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 OPPOSING FEDERAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Federal Defendants, in characterizing "the core of this suit" as Miracle Hill Ministries' refusal to work with Plaintiff Aimee Maddonna because her religion differs from that of Miracle Hill (HHS Mem. 1), completely misstates the nature of this case. To be sure, as the entity acting on behalf of the South Carolina foster-care program to recruit, train, and support foster-parent applicants, Miracle Hill's misconduct is important in illustrating how the combined transgressions of HHS and State Defendants have made possible—indeed, specifically authorized—discrimination in South Carolina's foster-care program through changes that enabled, encouraged, and resulted in religious discrimination, and continue to do so today. So it makes sense that Federal Defendants see Miracle Hill as a convenient scapegoat, particularly because it has not been sued and has not intervened. No relief is sought against Miracle Hill, for the problem here is impermissible federal and state action. Mrs. Maddonna's claims—grounded in both the Constitution and the Administrative Procedure Act—are properly brought against the governmental entities who bear full responsibility for the foster-care program that they altered in 2018 in order to permit any government-contracted child-placing agency to discriminate against prospective foster parents based on the CPAs' religious beliefs, without regard to the resulting burdens and harms imposed on Mrs. Maddonna and so many other people. Miracle Hill may have been a catalyst for Mrs. Maddonna's injuries, but the real core of this suit concerns religious discrimination in South Carolina's foster-care program, which HHS and the state together fund.

South Carolina had a problem: It learned that one of the largest CPAs with whom it contracted to provide foster-care services for the state was turning away applicants who did not meet the CPA's evangelical Christian litmus test. Jews, Unitarians, nonbelievers, and even Catholics like Mrs. Maddonna were being turned away from participation as foster parents, in violation of federal and state law. But instead of bringing the State's foster-care program into compliance with the law, in 2018 South Carolina's Governor changed the State's foster-care program, to authorize any CPA performing services on the State's behalf, both then and in the

future, to turn away prospective foster parents who do not meet a CPA's religious requirements for participating in the program.

The terms of federal funding that the United States Department of Health and Human Services provides to South Carolina's foster-care program require the State to administer the program so that no person otherwise eligible is excluded from participation in the program based on non-merit factors such as religion. 45 C.F.R § 75.300(c) (2016). To avoid any impact on South Carolina's federal funding for the foster-care program, the Governor sought and received from HHS an exemption from the federal nondiscrimination requirement.

After having initially blessed this change to the State's program, and the discrimination that it authorizes, enables, and funds, HHS conceded during the pendency of this suit that the exception it had granted to South Carolina was unlawful. But while HHS therefore 'withdrew' the exception, it also assured the State that the changes HHS and the Governor had made to the program to authorize religious discrimination could continue: To serve the purpose of the concededly unlawful exception, HHS issued a blanket nationwide notice that it would not enforce the nondiscrimination rule against anyone, anywhere. In ostensibly withdrawing the unlawful exception, in other words, HHS ensured that nothing would change, because South Carolina could now rely on the nonenforcement notice, which effectively revoked the underlying nondiscrimination rule itself.

Revoking a lawfully promulgated rule through a blanket nonenforcement notice violates the Administrative Procedure Act. Moreover, when HHS then invoked that notice to provide the very same exception that HHS had already deemed an unlawful application of the Religious Freedom Restoration Act, the agency applied it in a context that clearly violated the Establishment Clause—a turn of events that this Court foresaw even at the very outset of this case. Order 28, ECF No. 43.

Thus, HHS's role in perpetuating religious discrimination in South Carolina remains essentially unchanged. The 2018 authorization of discrimination based on religion remains in effect today, with HHS continuing to permit any CPA to discriminate because of religion while

exercising governmental authority. As with the Governor's executive order, HHS's Notice of Nonenforcement also must go.[1]

RESPONSE TO FEDERAL DEFENDANTS' BACKGROUND STATEMENT

HHS, having conceded that its 2018 approval of an exception to the religious-nondiscrimination requirement of 45 C.F.R. § 75.300(c) (2016) was an improper application of the Religious Freedom Restoration Act, purported to withdraw the exception on November 18, 2021, Ex. 1 HHS Withdrawal of Exception, relying instead on its Notice of Nonenforcement, 84 Fed. Reg. 63,809, 63,811 (Nov. 19, 2019), to achieve the same result. HHS's having conceded Plaintiff's challenge to the original RFRA exception letter, the administrative record concerning the exception letter's original issuance has indeed been rendered largely immaterial[2] to the remaining claim against HHS. But that claim itself survives: HHS substituted for the exception letter a nationwide Notice of Nonenforcement policy—which has the effect of revoking the underlying rule without following the APA—and thus has continued the concededly unlawful policy nationally that the agency previously imposed in South Carolina using the RFRA exception letter.

With respect to the Notice, the Background Statement in HHS's Memorandum (ECF No. 108-1, at 2-7) sets out the three points that provide the necessary context for this Court's ruling as to the Notice of Nonenforcement. (HHS also makes a fourth point about Miracle Hill's current voluntary decision not to get reimbursements for administrative fees—a fact that is not disputed but also is immaterial to whether HHS's Nonenforcement Policy is lawful.)

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[1] HHS speculates that plaintiffs in the related case, *Rogers v. HHS*, No. 19-cv-1567 (D.S.C.), dismissed their claims against the federal agency "because they recognized that there is no longer a case or controversy against HHS." HHS Mem. 2 n.1. Federal Defendants point to nothing to support their assumption. And they fail to mention that the *Rogers* plaintiffs did not plead an APA claim against HHS challenging the Notice of Nonenforcement of the Grants Rule, which is a far more logical explanation why the claims that were made against the agency would have been dismissed. But whatever the reason, it is not material here.

[2] HHS's analysis of why the RFRA exception was unlawful is still instructive as to the legality of the Governor's executive order, which fails for the same reasons under South Carolina's RFRA counterpart and, thus, violates the Establishment Clause.

As to HHS's three material points:

1. HHS's description of the statutory and regulatory scheme under Title IV-E of the Social Security Act as it pertains to state foster-care programs is generally accurate with the exception that 45 C.F.R. § 75.300(c) does more than just protect *beneficiaries* from discrimination in federally funded foster-care programs. It provides that "no person otherwise eligible will be excluded *from participation* in . . . or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as . . . religion . . . ." HHS Mem. 2-4. Mrs. Maddonna sought to participate as a foster parent, so on its face the regulation's protections extend to her.

2. HHS accurately describes the events surrounding its RFRA exception letter to South Carolina and the subsequent withdrawal of it. The key points here are: HHS admits that the RFRA exception that it issued "did not properly apply the substantial burden requirement under . . . RFRA," yet HHS assured the State that this failing wouldn't matter because HHS would not enforce the 2016 rule at all against anyone, anywhere. HHS Mem. 4-5.

3. In its final point, HHS describes the events giving rise to the Notice of Nonenforcement and the agency's failed attempt to revise the 2016 rule. HHS Mem. 5-7. Here, HHS points to publicly available records that describe the Notice of Nonenforcement, which by its own terms was intended to be temporary, until a new rule could be promulgated. 84 Fed. Reg. 63,809. The Notice of Proposed Rulemaking, 84 Fed. Reg. 63,831 (Nov. 19, 2019), did result in a 2021 revised rule, 86 Fed. Reg. 2257 (Jan. 12, 2021). But subsequent litigation in the United States District Court for the District of Columbia vacated the 2021 version of the rule because HHS failed to comply with the Administrative Procedure Act in promulgating it.

HHS portrays the Notice of Nonenforcement of the 2016 rule and the need to promulgate a new rule as prompted by HHS's "concern over its compliance with administrative requirements, not religion," HHS Mem. 15, and as "not prompted by considerations relating to religion," HHS Mem. 2. Yet the NPRM Summary at II.B. prominently featured the 2016 rule's prohibition of

religious discrimination, requests for RFRA exceptions, and resulting litigation as core reasons why HHS wanted to promulgate a revised rule. 84 Fed. Reg. at 63,832. When the 2021 proposed rule was finally published, it made clear that *every comment* HHS received related to the religious-nondiscrimination provision; not one addressed any of the administrative requirements. 86 Fed. Reg. at 2261-2271. HHS's stance that religion and religiously based discrimination were not the concern is just not credible.

As for *Facing Foster Care in Alaska v. HHS*, No. 21-cv-308, a district-court action in the District of Columbia, HHS correctly admits that it agreed to vacate the 2021 replacement rule, but it fails to mention that it originally sought to have the Court simply remand *without* vacatur so that it could fix problems relating to the APA violations. HHS would later abandon that relief and concede that the 2021 rule had to be vacated. Order, *Facing Foster Care*, No. 21-cv-308 (D.D.C. June 29, 2022), ECF No. 44.

HHS has not issued a new NPRM or a renewed Notice of Nonenforcement, so the 2016 rule remains in effect.

* * *

Finally, HHS points out that, recently, Miracle Hill voluntarily stopped asking for reimbursement of administrative expenses. HHS Mem. 2-3. While that narrow fact appears to be undisputed, the point is most noteworthy for what HHS does not say: Miracle Hill still maintains a CPA license, still contracts to provide foster-care services on behalf of South Carolina, still is listed as a state-authorized CPA on South Carolina's Heartfelt Calling website, and still discriminates against prospective foster parents who do not meet Miracle Hill's religious requirements.[3] Moreover, Miracle Hill's decision to forgo fee reimbursements was entirely

[3] Not every CPA seeks reimbursement of administrative fees. Miracle Hill received $3,326,880 in administrative fees from SCDSS for foster-care services provided between July 1, 2016, and June 30, 2021. Ex. 2 SCDSS Summ. of CPA Admin. Fees; *see also* Ex. 3 Roben Tr. 59:20-60:1, 92:21-93:2. Before January 1, 2019, Miracle Hill was the only nontherapeutic CPA to receive such fees from SCDSS. Ex. 3 Roben Tr. 57:21-58:19; Ex. 4 McDaniel-Oliver Tr. 25:16-22; 56:12-57:5; 65:15-66:1; 84:15-22). The other CPAs provided services without receiving administrative fees. Ex. 3 Roben Tr. 70:7-71:15; 129:21-131:22; Ex. 4 McDaniel-Oliver Tr. 65:15-66:1. Since January 1, 2019, other CPAs have received administrative fees from SCDSS. Ex. 2 SCDSS Summ. of CPA

voluntary, and it is under no compulsion to do so in the future.

As for discrimination in the foster-care program itself, neither South Carolina nor HHS has taken any steps to preclude Miracle Hill—or any other CPA—from discriminating against applicants based on religion—whether or not they receive fee reimbursements. South Carolina's program still includes a prospective, blanket authorization to any CPA that wishes to discriminate based on religion—a RFRA exemption that mirrors the one HHS itself had issued but later disavowed as unlawful—and HHS still funds that program in violation of its own 2016 rule. That Miracle Hill voluntary stopped seeking reimbursement for some fees is immaterial to Mrs. Maddonna's claim against HHS.

ARGUMENT

I. Plaintiff's Claim that HHS Intentionally Enables and Encourages Religious Discrimination in South Carolina's Federally Funded Foster-Care Program Is Not Moot.

Federal Defendants argue that any claims against them are moot both because Miracle Hill is currently declining to accept *direct* reimbursements of administrative fees to which it is entitled while it continues to serve as a CPA on behalf of South Carolina, and because HHS 'withdrew' the conditional exception letter through which it originally authorized discrimination in the foster-care program. HHS is mistaken.

A. HHS continues to fund South Carolina's foster-care program under the 2018 changes, which expressly permit religious discrimination against prospective foster parents.

Federal Defendants' initial argument—that HHS funds no longer flow to Miracle Hill, rendering the case moot—is wrong for at least three reasons.

To begin with, the cases on which Federal Defendants rely do not support their position. Both *Catawba Riverkeeper Foundation v. North Carolina Department of Transportation*, 843 F.3d 583, 588-89 (4th Cir. 2016), and *Doe v. Shalala*, 122 F. App'x 600, 603 (4th Cir. 2004), hold that

Admin. Fees. The list of CPAs that have received administrative fees from SCDSS since January 1, 2019, includes, among others, Church of God Home for Children, Connie Maxwell, Nightlight Christian Adoptions, and The Bair Foundation. *Id.*

a challenge to a federal program may become moot when the *program* is discontinued or no longer receives federal funds. The challenge here is to the South Carolina foster-care program as it currently operates under the 2018 Executive Order and HHS Notice of Nonenforcement. The program still receives federal funds, and it still permits *any* CPA, now and in the future, to discriminate based on the CPA's religious beliefs when providing foster-care services on the State's behalf and on the federal government's dime.

Second, Federal Defendants' argument is further belied by the text of the very regulation they seek to ignore:

> [N]o person otherwise eligible will be excluded from participation in . . . 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.*

45 C.F.R. 75-300(c) (2016) (emphasis added).

South Carolina's foster-care program is the program supported by the HHS award, so HHS is obligated to ensure that the South Carolina Department of Social Services' program is nondiscriminatory and administered in a nondiscriminatory manner, just as the Department of Social Services itself is. Whether federal funds that flow to the state program are ultimately traced to Miracle Hill is beside the point: Federal Defendants point to no authority that supports parsing the federal funds under some sort of equitable-tracing theory; that is not how the federal government understands its own regulatory requirements or exercises its enforcement authority relating to federal grants; and it does not erase HHS's legal and constitutional duties. Rather, the regulation straightforwardly provides that the funded *program* must not discriminate against participants on the basis of religion. *See* 2 C.F.R. § 200.300(a) (2020) ("The Federal awarding agency must manage and administer the Federal award in a manner so as to ensure that Federal funding is expended and *associated programs are implemented* in full accordance with the U.S. Constitution") (emphasis added). Miracle Hill is still part of that state program, which HHS still funds.

If South Carolina could evade the constitutional protections provided to program participants by simply directing that federal funds be used for the state's operation of the federally funded program but not paid over to subgrantees or others who are performing the program functions in a discriminatory manner, the purpose of the rule would be completely undermined, also violating the core principle that 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). That is why the condition on funding attaches to the administration of the program itself, and why South Carolina DSS, as the recipient, bears the responsibility for compliance.[4]

Finally, Miracle Hill's current decision not to seek reimbursement of administrative fees was not prompted by any action by South Carolina or HHS. It was fully voluntary. Thus, Miracle Hill's voluntary cessation could not moot Plaintiff's claims *unless* "subsequent events made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur"—by South Carolina, by Miracle Hill, or by any other person or entity performing program functions or receiving program funds. *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014) (emphasis added). Here, all the changes to South Carolina's foster-care program that permitted and encouraged CPAs to discriminate remain in place and point toward likely continuing discrimination in the future.

Nor has SCDSS assessed the effect of the blanket waiver since it took effect. Ex. 5 Tester Tr. 19:24-20:19, 39:1-13, 44:16-23. The State does not know which other CPAs discriminate based on religious criteria; it merely supposes that other CPAs are not discriminating because invidious discrimination is not obvious on the face of agencies' written policies, and the State has not received complaints. Ex. 6 Def. Leach's Ans. to 2d Interrog. No. 3. Yet under the State's blanket prospective waiver, which applies to all religious CPAs that wish to engage in religious discrimination, the CPAs do not have to request an exemption from the nondiscrimination

[4] For precisely the same reason, Federal Defendants' insistence that Miracle Hill is not receiving direct funding is beside the point: South Carolina, as the recipient of the federal grant, must run the program receiving the grant—the entire program—in accordance with federal constitutional, statutory, and regulatory requirements.

requirements in order ignore those requirements. Nor are CPAs required to report to the State when they turn someone away or decide not to recommend someone as a foster parent. Ex. 7 Lowe Tr. 44:6-14; Ex. 8 Barton Tr. 38:23-39:10. The state has no other mechanism through which to learn whether a CPA has turned someone away on religious grounds. Ex. 8 Barton Tr. 115:16-116:4. It does not track whether people turned away on religious grounds try applying to work with another CPA. Ex. 5 Tester Tr. 142:9-144:3. And it does not monitor whether CPAs using the waiver make referrals when they turn prospective foster parents away for religious reasons. Ex. 7 Lowe Tr. 165:19-168:3. The only way SCDSS would know whether a CPA follows federal and state nondiscrimination requirements—or the CPA's own stated policies with respect to whether it discriminates against prospective parents—would be if a prospective parent filed a complaint, Ex. 7 Lowe Tr. 256:18-257:8, or a CPA self-reported. And because SCDSS does not even ask whether CPAs discriminate, after having given them a blanket authorization to do so, it is no surprise that CPAs don't voluntarily self-report what SCDSS expressly allows them to do. *Id.* So SCDSS has no idea how many prospective foster parents have been turned away by CPAs based on religious criteria. Ex. 5 Tester Tr. 153:19-154:1. In other words, HHS and SCDSS have together set up a system that authorizes, allows, and encourages federally funded, state-administered discrimination, and then they close their eyes and cover their ears to the results. But constitutional obligations don't cease to apply just because the government doesn't wish to follow them.

Under these circumstances, whether Miracle Hill currently receives federal funding is immaterial to whether the case is moot. It is not.

B. Rather than withdraw the conditional exception letter, HHS effectively substituted the functionally equivalent Notice of Nonenforcement.

HHS also suggests that the case is moot by conflating two points that center on the purported withdrawal of the letter granting a conditional exception to the 2016 nondiscrimination regulation.

First, HHS analyzes this lawsuit challenging the 'withdrawn' exception letter and its notice-of-nonenforcement substitute as falling within the general rule that when an agency has

rescinded and replaced a regulation, litigation over the original regulation becomes moot. A fair point, but one that is inapposite here. The exception letter wasn't *withdrawn*; it was *replaced* by a Notice of Nonenforcement of the Grants Rule (NNGR) that was intended to achieve the same result while giving the agency a chance to "rescind and replace" the relevant portions of 45 C.F.R § 75-300. Ultimately, HHS's attempt to rescind and replace the 2016 regulation *failed.* On these facts, the mootness principle based on "rescind and replace" described in *Alaska v. USDA,* 17 F.4th 1224, 1226-31 (D.C. Cir. 2021), and the related cases cited on page 10 of HHS's Memorandum do not support but instead undercut Federal Defendants' argument.

HHS's discussion of vacatur of the 2021 replacement rule is likewise incomplete and therefore misleading: HHS neglects to point out that it originally sought remand *without* vacatur in *Facing Foster Care,* to afford itself the opportunity to cure the defects in the 2021 rule. Long-standing judicial precedent in the D.C. Circuit supports application of that remedy after a finding that a challenged agency action, while invalid, is not seriously deficient. *E.g., N. Air Cargo v. U.S. Postal Serv.,* 674 F.3d 852, 860-61 (D.C. Cir. 2012); *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). Only when HHS ultimately recognized that the APA deficiencies could not be so easily cured—i.e., that the agency action *was* seriously deficient—did it agree to vacate the 2021 rule, at which time its request for remand without vacatur was dismissed as moot. Order, *Facing Foster Care*, ECF No. 44. Rule would never become effective.

HHS has not pointed to anything it has issued since the *Facing Foster Care* decision that advised the public that the 2021 rule was vacated; it has not stated any intent to engage in new notice-and-comment rulemaking with respect to the 2016 regulation; it has not notified the public of its intent not to enforce the 2016 rule. One might reasonably conclude that HHS—unable to properly repeal or amend the rule—simply hopes no one will notice it still exists.

Second, HHS contends that in withdrawing South Carolina's exception letter, it voluntarily ceased the activity challenged here—i.e., HHS's authorizing and enabling South Carolina to permit religious discrimination in its foster-care program without jeopardizing the federal funding for that

program—thus mooting the case. HHS goes on to invoke "a presumption of good faith" that the government will not engage in the same conduct in the future. Unfortunately for HHS, presumptions may be rebutted. And the withdrawal of exception letter here on its face, and the issuance of the Notice of Nonenforcement, demonstrate lack of good faith.

Context matters. The exception letter was unlawfully granted because HHS failed to apply the proper analysis required under the Religious Freedom Restoration Act. When HHS conceded as much, it simultaneously assured South Carolina that its discriminatory foster-care program would not be affected by withdrawal of the exception, and hence that the discrimination in that federally funded program could continue. HHS did so by straightforwardly announcing that it simply would not enforce the nondiscrimination protections in the 2016 regulation against anyone, anywhere. The message could not have been more explicit: HHS would provide the *same* protection through the Notice of Nonenforcement as it had provided in the withdrawn, unlawful exception, and would extend that protection across the country. And it would do so to give itself time to promulgate a new regulation to replace the nondiscrimination provisions in the 2016 regulation, with weaker, ambiguous provisions.

All that remains is HHS's insistence on maintaining the Nonenforcement Policy, which was never intended to be permanent. By its own terms, it was to be in place only until a new rule was promulgated. 84 Fed. Reg. at 63,811 ("[T]he Department is announcing that it will not enforce the regulatory provisions, pending repromulgation of the Rule."). But that new regulation has been promulgated and now is vacated. Even if HHS could have argued that leaving the Nonenforcement Policy in place during that now-completed litigation in the U.S. District Court for the District of Columbia was justified to provide consistent policy while the fate of the 2021 regulation was unclear, maintaining the Nonenforcement Policy now that the new rule has been vacated is exposed as mere pretext for rescinding the lawfully promulgated 2016 regulation—and the prohibition against religious discrimination in federally funded programs it ensures—that HHS has been unable to easily discard.

Good faith does not attach when the government, by its conduct, shows that it fully intends to continue enabling and facilitating religious discrimination in South Carolina's foster-care program. *See Wall v. Wade*, 741 F.3d at 497-98; *Brooks v. Vassar*, 462 F.3d 341, 348 (4th Cir. 2006).

II. Through its Nationwide Notice of Nonenforcement of the Grants Rule, HHS Has Rescinded a Lawful Regulation Without Notice and Comment, Thereby Permitting Religious Discrimination In South Carolina's Federally Funded Foster-Care Program.

HHS argues that its Notice of Nonenforcement of the Grants Rule "is a classic exercise of agency enforcement discretion." HHS Mem. 2. It is not. Rather, the Notice effectively rescinds the rule's protections against religious discrimination in toto. Repealing a lawfully promulgated rule requires the same notice-and-comment rulemaking as was required to enact the rule in the first place. And HHS's assertion that its use of the nonenforcement notice cannot violate the Establishment Clause because "it does not mention and was not prompted by considerations relating to religion," *id.*, is completely belied by both HHS's Withdrawal of Exception letter and its failed attempt to amend the rule itself. 86 Fed. Reg. 2257.

A. The Notice of Nonenforcement of the Grants Rule is reviewable.

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 Section 701(a)(2), *id.* 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, 812 (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]" and lawful regulations 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.[5]

Casa de Maryland is controlling Circuit precedent. There, the court of appeals held that the U.S. 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] 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

[5] The irony here is not lost. HHS's nonenforcement policy suffers from the same legal defect that compelled the agency to withdraw the RFRA exception it previously granted to South Carolina. As this Court observed, the Notice of Nonenforcement "effectively reimplements and extends the HHS Waiver's previous provisions." Order 28, ECF No. 43. In both cases, HHS issued blanket prospective relief that was divorced from any individualized, fact-driven assessment of imposed burdens and resulting third-party harms.

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.

Any argument by HHS that the NNGR is like the individualized discretionary act in *Heckler* (*see* Fed. Defs.' Mem. 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 Food and Drug Administration 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 id.* at 839 (Brennan, J., concurring).

B. HHS has used the Notice of Nonenforcement as the functional equivalent of its conditional exception letter for the purpose of funding religious discrimination in a government program.

HHS acknowledges this Court's earlier holding that HHS's conditional exception letter and the subsequent notice of nonenforcement support a claim that "Federal Defendants essentially created a mechanism through which individual states could circumvent constitutional protections for individuals like Plaintiff." Order 42, ECF No. 43. HHS now argues, however, that having withdrawn the exception, the remaining Notice of Nonenforcement cannot be read to accomplish the same result—even though it assured South Carolina the notice does exactly that. HHS now insists that the Notice does not speak to enforcement of any constitutional protections at all—even though the very regulation HHS refuses to enforce ensures 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), which is also a constitutional requirement for government programs, *see, e,g.*, *Norwood*, 413 U.S. at 465–66 (in addition to prohibiting government itself from discriminating based on religion, the Establishment Clause bars government from funding programs or delegating governmental authority to private entities that "induce, encourage or

promote private persons to accomplish what it is constitutionally forbidden to accomplish"); *Nat'l Black Police Ass'n v. Velde*, 712 F.2d 569, 580 (D.C. Cir. 1983) ("[a]ctivities that the . . . government could not constitutionally participate in directly cannot be supported indirectly through the provision of support for other persons engaged in such activity").

When the government's delegated authority permits a CPA to limit participation in the government's program to people who share the CPA's faith, it discriminates based on religion. *Mitchell v. Helms*, 530 U.S. 793, 844, 857 (2000) (controlling concurring opinion of O'Connor, J.); *see Columbia Union Coll. v. Oliver*, 254 F.3d 496, 504 & n.1 (4th Cir. 2001) (agreeing that Justice O'Connor's opinion in *Mitchell* is "controlling"). Read in context with the regulation HHS forswears enforcement of, the notice clearly implicates constitutional protections, particularly given HHS's assurances that it could easily provide—and did provide—the protection that the withdrawn unlawful exception letter did. Ex. 1 HHS Withdrawal of Exception 1.

Additionally, in attempting to finalize the 2021 final rule that was intended to replace the 2016 rule, HHS noted that the primary aim was to dilute the nondiscrimination requirements of §75.330 (c) and (d) to address concerns over lawsuits—such as this one—and requests for accommodations under the Religious Freedom Restoration Act. 86 Fed. Reg. 2257. Indeed, the only things in the 2021 rule on which HHS received any comments at all during the notice-and-comment period were the changes concerning the nondiscrimination requirements of the 2016 rule. *Id.* at 2261-71. There can be no serious dispute that the Notice of Nonenforcement and the intended 2020 amendments to the 2016 rule were born out of the very religious violations that are central to this case. HHS's insistence that the Notice (and proposed 2021 rule it anticipated) "does not mention and was not prompted by considerations relating to religion," HHS Mem. 2, is hard to swallow.

Although *Heckler* did not expressly decide whether any presumption of nonreviewability might ever 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 when "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 itself is cabined by constitutional constraints, so the prosecutor analogy in fact underscores why HHS's actions here are reviewable for unconstitutionality. *See* Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. Chi. L. Rev. 653, 676 & n.131 (1985) (citing *Wayte v. United States*, 470 U.S. 598, 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).[6]

HHS's nationwide blanket Notice of Nonenforcement—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.

C. The Notice of Nonenforcement Is Procedurally Invalid for Lack of Notice and Comment.

The NNGR also violates the APA's procedural requirements for an entirely separate reason: It rescinds a notice-and-comment rule without 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

[6] 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).

Department will not enforce the relevant provisions of the 2016 Grants Rule. 84 Fed. Reg. at 63,811. 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 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 Nonenforcement Policy was promulgated unlawfully and must be vacated.

CONCLUSION

HHS's Notice of Nonenforcement is an improper attempt to vacate a lawful rule without following the Administrative Procedure Act. And its use by HHS as a substitute for—and to accomplish the same purpose as—the admittedly unlawful RFRA exception letter that HHS previously granted to South Carolina in 2018 violates the Establishment Clause.

The Court should deny Federal Defendants' Motion for Summary Judgment.

Greenville, South Carolina
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Respectfully submitted,

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