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 STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

State Defendants moved for summary judgment based principally on *Fulton v. City of Philadelphia*—the case they wish they had here, and a decision that this Court has already held inapposite. What happened in South Carolina does not mirror what happened in Philadelphia. Quite the contrary. In 2018, South Carolina, with the consent and authorization of HHS, changed the State's foster-care program to allow any contracted child-placing agency to exclude potential foster parents based on the CPA's religious beliefs. The South Carolina Department of Social Services has no way to know for sure how many parent applicants were turned away or gave up, because SCDSS has no system in place to track which CPAs choose to discriminate or how many people they have turned away. We do know that, around the time the changes took place, one CPA—Miracle Hill Ministries—had alone turned away roughly 25 to 30 families. The CPA later softened its formal position to make limited (but ultimately meaningless) exceptions for certain applicants who would affirm its Statement of Faith.

Today, CPAs' ability to discriminate against potential program participants on the basis of religion is still in effect through the Governor's Executive Order, which provides a blanket, prospective exemption to any CPA that wishes to discriminate. Although HHS eventually withdrew its own exemption for South Carolina—which mirrored the Executive Order—and acknowledged that the order had been issued unlawfully, it nonetheless continues to ignore the program's discrimination.

There is no dispute that South Carolina's foster-care program delegates important, discretionary governmental powers to religious CPAs without any effective means of guaranteeing that the delegated power is used exclusively for secular, neutral, nonideological purposes. This improper delegation of governmental authority violates the Establishment Clause. And South Carolina authorizes discrimination and religious coercion in its foster-care program through a blanket, prospective exemption that permits any CPA to impose religious requirements in the state program and discriminate against potential foster parents based on the CPA's religious beliefs. That exemption is an unlawful application of the South Carolina Religious Freedom Act and

violates the Establishment Clause.

The Governor's Executive Order is unconstitutional. State Defendants' motion for summary judgment should be denied.

RESPONSE TO STATE DEFENDANTS' STATEMENT OF UNDISPUTED FACTS.

A. State Defendants' assertions concerning foster care in South Carolina

State Defendants' assertions concerning how foster care works in South Carolina are generally undisputed, except for the following instances, where their factual statement is incomplete, disputed, or immaterial:

1. Although it is undisputed that only SCDSS can place a child with a foster family, and only SCDSS can license a prospective foster family, the statement is incomplete. While SCDSS issues the licenses (Ex. 1 Lowe Tr. 40:23-41:8; Ex. 2 Barton Tr. 31:9-11), CPAs make suitability recommendations, including home assessments, (Ex. 1 Lowe Tr. 37:24-38:6; *see also* Ex. 2 Barton Tr. 106:6-17), which SCDSS generally follows, (Ex. 1 Lowe Tr. 41:9-42:1).

2. While it is undisputed that SCDSS has shifted its focus to kinship care, the assertion that "a prospective foster parent who cannot or prefers not to work with a CPA still has the option of working directly with SCDSS" (SCDSS Mem. 3 n.2) is disputed, or at least wildly incomplete: A SCDSS representative testified that if a prospective nonkinship foster family is unable to find a CPA that will work with them, it could work with SCDSS. Ex. 1 Lowe Tr. 54:17-55:8. SCDSS does not, however, take applications from nonkinship applicants; instead, families would have to go through DSS's centralized application and intake line, Heartfelt Calling, and if they are unable to find a CPA, only then might Heartfelt Calling consult with the SCDSS state office and the matter might "feed[] down" to the SCDSS regional office. *See* Ex. 2 Barton Tr. 139:1-140:15; 138:7-18. Few, if any, nonkinship applicants have been handled by SCDSS since the July 2020 change in policy. *Id.* at 138:7-18, 139:1-5.

3. Though State Defendants contend that, like SCDSS, "the overwhelming majority of CPAs partner with foster parents and prospective foster parents of any faith or of no faith" (SCDSS

Mem. 4), the cited passage does not support that assertion. SCDSS employee Lowe testified that she had no idea whether any other CPAs would refuse to work with foster parents outside of a particular religion. Ex. 1 Lowe Tr. 240:3-12.

4. Finally, though State Defendants assert that their contracts do not expressly require CPAs "to recruit prospective foster parents or to assist them in seeking licensure" (SCDSS Mem. 5), that assertion, standing alone, is incomplete, misleading and, thus, disputed. The CPAs' responsibilities include "mak[ing] foster homes available for placement of a child" and "provid[ing] training and support to foster families." ECF No. 111-05, at 3; *see also* S.C. Code Ann. Regs. § 114-4910(c)(5) (2023) (requiring CPAs to provide an outline of policies that include recruitment for foster homes and qualification criteria for foster families). They do this by recruiting prospective foster parents, screening them for their suitability to obtain a foster-care license, and making recommendations to SCDSS about licensure, which SCDSS generally follows. Ex. 1 Lowe Tr. 36:11-42:1. As one SCDSS employee explained, "recruitment is—is ongoing, and we're all responsible for it. It doesn't *just* fall on—on a child-placing agency to recruit." Ex 2 Barton Tr. 227:7-10.[1]

B. State Defendants' assertions concerning child placing agencies in Upstate South Carolina

State Defendants' assertions concerning child-placing agencies in Upstate South Carolina are generally undisputed, except for the following instances, where the factual statement is incomplete, disputed, or immaterial:

[1] State Defendants also assert that SCDSS is not required to reimburse recruitment efforts under the contract. The point is misleading: "Reimbursement" aside, SCDSS *does* directly fund recruitment efforts and coordination on behalf of CPAs through its central intake system, the Heartfelt Calling website, which includes information on CPAs such as Miracle Hill. Ex. 2 Barton Tr. 35:6-36:6; *see also* Heartfelt Calling, *Greenville: Foster Home Licensing Agency Selection*, https://heartfeltcalling.org/category/upstate/greenville. And in the end, whether government funds are used to reimburse certain expenses of any CPA is immaterial. Plaintiff does not rely on taxpayer standing to bring her Establishment Clause claim—as this Court previously noted. Order 20 n.7, 28-30, ECF No. 43. Rather, her claim is based on the direct harm that she suffers from unlawful discrimination resulting from delegated governmental authority.

1. Though State Defendants assert that 18 CPAs serve in Upstate South Carolina and that all 18 are licensed to assist in the provision of "non-therapeutic" foster care (also known as "regular" foster care), the evidence is that only 12 with offices in the Upstate Region provide nontherapeutic foster-care services.[2]

2. Whereas State Defendants assert that Miracle Hill is the only CPA that discriminates against and refuses to serve prospective foster parents based on its religious beliefs, they in fact admit in footnote 4 that there *is* affirmative evidence that at least one other CPA limits its recruitment efforts to individuals from within its religious denomination, and that another CPA does not affirmatively recruit same-sex couples. SCDSS Mem. 5 n.4. Even that misrepresents the testimony cited and is disputed. The supervisor of the group-home and CPA unit at SCDSS testified that SCDSS was not aware of other CPAs discriminating based on religion. Ex. 4 Staudt Tr. 15:15-18, 92:12-93:8. This lack of knowledge does not establish that no other CPAs discriminate.

In fact, any lack of knowledge by SCDSS officials about other discriminating CPAs would not be surprising: Under the State's blanket prospective waiver that protects all religious CPAs that wish to engage in religious discrimination, the CPAs do not have to request or report anything in order to be able to discriminate; 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. 1 Lowe Tr. 44:6-14; Ex. 2 Barton Tr. 38:23-39:10. 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

[2] They are Church of God Home for Children, Connie Maxwell Children's Ministries, Epworth Children's Home, Lifeline Children's Services, Miracle Hill, New Foundations Home for Children, Inc., Nightlight Christian Adoptions, South Carolina Mentor, Southeastern Children's Home, Specialized Alternatives for Families and Youth, the Bair Foundation, and Thornwell. Ex. 3, 10545-G0716, at -721-23; Ex. 1 Lowe Tr. 191:5-197:8. Though Defendants assert that Family Preservation Community Services, Growing Home Southeast, Lutheran Services Carolinas, and South Carolina Youth Advocate Program offer nontherapeutic foster-care services in the Upstate Region, it is undisputed that none have offices in the Region. And there is no evidence that either Hope Embraced Adoption Agency or Oasis of Hope has offices in the region either. Ex. 3, 10545-G0716, at -721-723; Ex. 1 Lowe Tr. 191:5-197:8.

it discriminates against prospective parents would be if a prospective parent filed a complaint. Ex. 1 Lowe Tr. 256:18-257:8.

The State has no other mechanism to discover whether a CPA turned someone away on religious grounds. Ex. 2 Barton Tr. 115:16-116:4.

- SCDSS 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.
- SCDSS does not monitor whether CPAs using the waiver make referrals when they turn prospective foster parents away for religious reasons.
- The only way SCDSS would know whether prospective parents are turned away and whether they receive any referrals would be if CPAs self-report to SCDSS—which they don't. Ex. 1 Lowe Tr. 165:19-168:3.
- SCDSS does not know or inquire about how many prospective foster parents have been turned away by CPAs based on religious criteria. Ex. 5 Tester Tr. 153:19-154:1.

So contrary to Defendants' contention, no SCDSS employee has testified that all other CPAs work with foster parents of any faith or sexual orientation. In fact, with regard to the CPAs who actually serve Mrs. Maddonna's area (*see supra* note 2), a SCDSS foster-care policy official could identify only three CPAs that do *not* discriminate. Ex. 2 Barton Tr. 133:21-134:25. For the rest, SCDSS does not know, does not seek to find out, does not care.

3. Though State Defendants assert that, outside of recruiting, licensing, and supporting foster parents to participate in the South Carolina foster-care program on behalf of the State, Miracle Hill works with most volunteers without regard to religion, this fact, though undisputed, is immaterial: That Mrs. Maddonna might volunteer to sort old clothes or otherwise work in wholly unrelated charitable programs or services that Miracle Hill performs entirely within its own ministry does nothing to further her desire to participate in the *State's* foster-care program. To add insult to injury, Miracle Hill even suggested that she could do, among other things, administrative work at its foster-care facility, but she, as a Catholic, was ineligible to foster children—she couldn't be trusted with them—because it is "one of the few roles involving spiritual influence, teaching

and formation, that we reserve for those who share our distinctly Protestant beliefs and convictions." Ex. 6 Maddonna Tr. Ex. A.

4. State Defendants' assertion that Miracle Hill works with only a fraction of the prospective foster parents and foster-child placements handled by SCDSS each year is disputed, or else incomplete and misleading: Miracle Hill is South Carolina's largest provider of foster-care services for children requiring nontherapeutic foster care, recruiting 15% the foster families. ECF No. 111-14, at 10545-B-025. From 2017 to 2021, Miracle Hill assisted more families in procuring a foster-home license than any other nontherapeutic CPA in the entire state of South Carolina. Ex. 3, 10545-G0716, at -717. Miracle Hill helped a total of 338 families get licensed—nearly three times as many as the CPA with the next largest share of nontherapeutic placements (Epworth Children's Home with 114) (*id.*); and 1,278 children were placed with nontherapeutic foster-care families licensed through Miracle Hill—more than 4 times as many children as the CPA with the next largest share (Epworth Children's Home, with 288) (*id.* at -718). Of nontherapeutic placements, the overwhelming majority of children whom SCDSS placed in foster families in the Upstate Region were placed with Miracle Hill families. *See id*.

C. State Defendants' assertions concerning the 2017 change in federal regulations and Defendants' responses

State Defendants' assertions concerning the changes that South Carolina made to the foster-care system in 2018 and the steps that the Governor took and the justification he gave to accomplish those changes are generally undisputed, except for the following instance, where Defendants' factual statement is incomplete and thus misleading:

State Defendants say that, in 2018, HHS determined that requiring subrecipients that use religious criteria in partnering with prospective foster parents to comply with the religious-nondiscrimination provision of 45 C.F.R. § 75.300(c) (2016) would impermissibly burden religious beliefs under the Religious Freedom Restoration Act (42 U.S.C. § 2000bb et seq. (2018)) and, accordingly, HHS approved an exception to the funding restrictions in 45 C.F.R. § 75.300 for South Carolina's foster-care program. SCDSS Mem. 8. State Defendants fail to mention, however,

the critical fact that on November 18, 2021, HHS reversed its position and acknowledged that, in granting the 2018 exception, it had not properly applied RFRA's substantial-burden requirement, and withdrew the exception. HHS Withdrawal of Exception, ECF No. 91-1. Nor, therefore, did State Defendants address the fact that the Governor's justification for his Executive Order must be tested against the proper legal analysis, which is detailed in HHS's 2021 Withdrawal of Exception letter. HHS Withdrawal of Exception, ECF No. 91-1.

D. State Defendants' assertions concerning Mrs. Maddonna's first lawsuit

Mrs. Maddonna responds to State Defendants' assertions concerning her first prior lawsuit as follows:

1. State Defendants assert that although Mrs. Maddonna was aware of opportunities to foster through other CPAs in her area or with SCDSS directly, she admits that she made no attempt to do so. That statement is mostly undisputed but woefully incomplete. Mrs. Maddonna further explained that she knew of only one other opportunity, about which she learned from Miracle Hill—the entity that had just rejected her for being Catholic—and that the other CPA was Miracle Hill's affiliated group, Fostering Great Ideas. Mrs. Maddonna was also then aware that the 2018 changes to the foster-care program expressly permitted (and still permit) contracted agencies to discriminate based on religion. So she had no assurances that she would not experience the same rejection. Ex. 7 Maddonna Tr. 43:20-47:3.

2. State Defendants insinuate that Mrs. Maddonna's contact in 2019 with Miracle Hill—which confirmed that she could seek to be a foster parent through them only by affirming Miracle Hill's Statement of Faith—was prompted by ill motive. SCDSS Mem. 9 ("She did so despite her professed fear of rejection that, for four years, had allegedly prevented her from making any further effort to become a foster parent or volunteer with any CPA or SCDSS."). But Mrs. Maddonna explained that, now that her kids were older, she wanted to know whether Miracle Hill's policy had changed. Ex. 7 Maddonna Tr. 40:16-41:2. She also underscored that her only understanding of "other avenues" to foster involved one other organization, which was affiliated with the very

CPA that said she didn't meet the criteria to foster because she is Catholic. And yes, the harm and fear of future of rejection was a factor. *Id.* at 48:25-51:3.

3. State Defendants assert that in 2019 Miracle Hill revised its policy and publicly announced that it would work with Protestant, Orthodox, and Roman Catholic volunteers and foster parents who could affirm Miracle Hill's Doctrinal Statement. SCDSS Mem. 10. That is undisputed. But so is the fact that Mrs. Maddonna cannot affirm that Doctrinal Statement because she understands it to be contrary to her own religious beliefs. Ex. 7 Maddonna Tr. 86:3-17, 87:15-88:1. Mrs. Maddonna explained in detail many of the differences between Miracle Hill's Doctrinal Statement and her own beliefs, as well as her understanding of Catholic teachings based on her upbringing and religious education. *See id.* 86:18-87:5, 91:15-97:24, 98:22-102:4.[3]

4. State Defendants assert, based on a statement in a newspaper article, that the Roman Catholic Church reviewed Miracle Hill's Doctrinal Statement and found it to be consistent with Roman Catholic teaching and doctrine. SCDSS Mem. 10. Not only does that assertion rest entirely on inadmissible hearsay that cannot form the basis for summary judgment (Fed. R. Civ. P. 56(c)(2)), but even if it were admissible, the statement would be immaterial, because Mrs. Maddonna's sincerely held religious beliefs are personal to her, and that is what matters for her being excluded from participating in the State's foster-care program because of her faith. Finally, even if the hearsay were admissible and material, it is disputed as a categorical statement of Catholic doctrine. When asked generally whether she had heard about the stance that the Diocese took, Mrs. Maddonna explained her understanding that someone unidentified had indicated that a Catholic "could affirm [Miracle Hill's Statement], but not that every Catholic would or

[3] State Defendants' suggestion at footnote 6 that Mrs. Maddonna's "disagreements with Miracle Hill stem from areas in which her *own* beliefs—not those of Miracle Hill—diverge from the teaching and doctrine of the Roman Catholic Church" (SCDSS Mem. 10 n.6) is contrary to her detailed explanation of her religious beliefs and thus clearly disputed. Moreover, Defendants' attempt to distance Mrs. Maddonna's beliefs from official doctrinal positions of the Catholic Church to which she belongs works against Defendants by disqualifying her from participation even under Miracle Hill's "Catholic exception," on the same basis as non-evangelical protestants, Jews, Muslims, atheists, and many other faiths are turned away.

should . . . [T]his does not reflect church dogma, so to speak. It does not reflect church not in the way that I was raised with it." Ex. 7 Maddonna Tr. 103:5-103:21. The Court cannot be tasked with resolving a dispute about church doctrine, *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976)—and certainly not on this record. Nor should it, given that what matters is *Mrs. Maddonna's* religious beliefs, and her exclusion because of them.

5. The remainder of State Defendants' discussion concerning the allegations and procedural history of the first lawsuit—which was dismissed without prejudice for failing to adequately plead standing—is immaterial to the issues currently before the Court in this lawsuit.

E. State Defendants' assertions concerning this second lawsuit

1. State Defendants assertion that Mrs. Maddonna has failed to establish her standing here (SCDSS Mem. 11) is disputed by Mrs. Maddonna for the same reasons this Court previously rejected those arguments.[4] The record shows that on February 12, 2019, Mrs. Maddonna again reached out to Miracle Hill to revisit the possibility that her family might be accepted as volunteer mentors to foster children in its care, with the ultimate aim to foster a child. Ex. 8 Maddonna Decl. ¶ 14. On February 20, 2019, a representative of Miracle Hill sent Mrs. Maddonna an e-mail that once again rejected the Maddonna family as volunteer mentors, informing Mrs. Maddonna that because "mentors play an important role in providing spiritual as well as emotional support, guidance, and counsel," Miracle Hill requires them to agree with its Protestant Statement of Faith and share its distinctly Protestant beliefs and convictions. *Id* ¶ 15. The representative told Mrs. Maddonna that she could go someplace else to become a mentor, or that she could do other charitable work through Miracle Hill, but that she could not mentor or foster any children assigned to Miracle Hill by SCDSS. *Id.* ¶ 16. That was because, Miracle Hill entrusts roles that involve the spiritual influence, teaching, and formation of children that the State assigns to its care to Protestants only. *Id.* Mrs. Maddonna clearly understood that she and her family were turned away

[4] Order 16-20, ECF No. 43. Plaintiff here provides record citations supporting the necessary facts alleged in the Complaint on which this Court relied for that disposition.

by Miracle Hill because they do not share its evangelical-Christian beliefs and cannot affirm its Statement of Faith. *Id.* ¶ 17. And when Mrs. Maddonna requested in February 2019 that she and her family be permitted to volunteer, Miracle Hill had not yet lifted its formal bar on Catholics' participating in its foster-care services. *Id.* ¶ 18.

Even after Miracle Hill did later lift its formal anti-Catholic ban (while still excluding Jews, Muslims, other minority faiths, and nonbelievers), it made clear that Catholics would be allowed only if they signed and affirmed Miracle Hill's Protestant Statement of Faith and agreed to live in accordance with it—never mind their own faith, religious beliefs, and religious practices. *Id.* ¶ 19; Ex. 9 Betts Tr. 92:11-15; Ex. 10 Lehman Tr. 24:25-25:21. Under Miracle Hill's revised policy, it would not be enough simply to sign the Statement of Faith; prospective foster parents must also adhere to it "in faith and in practice." Just as Miracle Hill previously refused to work with those who don't believe something in the Statement of Faith, it continued to refuse to work with those whose religious "practices might not align with Miracle Hill's doctrinal statement." Ex. 9 Betts Tr. 94:1-2, 169:7-170:16. And Miracle Hill requires that prospective foster parents regularly attend a Christian church that Miracle Hill determines meets its narrow definition of "Christian." *Id.* at 27:14-28:19.

Mrs. Maddonna reviewed Miracle Hill's Doctrinal Statement and found that it was and is inconsistent with her religious beliefs and her understanding of her faith. Ex. 8 Maddonna Decl. ¶ 20. If she were to attest to and agree to live in accordance with that Doctrinal Statement, she would be forced either to misrepresent her faith and falsely affirm commitments to religious beliefs and practices that are not her own, or else abandon her own beliefs to adopt the religious beliefs and practices that Miracle Hill favors. Because of the religious requirements that Miracle Hill inserted into its provision of foster-care services, Mrs. Maddonna's family was prevented from becoming volunteer mentors to children in the State's care that SCDSS assigned to Miracle Hill. The Maddonnas were thereby deprived of the opportunity to open their loving home to a child in need. *Id.* ¶ 21. And because the State permits all agencies with which it contracts to enforce their own religious beliefs in providing foster-care services, Mrs. Maddonna has no assurance or

expectation that another religious agency would treat her in a nondiscriminatory way. *Id.* ¶ 22. She could not put her family through another round of preparing and getting excited about getting to know and help foster children but then being told that they aren't good enough because of their religion. *Id*. The experience of being rejected from the State's foster-care program because the Maddonnas are Catholic was and is hurtful to Mrs. Maddonna and her children. The thought of going through the motions again of planning and scouting out other opportunities—ones she wasn't even sure existed—and risk suffering religious discrimination that she knew the State doesn't prohibit—seemed futile. *Id.* ¶ 23; Ex. 7 Maddonna Tr. 51:22-52:9, 82:8-83:10. If the State were to provide assurances that religious foster-care agencies will not turn away families like the Maddonnas based on their' religious beliefs, the family would welcome the opportunity in the future to open their home to a child in need. (Ex. 8 Maddonna Decl. ¶ 24.)

2. State Defendants' assertions that there are many CPAs that provide resources and support comparable to Miracle Hill in Greenville County is vigorously disputed. As previously shown, SCDSS overstates the number of potential CPAs. *See supra* pp. 4-6. Further, the record disputes Defendants' assertion that all CPAs and SCDSS (which focuses on kinship adoptions only) provide resources and support comparable to Miracle Hill's. Miracle Hill has a placement coordinator who recommends families to SCDSS that 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. Those placement visits are not required by SCDSS, and Miracle Hill is unaware of any other CPAs that provided the service. Ex. 9 Betts Tr. 58:14-59:17. SCDSS is likewise unaware. Ex. 2 Barton Tr. 74:23-76:25. In addition to guiding families through the process of applying to become licensed foster parents and helping them obtain placements, families working with Miracle Hill receive other key benefits and support. Miracle Hill sometimes provides tangible support, including if the family needs a bed, dresser, or other similar items. Ex. 9 Betts Tr. 55:3-21. After a child is placed with a Miracle Hill family, Miracle Hill continues to provide support above and beyond what is required by SCDSS. For example, it helps connect foster families with educational support and resources for their foster child. Neither Miracle Hill, nor SCDSS, nor Mrs.

Maddonna is aware of *any* other CPAs that provide that kind of support. *Id.* at 56:22-57:14; Ex. 2 Barton Tr. 74:23-76:25; Ex. 7 Maddonna Tr. 141:6-8. Miracle Hill also gives its foster families tickets to events and other community activities. Ex. 9 Betts Tr. 56:6-21. Miracle Hill has care coordinators who prepare individual service plans for the children (not required by SCDSS) and meet with the assigned families monthly (not just the quarterly meetings required by SCDSS). *Id.* at 59:18-61:20. 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. *Id.* at 63:19-64:23. Miracle Hill's ability to offer this respite support depends on the agency's large number of licensed foster families, including roughly thirty families licensed solely for respite care. *Id.* at 66:2-6; *see also* Ex. 3, 10545-G0716, at -717.

3. State Defendants assert that Miracle Hill's discriminatory recruiting and screening of prospective foster parents is no longer funded or reimbursed with government funds. The point is immaterial to Mrs. Maddonna's claim that Miracle Hill's use of delegated governmental authority to discriminate on the basis of religion violates the Establishment Clause, because taxpayer funding is not a required element of that claim (and Mrs. Maddonna does not proceed based on taxpayer standing). Moreover, Defendants' contention is disputed, because SCDSS *does* support the CPA's recruiting and screening efforts through the State's partnership with the Heartfelt Calling project's website. Ex. 2 Barton Tr. 40:14-41:9, 140:16-141:11.

4. State Defendants' assertion that Miracle Hill does not proselytize children in foster care or coerce them to engage in religious exercise against their will is disputed. 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." Ex. 9 Betts Tr. 26:2-12, 28:20-29:2, 209:15-210:16. Miracle Hill considers it important that foster parents expose foster children to its preferred religious teachings and expects foster parents to exercise spiritual influence—Protestant Christian influence—over the children that the State has placed in Miracle Hill's care. *Id.* at 210:17-211:9. Unless the biological parents or children specifically object,

Miracle Hill intends for 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. *Id.* at 213:13-23, 214:19-25, 217:13-218:9. Miracle Hill 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. *Id.* at 24:12-25:8, 28:20-29:2. Miracle Hill employees asks 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. *Id.* at 24:12-26:12. Miracle Hill "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 taking their beliefs and wishes into account *only* if the biological parents specifically and affirmatively raise objections on their own. *Id.* at 213:5-23.

5. Mrs. Maddonna disputes State Defendants' assertion that if Miracle Hill were to shut down, as many as 60% of their foster parents would choose to cease serving as foster parents altogether. Miracle Hill's Foster Care Licensing Supervisor had no idea what percentage, if any, of Miracle Hill families would cease fostering rather than work with another agency. *Id.* at 188:23-189:3. One SCDSS witness expected that most families would work with another agency if Miracle Hill were to stop providing services. Ex. 2 Barton Tr. 159:9-161:9. Indeed, even SCDSS apparently didn't believe what State Defendants assert in support of their summary-judgment bid, as that would be inconsistent with SCDSS's earlier decision to end Miracle Hill's contract because of its discrimination—the very thing that prompted the Governor to act to change the entire system to allow that discrimination. Ex. 1 Lowe Tr. 172:20-173:3.

F. State Defendants' assertions concerning events following the filing of this lawsuit

As for State Defendants' assertions about events during the pendency of this lawsuit, it is undisputed that Miracle Hill notified SCDSS in 2021 that, going forward, it would voluntarily decline to receive reimbursements of administrative fees to which it is entitled—which is

immaterial to whether the program itself continues to discriminate on the basis of religion—and that it would remain licensed and contracted to work as a CPA and continues to exercise its delegated authority in a discriminatory manner. Ex. 2 Barton Tr. 101:15-102:17.

ARGUMENT

I. State Defendants' standing and mootness arguments reflect a mistaken understanding of Mrs. Maddonna's injury and claim for relief.

State Defendants press the Court to revisit its previous, detailed, thoroughly reasoned ruling that Mrs. Maddonna has standing to pursue her Establishment Clause claim against them. They argue that discovery has proven the Court's ruling erroneous and that intervening events now also call for a different result. They are wrong on both counts.

A. Miracle Hill, the State's government-contracted CPA, will not allow Mrs. Maddonna to mentor children in the State's care or apply to become a foster parent unless she expressly affirms the CPA's religious beliefs—a discriminatory practice that the Governor's Executive Order authorizes.

State Defendants attack Mrs. Maddonna's standing by insisting that she has not established injury-in-fact. *See* SCDSS Mem. 25-26. They are mistaken. Discovery has confirmed the essential facts that she alleged in her Complaint: She contacted Miracle Hill, a government-contracted CPA, in February 2019 to determine whether the organization still refused to work with Catholics when recruiting, training, and licensing potential foster parents who wish to participate in the State's foster-care program. Having experienced the pain of being turned away earlier, she did not want to put her family through that disappointment again. She received a response within a few weeks that Miracle Hill's policy had not changed, straightforwardly informing her that any efforts to mentor or foster children in state care through Miracle Hill would still be futile. Mrs. Maddonna also learned of a new development: Miracle Hill would begin making exceptions to its religious criteria for Catholics who affirm Miracle Hill's evangelical-Protestant Statement of Faith. She reviewed the Statement and concluded that it is inconsistent with her own religious beliefs and, thus, could not sign it—all before filing this suit. These facts, having been established through discovery, confirm that the Court's previous standing analysis is correct. Order 16-20, ECF No.

43. Mrs. Maddonna has proven a cognizable injury-in-fact under the Establishment Clause. *See, e.g., Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 259 (4th Cir. 2018) ("The common thread among these different forms of cognizable legal injury [in Establishment Clause cases] is 'personal contact' with the alleged establishment or disfavoring of religion." (quoting *Suhre v. Haywood Cnty.*, 131 F.3d 1083, 1086 (4th Cir. 1997), *vac'd on other grounds*, 138 S. Ct. 2710 (2018)).

Mrs. Maddonna has endured actual, legally cognizable injuries, namely: (1) the erection and maintenance of a religious barrier to her ability to participate in a government program, and (2) the stigma of discrimination flowing from that religious barrier.

First, by contracting with CPAs, including Miracle Hill, that bar prospective foster parents using religious criteria, and by authorizing this religious discrimination through the blanket waiver in the Governor's Executive Order, South Carolina has erected and maintained a religious barrier to Mrs. Maddonna's ability to participate in a government foster-care program on equal terms with those who meet the favored religious criteria. Importantly, as between government-contracted CPAs and foster-parent applicants, the exception is neither neutral nor individualized: The CPA's religious beliefs will *always* be favored over the different religious beliefs of prospective foster parents.

Second, through the same actions the State has subjected Mrs. Maddonna to the stigma of religious discrimination, which is an independent injury-in-fact. *See Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) ("[D]iscrimination itself . . . can cause serious non-economic injuries to those persons who are denied equal treatment solely because of their membership in a disfavored group."); *Int'l Refugee Assistance Project*, 883 F.3d at 259-60 (Muslim plaintiffs had standing to challenge travel ban "as members of the disfavored religion" suffering "[f]eelings of marginalization and exclusion"); *Moss v. Spartanburg Cnty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012) (recognizing standing to raise Establishment Clause challenge based on stigmatic harm).

State Defendants suggest that Mrs. Maddonna has suffered no injury because she failed to reapply to Miracle Hill after the CPA nominally changed its policy by ending its formal categorial bar on Catholics—while still requiring Catholics to affirm Miracle Hill's evangelical-Protestant doctrinal statement. That hardly renders Mrs. Maddonna's injuries "purely speculative and hypothetical." SCDSS Mem. 25. On the contrary, Miracle Hill's written response to Mrs. Maddonna made clear, and discovery has confirmed, that people who will not affirm and agree to live according to Miracle Hill's favored religious beliefs and practices—which are not Mrs. Maddonna's—cannot and will not be placed in a position of spiritual influence over children in state custody. "[W]hile Plaintiff did not officially apply to foster children through Miracle Hill, . . . such application would likely have been futile, as Miracle Hill explicitly notified Plaintiff of her inability to foster notwithstanding her not filing a formal application." Order 17-18, ECF No. 43.

B. Miracle Hill's purported decision to stop accepting government funding does not moot the case.

State Defendants argue that the case is moot because Miracle Hill recently chose not to receive reimbursement from the State of its administrative fees. This argument fails for two reasons.

First, proof that Miracle Hill receives government funding is not a necessary element of Mrs. Maddonna's Establishment Clause claim. Rather, South Carolina's constitutional transgression at the heart of this suit is its delegation of governmental functions to religious entities without adequate safeguards to prevent their turning away from the state program disfavored persons based on the entities' religious beliefs. *See Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 697, 703 (1994); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-27 (1982). History has long and consistently taught that when government uses religious institutions to carry out certain civil functions, the Establishment Clause's protections are triggered. *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1609 (2022) (Gorsuch, J., concurring).

Second, any voluntary decision by Miracle Hill—who is not a party to the case—to forgo state reimbursement of administrative fees at this time does not moot the case because Miracle Hill is still a licensed and contracted CPA that continues to discriminate based on religion, and because it is free to resume collecting the funding at any time. And the State allows all other CPAs to discriminate based on religion also. The defendants asserting mootness have not met their "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 190 (2000).

Simply put, *South Carolina*'s wrongful policy continues to authorize discrimination. The Governor's Executive Order is still very much in place and provides *carte blanche* for all CPAs, including Miracle Hill, to employ religious litmus tests in a government program, in violation of the Establishment Clause. And regardless of whether Miracle Hill currently receives government funds, South Carolina continues to delegate governmental authority to religious institutions, including Miracle Hill, with no oversight that will prevent what happened to Mrs. Maddonna from recurring. Because the State permits the CPAs with which it contracts to enforce their own religious beliefs in providing foster-care services, Mrs. Maddonna has no assurance or expectation that another religious agency would treat her in a nondiscriminatory way.

A case is not moot if a court can grant "any effectual relief whatever to the prevailing party." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (cleaned up). Mrs. Maddonna's request for relief against State Defendants is not affected by Miracle Hill's current decision to stop collecting government funds even as it continues to discriminate. Declaratory relief and an injunction against Executive Order No. 2018-12, as Mrs. Maddonna has requested, would provide assurance that she can approach Miracle Hill or any other CPA without fear of being turned away from participation in South Carolina's foster-care program because of her religion.

II. *Fulton* does not determine Mrs. Maddonna's Establishment Clause claim.

State Defendants erroneously insist that *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), a decision that does not address the Establishment Clause at all, somehow disposes of Mrs. Maddonna's Establishment Clause claim here. *See* SCDSS Mem. 16-24. Their argument falters at every step.

A. This Court correctly held that *Fulton* is not controlling here.

State Defendants ask this Court to revisit its prior rulings that *Fulton* is not controlling or dispositive of this case or the related *Rogers* action. Text Order, ECF No. 87; Order 6, *Rogers v. HHS*, No. 19-cv-1567 (D.S.C. Dec. 2, 2021), ECF No. 201 (same decision applied here). Nothing has changed, and Defendants fail to provide any justification for the Court to change is ruling.

Fulton was a free-exercise case involving what has come to be called the unconstrained-discretion rule, under which the creation of a formal mechanism for unfettered grants of exceptions renders a policy not generally applicable for purposes of the Free Exercise Clause by "invit[ing] the government to decide which reasons for not complying with the policy are worthy of solicitude." *Fulton*, 141 S. Ct. at 1879 (cleaned up); *see also Canaan Christian Church v. Montgomery Cnty.*, 29 F.4th 182 (4th Cir. 2022) (applying *Fulton*'s unconstrained-discretion rule in context of Religious Land Use and Institutionalized Persons Act). The Court held that Philadelphia's foster-care program ran afoul of the Free Exercise Clause because the program formally permitted a public official or designee, entirely "in his/her sole discretion," to grant individualized exceptions from nondiscrimination requirements, while categorically excluding religious objections as a basis for obtaining an individualized exception. *Fulton*, 141 S. Ct. at 1878, 1882 ("On the facts of this case, [the City's] interest cannot justify denying [the child welfare agency] an exception for its religious exercise."). The problem was that City officials could grant exemptions from contract requirements for any reason that a contractor might ask, or no reason at all, except that it categorically and absolutely could *not* grant a religiously based request—in other words, all is permitted, except religious exceptions, which are forbidden. The decision thus applies only to systems of "individualized exemptions" weighed according to vague, overly flexible,

unlimited, discretionary standards like "good cause," "necessity," or "reasonableness"—unfettered discretion—in which religion is systematically disfavored. Nothing like that is present here.

In their dogged determination to shoehorn the facts of this case into *Fulton,* State Defendants insist that South Carolina's system is like the one that Philadelphia had. To get there, they suggest that South Carolina's Religious Freedom Act (S.C. Code Ann. § 1-32-40 (2022)—the state analog to the federal RFRA, on which HHS relied to issue its own exception—provides the same type of discretion for the Governor to grant exemptions as was present in *Fulton*. SCDSS Mem. 19-20. But the SCRFA is particular to *religion*, not to everything *but* religion, or everything in general. The issue in *Fulton* was that the City could grant exemptions for any reason or none, except that religion was forbidden, so it didn't get equal treatment. If State Defendants wanted to argue that the Governor has discretion to grant other exemptions so he must be able to grant religious ones, they'd have to show that he has the discretionary authority to grant other exemptions that permit turning away prospective foster parents willy-nilly on non-merit grounds—which isn't so—and therefore he must be able to grant religious ones. Discretion to grant religious—and only religious—exemptions is precisely the opposite of *Fulton*.

Besides, the Governor doesn't have unfettered discretion to grant exemptions under SCRFA, even if that were what matters: Neither RFRA nor SCRFA operates that way. Under the statutes, granting a religious exemption is individualized, and the persons seeking one must meet the undue-burden standard required to warrant consideration. Thus, the SCRFA could not support granting a blanket, prospective exemption to all CPAs without any having requested one. And there are other legal criteria at play. The requested religious exemption cannot burden or harm third parties. Indeed, HHS set out the proper legal analysis in detail when it explained why it had no choice but to withdraw its own blanket, prospective exemption that mirrored the Governor's Executive Order. *See* HHS Withdrawal of Exception, ECF No. 91-1.

Also in *Fulton,* the fact that no one had ever been turned away or otherwise harmed by the child-welfare agency's policy was central to the Court's decision. *Fulton*, 141 S. Ct. at 1875, 1882.

That is manifestly not so here, where Mrs. Maddonna and others *were* turned away from participating in the State foster-care program, and State Defendants have left in place the Executive Order providing a blanket, prospective waiver to all CPAs in the future to discriminate based on their religious beliefs.

In short, this case does not ask whether the Free Exercise Clause requires South Carolina to accommodate Miracle Hill or any other CPA. Nor does it ask whether the Establishment Clause permits South Carolina to accommodate Miracle Hill if it wishes to do so. For there is no CPA asking for an accommodation or making the required showing under RFRA and SCRFA to present a colorable claim for an accommodation. Rather, the only question here is, did the State Defendants violate the Establishment Clause by issuing a prospective, blanket exemption to *all* CPAs—whether requested by them or not—that authorizes continuing religious discrimination against and harm to prospective foster parents, including Mrs. Maddonna? *Fulton* could not possibly answer that question.

B. *Fulton* does not address, let alone undermine, Mrs. Madonna's claims that the State has encouraged religious coercion and impermissibly fused governmental and religious functions.

Turning to each of Mrs. Maddonna's specific claims presented in this case, *Fulton* poses no obstacle. South Carolina's use of religious CPAs while authorizing them to discriminate violates the Establishment Clause distinct ways. First, the blanket waiver underwrites religious coercion of participants in the State's foster-care program. Second, the State has impermissibly delegated governmental functions to religious entities without adequate—or any—safeguards to prevent those entities from using the delegated power to further religious ends.

State Defendants vaguely try to dispose of Mrs. Maddonna's claim of unconstitutional religious coercion by asserting, "*Fulton* confirmed that accommodating religious agencies in the foster care system does not establish religion: Here, as in *Fulton*, the CPA 'does not seek to impose [its] beliefs on anyone else.'" SCDSS Mem. 24 (quoting *Fulton*, 141 S. Ct. at 1882).

As a threshold matter, Mrs. Maddonna does not claim that all accommodations for religious CPAs would violate the Establishment Clause. Rather, she argues that South Carolina's blanket waiver does, because it bypasses the constitutional prerequisites to permissible accommodation. But more specific to her claim of religious coercion, *Fulton* is factually inapposite. The *Fulton* Court observed that the city contractor there "does not seek to impose [its] beliefs on anyone else"—an important *factual* predicate for the Court's decision. *Fulton*, 141 S. Ct. at 1882. Here, Miracle Hill *did* and *does* seek to impose its beliefs on foster parents by working with them in the operation of the state foster-care program only if they pledge to live according to its religious beliefs, not their own. And the State allows all other CPAs to do the same thing.

Mrs. Maddonna was put to an unconstitutional choice: either forgo participation on equal terms in the State's foster-care program if she wanted to remain true to her faith, or participate only after compromising her beliefs by affirming Miracle Hill's Statement of Faith. *See* Ex. 8 Maddonna Decl. ¶¶ 9-21; Ex. 9 Betts Tr. 27:14-28:19, 92:11-15, 94:1-2, 169:7-170:16. *Fulton* says nothing to undermine the settled legal precedent that being pressured to change one's religious beliefs and practices on pain of denial of a government service is the type of "subtle [or not-so-subtle] coercive pressure" that the Establishment Clause forbids. *Lee v. Weisman*, 505 U.S. 577, 592 (1992); *see also DeStefano v. Emergency Hous. Grp., Inc.*, 247 F.3d 397, 412 (2d Cir. 2001). *Cf. Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (government "may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish" (citation omitted)).

Turning to the second claim, impermissible fusion of governmental and religious functions, State Defendants suggest that *Fulton* disposed of Mrs. Maddonna's claim that South Carolina's approach to CPAs impermissibly fuses governmental and religious functions, contending that "partnering with religious foster agencies [does not] impermissibly entangle church and state" based on *Fulton*'s simple observation that the "foster care system depends on cooperation between the City and private foster agencies." SCDSS Mem. 24 (quoting *Fulton*, 141 S. Ct. at 1875). But Mrs. Maddonna does not challenge the State's ability, as a general matter, to partner with religious

organizations to provide foster-care services. Rather, she claims that South Carolina has violated the Establishment Clause by "delegating 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." *Grumet*, 512 U.S. at 697 (cleaned up). South Carolina has done quite the opposite of implementing effective safeguards: Through its blanket waiver, it invites all faith-based CPAs to use their delegated powers for religious purposes, including subjecting prospective foster parents to religious tests in order to participate in a government program and barring them if they don't pass that religious litmus test. Neither these facts, nor these legal claims, were before the Supreme Court in *Fulton*. So *Fulton* is irrelevant here.

C. Even if a CPA sued South Carolina for an accommodation, *Fulton*'s narrow free-exercise holding would not justify the blanket prospective exemption contained in the Governor's Executive Order.

Turning to Mrs. Maddonna's third claim, because the State's blanket, prospective waiver is not tailored to any substantial burden on religious exercise and burdens third parties, it cannot be understood as a permissible religious accommodation.

Fulton cannot be so distorted as to support a mandate that all CPAs across South Carolina are entitled to *receive* an exemption from neutral nondiscrimination requirements without even asking for one, without any consideration of whether the CPA has established an undue burden on its religious exercise, without consideration of whether the government's own compelling interest is undermined, and without any consideration of the consequences, burdens, or harms visited on other persons. Religious exemptions simply do not work that way. If they did, they would violate the Establishment Clause.

Though government may, and sometimes must, grant religious exemptions from general 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 Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Lee*, 505 U.S. at 587).

The Supreme Court has made clear that religious exemptions are permissible only if they are limited to alleviating substantial government-imposed burdens on religious exercise (*see Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 613 n.59 (1989); *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987)), and only if they do not detrimentally affect nonbeneficiaries (*see Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005); *Est. of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985)). These Establishment Clause mandates are also preconditions to any free-exercise claim for a religious accommodation, whether constitutional or statutory, regardless of the level of judicial scrutiny that would apply if the preconditions are met and the claim is deemed colorable.[5] Both preconditions were met in *Fulton*. Here, neither are.

Taking these prerequisites in turn, the Establishment Clause forbids religious exemptions from general laws if they harm nonbeneficiaries. Such exemptions cross the line from permissible accommodations to unconstitutional preferences for the benefited religious beliefs and their adherents. *See, e.g.*, *Cutter*, 544 U.S. at 722; *Caldor*, 472 U.S. at 709–10; *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989) (plurality opinion). The Religion Clauses "give[] no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Caldor*, 472 U.S. at 710 (quoting *Otten v. Baltimore & Ohio R.R.*, 205 F.2d 58, 61 (2d Cir. 1953) (Hand, J.)).

When it comes to third-party harms, the undisputed facts in this case diverge dramatically from those in *Fulton*. Most notably, the Supreme Court emphasized in *Fulton* that "[n]o same-sex couple ha[d] ever sought certification from CSS" in its 50 years of contracting with Philadelphia to provide foster-care services, and hence, no one was ever turned away as a prospective foster

[5] Because no federal or state statute can forbid what the Constitution requires or require what it forbids (*see, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005); *Santa Fe*, 530 U.S. at 301), the federal RFRA and SCRFA must be interpreted to incorporate these constitutional mandates (*see, e.g.*, *Cutter*, 544 U.S. at 720). Thus, the statutes cannot require, or even permit, exemptions from antidiscrimination laws if the exemptions would inflict harms on nonbeneficiaries in violation of the Establishment Clause.

parent on the basis of sexual orientation. *Fulton*, 141 S. Ct. at 1875. By contrast, Mrs. Maddonna has established that Miracle Hill *did* turn her away based on her religious identity and beliefs—twice—and did the same to 25 to 30 other families (Ex. 9 Betts Tr. 97:11-98:15; *see also* Ex. 2 Barton Tr. 146:22-147:14), and that it would do so to Mrs. Maddonna again if she doesn't affirm its Statement of Faith.

Whereas the *Fulton* Court underscored that there are "more than 20 other agencies in the City, all of which currently certify same-sex couples" (*Fulton*, 141 S. Ct. at 1875), the record here confirms there are relatively few, or no, comparable opportunities available to her. Miracle Hill is the largest, best-resourced private agency offering nontherapeutic foster-care services in the State. From 2017 to 2021, Miracle Hill has had the highest number of new foster-home licenses among nontherapeutic CPAs, as well as the highest number of nontherapeutic placements. Miracle Hill also offers myriad support services not required by SCDSS or other CPAs. And SCDSS does not track and cannot confirm which CPAs discriminate based on their religious beliefs, but simply assumes that they don't discriminate because SCDSS has not received complaints—under a system that is set up not to identify, receive, track, or respond to complaints, much less affirmatively to identify and address violations and violators.

Exemptions are also permissible under the Establishment Clause only if a religious claimant's religious exercise is substantially burdened by the government. *See Allegheny*, 492 U.S. at 613 n.59; *Amos*, 483 U.S. at 334. This mandate, along with the requirement that religious exemptions not detrimentally affect nonbeneficiaries, means that any exemption requires an individualized inquiry to determine whether these constitutionally mandated prerequisites are met—a reality even the State's codefendant HHS had to acknowledge. HHS Withdrawal of Exception, ECF No. 91-1. The blanket religious waiver that the State issued here, by its very nature, fails this requirement of individualized assessment.

Once again, the facts—and the legal questions—in *Fulton* were entirely different. As this Court articulated earlier in this litigation, the plaintiffs in *Fulton* included a CPA that "asserted that the actual application of a non-discrimination clause in a government contract improperly

restricted [its] religious exercise." Order 6, *Rogers*, ECF No. 201. Because that CPA was a party to the case—indeed, it was the plaintiff seeking a religious exemption—the *Fulton* Court necessarily began by concluding that the agency's religious exercise was in fact burdened, before the Court proceeded any further in evaluating the claim for an exemption. *See Fulton*, 141 S. Ct. at 1876 ("As an initial matter, it is plain that the City's actions have burdened CSS's religious exercise.").

Furthermore, *Fulton* cannot possibly have any bearing on the blanket exemption issued here, when its core holding centered on the individualized nature of Philadelphia's exemptions process. The Supreme Court held only that Philadelphia violated the Free Exercise Clause because its foster-care program "incorporate[d] a system of individual exemptions" "at the 'sole discretion' of the Commissioner," yet the City categorically excluded religious objections as a basis for obtaining an individualized exemption. *Id.* at 1878, 1882. Reaffirming and applying *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court applied strict scrutiny only because the discretionary "system of individual exemptions" rendered Philadelphia's nondiscrimination requirements not generally applicable. *See Fulton*, 141 S. Ct. 1868 at 1877-78 (quoting *Smith*, 494 U.S. at 884). After engaging in a fact-intensive inquiry into whether Philadelphia's asserted interests were sufficiently compelling and narrowly tailored to justify denying an individual exemption to the plaintiff agency, the Court concluded that that the agency was entitled to an exemption. *See id.* at 1881 ("The question . . . is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exemption to CSS."); *id.* at 1882 ("On the facts of this case, [the city's] interest cannot justify denying CSS an exemption for its religious exercise."). The exemption that the *Fulton* Court authorized, therefore, was an individual one, available only to the plaintiff entity, based on an individualized assessment—and only after that entity had established, as a threshold matter, that its religious exercise was substantially burdened.

In short, the necessary and express prerequisites to the Court's analysis in *Fulton* were that there was a substantial burden on CSS's religious exercise, and that nobody was ever turned away.

It is not that third-party harms weren't considered or didn't matter in *Fulton*; rather, as a factual matter, there weren't any. That doesn't mean government does not have to take harms to nonbeneficiaries into account—rather, *Fulton* underscored that it must—but that there actually was no harm in that case because nobody was ever turned away. It isn't that the Court wasn't doing a third-party-harm analysis; and isn't that government can ignore third-party harms. Rather, as an absolutely certain fact of the matter, the harms were precisely zero, and so "zero" is what weighs into the legal analysis.

Turning the focus back home: "This case is distinguishable," as this Court previously explained, "in that no party claims that a non-discrimination policy has been unconstitutionally applied to them, or applied at all. To the contrary, the State Defendants provided a broad exemption from the applicable non-discrimination regulations for all child placing agencies in South Carolina." *See* Order 6, *Rogers*, ECF No. 201.

This prospective blanket-waiver scheme that Mrs. Maddonna challenges entirely bypasses the constitutionally mandated individualized inquiry into whether a CPA's religious exercise is substantially burdened and whether third parties are harmed. Any CPA that wants to discriminate based on religion can take advantage of the waiver, without making any showing that its religious exercise is burdened in the slightest, and without the State's evaluating potential (or as here, actual) harms to nonbeneficiaries. In other words, State Defendants do not even know who these CPAs are, let alone who they are harming through their discrimination.

Fulton on its face does not, and as a matter of law cannot, mean that a religious exemption is constitutionally required under the Free Exercise Clause in every circumstance in which one is sought—let alone that one is required even for those who have not asked for it.

III. *Kennedy* reaffirmed the Establishment Clause jurisprudence that supports Mrs. Maddonna's claim.

State Defendants also contend that the blanket waiver is constitutional because (1) it is rooted in "historical practices and understandings" (*see* SCDSS Mem. 15-16, 27-32 (quoting *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022))), (2) CPAs' religious exercise

cannot be attributed to South Carolina (*see id.* at 36-40), and (3) this kind of government accommodation does not violate the Establishment Clause (*see id.* at 32-36). All three arguments are wrong.

State Defendants' assertions that religious organizations pioneered foster care and their descriptions of long-standing partnerships between government and private religious foster-care agencies ignore relevant history—and once again elide the particular state action that Mrs. Maddonna is actually challenging, which is *not* the *existence* of public-private partnerships involving religious entities. State Defendants also incorrectly insist that only CPAs, not the State, have advanced religion. Yet South Carolina has delegated governmental functions to CPAs, and instead of erecting safeguards to prevent CPAs from using that delegated power to advance religion, the Governor issued a blanket waiver that explicitly approves and encourages them to do just that. Finally, while it is true (and we have never disputed) that the Establishment Clause does not impose a total bar on government accommodation of religion, it does impose limits—limits that South Carolina transgressed here.

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

First and foremost, the *Kennedy* Court, in replacing the *Lemon* test in Establishment Clause cases, never held or even suggested that religious coercion is okay. Neither the Supreme Court nor even any individual Justice has *ever* suggested that religious coercion in a government program is constitutionally permissible. Quite the contrary. The Establishment Clause's most basic historical concerns include "coerc[ion]" regarding "religion or its exercise." *Shurtleff*, 142 S. Ct. at 1609 (Gorsuch, J., concurring) (quoting *Lee*, 505 U.S. at 587); *see also Lee*, 505 U.S. at 640 (Scalia, J., dissenting); *Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, J., concurring)). Mrs. Maddonna's coercion claim is clearly consistent with *Kennedy*.

Beyond that, State Defendants focus on the part of *Kennedy* that discusses replacing the Court's *Lemon* test with an analysis that turns on consideration of the Establishment Clause's "historical practices and understandings" (SCDSS Mem. 28 (quoting *Kennedy*, 142 S. Ct. at

2428)), ignoring the pertinent part of the *Kennedy* decision. The Fourth Circuit recently acknowledged the Supreme Court's abandonment of *Lemon*, noting that the record now must establish facts historically understood as an establishment of religion when the supporting authority has not already dealt with the Establishment Clause in historical terms. *Firewalker-Fields v. Lee*, No. 19-7497, 2023 WL 192737, at *11-12 (4th Cir. Jan. 17, 2023). Here, the authority on which Mrs. Maddonna relies already has the historical connection: Establishment Clause history teaches that whenever government uses religious institutions "to carry out certain civil functions," Establishment Clause concerns 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)). Justice Gorsuch specifically pointed out in *Shurtleff* that this *historical understanding* helps explain the Court's decision in *Larkin. Id.*; *see also Kennedy*, 142 S. Ct. at 2429-30. Mrs. Maddonna's *Larkin* claim based on South Carolina's unconstitutionally delegated governmental functions to religious institutions has a clear connection to that historical practice and understanding.

State Defendants' efforts to relegate this case to a new and different understanding (i.e., a straightforward denial) of the Establishment Clause's consistent and clear prohibitions against religious coercion and against delegating governmental functions to a religious entity without establishing and maintaining adequate safeguards to avoid discrimination and coercion cannot be squared with the Supreme Court's pronouncements.

B. State Defendants' attempt to establish a different historical understanding for this case is based on inadmissible and inapposite evidence.

State Defendants point to "a long history of religious agencies . . . cooperat[ing] with the State, without giving up their status as private, religious entities" and purport to conclude that South Carolina's actions here must therefore be lawful. SCDSS Mem. 15-16. To begin with, their argument is based not on admissible record evidence, but primarily on cherrypicked excerpts from textbooks that constitute inadmissible hearsay, Fed. R. Civ. P. 56(c)(2), for which the only exception is not established, Fed. R. Evid. 803(18). With respect to hearsay exception 18, the

advisory committee explained that the great weight of authority has been that so-called learned treatises are not admissible as substantive evidence because there is a likelihood that a treatise will be misunderstood and misapplied without expert assistance and supervision. Fed. R. Evid. 803(18), advisory committee's note. State Defendants have not provided testimony of an expert historian through which "learned treatises" could become admissible. Thus, their attempt to paint a historical understanding of religious agencies' participation in foster-care programs must fail.

Equally important, the supposed history that Defendants describe misses the point. The Establishment Clause claim here is manifestly not a challenge to the state's ability, as a general matter, to partner with religious organizations to provide secular services, or religious organizations' ability to serve the public. Indeed, Miracle Hill itself offers a wide variety of community services, shelters, and public assistance, none of which are challenged here. Ex. 6 Maddonna Tr. Ex. A. The State's supposed historical examples, even if they were accurate and presented in an admissible form, are simply immaterial to the modern foster-care system at the center of this lawsuit.

Government-run foster care, as we know it today, simply did not exist during the time Defendants describe. When South Carolina exercises its considerable authority as *parens patriae* to safeguard the welfare of its children, including to intervene in the family unit to place children in state care, it is performing a uniquely governmental function, acting in ways that private entities cannot. *See generally Harris v. Harris*, 415 S.E.2d 392, 393 (S.C. 1992) (South Carolina, "as *parens patriae*, protects and safeguards the welfare of its children" and "ensure[s] that, in all matters concerning a child, the best interest of the child is the paramount consideration."); *In re Stephen W.*, 761 S.E.2d 231, 234 (S.C. 2014) (same). There is no dispute that the State's "foster care system is overseen by SCDSS, which has legal custody of all foster children in South Carolina, licenses all foster families, and oversees the training and supervision of foster homes and residential foster facilities in the State." SCDSS Mem. 3. Those are indisputably governmental functions, not private ones—and not ones that private entities, religious or otherwise, have ever had the legal authority to engage in. Whatever historical practices by religious entities there might

have been in the early days of the Nation, they were not exercises of governmental power to remove children from their families and place them in state care.

The constitutional concern here is that the State delegated its authority in running important aspects of the *State*'s foster-care program and further authorized CPAs to go beyond providing secular services that "happen to coincide with [their] religious views." *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988). State Defendants are enabling and ratifying CPAs like Miracle Hill's administration of a government program to discriminate against prospective foster parents who do not share their religion—and enabling and encouraging proselytization of children in the State's custody. *See* Ex. 9 Betts Tr. 24:12-26:12, 28:20-29:2, 94:1-2, 169:7-170:16, 209:15-211:9, 213:5-23, 214:19-25, 217:13-218:9; Ex. 11 Executive Order. While the Establishment Clause permits religious organizations to operate government programs, they may not do so in a manner that the Constitution forbids the government itself to do. *Norwood*, 413 U.S. at 463-67. State Defendants may not discriminate against foster parents based on religion, nor may they proselytize foster children, so State Defendants must not acquiesce in, much less authorize and enable, this conduct in a program operated on their behalf.

C. State Defendants have impermissibly delegated governmental functions to religious entities without safeguarding against the use of that power to advance religious purposes.

State Defendants insist that Mrs. Maddonna's claims fail because "only *government* action advancing religion can violate the Establishment Clause," and "Miracle Hill's religious exercise cannot be attributed to South Carolina." SCDSS Mem. 36-37. But as Mrs Maddonna has already demonstrated, South Carolina *has* taken action to advance religion here. Under the system that the State 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." Ex. 2 Barton Tr. 118:6-13. 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.

The blanket waiver furthers an impermissible delegation under the Establishment Clause and encourages (and in the case of Miracle Hill, at least, absolutely guarantees) precisely the exercise of that power that the Establishment Clause forbids.

D. The blanket waiver exceeds the bounds of a permissible religious accommodation.

Mrs. Maddonna's statement of the law on religious accommodation has been consistently clear: While government may, and in some circumstances must, accommodate religion by exempting it from general legal requirements, "accommodation is not a principle without limits," (*Grumet*, 512 U.S. at 706) and cannot "supersede the fundamental limitations imposed by the Establishment Clause" (*Santa Fe*, 530 U.S. at 302 (quoting *Lee*, 505 U.S. at 587)). State Defendants' response—that "Plaintiff's claims . . . fail because accommodating private religious exercise does not violate the Establishment Clause" (SCDSS Mem. 32)—does not seriously engage with Mrs. Maddonna's allegations and evidence of impermissible religious favoritism. For Mrs. Maddonna does not dispute that government may accommodate religion "in a neutral fashion" without running afoul of the Establishment Clause. *See id.* (quoting *Madison v. Riter*, 355 F.3d 310, 317 (4th Cir. 2003)). She has repeatedly explained, however, that not every exemption is a permissible accommodation, and that religious favoritism in a state program constitutes an establishment of religion.

As discussed in detail above, the Governor's blanket waiver is not designed to alleviate actual, substantial, government-imposed burdens on the exercise of religion. Miracle Hill was the only agency that ever requested a waiver of SCDSS's nondiscrimination requirements. Ex. 1 Lowe Tr. 160:1-7. Yet the Governor waived the requirements for *all* faith-based CPAs in South Carolina. Ex. 11 Executive Order. The State did not assess whether any other agency's religious beliefs were burdened substantially (or at all) by state and federal nondiscrimination requirements. It did not require CPAs to submit requests explaining why (or even whether) they believe that their religious

exercise is substantially burdened. It did not even require agencies to inform SCDSS, or anyone else, that they intend to take advantage of the waiver.

The blanket waiver cannot be justified under South Carolina's Religious Freedom Act, nor can it be deemed constitutional. Indeed, Federal Defendants agree that "creat[ing] class-wide regulatory exceptions that apply throughout a state, as the exception to South Carolina provide[d] even though not requested by any other CPAs, runs contrary to" the organization-specific analysis required by RFRA and similar laws. HHS Withdrawal of Exception 5, ECF No. 91-1. Because it cannot be justified as lifting a government-imposed substantial burden on a particular individual or entity's religious exercise, it must instead be understood as unconstitutional religious favoritism.

South Carolina's blanket waiver also imposes significant harms on third parties. It subjects prospective foster parents like Mrs. Maddonna to discrimination based on their religion, stigmatizing them and discouraging them from fostering children. And this doesn't even begin to factor in the burden on children in care who are deprived of more diverse opportunities to meet their needs, or the harm to biological parents whose children are proselytized. Rejection by a CPA also subjects prospective foster parents to practical hurdles, as different agencies have different locations and provide different services and support. CPAs are thus not interchangeable. Ex. 4 Staudt Tr. 34:11-19, 34:25-35:2, 37:6-38:9; Ex. 7 Maddonna Tr. 141:1-5. Because the blanket waiver is not limited to alleviating substantial government-imposed burdens on religious exercise and unduly burdens nonbeneficiaries, it exceeds the bounds of a permissible religious accommodation under the Establishment Clause.

As for State Defendants' invocation of *Amos*, that decision upheld a provision in the Civil Rights Act of 1964 that exempts religious organizations from the prohibition against employment discrimination based on religion. The Court concluded that the exemption does not constitute impermissible governmental favoritism but instead is a neutral measure that allows religious institutions to advance their faith *on their own behalf*. 483 U.S. at 337. Here, by contrast, South Carolina's blanket waiver does not accommodate religion "in a neutral fashion." SCDSS Mem. 32 (quoting *Riter*, 355 F.3d at 317). Instead, it unlawfully fosters, underwrites, and imposes on

prospective foster parents (and foster children) the specific religious beliefs of CPAs in a government program, depriving the prospective foster parents (and children) who do not share those beliefs of the ability to participate on an equal footing. Furthermore, *Amos* concerned a church's firing of an employee who was not in religious good standing. *See* 483 U.S. at 330. The exemption from Title VII's bar on religious discrimination was not unconstitutional religious favoritism because it avoided interfering with church autonomy and internal governance—matters not implicated here. *See id.* at 341 (Brennan, J., concurring).

Nor is there any merit to State Defendants' reliance on *Cutter*, 544 U.S. 709. They are grossly mistaken to suggest that "accepting Plaintiff's arguments would cause all manner of religious accommodations to fall." SCDSS Mem. 34 (paraphrasing *Cutter*, 544 U.S. at 724). The Supreme Court in *Cutter*, after noting that, "[a]t some point, accommodation may devolve into an unlawful fostering of religion," held that RLUIPA's institutionalized-persons provision "does not, on its face, exceed the limits of a permissible government accommodation of religious practices." 544 U.S. at 714 (quoting *Amos*, 483 U.S. at 334-35 (internal quotation marks omitted)).[6]

In holding that RLUIPA falls on the permissible side of the line, the Court was clear about what those limits are—and they are the ones Mrs. Maddonna has been articulating in this suit all along. "Foremost," the Court declared, "we find RLUIPA's institutionalized-persons provision compatible with the Establishment Clause because it *alleviates exceptional government-created burdens on private religious exercise*." *Cutter*, 544 U.S. at 720. Second, the Court explained, in applying RLUIPA "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Id.* "Should inmate requests for religious accommodation become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the

[6] Cutter says that RLUIPA, facially, doesn't exceed permissible accommodation because all it does is set up a system for making and adjudicating individual accommodation claims, according to the constitutional requirements for accommodation. It doesn't say that all exemptions are permissible. It says that the system that RLUIPA sets up isn't unconstitutional because all it does is to specify that *permissible* accommodations should be given. The Court vacated and remanded for proper individualized determinations of the claims that the state there had summarily rejected. *Cutter*, 544 U.S. at 723 n.11.

effective functioning of an institution" (i.e., unduly burden nonbeneficiaries), an "as-applied challenge would be in order." *Id.* at 726. RLUIPA is not a blanket waiver: it requires an individual to actually request an accommodation, and it requires individualized consideration of whether what is requested would alleviate a substantial burden on religious exercise while not shifting burdens to third parties.[7] In other words, the putative religious accommodations that must fall under Mrs. Maddonna's legal theory (and the Supreme Court's express jurisprudence) are not religious accommodations at all; they are impermissible religious establishments.

CONCLUSION

The State Defendants' Motion for Summary Judgment should be denied.

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[7] State Defendants fundamentally mischaracterize the Executive Order when they describe it as "an accommodation afforded under the compelling-interest analysis." SCDSS Mem. 34. The blanket waiver runs afoul of the constitutional mandate 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).