a church of which the agency approved; and the CPA required prospective foster parents to affirm their agreement with and pledge to live according to its evangelical-Christian statement of faith.

South Carolina has a responsibility of the highest order to care for the children in its custody and under its control—children who often come into the foster-care system during tumultuous periods of transition and instability. In fulfilling its legal and ethical obligations to these children, the State should ensure that they have the best opportunities to be placed in safe, loving homes.

The State partners with faith-based organizations to assist it in running its foster-care program; and Mrs. Maddonna does not object. For many faith-based organizations provide important social services to people in need. The problem was that when South Carolina learned of Miracle Hill's conduct, rather than serving the best interests of the children and protecting Mrs. Maddonna and other prospective foster parents from religious discrimination and religious coercion, the State instead sought to promote that discrimination. With the necessary approval of the U.S. Department of Health and Human Services (HHS), which provides and controls federal funding for foster-care services, Governor McMaster intervened to alter the very structure of the State's foster-care program. He issued an executive order granting a blanket, prospective waiver

to all religious CPAs, allowing them to discriminate based on religious criteria, without asking them to show a substantial burden on their own religious exercise, and without putting in place any protections for prospective foster parents who might be turned away.

When South Carolina exercises its considerable power as *parens patriae* to intervene in the family unit and place children in state care, it bears a particular responsibility to respect constitutional limitations. It may delegate authority to private agencies, religious or not, to provide governmental services and perform governmental functions on its behalf, and the Defendants may pay those agencies for the services with federal and state dollars. But they must not sponsor or fund religious discrimination, or permit religious coercion of participants in the program; to do otherwise violates the Establishment Clause of the First Amendment to the U.S. Constitution. Yet South Carolina and HHS not only permitted Miracle Hill to discriminate in the provision of governmental services, but also compounded the constitutional violation by enacting structural changes to the foster-care program itself by granting unrestricted permission going forward to allow all religious CPAs to violate antidiscrimination laws based on the CPAs' religious beliefs.

The Court should declare these structural changes to the program unlawful and enjoin their enforcement.

STATEMENT OF FACTS[1]

A. South Carolina's Foster-Care System

To fulfill its duty to care for children in the State's legal custody, the South Carolina Department of Social Services contracts with private CPAs, which hold licenses from the State to facilitate placement of foster children with foster parents and receive reimbursements from state and federal funds for performing those governmental services. S.C. Code § 63-9-30(5); S.C. Code Regs. 114-4910; SUMF ¶ 5. DSS issues a standard, one-year license to qualifying foster-care CPAs

[1] Except where background facts are established by reference to statute or regulation, this general summary of the facts, as well as other specific facts cited throughout this brief, will reference the Statement of Undisputed Material Facts (SUMF) filed contemporaneously with this Memorandum. Because this lawsuit seeks prospective injunctive relief, this summary of the South Carolina foster-care program includes changes to the program during the course of the litigation.

that satisfy its regulatory requirements, and then it monitors these licensed agencies to ensure their continuing compliance with federal and state laws and regulations. S.C. Code Regs. 114-4920(E), 114-4930(E).

If a CPA is temporarily unable to comply with a state foster-care-licensing requirement, DSS is authorized to grant the agency a temporary license if the agency provides it with a written plan detailing how, during a probationary period, the agency will correct the areas of noncompliance. S.C. Code Regs. 114-4930(F). DSS may deny or revoke a CPA's license if it determines that the agency cannot comply with state regulations or if the agency provides false information during the application or relicensing process. *See id.* at 114-4930(G)(1)(d)–(e).

Licensed CPAs perform a variety of services on behalf of the State: They conduct initial and relicensing foster-home investigations consistent with regulations established by DSS; make recommendations that DSS uses to determine whether a foster-family license should be issued, denied, reissued, or revoked; monitor the homes for compliance with DSS's foster-home regulations; investigate complaints about possible violations of those regulations; and provide DSS with written reports of their findings, conclusions, and any recommended actions affecting the investigated homes' licenses. S.C. Code Regs. 114-550(C)–(E), 114-4980(A).

CPAs also exercise substantial control over foster children's time in the system, including developing written case plans for all children assigned to them and determining which foster home is appropriate for a child based on the agency's assessments of foster families' strengths and children's needs. S.C. Code Regs. 114-4980(B)–(C).

In July 2020, DSS changed its internal practice to focus on kinship care, transitioning all non-kinship foster-parent applications—which would include applicants like Mrs. Maddonna's—to its contracted CPAs. SUMF ¶ 17. To make this change, DSS shifted a large portion of the private intake work to Heartfelt Calling, a program of the South Carolina Foster Parent Association. Heartfelt Calling serves as a central clearinghouse that potential foster parents may (but aren't required to) use. Heartfelt Calling provides a list of the CPAs and forward the intake to the one the family chooses from the list. If the CPA declines to work with the family, the family can then

return to Heartfelt Calling and pick another CPA from the list. DDS would not know that the family was turned away unless the family contacted DDS directly. DDS does not ask and does not know which CPAs are taking advantage of the Executive Order's exemption to exclude families on religious criteria.

B. Miracle Hill Ministries

Miracle Hill Ministries is an entity based in Greenville, South Carolina, that serves as a foster-care CPA for the State and provides government-funded services under contract with the State to those seeking to be licensed by DSS as foster parents. When this lawsuit was filed, Miracle Hill was the largest placement agency in region where Aimee Maddonna lives, and one of the largest across the entire State. SUMF ¶¶ 18-20, 28-29.

As a licensed CPA, Miracle Hill assists prospective foster parents and families in obtaining state foster-care licenses, provided home studies and assessments that DSS relied on in making foster-care-licensing decisions, helped determine the foster families with whom children should be placed, and influenced the State's assessment of whether prospective foster parents fit the needs of a child ready for placement. SUMF ¶¶ 6 - 11. Unlike DSS, Miracle Hill permitted children as well as adults to volunteer with children awaiting placement in a foster home, allowing for families like the Maddonnas to volunteer as a family. Volunteering helps families establish the types of relationships with children in foster care that lead to long-term foster placements and even adoptions. SUMF ¶¶ 65-66.

Miracle Hill is a religiously affiliated organization that administered its foster-care services in a Christ-centered environment. SUMF ¶¶ 21-26. Miracle Hill believes that foster parents are in a position of spiritual influence over the children in their homes, and hence it required prospective foster parents and volunteer mentors to attest that they read and agreed with Miracle Hill's doctrinal statement. SUMF ¶ 27, 74.

When reviewing Miracle Hill's application to renew its CPA license for 2018, DSS determined that Miracle Hill was using religious information that it gathered about prospective

foster parents and families to refuse to provide services as a licensed CPA to families who did not adhere to its evangelical-Christian beliefs or did not attend Miracle Hill-approved Christian churches. DSS determined that Miracle Hill's policies and practices constituted discrimination based on religion, in contravention of federal and state law, and that Miracle Hill was violating its own nondiscrimination policies submitted to DSS as part of the organization's license-renewal process. SUMF ¶ 36. For these reasons, in January 2018 DSS issued Miracle Hill a temporary (rather than regular) CPA license and requested that Miracle Hill submit, within thirty days, a written plan for resolving the legal violations that DSS had identified and for complying with applicable laws, regulations, and policies. Miracle Hill never issued any compliance plan. SUMF ¶ 38. Instead, it sought the Governor's intervention. SUMF ¶ 39.

C. Governor McMaster's Intervention and Executive Order

Rather than require Miracle Hill to comply with federal and state law—which would ensure that the State's continued funding and licensing of Miracle Hill does not violate the Constitution—in March 2018 Governor McMaster issued Executive Order No. 2018-12, which prohibited DSS from taking any action against a CPA in South Carolina that failed to comply with antidiscrimination requirements if the agency believed doing so violated its religious beliefs. SUMF ¶ 42. The Executive Order expressly permits faith-based subgrantees to associate only with "foster parents and homes who share the [subgrantee's] faith" "in recruiting, training, and retaining foster parents." SUMF ¶ 44. The Executive Order also directs DSS to "review and revise its policies and manuals in accordance with this Order and ensure that [DSS] does not directly or indirectly penalize religious identity or activity in applying" the State's licensure requirements. SUMF ¶ 42 at 4. The governor did not even consult DSS's Director of Permanency Management, one of the top policymakers for foster care in the state, before deciding to authorize CPAs to discriminate based on religion. SUMF ¶ 46.

CPAs are not required to inform DSS or take any steps to make use of the waiver. SUMF ¶¶ 56-57. DDS does not know or bother to inquire about which CPAs might be taking advantage

of the Executive Order to discriminate on the basis of religion; nor does it have any process in place to monitor or learn whether that is the case. SUMF ¶¶ 49-52. DSS has never bothered to assess the effect of the blanket waiver. SUMF ¶¶ 47-48.

D. HHS's Facilitation of South Carolina's Discriminatory Scheme

To ensure that his authorizing CPAs to discriminate based on religion didn't jeopardize South Carolina's federal funding, Governor McMaster reached out to HHS's Administration for Children and Families to obtain an exemption from any funding conditions that might prohibit that discrimination in the State's foster care program. SUMF ¶ 40. HHS approved the exception request in January 2019. SUMF ¶ 41.

Once South Carolina received the federal exception letter, DSS replaced Miracle Hill's temporary, probationary CPA license with a regular license, thus allowing Miracle Hill to continue offering publicly funded foster-care services on behalf of the State in a discriminatory manner. To this day, Miracle Hill continues to be listed on the Heartfelt Calling website as a DSS Licensing Partner authorized by the State, expressly noting it will serve only Christian foster parents and require families to agree to live in accordance with a statement of faith. https://bit.ly/3XnVDkn.

In November 2019, HHS went further, announcing a pair of agency actions to eliminate the protections of the 2016 Grants Rule (from which South Carolina had already been granted an exemption).[2] First, HHS proposed a rule that would remove the nondiscrimination prohibitions in the 2016 Grants Rule (later finalized as the 2021 Grants Rule). *See* Office of the Assistant Secretary for Financial Resources, HHS Grants Regulation, 84 Fed. Reg. 63,831, 63,832 (Nov. 19, 2019). Second, HHS published a Nonenforcement Policy to inform the public that HHS would no longer enforce any of the still-valid grants provisions at issue in the 2016 Grants Rule—including the nondiscrimination provisions—pending the agency's decision on the proposed rulemaking (the

[2] The 2016 Grants Rule, 45 C.F.R. § 75.300(c) (2016), provides: "It is a public policy requirement of HHS 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 . . . . Recipients must comply with this public policy requirement in the administration of programs supported by HHS awards."

NNGR). Notification of Nonenforcement of Health and Human Services Grants Regulation, 84 Fed. Reg. 63809 (Nov. 19, 2019). By its own terms, the NNGR was meant to end on finalization of the 2021 Rule. *Id.* It was never meant to outlast the 2021 Rule and become permanent policy.

In January 2021, HHS finalized the replacement Rule for the 2016 Grants Rule. HHS Grants Regulation, 86 Fed. Reg. 2257 (Jan. 12, 2021). Although the new 2021 Grants Rule was promulgated, it never went into effect, because HHS ultimately confessed error as to the process that led to it and agreed to a court order vacating it. Order, *Facing Foster Care in Alaska v. HHS*, 21-cv-308-JMC (D.D.C. June 29, 2022), ECF No. 44. Thus the 2016 Rule is currently effective, and HHS has not issued any new notice of proposed rulemaking.

E. Aimee Maddonna

Aimee Maddonna, her husband, and their three children live in Simpsonville, South Carolina, just outside Greenville. Mrs. Maddonna father's childhood experiences in the foster-care system led him as an adult to take in and care for foster children so that he could provide them with the type of foster family that he wished he had. Mrs. Maddonna thus grew up with both biologically related and foster siblings, and her parents instilled in her the importance of providing a safe, loving home to children in need of a foster family. She intends to share with and pass on to her own children these fundamental values of charity and service. SUMF ¶¶ 62-65.

Accordingly, building on her own experience growing up with foster siblings, Mrs. Maddonna contacted Miracle Hill to see whether her family could volunteer to work with foster children. Through volunteering, Mrs. Maddonna hoped that her family would get to know and develop relationships with children who might be good matches for foster placement in their home, and that the family would ultimately provide a loving home for a child or children in need. Because the Maddonna children have special needs, volunteering as a family was especially important to ensure that any foster child that the family would welcome into their home would be a good fit with the whole family. The Maddonnas were and are particularly experienced and willing to work with special-needs kids and older children—who are the hardest to place. SUMF ¶¶ 66-67.

In February 2019, Mrs. Maddonna reached out to Miracle Hill to apply as a family to be volunteer mentors to foster children in Miracle Hill's care, with the ultimate hope of fostering a child. Miracle Hill rejected the Maddonna family because they are Catholic. Miracle Hill believes that mentors and foster families play an important role in providing spiritual as well as emotional support, guidance, and counsel, to children in State care, and that only evangelical Protestants are suitable to fulfill that role. Thus, Miracle Hill requires mentors and foster parents to agree with and attest to Miracle Hill's Protestant statement of faith, share its distinctly Protestant beliefs and convictions, and belong to a Miracle-Hill approved Protestant church. Miracle Hill told Mrs. Maddonna that she could go someplace else to become a mentor, or that the Maddonnas could do other charitable work through Miracle Hill that didn't involve being around the foster children assigned to Miracle Hill by DSS. SUMF ¶¶ 73-76.

While Miracle Hill later lifted its formal, absolute bar on Catholics' participating in its foster-care Services (while still excluding Jews, Muslims, other minority faiths, and nonbelievers), it continues to require prospective foster parents to agree to and live in accordance with its Protestant statement of faith. Mrs. Maddonna has reviewed that doctrinal statement and found it inconsistent with her religious beliefs and her understanding of her faith. Were she to attest to and agree to practice in accordance with that doctrinal statement, she would be forced either to misrepresent her faith and falsely affirm commitments to religious beliefs that are not her own, or else abandon her own beliefs to adopt the religious beliefs and practices that Miracle Hill favors. SUMF ¶¶ 77-82.

STANDARD ON SUMMARY JUDGMENT

The question on summary judgment is whether, based on the undisputed material facts, the moving party is entitled to judgment as a matter of law. *S. Appalachian Mountain Stewards v. A&G Coal Corp.*, 758 F.3d 560, 562 (4th Cir. 2014).

ARGUMENT

Federal and state laws provide a clear path for granting individualized religious accommodations and avoiding a delegation of governmental authority to religious organizations that can be used to harm others. Sadly, this case is a textbook example of how *not* to follow that lawful path. In 2018, the state and federal defendants, in concert, changed the South Carolina foster-care program for the sole purpose of permitting religious discrimination. To be clear, only one CPA, Miracle Hill, sought an exemption. Yet Defendants did not simply consider an individualized exception for Miracle Hill. Rather, through a state executive order and a federal waiver, they changed the program in a sweeping way that operates prospectively and permits *any* CPA to engage in future acts of religious discrimination, without notice to the state, the federal government, or those who are victims of the discrimination—and without safeguards against harm to foster-parent applicants or the children in state care. These changes are still in effect nearly five years later—a sad situation that this Court, for reasons presented below, can and should remedy.

I. The Governor's Executive Order Modified South Carolina's Foster-Care Program to Authorize Discriminatory Exclusion of Participants Who Fail to Satisfy Religious Criteria, Thus Violating the Establishment Clause.

As the Supreme Court recently reaffirmed, the First Amendment's Religion Clauses "have 'complementary' purposes, not warring ones where one Clause is always sure to prevail over the others." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2426 (2022). Animating both Religion Clauses is governmental neutrality respecting religion, which is essential to protect religious exercise and maintain separation of religion and government. Determining religious neutrality under both Clauses triggers an equal-protection mode of analysis, to identify any discriminatory object of governmental action, including by looking to the historical background of the government's decision and the specific series of events leading to the government's policy. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993). Here, the unrebutted evidence is that the line of neutrality has been crossed repeatedly: Time and again, South Carolina has favored and ratified CPAs' religious beliefs over the interests of children and

prospective parents in the foster-care system.

Government must remain neutral between religion and religion, and between religion and nonreligion. *See Larson v. Valente*, 456 U.S. 228, 244 (1982); *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994). Hence, the state "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). Yet contrary to these well-established constitutional principles, the state program and state and federal funding here are knowingly being used to disfavor a class of people because they are religiously objectionable and fail to satisfy a particular denomination's litmus test. This practice is at the heart of what the First Amendment proscribes: It directly contravenes the constitutional principles that protect us all against government-sponsored, religion-based harm.

Government may not coerce anyone in matters of religion or religious practice. If the state delegates "important, discretionary governmental powers" to religious organizations, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982), it must put adequate "safeguard[s]" in place to ensure that its delegated power is used only for secular, neutral, nonideological purposes, *Grumet*, 512 U.S. at 703. For government "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). Nor may the state accommodate religion by imposing undue burdens on others. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (governmental action crosses the line from permissible religious accommodation to unconstitutional establishment if it shifts burdens or harms from benefited religious exercise to nonbeneficiaries); *see also Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005). Failing to account for that burden forces Mrs. Maddonna to subsidize the CPA's religious beliefs that are contrary to her own—and subsidize discriminating against *her*. Imposing such undue burdens are especially problematic when there is no assessment of whether there has been any substantial burden on religion in the first place.

South Carolina's approach to religious CPAs like Miracle Hill violates the Establishment Clause principally in three ways. First, it coerces religious belief and exercise by prospective foster

parents and foster youth alike. Second, it delegates governmental power to religious entities without safeguards against use of the power for religious purposes, impermissibly fusing governmental and religious functions. Finally, because the blanket waiver is not tailored to any substantial burden on religious exercise and burdens third parties, it cannot be understood as a permissible religious accommodation but instead is impermissible governmental favoritism toward CPAs' religion.

A. South Carolina's blanket waiver allowing faith-based CPAs to discriminate based on religion encourages and underwrites religious coercion of participants in the state's foster-care program.

The fundamental 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 coercion "was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment." *Kennedy*, 142 S. Ct. at 2429; *accord Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1609 (2002) (Gorsuch, J., concurring) (explaining that many "traditional hallmarks" of forbidden religious establishments "reflect forms of 'coerc[ion]'" of religious belief or practice (quoting *Lee*, 505 U.S. at 587)). Thus, it has long and unequivocally been the law that "the machinery of the State" must not be used "to enforce a religious orthodoxy." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000). And government "may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations." *Texas Monthly*, 489 U.S. at 9; *cf. Town of Greece v. Galloway*, 572 U.S. 565, 589 (2014) (plurality opinion) ("Nothing in the record indicates that town leaders allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined.").

"[T]he type of coercion that violates the Establishment Clause need not involve either 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 to whom government delegates its authority) "may no more use social pressure to enforce orthodoxy than [they] may use more direct means." *Id.* at 594; *accord Herndon ex rel. Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 180 (4th Cir. 1996) ("[T]he degree of involuntariness needed to invoke the Establishment Clause is exceedingly low, and includes . . . 'subtle and indirect' pressure." (quoting *Lee*, 505 U.S. at 593)).

1. The blanket waiver authorizes and encourages religious coercion of prospective foster parents.

By authorizing religious CPAs to turn away prospective foster parents based on religious criteria, South Carolina's blanket waiver ties participation in a state program to religion, pressuring prospective foster parents to adhere to agencies' religious beliefs to participate fully in South Carolina's foster-care program. Miracle Hill's history shows the harms wrought by the 2018 changes—adopted specifically to enable Miracle Hill's conduct, and still in effect for all religiously affiliated CPAs today and the religious discrimination that they intentionally enable. Mrs. Maddonna was subjected to that coercion when, solely because of her Catholic faith, Miracle Hill twice rejected her as a mentor or foster parent, even though Miracle Hill otherwise determined that she was a perfect candidate. And when she reached out to Miracle Hill again in 2019 to ask whether it still refused to work with her because of her religion, she was rejected yet again. This rejection put her to an impossible choice: To work with the CPA best suited to her family's needs, she would have to forsake her faith.

Miracle Hill's later policy only underscored the coercion: Miracle Hill declared that it would work with Catholics if, but only if, they agreed and attested to the agency's evangelical Protestant statement of faith. To be clear, it would not be enough simply to sign that statement of faith, for Miracle Hill requires more than mere agreement: Prospective foster parents must commit to adhere to the statement of faith "in faith and in practice." SUMF ¶¶ 27, 79. And just as Miracle Hill would refuse to work with those who don't believe something in the statement of faith, it would also refuse to work with those whose religious "practices might not align with [its] doctrinal

statement." SUMF ¶ 79. And Miracle Hill also still required that prospective foster parents regularly attend a Christian church that Miracle Hill determines meets its narrow definition of "Christian." SUMF ¶ 80. These assessments of "the home's spiritual health and well-being" were built into Miracle Hill's home studies. SUMF ¶ 24.

These requirements pressured prospective foster parents to affirm religious beliefs and practices with which they may not agree—and to adjust their conduct accordingly—on pain of being denied participation in the state program. Mrs. Maddonna explained that she cannot sign Miracle Hill's doctrinal statement, for the faith that she grew up with, what she was taught, and what she believes are not consistent with that statement of faith. Agreeing to it would be tantamount to abandoning her Roman Catholic faith. SUMF ¶¶ 81.

Nor was Mrs. Maddonna the only Catholic facing this dilemma. Miracle Hill turned away approximately 25 to 30 families between 2017 and its policy change—the majority of whom were Catholic. SUMF ¶¶ 37, 79. Even after the change, Miracle Hill accepted only one Catholic family. SUMF ¶ 79. And prospective foster parents of other faiths and the nonreligious faced the same choice: Agree to live by Miracle Hill's statement of faith and attend a Miracle-Hill-approved Christian church, or else be denied equal participation in South Carolina's foster-care program. The state's continued greenlighting of religious discrimination authorizes religious CPAs to pressure prospective foster parents to conform to the CPAs' religious beliefs. The Establishment Clause prohibits government from putting people to that disgraceful test.

2. The blanket waiver leaves foster youth vulnerable to religious coercion.

In addition to enabling and promoting religious coercion of prospective parents, South Carolina's blanket waiver enables religious coercion of foster children. Again, Miracle Hill is the poster child for what the state's 2018 changes were intended to permit, for the CPA repeatedly explained that it would not work with Mrs. Maddonna to mentor or foster children because it "believe[s] mentors play an important role in providing spiritual as well as emotional support, guidance, and counsel," and it therefore restricts these roles to those who agree to practice and

raise the children in the agency's preferred faith. SUMF ¶74, 75 (explaining that "there are a few roles involving spiritual influence, teaching, and formation, that we reserve for those who share our distinctly Protestant beliefs and convictions," and noting that, in foster care, they would allow Mrs. Maddonna to perform "administrative work only"); i*d.* (explaining that non-Protestants could not volunteer as mentors for foster youth in part because Miracle Hill "hope[s] that spiritual teachers and volunteers will bring introduce[sic] clients to their churches and integrate them into their church families" and believes that "[t]o allow spiritual teaching by volunteers from non-protestant churches will damage our relationships with the churches to whom we are accountable"). During initial home studies, Miracle Hill employees ask about church attendance and involvement of the prospective parents and any children they have, because Miracle Hill "would want the family to be attending church together and . . . would want to see what they're teaching their children." SUMF ¶ 21. Miracle Hill wants foster parents expose foster children to those particular religious teachings and exercise spiritual influence—Protestant Christian influence—over the children. SUMF ¶ 22. Miracle Hill does not require that a child's biological parents' consent (or even be consulted) before requiring foster parents to provide a foster child with the agency's preferred religious teachings. SUMF ¶ 26. Unless the biological parent or child specifically objects, Miracle Hill expects foster parents to teach the Christian religion to their foster children and "share the gospel of Jesus Christ" with them—even if those foster children and their biological families are adherents of a different religion. SUMF ¶ 23. And DSS itself does not track the religions of foster children or their biological parents unless the family or the child makes a specific request related to practicing their religion. SUMF ¶ 12.

B. State Defendants have impermissibly delegated governmental functions to religious entities without adequate—or any—safeguards to prevent turning away disfavored persons based on the entities' religious beliefs.

The Establishment Clause prohibits governments from delegating government power to religious entities in ways that would "'fus[e] . . . governmental and religious functions'" and enable religious entities to exercise the delegated power in furtherance of religious ends. *Larkin*,

459 U.S. at 126 (quoting *Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963)). History has long taught that when government uses religious institutions "to carry out certain civil functions," the Establishment Clause's protections are triggered. *Shurtleff*, 142 S. Ct. at 1609 (Gorsuch, J., concurring) (citing Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131–81 (2003)). For when the state "delegat[es] important, discretionary governmental powers to religious bodies" without any "effective means of guaranteeing that the delegated power would be used exclusively for secular, neutral, and nonideological purposes," it impermissibly entangles government and religion in violation of the First Amendment. *Grumet*, 512 U.S. at 697 (internal quotation marks and alteration omitted). Hence, a state may not delegate to churches a veto power over liquor-license applications in the churches' vicinity. *Larkin*, 459 U.S. at 117, 125, 127; *see also Shurtleff*, 142 S. Ct. at 1609 (Gorsuch, J., concurring) (identifying founding-era historical underpinnings of *Larkin*). Nor may a state delegate its authority over public schools to a religious group by drawing a school district to include only members of that group. *Grumet*, 512 U.S. at 698 (plurality opinion).

South Carolina has crossed this line, "enmesh[ing] churches in the exercise of substantial governmental powers" in its foster-care program. *Larkin*, 459 U.S. at 126. It authorizes and invests private CPAs with the governmental authority "to provide foster care services" "for the state." SUMF ¶ 4. These agencies "recruit, train, and license families or make recommendations for licensure to [DSS]." *Id.* They handle initial inquiries and applications from prospective foster parents. SUMF ¶ 7. They guide prospective parents through the application process. And they perform home studies for the state, "conduct[ing] a walk-through of the home, assess[ing] the family, interview[ing] . . . applicable household members," and submitting a "written home study assessment" to DSS along with a recommendation whether the family is suitable to be licensed as foster parents. SUMF ¶ 8. The agencies' home-study assessments are a "big piece" of the information DSS has on applicants. SUMF ¶ 9. Generally, "if there is nothing glaring that . . . causes [DSS] to ask more questions," it relies on the home study and other application materials sent by the CPA in deciding whether to license foster families. SUMF ¶ 10. DSS rarely goes against

the recommendations of its CPAs in deciding whether to license a foster family. SUMF ¶ 11.

Thus, under the system that South Carolina has set up, "DSS works with CPAs who cull out families . . . based on their own set of religious criteria . . ., and then DSS relies on CPAs to recommend whoever has made it past that screening process to become a prospective foster parent in South Carolina." SUMF ¶ 13. By making CPAs the gateway to the state's foster-care program, South Carolina has delegated its "important, discretionary governmental powers" over recruitment and screening of foster parents to religious agencies while expressly permitting them to exercise those powers to further the CPAs' religion. *Grumet*, 512 U.S. at 697.

Nor does the delegation end at the screening and application stages. Once a foster family is licensed, the CPA keeps that family and home "under their supervision," ensuring that the family continues to meet state requirements and, once the family receives a foster-child placement, "making sure that the child gets the care that he needs." SUMF ¶¶ 14. Child-placement agencies also help DSS decide where to place particular children: DSS sends the agencies information about children in need of homes, and the agencies respond if they have a family that might be a good match. SUMF ¶ 15. Because "[t]he child-placing agencies know those families better than [DSS] know[s] those families," DSS considers these recommendations valuable information. SUMF ¶ 16.

Notably too, DSS has since July 2020 shifted most of its in-house efforts to applicants for kinship care—that is, people looking to foster a child who is related to them or with whom they already have a close relationship. DSS has worked with very few, if any non-kinship applicants since implementing this change. Because of DSS's focus on recruiting kinship families, it relies even more heavily on CPAs to work with non-kin prospective parents. SUMF ¶ 17.

And the State has "not suggested any 'effective means of guaranteeing' that the delegated power 'will be used exclusively for secular, neutral, and nonideological purposes.'" *Larkin*, 459 U.S. at 125 (quoting *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 780 (1973)). On the contrary, through Executive Order 2018-12 the State invited and authorized Miracle Hill and all other faith-based CPAs to use their delegated powers for religious purposes, including subjecting prospective foster parents to religious litmus tests in order to participate in a

government program. Miracle Hill, for example, incorporates religious tests into several components of its foster-care program, with the state's approval. First, it uses religious criteria to screen applicants, refusing even to begin working with prospective foster parents, such the Maddonnas, who hold religious beliefs that differed from its own. And even after Miracle Hill begins working with prospective foster parents, religion continues to factor into its work. The agency incorporates religious questions into its initial home study, assessing "the home's spiritual health and well-being" through questions about the family's beliefs and spiritual life. SUMF ¶ 24. Its employees ask about "how [the family] follow[s] Christ on a day-to-day basis," what Jesus and the cross mean to them, and what their involvement is in their church. SUMF ¶ 25. It requires foster parents to adhere to its doctrinal statement "in faith and in practice." SUMF ¶ 27. It "expects foster parents to provide Christian teachings to the children in their care" absent an explicit objection from the biological parents or the child; and it does not even seek parental consent before doing so, instead imposing its own religious choices unless biological parents figure out on their own that they should raise objections. SUMF ¶26. Miracle Hill does not use its delegated governmental authority in a religiously neutral way, and South Carolina makes no attempt to establish guardrails in its blanket waiver to prevent Miracle Hill and other CPAs from doing so. Rather, Governor McMaster's Executive Order expressly authorizes and invites that religious favoritism. The blanket waiver is thus an impermissible delegation under the Establishment Clause.

C. The Executive Order's prospective licensing of contracted CPAs to administer the foster-care program in a discriminatory manner is not a permissible religious accommodation.

Though government may in some circumstances accommodate religion by exempting it from generally applicable legal requirements, "accommodation is not a principle without limits." *Grumet*, 512 U.S. at 706. "The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Santa Fe*, 530 U.S. at 302 (quoting *Lee*, 505 U.S. at 587).

To be constitutional, religious accommodations (1) must alleviate substantial, government-imposed burdens on the exercise of religion and (2) must not impose undue burdens on third parties. *See Texas Monthly*, 489 U.S. at 15 (plurality opinion); *Caldor*, 472 U.S. at 709-10. For if the state has not imposed a "significant" 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); *accord Caldor*, 472 U.S. at 709–10. If, in purporting to accommodate the religious exercise of some, the state 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. *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. Thus, all other considerations aside, South Carolina cannot "accommodate" CPAs' religious beliefs by contracting with them to provide government services while exempting them from the nondiscrimination requirements that apply to the State itself and therefore to its contractors.

1. The blanket waiver is not tailored to lift substantial, government-imposed burdens on religious exercise.

The first fatal flaw of the Executive Order's scheme is that it is not designed to lift substantial, government-imposed burdens on religious exercise. South Carolina asserts that its blanket waiver was called for and justified by the state's Religious Freedom Act, which prohibits the state from "substantially burden[ing] a person's exercise of religion" unless it is the least restrictive means of furthering a compelling state interest. S.C. Code § 1-32-40; *see also* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (similar test).

But the Federal Defendants have admitted that, to be permissible, any RFRA-type exception or exemption "should be tailored to reduce the burden on a religious organization *while accounting for harms to other parties*." Letter from Joo Yeun Chang 6, ECF No. 91-1 (emphasis added). South Carolina utterly failed to do so: Miracle Hill was the only agency that ever requested a waiver of DSS's nondiscrimination requirements. SUMF ¶ 45. Yet the governor waived the

requirements for *all* faith-based CPAs in the state. The state did not assess whether any other agency's religious beliefs were substantially burdened by nondiscrimination requirements. It did not require CPAs to submit requests explaining why they believe that their religious rights are substantially burdened. It did not even require agencies to inform DSS, or anyone else, that they intend to take advantage of the blanket waiver. And even today, DSS does not know and chooses not to ask which CPAs might be taking advantage of the Executive Order to further their own religious beliefs in their administration of the program. In short, the prospective blanket exception runs afoul of the constitutional stricture that accommodations must be limited to the particular application of the legal requirement to which the claimant objects. *Cf. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006) (compelling-interest test requires government to address specific practice at issue).

The across-the-board waiver cannot be justified under South Carolina's Religious Freedom Act, nor can it be deemed constitutional. Indeed, Federal Defendants have agreed that "creat[ing] class-wide regulatory exceptions that apply throughout a state, as the exception to South Carolina provide[d] (even when not requested by the other CPAs), runs contrary to" the organization-specific analysis required by RFRA and similar laws. Letter from Joo Yeun Chang 5, ECF No. 91-1. Because it cannot be justified as the lifting of a government-imposed substantial burden on specific agencies' religious exercise, it must instead be understood as unconstitutional religious favoritism.

2. The blanket waiver unconstitutionally burdens third parties.

In addition to lacking any tie to actual, individualized, substantial burdens on religious exercise, South Carolina's blanket waiver blatantly—and unconstitutionally—disregards the harms to third parties. The Establishment Clause bars religious exemptions from neutral, generally applicable laws if the exemptions would shift costs, harms, or other burdens to nonbeneficiaries. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693, 729 n.37 (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.'"); *Texas Monthly*, 489 U.S. at 18 n.8 (plurality opinion) (sales-tax exemption for religious periodicals impermissibly "burden[ed] non-beneficiaries by increasing their tax bills . . . 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").

South Carolina's blanket waiver seriously burdens nonbeneficiaries—i.e., prospective foster parents who seek to participate in the program and foster children in the state's care. It subjects prospective foster parents like Mrs. Maddonna to discrimination based on their religion, stigmatizing them and discouraging them from fostering children. It also subjects prospective foster parents to practical hurdles, as different agencies have different locations and provide different services and support. And compounding these burdens, South Carolina has established no safeguards to shield prospective foster parents from these burdens—nor has it even tried to learn what the burdens are.

Being turned away from a CPA on a religious litmus test is a serious burden and harm for prospective foster parents. It sends the message that their religion makes them somehow less suitable or less worthy to be a foster parent, and that others are better parents solely because they adhere to a preferred faith. Take Mrs. Maddonna's experience: Before Miracle Hill knew Mrs. Maddonna's religion, its representative was enthusiastic to get Mrs. Maddonna connected with Miracle Hill's program. Yet as soon as Mrs. Maddonna said that she was Catholic and attended a Catholic church, Miracle Hill did an about-face and informed her that she was no longer welcome. And even under Miracle Hill's changed requirements, the message remains the same: If you don't share our religious beliefs, you can't be trusted to volunteer with children or be a foster parent.

That rejection hurts. As Mrs. Maddonna explained when asked why she didn't just go to a different CPA after being turned away,

> I was harmed. The children were harmed. Just because I wasn't—just because I guess I could have tried to scout out other opportunities that I'm not aware of existed, that doesn't mean that I wasn't harmed in the process. Being told that I'm

> perfect in—that I sound perfect for [the] opportunity in every way and going through the motions of—of planning for that, of looking forward to that, of feeling like I have the opportunity to do something that my—that I always wanted to do and then being told that I can't do that because of my—because of the parish I belong to, I can't imagine that that's not harmful.

SUMF ¶ 85 (Ex. 1 Maddonna Tr. 51:22-52:9).

Indeed, as with Mrs. Maddonna's experience, the rejection may cause so much pain and distress that prospective foster parents give up on fostering altogether rather than risk facing similar rejections again. Mrs. Maddonna's experiences offer a prime example: She had not known that Miracle Hill would turn her away. After it did, she has not felt comfortable reaching out to other CPAs, for she has no assurance that other agencies aren't going to do the same thing. SUMF ¶ 84. There are no policies or protections to "ensure [she is] not going to be turned away for the same reason[]"—her faith. Trying again with other agencies that "may or may not take [her] faith into account" is a "major hurdle" for her because she does not want to have her family be rejected yet again by another agency. "It doesn't matter how long the list [of CPAs] is . . . . That part of that list might include somebody's criteria I still can't meet. And I guess that if you haven't been there you don't understand . . . . I don't want to go through that again." SUMF ¶ 85 (Ex. 1 Maddonna Tr. 82:8-83:10). South Carolina's blanket waiver does nothing to protect Mrs. Maddonna or other prospective foster parents from this devastating harm. SUMF ¶¶ 85-86.

Rejection by a CPA also creates practical burdens for prospective foster parents. Different CPAs have different locations and offer different kinds of resources and support to prospective parents as they apply for licenses, seek to have a child placed with them, and take care of any foster children with whom they are entrusted. CPAs are thus not interchangeable. Different families have different needs, and what might be sufficient resources for one family may not suit the needs of another. SUMF ¶ 53.

Working with a CPA with an office close to one's home is particularly important for many because that makes it more likely that the agency can offer help—or send it quickly when needed. Miracle Hill, for example, offers 24-hour emergency support services, which can include in-person visits as needed. Ready access to your caseworker is important. SUMF ¶ 54.

Nor is the potential alternative of working directly with DSS to foster children enough to negate these practical burdens. As noted above, DSS has largely shifted its focus and resources to kin-based placements, leaving the bulk of non-kinship applicants to the private CPAs. And DSS does not provide the same levels of services and support that the private agencies do. For example, some CPAs provide free monthly cleaning services or doctor-appointment set-up and transportation assistance. SUMF ¶ 55. So even if prospective parents were able to go through DSS rather than a private CPA, they still would likely receive different (and lesser) support than if they had been of the "right religion" to work with a CPA that discriminates. Those who are the right religion have all the options and can select the agency that best suits their needs. Those who, like Mrs. Maddonna, are the wrong religion, don't and can't.

Again, Miracle Hill provides a prime example of why the State's contracted CPAs are not all equivalent or interchangeable. Miracle Hill had standout success when it came to foster-home licenses and placements. From 2017 to 2021, Miracle Hill had the highest number of new foster-home licenses among nontherapeutic agencies (*i.e.*, those that don't do placements for children with the most severe medical conditions). SUMF ¶ 28. And in both 2017 and 2020, Miracle Hill had the highest number of new licenses overall, even counting the therapeutic agencies. *Id*. Miracle Hill likewise had the highest number of nontherapeutic foster-child placements from 2017 to 2021. SUMF ¶ 29. The only providers that had higher placement numbers during any of those years were therapeutic agencies, and their counts of *non*therapeutic placements were lower than Miracle Hill's. *Id.* Miracle Hill's success in child placements is no surprise. It has a placement coordinator who recommends families to DSS who may be a good fit for a particular foster child, and then meets with the family once a placement is made to help with the paperwork and provide additional support. SUMF ¶ 30. Those placement visits are not required by DSS, and Miracle Hill is unaware of other CPAs that provided the service. *Id.*

In addition to its success in guiding families through the process of applying to become licensed foster parents and helping them obtain placements, families working with Miracle Hill also receive other benefits and support. Miracle Hill sometimes will provide tangible support, like

if the family needs a bed, dresser, or other similar items. SUMF ¶ 31. After a child is placed with a Miracle Hill family, Miracle Hill continues to provide support above and beyond what is required by DSS. For example, it helps connect foster families with educational support and resources for their foster child. SUMF ¶ 32. A Miracle Hill employee was not aware of any other CPAs that provide that kind of support. *Id.* Miracle Hill also gives its foster families tickets to events and other community activities. SUMF ¶ 33. Miracle Hill has care coordinators who prepare individual service plans for the children (not required by DSS) and meet with the assigned families monthly (not just the quarterly meetings required by DSS). SUMF ¶ 34. And Miracle Hill offers respite care to its foster families, during which another licensed foster family takes care of the foster child while the regular foster family is away. SUMF ¶ 35. Miracle Hill's ability to offer respite support depends on the agency's large number of licensed foster families, including roughly thirty families licensed solely for respite care. *Id*.

Mrs. Maddonna did not know of any other CPAs that offered the same resources, support, and other benefits as Miracle Hill does. But because Mrs. Maddonna could not sign Miracle Hill's statement of faith, she could not work with the agency or the children that the State entrusted to its care. Mrs. Maddonna's Catholic faith meant that she had far fewer and substantially poorer opportunities compared to those who can sign Miracle Hill's Statement of Faith, driving home that the mere existence of other CPAs does not alleviate the burdens and disadvantages when one's religion disqualifies one from the full range of government CPAs that people of the "right religion" enjoy.

As explained, under the Governor's Executive Order South Carolina does not require agencies to inform DSS—or anyone—that they intend to make use of the blanket waiver. Agencies are not required to inform DSS that they have turned someone away, much less confirm that they have done so for religious reasons rather than because the family is unfit to foster children. And DSS has not required CPAs making use of the waiver "to take any steps when they turn away an applicant based on religion," such as referring the rejected applicants to DSS or other CPAs. SUMF

¶ 50.[3] Yet this is exactly how the South Carolina foster-care program, under the 2018 changes, is intended to work.

Neither does DSS's recent partnership with Heartfelt Calling lift the burdens on prospective foster parents who try to navigate the various CPAs. As one DSS employee explained, Heartfelt Calling does not direct prospective parents toward specific agencies. Instead, it sends them to the page on its website that lists all the CPAs available. SUMF ¶¶ 59-61. Prospective parents must then roll the dice, hoping not to suffer discrimination and painful rejection yet again. And though Heartfelt Calling's website might for some agencies include limited information about the kinds of parents the agency is willing to work with, Heartfelt Calling does not have accurate information for every CPA, meaning that prospective parents likely have no way to know an agency's religious criteria until they contact that agency. SUMF ¶ 60. If an agency turns them away based on religious criteria, Heartfelt Calling will once again merely direct the prospective parents back to the listings on its website. SUMF ¶ 61. Hence, the burdens always end up being on the prospective parents to reach out to agencies one by one, hoping eventually to find one that won't inflict yet more invidious rejection. The process thus utterly fails to protect prospective parents from the harms and burdens inflicted by religious discrimination.

South Carolina didn't simply fail to establish safeguards against these harms to prospective foster parents—it expressly chose to ignore the harms. As explained, the governor did not consult with top policymakers for foster care before deciding to issue the Executive Order and request a waiver from HHS allowing CPAs to discriminate based on religion. And before issuance of the blanket waiver, DSS did not study what effects that waiver would have on the foster system in general or foster youth in particular. Nor has DSS assessed the effect after the blanket waiver took

[3] But even if it did, prospective foster parents would continue to face the risk of being turned away from the next agency, and the next—if they even feel comfortable trying again at all. For example, though Miracle Hill typically informs rejected parents of other CPAs in the region, that includes other faith-based agencies that Miracle Hill believes might also discriminate based on religion. SUMF ¶ 58. And Miracle Hill does not know or track whether those who fail its religious test end up reaching out to other CPAs or DSS. Id. Nor does it know whether the people it turned way find another CPA that offers comparable services and support. Id.

effect.

The State does not even know which other CPAs discriminate based on religious criteria. It assumes that other agencies likely are not discriminating because invidious discrimination is not obvious on the face of agencies' written policies, and the State has not received complaints. But state workers were likewise unaware of Miracle Hill's having turned away 25 to 30 families on religious bases since 2017. Now they know—and don't care.

It is not hard to understand how South Carolina would fail to know which agencies are discriminating, given the state's structuring of its foster-care program to include a blanket prospective waiver that protects all religious CPAs who wish to engage in religious discrimination. The CPAs do not have to request anything. Nor are they required to report to the State when they turn someone away or decide not to recommend someone as a foster parent. DSS neither tracks whether people turned away on religious grounds try applying to work with another CPA, nor monitors whether CPAs using the waiver make referrals. Following the 2018 changes, South Carolina has failed to incorporate *any* safeguards into its foster-care program to protect potential foster parents against religious discrimination.

II. The HHS Notice of Noneforcement Enables South Carolina and Its Contracted Providers to Continue Operating the Foster-Care Program in Violation of the Establishment Clause.

Title IV-E of the Social Security Act authorizes HHS to provide federal funding to states for foster-care services. HHS thus funds South Carolina's DSS, which directs the federal dollars to South Carolina's licensed CPAs for the governmental foster-care services that the agencies provide to the State. In order to receive these federal funds, DSS and its subgrantees (the licensed CPAs) must comply with federal law. HHS regulations for grants awarded under Title IV-E previously required 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." 45 C.F.R. § 75.300(c) (2016). Under 45 C.F.R. § 75.101(b)(1), the antidiscrimination provisions of § 75.300 follow federal grant dollars

through grantees, such as South Carolina, to subgrantees, including the CPAs that DSS licenses and contracts with. Federal and state law allow religiously affiliated organizations to become licensed CPAs and receiving public funds to provide governmental foster-care services as long as the religiously affiliated organizations adhere to all applicable laws and requirements, just as their nonreligious counterparts must do. *See* 45 C.F.R. § 87.3. HHS regulations prohibit religiously affiliated agencies from "engag[ing] in any explicitly religious activities (including activities that involve overt religious content such as . . . proselytization) as part of the programs or services funded with direct financial assistance from the HHS awarding agency." 45 C.F.R. § 87.3(b). Further, whatever other federal and state laws and regulations govern the funding and administration of foster-care services, HHS and the State—and therefore also their subgrantee CPAs performing state foster-care services—are always bound by the requirements of the U.S. Constitution, which prohibits government from funding religious discrimination. In other words, people like Mrs. Maddonna who seek federally funded foster-care services from providers such as South Carolina's licensed CPAs cannot be turned away based on their religion or be proselytized or religiously coerced in or by those programs.

That's how things are supposed to work, anyway.

In 2019, however, when Ms. Maddonna was turned away from participation in the State's foster-care program because she and her family are Catholic, South Carolina was operating under the HHS Approval of Exception to these funding conditions, ECF No. 79-3, that Governor McMaster had requested, ECF No. 79-1. When HHS withdrew the exception on November 18, 2021, as improperly granted and inconsistent with the constitutional requirements for religious accommodations, ECF No. 91-1, that *could* have mooted the case against HHS: South Carolina could choose to withdraw its Executive Order and get federal funding, or not, and either way, the federal government would be in compliance with constitutional mandates. But instead, the Federal Defendants' "giving [was] of such a character, that the right hand gives, but the left hand takes." Martin Luther, *Commentary on the Sermon on the Mount* 236 (Charles Hay trans. 1892). Enter the NNGR—HHS's Notice of Nonenforcement, 84 Fed. Reg. 63809 (Nov. 19, 2019). HHS assured

South Carolina that it no longer needed the wrongfully granted exception because the State's discriminatory foster-care scheme under the Governor's Executive Order enjoys the broader, nationwide protection afforded by the NNGR—a policy action that effectively rescinds the conditions on funding altogether. Thus, the case against HHS continues because Federal Defendants continue to protect South Carolina's discriminatory foster-care scheme—now relying on a Notice of Nonenforcement that violates the Administrative Procedure Act.

Correctly foreseeing this very issue, this Court observed, "Plaintiff alleges that the nonenforcement effectively allows for continued discrimination in violation of her constitutional rights. . . . [T]he notice of nonenforcement appears, in essence, to be a blanket waiver for all states, much like the HHS Waiver for South Carolina. . . . [T]he notice of nonenforcement . . . effectively reimplements and extends the HHS Waiver's previous provisions, which Plaintiff alleges caused her present injuries." Order at 28, ECF No. 43, August 10, 2020. Enjoining Defendants from implementing the notice of nonenforcement would redress Mrs. Maddonna's injuries.

A. HHS substituted a blanket, nationwide nonenforcement policy for the agency's admittedly unlawful RFRA exception, fully intending to continue funding religious discrimination by the South Carolina foster-care program.

1. HHS's Notice of Nonenforcement is reviewable under the APA.

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). Here, neither exception applies.

While *Heckler v. Chaney*, 470 U.S. 821 (1985), held that an agency's decision in an individual case "not to prosecute or enforce, whether through civil or criminal process," is presumptively immune from judicial review under § 701(a)(2), 470 U.S. at 831, that narrow rule applies when, as with a prosecutor's decision not to indict, an agency decides not to take enforcement action in a specific instance against a particular regulated entity, because the exercise

of that prosecutorial discretion is "regarded as the special province of the Executive Branch." *Id*. at 832. *Heckler* did not hold, and the APA does not afford absolute discretion for an agency categorically to refuse to enforce all violations of a legal requirement. Neither did *Heckler* give agencies free rein to authorize violations of the law prospectively and permanently. For those are acts of policymaking, not discretionary enforcement. Thus, *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 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 nonreviewability, further explaining that the Court did not address 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). The third and fourth factors are clearly implicated here.

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)). 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 or nonenforcement policies are "direct interpretations of the commands of . . . substantive statute[s]" that are subject to judicial review. *Id*. (quoting *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994)).

Heckler does not bar judicial review of HHS's broad, nationwide NNGR, which is a prospective, categorical policy not to enforce the antidiscrimination requirements of 45 C.F.R. § 75.300(c) (2016)—requirements that are intended to apply to all recipients and subrecipients of HHS funds. The NNGR 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 128, 130–33 (4th Cir. 1989). 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 constitutes "abandon[ment of HHS's] regulatory function" (*N. Ind. Pub. Serv. Co.*, 782 F.2d at 745). Like the earlier South Carolina exemption, it is a statement of general enforcement policy that nullifies the rules for the whole class of regulated entities. It is agency rulemaking by another name, which 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 action 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 (Nov. 19, 2019).

Any argument by HHS that the NNGR is like the individualized discretionary act in *Heckler* (see Fed. Defs.' Memo. in Supp. of Mot. to Dismiss 19, ECF No. 34-1) would simply be

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 838. Here, HHS has not merely exercised agency discretion under the rules but instead has wholly—and impermissibly—abdicated its responsibility to enforce the law. *Heckler* does not foreclose judicial review in situations like this one. *See* 470 U.S. at 839 (Brennan, J., concurring); *see also infra* Section II.B.

2. Even if the Notice of Nonenforcement were nonreviewable for illegality under § 706(2)(A), it, and HHS's funding of religious discrimination generally, are reviewable for unconstitutionality.

Even if the Court were to hold that the challenged NNGR was somehow a gaggle of individual discretionary nonenforcement decisions that are each unreviewable for illegality under 5 U.S.C. § 706(2)(A), Mrs. Maddonna's claims that HHS's actions are unconstitutional and thus also violate 5 U.S.C. § 706(2)(B) would still be reviewable under that subsection.

Although *Heckler* did not expressly decide whether any presumption of nonreviewability might apply to agency action or inaction that is alleged to violate the Constitution, the Court took pains to point out that "[n]o colorable claim was made . . . that the agency's refusal to institute proceedings violated any constitutional rights of respondents." 470 U.S. at 838. And Justice Brennan underscored that the Court's holding did not foreclose judicial review 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*. In other words, unless Congress says otherwise—and indeed, even if it does—agency action should be reviewable for unconstitutionality.

Moreover, Professor Sunstein has pointed out that the day before *Heckler* was decided the Supreme Court held that prosecutorial discretion is cabined by constitutional constraints; so the prosecutor analogy 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, 676 n.131 (1985) (citing *Wayte v. United States*, 470 U.S. 598, 608 (1985)). Any argument that *Heckler* bars review here cannot be squared with the Supreme Court's contemporaneous holding in *Wayte*.

Nor can it be squared with binding Circuit 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) 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. *Id*. As the court explained, that rule is also consistent with earlier precedents 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. Webster v. Doe*, 486 U.S. 592, 603 (1988) (interpreting statute to permit challenges, to "avoid 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))). 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." *Reg'l Mgmt. Corp. v. Legal Servs. Corp.*, 186 F.3d 457, 461 n.3 (4th Cir. 1999); *cf. 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]

HHS's nonenforcement notice—which replaced the unlawful exemption—and its ongoing funding of religious discrimination are unconstitutional and thus also violate 5 U.S.C. § 706(2)(B). Judicial review is available as a matter of law.

B. The Notice of Nonenforcement is procedurally invalid for lack of notice and comment.

The NNGR also independently violates the APA's procedural requirements for an entirely separate reason: It rescinds a notice-and-comment rule without undergoing notice-and-comment rulemaking. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015) ("[T]he 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."). HHS's failure to act through notice-and-comment rulemaking thus violated the APA, requiring vacatur of the NNGR. 5 U.S.C. § 553(b)-(c). HHS has categorically declared that the Department will not enforce the relevant provisions of the 2016 Grants Rule. 84 Fed. Reg. at 63,811 (Nov. 19, 2019). This categorical refusal to enforce the existing regulations "is 'tantamount to amending or revoking a rule,' and 'an agency action which has the effect of suspending a duly promulgated regulation . . . is normally subject to APA rulemaking requirements.'" *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 83–84 (D.C. Cir. 2020) (quoting *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017); *Env't Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir. 1983)) (citations omitted); *see also Elec. Priv. Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 7 (D.C. Cir. 2011) (an agency action with "present binding effect" is a legislative rule); *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988) ("[W]hether a statement is a rule of present binding effect . . . depends on whether the statement constrains the agency's discretion."). Just as agencies cannot unilaterally delay the

[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). "Here, there is clearly 'law to apply'—the Constitution." *Nat'l Fed'n of Fed. Emps. v. Weinberger*, 818 F.2d 935, 941 n.11 (D.C. Cir. 1987); Sunstein, *supra*, at 676 (same).

effective dates of final rules, *Clean Air Council*, 862 F.3d at 6, or unilaterally rescind rules without proper process, "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." *Perez*, 575 U.S. at 101. Hence, HHS could not categorically refuse to enforce its final regulations without notice-and-comment rulemaking or a showing of good cause. 5 U.S.C. § 553(b). Because it did neither, the Non-enforcement Policy was promulgated unlawfully and must be vacated.

CONCLUSION

Defendants put in place an unconstitutional foster-care system through two independent but concerted actions:

- The Governor's Executive Order granting prospective, blanket permission to all CPAs to apply their own religious criteria when delivering foster-care services on the State's behalf, and
- HHS's blanket, nationwide Notice of Nonenforcement of regulations that prohibit discrimination based on religion in programs that receive federal funds.

The remedy is simple: declare the Executive Order and Notice of Nonenforcement unlawful, and enjoin their enforcement.

The Court should grant summary judgment in favor of Plaintiff and against the Defendants.

Greenville, South Carolina
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