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

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

PLAINTIFF AIMEE MADDONNA'S REPLY IN SUPPORT OF HER MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Federal Defendants have effectively conceded this case. And State Defendants continue to litigate the case they wish they had—a *Fulton*-style free-exercise case that hypothetically could be brought by a CPA—not this case, with these parties and legal claims. In so doing, State Defendants perpetuate the myth that they face a choice: If the State wishes to encourage faith-based CPAs to recruit foster parents from their co-religionists ranks, the State must necessarily be willing to turn away people who do not share those beliefs. But that is a false binary that neither the Establishment Clause nor the South Carolina Religious Freedom Act permits, let alone requires. It is not a zero-sum game. Preferencing targeted recruitment efforts need not entail exclusion of prospective foster parents based on religion. For the very reasons that HHS abandoned its position that expressly exempted South Carolina's foster-care program from the proscription against religious discrimination,[1] the State's actions are unlawful. Mrs. Maddonna is entitled to summary judgment.

RESPONSE TO COUNTERSTATEMENT OF MATERIAL FACTS

Despite being granted 10 extra pages and two extra weeks to dispute the factual assertions in our Statement of Undisputed Material Facts (Text Order, ECF No. 128), State Defendants instead devote most of their factual section to challenging our legal conclusions rather than the facts underlying them.

State Defendants insist that Mrs. Maddonna was not subject to religious coercion, but because they do so without disputing a single paragraph in our SUMF (SCDSS Br. Opp'n Mot. Summ. J. 4, ECF No. 134 ["SCDSS Opp."]), that is really a legal question—one to which they also devote half of their Argument section (*see id.* Part II), and which we, in turn, rebut in Section I.B below.[2]

State Defendants then argue that the Executive Order was tailored to lift a substantial

[1] To be sure, Federal Defendants' withdrawal of the Conditional Exception Letter hardly makes them saints. HHS continues to permit the program to discriminate under a functionally equivalent Notice of Nonenforcement, which they insist—wrongly—is authorized by their nonreviewable discretion.

[2] State Defendants' statement that they "only accommodated one CPA" (SCDSS Opp. 4) is patently false, as the Executive Order on its face exempts *all* religious CPAs from the State's nondiscrimination requirements. S.C. Exec. Ord. No. 2018-12, at 4, ECF No. 110-14.

burden on religious exercise, again without disputing any facts. SCDSS Opp. 4-5. This conclusion is based on their assertion that Miracle Hill explained to the Governor why it was burdened, that the Governor agreed, and that he then determined—based solely on his conversations with Miracle Hill—that *all* religious CPAs were similarly burdened. *Id.* The dispute goes only to whether this "process" satisfies the Establishment Clause's requirements for religious accommodations. We have explained why it does not. *See* Maddonna Mem. Supp. Summ. J., ECF No. 110-1, 18-19 ["Maddonna Mem."]; *infra* pp. 11-12.

State Defendants also reject our description of Mrs. Maddonna's being turned away from a state-licensed CPA as stigmatizing. SCDSS Opp. 6. Aside from their contention about state action (which we refute in Part I, *infra*), this is mostly semantics: They merely put a spin on Miracle Hill's rejection e-mail to Mrs. Maddonna (Maddonna Tr. Ex. A, ECF No. 132-07), deemphasizing that she was expressly rejected on religious grounds and highlighting instead the noncomparable volunteer opportunities that were offered to her.[3]

Similarly, in asserting that Miracle Hill does not proselytize foster children, State Defendants simply ignore the facts. They accuse us of relying on "cherry-picked excerpts"—yet in doing so, they cite a statement by Miracle Hill employee Sharon Betts explaining that foster parents should "demonstrate" Protestant Christian "practice" to "children in their care." Betts Tr. 211:2-9, ECF No. 132-10; SCDSS Opp. 3 n.3. What is more, that statement is part of a larger passage in which Betts confirms that Miracle Hill expects prospective foster families to be "attending church" so Miracle Hill can see what kind of "teaching and expectations [they have] for their children" (Betts Tr. 209:15-24, ECF No. 132-10), and that "Miracle Hill expects the foster parents to provide Christian teachings to the children in their care" (*Id.* at 213:19-23; *accord id.* at

[3] State Defendants contend that we incorrectly stated that Miracle Hill offered Mrs. Maddonna the opportunity to do "administrative work only." SCDSS Opp. 6; Maddonna Mem. 14. They either mistook what we said or did not read the rejection email. Though Miracle Hill did offer Mrs. Maddonna volunteer work beyond just administrative duties, when it came to *foster-care* volunteer opportunities, administrative work was all that was available to her. *See* Maddonna Tr. Ex. A 3, ECF No. 132-07 (bulleted list of volunteer opportunities, listing "Foster Care" as "administrative work only").

210:17-22). If the Executive Order was never intended to provide an exception to SCDSS regulations against proselytization, why is this conduct allowed to continue?

As for State Defendants' footnote arguing lack of third-party standing (SCDSS Opp. 2 n.1), Mrs. Maddonna has never tried to assert standing based on the proselytization of foster children. Rather, proselytization matters for this Court's analysis of third-party harms in determining whether the blanket waiver satisfies the constitutional limitations on religious accommodations.

In contending that Mrs. Maddonna was not turned away from a state program (*see* SCDSS Opp. 7), State Defendants misread the sworn statements in her Declaration. Mrs. Maddonna sought to mentor foster children in order to find good matches for foster placement in her home. Maddonna Decl. ¶ 6, ECF No. 132-09. Because Mrs. Maddonna's children have special needs, the entire family must develop relationships with a foster child and be sure of a good fit before they can accept a placement. *Id.* ¶ 7. Thus, notwithstanding State Defendants' assertion that Mrs. Maddonna herself might have mentored through other CPAs or even non-CPAs, it is crucial that Mrs. Maddonna works with an organization that is authorized to recommend placement of a child in her home and that offers support services suited to her family.[4] Having foster parents suitable for special-needs kids should be of great value to SCDDS. And although Mrs. Maddonna learned that she is ineligible to foster by exploring the CPA's related mentoring component, it remains undisputed that she is still ineligible unless she signs Miracle Hill's Statement of Faith.

As explained in our Opposition, State Defendants' assertion that Miracle Hill no longer receives government funds for its foster care services (SCDSS Opp. 5) is immaterial to Mrs. Maddonna's claims of impermissible delegation, both because taxpayer funding is not a required element of that claim and because Mrs. Maddonna does not proceed on a theory of taxpayer standing (Maddonna Opp. 12, ECF No. 132). Moreover, the contention that recruitment and screening practices have never been funded because they are outside the contract with SCDSS is

[4] In highlighting that Miracle Hill's mentoring program is an added component to its foster-care contract, State Defendants only reinforce Mrs. Maddonna's point that the level and scope of services provided by CPAs are neither uniform nor equal. *See* Maddonna Mem. 21-23.

disputed, because these practices are inherent in CPAs' contractual obligation to "make foster homes available for placement of a child," and CPAs receive funding for these placements. *Id.* at 3 (quoting ECF 111-05, at 3). In addition, SCDSS directly funds CPAs' recruitment efforts through its central intake system, Heartfelt Calling (i*d.* at 3 n.1), in which Miracle Hill participates.

We also previously disputed, with extensive citations to the record, State Defendants' assertion that other CPAs offer resources similar to Miracle Hill's. *See* Maddonna Opp. 11-12. State Defendants support their assertion by pointing to a single CPA that provides a single service (monthly home cleaning) that Miracle Hill is not known to provide. SCDSS Opp. 6.

ARGUMENT

I. State Defendants' Arguments Are Not Responsive.

A. State Defendants are liable for state-sanctioned religious discrimination in the public foster-care system.

Notwithstanding State Defendants' dogged attempts to make this case about Miracle Hill, it is about what the *State* did. Miracle Hill is not a defendant here. Nor is Mrs. Maddonna trying to hold State Defendants liable for Miracle Hill's actions. Rather, she is suing state officials for actions *they* took to enable discrimination in a government program. Hence, State Defendants' entire state-action analysis regarding Miracle Hill, even if it were correct (which it isn't), is irrelevant to the case actually before this Court. And the cases on which State Defendants purport to rely have no bearing, because they all address whether and when *private* entities may be sued under Section 1983.[5] Actions of state officials sued in their official capacity "constitute state action for purposes of the Fourteenth Amendment." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 929 (1982). And Mrs. Maddonna is suing state officials directly under the Establishment Clause, as

[5] *See, e.g.*, *Mentavlos v. Anderson*, 249 F.3d 301, 323 (4th Cir. 2001) (rejecting § 1983 claim against military-college cadets for lack of state action); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 302 (2001) (permitting § 1983 claim against private association because entwinement with state officials rendered it a state actor); *Rendell-Baker v. Kohn*, 457 U.S. 830, 843 (1982) (rejecting § 1983 claim against private non-profit school for lack of state action); *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1934 (2019) (same for private nonprofit corporation); *Milburn v. Anne Arundel Cnty. Dep't of Soc. Servs.*, 871 F.2d 474, 479 (4th Cir. 1989) (same for private foster parents); *Pullings v. Jackson*, No. 2:07-0912, 2007 WL 1726528, at *3 (D.S.C. June 13, 2007) (same).

applied to the states by the Fourteenth Amendment.

Thus, State Defendants' argument that foster care is not "traditionally the exclusive prerogative of the State" (SCDSS Opp. 9 (quoting *Milburn*, 871 F.2d at 479)) simply has no bearing on whether South Carolina *itself* is liable for authorizing religious discrimination in *its* foster-care program. And their analysis is in all events misguided: They rely yet again on supposed historical evidence that we previously explained is both inadmissible and inapposite. Maddonna Opp. 28-30. There is no foster-care system without the *parens patriae* powers of the state. *Id.*

State Defendants suggest that because the South Carolina has not delegated its "authority to remove children from their homes" or "issue licenses," CPAs who perform other aspects of the State's foster-care program are not "subject to the Constitution." SCDSS Opp. 12-13. Once again, this case is not about whether CPAs have engaged in state action and are liable. Applying State Defendants' theory to the actual claims here would require the conclusion that as long as the State does not outsource its *entire* foster-care program to CPAs but instead pays private entities to perform only certain integral functions of it, the State cannot be held liable for affirmatively authorizing CPAs to ignore the Constitution when carrying out those functions in the State's name. That cannot be correct, because as a matter of law, the State "may not induce, encourage or promote private [entities] to accomplish what it is constitutionally forbidden to accomplish." *Norwood v. Harrison*, 413 U.S. 455, 465 (1973).

Relatedly, State Defendants' attempt to divorce recruitment and screening from the rest of the State's foster-care program (*see generally* SCDSS Opp. I.A.) must also fail because it is contrary to the record. CPAs' government contracts might not use the terms "recruitment" or "screening," (*see* SCDSS Opp. 13), but those functions are integral to the State's program. As we previously explained (*see* Maddonna Opp. 3), CPAs' responsibilities include "mak[ing] foster homes available for placement of a child" (ECF No. 111-05, at 3), which inherently requires CPAs to recruit and screen prospective parents and make recommendations to SCDSS for licensure, which SCDSS generally follows (Lowe Tr. 36:11-42:1, ECF No. 132-02). Further, 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." Barton Tr. 227:7-10, ECF No. 132-03.

Furthermore, South Carolina's delegation of governmental functions to CPAs puts this case in an entirely different class than those cited by State Defendants for the proposition that the government is not liable for its "mere acquiescence, permission, or even authorization" of a private party's conduct. SCDSS Opp. 14. In *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982), the Supreme Court held that state defendants were not liable for a nursing home's discharge decisions because the home was not exercising powers delegated by the state.[6] Contrary to State Defendants' assertion that South Carolina bears no responsibility for licensed CPAs' recruitment and screening activities, SCDSS has delegated this function to them and rubber-stamps the prospective foster parents that CPAs select, knowing that the applicant pool that comes across SCDSS's desk has been "cull[ed] out . . . based on . . . religious criteria." Barton Tr. 118:6-13, ECF No. 132-03; Lowe Tr. 36:11-42:1, ECF No. 132-02. The implication that the State cannot be held responsible for how CPAs recruit and screen families in order to fulfill their contractual obligation to the State to "make foster homes available" is truly astonishing. And by State Defendants' own admission, "it doesn't matter" to them how many CPAs impose "similar faith requirements." SCDSS Opp. 22 n.4. In their view, the exact number—even if not a single licensed CPA will work with Catholics who are unable to sign a Protestant Statement of Faith—would not be "a material fact"; the State would not be responsible. *See* SCDSS Opp.*id.* But *Blum* does not apply when the State has delegated functions to entities and actively enabled them to exercise those functions to advance religious purposes. *See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 697 (1994); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125 (1982); *cf. Blum*, 457 U.S. at 1011. State Defendants cannot wash their hands of responsibility.

Finally, State Defendants' standing arguments turn on their all-too-familiar distortion of

[6] The other cases cited are not actually about holding *government* defendants liable, but (again) are about whether *private* entities have engaged in state action. *See Buchanan v. JumpStart S.C.*, No. 21-cv-00385, 2022 WL 3754732, at *8 (D.S.C. Aug. 30, 2022) (considering whether a private entity was a state actor, not whether state actors themselves violated the Constitution); *Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 182 (4th Cir. 2009) (addressing whether a private hospital's employment decisions were state action based on county's board appointments).

Mrs. Maddonna's claims: They insist that Mrs. Maddonna lacks standing because Miracle Hill's actions are not traceable to the State. SCDSS Opp. 16. But again, Mrs. Maddonna is suing State Defendants over their own actions, not Miracle Hill's. The Governor's Order directed SCDSS to stop enforcing nondiscrimination requirements against all CPAs with a religious objection and not to withhold from Miracle Hill—or any religious CPAs—their regular license based on such religious identity or objection. So when Mrs. Maddonna later approached Miracle Hill and was turned away because she is Catholic, that was a direct result of State Defendants' choice to allow all religious CPAs to continue operating as fully licensed providers of state services despite knowing about that invidious discrimination. Further, State Defendants' assertion that Mrs. Maddonna's injuries are not redressable misunderstands the relief she seeks, which is an equal opportunity to obtain state services offered by licensed CPAs, regardless of whether Miracle Hill is a contractor. Enjoining the Executive Order will guarantee Mrs. Maddonna just that. That the relief "will not guarantee Plaintiff the opportunity to work with Miracle Hill" is irrelevant. SCDSS Opp. 17. This Court's prior standing analysis is correct. Order 16-26, ECF No. 43.

B. Modern Establishment Clause doctrine squarely forbids the coercion that Mrs. Maddonna experienced here.

In yet another instance of wishful thinking, State Defendants seek to invalidate Mrs. Maddonna's coercion claim based on what they would have liked the Supreme Court to say in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022). In replacing the *Lemon* test, the Court never said that it was abandoning its long-standing coercion jurisprudence. Quite the contrary: *Kennedy* reaffirmed that coercion is "among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment." 142 S. Ct. at 2429. And although State Defendants try mightily to dismiss *Lee v. Weisman*, 505 U.S. 577 (1992), as "ahistorical" (SCDSS Opp. 20), the Supreme Court cites it in the immediately preceding sentence (*see Kennedy*, 142 S. Ct. at 2429). And in his concurrence in *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022), which the Court in *Kennedy* expressly references (142 S. Ct. at 2429 n.5), Justice Gorsuch similarly quotes *Lee* in explaining that many "traditional hallmarks" of forbidden

religious establishments "reflect forms of 'coerc[ion].'" *Shurtleff,* 142 S. Ct. at 1609 (Gorsuch, J., concurring). Given the *Kennedy* Court's reliance on *Lee*, State Defendants have no basis to contend that the Establishment Clause now requires that religious coercion carry the "force of law and threat of penalty" to constitute a violation (SCDSS Opp. 20 (quoting *Lee*, 505 U.S. at 640 (Scalia, J., dissenting))).

But even assuming for the sake of argument that State Defendants were correct in asserting that "subtle and indirect pressure" is not enough (SCDSS Opp. 18),[7] the coercion here is blatant. As we explained in our affirmative motion, the Governor's blanket waiver underwrites religious litmus tests in a state program, pressuring prospective foster parents to adhere to CPAs' religious beliefs—and adopt their religious practices—if the parents want to participate on equal footing with members of the favored faith. *See* Maddonna Mem. 12-13. Because of the Executive Order, Mrs. Maddonna was told: Sign away your religious convictions and you get to work with the CPA best suited to your family's needs. This coercion is neither subtle nor indirect; it's quid pro quo.

Even State Defendants' distorted reading of *Kennedy* cannot paint Mrs. Maddonna's experience as anything other than unconstitutional coercion. As State Defendants point out, the *Kennedy* Court observed, in finding no evidence of coercion, that the students "could not have reasonably feared" that failure to conform to a religious practice would have negative consequences, such as loss of "opportunities." *Kennedy*, 142 S. Ct. at 2430 (cleaned up); *see* SCDSS Opp. 20. Even if that were a necessary rather than merely sufficient condition for impermissible coercion (and nothing in *Kennedy* suggests that's the case), the condition would be satisfied here: Having previously been turned away and then explicitly told by Miracle Hill staff once again that they would not work with her unless she signs their Statement of Faith, Mrs. Maddonna not only reasonably feared—but *knew*—that she would be shut out of this opportunity if she did not sign. *See* Maddonna Decl. ¶¶ 9-17, ECF 132-09; Maddonna Tr. Ex. A, ECF No. 132-

[7] Responding to our affirmative motion's discussion of *Lee*, 505 U.S. at 592-94; *DeStefano v. Emergency Hous. Grp., Inc.*, 247 F.3d 397, 412 (2d. Cir. 2001); and *Herndon ex rel. Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 180 (4th Cir. 1996). *See* Maddonna Mem. 11-12.

07. South Carolina's blanket waiver has created a system in which prospective foster parents are coerced to sacrifice their religious beliefs on penalty of denial of full participation in a state program.

To reiterate, Mrs. Maddonna was not merely pressured to sign a piece of paper—though that would have been bad enough. She was pressured to adopt Miracle Hill's religious beliefs *and practices* as her own. *See* Maddonna Mem. 12-13. This kind of coercion lies at the core of what the Establishment Clause forbids, as *Kennedy* made crystal clear. The undisputed and overwhelming evidence is that Miracle Hill requires prospective foster parents to adhere to the Statement of Faith "in faith and in practice" and refuses to work with those whose religious "practices might not align with [its] doctrinal statement." Betts Tr. 94:1-2, 169:7-170:16, ECF No. 132-10; s*ee Kennedy*, 142 S. Ct. at 2429 ("[T]his Court has long held that government may not . . . 'make a religious observance compulsory.'") (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). Miracle Hill requires prospective foster parents to attend a Miracle-Hill-approved Protestant church. Betts Tr. 27:14-28:19, ECF No. 132-10; *see Kennedy*, 142 S. Ct. at 2429 ("Government 'may not coerce anyone to attend church,' nor may it force citizens to engage in 'a formal religious exercise.'") (quoting *Zorach*, 343 U.S. at 314; *Lee*, 505 U.S. at 589). These requirements for "the home's spiritual health and well-being" are built into Miracle Hill's home studies. Betts Tr. 24:12-25:8, 28:20-29:2, ECF No. 132-10. State Defendants grossly distort both the law and the facts in arguing that no impermissible coercion has occurred here.

State Defendants' analogy to *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), is similarly misplaced. In concluding that the Ohio voucher program was a "program of true private choice," the Court emphasized that "[p]rogram benefits are available to participating families on neutral terms, with no reference to religion." *Id.* at 653. Under the Ohio statute, participating schools "must agree not to discriminate on the basis of . . . religion" and are "required to accept students in accordance with [a lottery system]." *Id.* at 645-46 (citing Ohio Rev. Code Ann. § 3313.977(A)(1)(a)-(c)). Under the Governor's Executive Order here, by contrast, South Carolina has thrown all nondiscrimination requirements for CPAs out the window. In Ohio, all parents had

the same choices; in South Carolina, prospective foster parents' options are restricted with "reference to religion" (*id.* at 653).[8] Thus, South Carolina's foster-care system is the opposite of "true private choice . . . neutral in all respects toward religion." *Id.*

As for State Defendants' argument that Mrs. Maddonna's long-standing, traditional theory of coercion conflicts with the Free Exercise Clause (*see* SCDSS Opp. 24-27), we reiterate what this Court has already held—that there is no free-exercise claim in this case. Text Order, ECF No. 87; *accord* Order 6, *Rogers v. HHS*, No. 19-cv-1567 (D.S.C. Dec. 2, 2021), ECF No. 201. Moreover, State Defendants mischaracterize our discussion of what renders a religious exemption impermissible. We have shown that Establishment Clause doctrine requires that religious accommodations alleviate a substantial, government-imposed burden on religious exercise and not unduly burden third parties. Maddonna Mem. 18; *see Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 15, 18 n.8 (1989) (plurality opinion); *Est. of Thornton v. Caldor*, 472 U.S. 703, 709-10 (1985). Nothing about that constitutional mandate or our statement of it requires "religious agencies [to] first submit requests before any government entity [can] accommodate them." SCDSS Opp. 25 (internal quotation marks omitted). It merely requires that there be some process for the State to make these individualized determinations—be that through reviewing accommodations requests, evaluating a religious defense in an enforcement proceeding, or defending against a free-exercise or RFRA suit. *Cf. Cutter v. Wilkinson*, 544 U.S. 709, 722-23 & n.11 (2005) (RLUIPA does not facially exceed permissible accommodation because it sets up a system for adjudicating individualized accommodation claims that complies with the constitutional requirements for accommodation).

With the Executive Order, there is no procedure whatever. The blanket waiver prospectively exempts all religious CPAs from the State's antidiscrimination requirements. So it

[8] The voucher program in *Zelman* is also very different in that it distributed government aid to *parents*, who used it to enroll their children in schools. 536 U.S. at 646. In contrast, in South Carolina's foster-care system the State is funding government contractors to do the State's work. This distinction remains relevant even though Miracle Hill no longer receives direct funding. Other CPAs still do, and as stated many times, Mrs. Maddonna is challenging the whole *program*, as it operates under the Executive Order, not the actions of Miracle Hill.

isn't just that they don't have to request an exemption from the nondiscrimination requirements; there is never any point at which the State can make its constitutionally required individualized determinations. As much as State Defendants try to paint the Executive Order as an ordinary religious accommodation, it fails under the South Carolina Religious Freedom Act for precisely the same reason HHS determined that its Conditional Exception Letter failed under the federal Religious Freedom Restoration Act and the First Amendment.

Finally, State Defendants once again insist that *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), forecloses the requirement that religious accommodations take into account third-party harms. *See* SCDSS Opp. 28-32. As this Court has held, and we have repeatedly explained, *Fulton* has no bearing here. Maddonna Opp. 18-26; Text Order, ECF No. 87; *accord* Order 6, *Rogers*, ECF No. 201. State Defendants portray *Fulton* as a case in which the Court "mandated a similar type of religious accommodation for foster care agencies" as the Governor's Executive Order, and did so without assessing the burden on third parties. SCDSS Opp. 30. That is incorrect at every level. The *Fulton* Court concluded that a *single* religious foster-care agency that had asserted a *free-exercise* claim was entitled to a religious accommodation only after the Court determined, in an individualized inquiry, that the agency's religious exercise had been substantially burdened and that no same-sex couple had ever been turned away. *Fulton*, 141 S. Ct. at 1875-76, 1882. Thus, the *Fulton* Court *did* consider third-party harms, and per our discussion above, it went through a process for determining that the accommodation was permissible—namely, a free-exercise suit by a religious entity that wanted an exemption.

Apart from suggesting that third-party harms just shouldn't matter, State Defendants insist that Mrs. Maddonna—and other third parties—are not burdened *enough* because they are not *completely* barred from access to state services. *See* SCDSS Opp. 32. But that is a made-up legal standard. The Supreme Court has found impermissible third-party harms even for accommodations that just make it more expensive for others to obtain a government benefit. *See Tex. Monthly*, 489 U.S. at 18 n.8; *Caldor*, 472 U.S. at 710. And in addition to being wrong on the law, State Defendants distort the relevant facts: They repeat their assertions that Miracle Hill is the only CPA

that discriminates based on religion, and that prospective foster parents always have the fallback option of working with SCDSS directly. SCDSS Opp. 21, 32. As we have explained, with respect to CPAs that actually serve Mrs. Maddonna's area, a SCDSS foster-care official could identify only three that do *not* discriminate. Barton Tr. 133:21-134:25, ECF No. 132-03; Maddonna Opp. 4-5. And SCDSS itself no longer takes applications from nonkinship applicants. Maddonna Opp. 2. Thus, Mrs. Maddonna's options for access to state foster-care services are far more limited, and far poorer in comparison to those of the favored faith, than State Defendants suggest. And their insistence that third parties are not burdened because they have many options is also undermined by State Defendants' own admission that the "exact number" of CPAs open to families—even if that number were zero— is "not a material fact." SCDSS Opp. 22 n.4, 31 n.6.

II. Federal Defendants' Filings Effectively Confess Judgment Against HHS in Favor of Mrs. Maddonna.

While Federal Defendants argue that Mrs. Maddonna abandoned her claims against HHS, the record before the Court—including this additional evidence offered by HHS itself in its own summary-judgment motion that postdates the administrative record—tells quite a different story:

- In November 2021, HHS withdrew the Conditional Exception Letter, conceding that it was unlawfully issued, and substituted the Notice of Nonenforcement, which permitted the same religious discrimination, expanded to the entire country (ECF No. 91-1).
- Recognizing that the 2016 nondiscrimination provision is a legislative rule, HHS engaged in notice-and-comment rulemaking to amend or repeal it, and *related to that effort* issued a temporary Notice of Nonenforcement pending its promulgation. In 2021, the amended rule was published, meaning that the Notice of Nonenforcement should have expired. (ECF No. 108-01 at 6-7.)
- As a result of litigation, the 2021 rule was vacated based on HHS's failure to account for and respond to significant comments in the rulemaking process. (*Id.*) HHS has not provided any evidence of new notice-and-comment rulemaking—or any related nonenforcement policy—concerning additional efforts to amend or repeal the 2016 legislative rule.

Thus, through their *own* actions, Federal Defendants have taken us beyond the original administrative record and placed HHS's Notice of Nonenforcement, as applied here, at the center of Mrs. Maddonna's claims against them. HHS would have us believe that its discretionary enforcement powers are magically flexible and enduring and solve all problems: The agency relies on them not only as a substitute for an admittedly unlawful religious accommodation but also as a

tool to repeal (or at least completely ignore) a legislative rule that the agency failed to amend through notice-and-comment rulemaking, as the Administrative Procedure Act requires.

When facts proven are different from or in addition to those alleged in the complaint, the plaintiff is still entitled to any relief that is consistent with the theory and type of relief specified in the complaint. *Gilbane Bldg. Co. v. Fed. Rsrv. Bank of Richmond*, 80 F.3d 895, 901 (4th Cir. 1996). Mrs. Maddonna's summary-judgment motion seeks the same relief against HHS, consistent with the theories set out in her Complaint, framed by—and conformed to—Federal Defendants' own evidence.

A. HHS admitted that its Conditional Exception Letter was unlawful.

Although Federal Defendants try to argue that Mrs. Maddonna abandoned her challenge to the Conditional Exception Letter, her summary-judgment motion points out that HHS withdrew it, conceding that it was unlawfully issued. In the withdrawal notice, HHS conceded that when it issued the Conditional Exception Letter, it had failed to apply the undue-burden test properly and had also neglected to consider or account for the burdens and harms imposed on third parties. Withdrawal Notice 5-6, ECF No. 91-01. Thus, the analysis required for an accommodation under the Religious Freedom Restoration Act was absent and the exception was unlawful. Given HSS's admission in withdrawing its Letter, nothing further is necessary from Mrs. Maddonna with respect to her Establishment Clause claim concerning that Letter. Summary judgment in her favor on that claim is established by HHS's own admission.[9]

B. The Notice of Nonenforcement, applied as a substitute for the Conditional Exception Letter, suffers the same flaws: It is arbitrarily overbroad and violates the Establishment Clause.

Mrs. Maddonna's Complaint clearly alleges that the Notice of Nonenforcement grants a blanket, prospective nationwide exemption for religious discrimination in state foster-care programs that receive federal funding. Complaint ¶ 117, ECF No. 1. That exemption is arbitrary

[9] In her summary-judgment motion, Mrs. Maddonna also pointed out that HHS's concession shows why the Governor's Executive Order is likewise an improper exemption under the South Carolina Religious Freedom Act and unlawful under the Establishment Clause. Maddonna Mem. 18-25.

and capricious, violates the Constitution, and requires vacatur under the APA. Federal Defendants made Mrs. Maddonna's concern a reality when, in November 2021, they advised this Court that the Notice of Nonenforcement would be substituted for the withdrawn Conditional Exception Letter and provides the State and its subrecipients of federal funds with the same protections for religious discrimination in the State's foster-care program. Both Mrs. Maddonna's summary-judgment motion and her opposition to Federal Defendants' cross-motion clearly make that point. ECF No. 110-1 at 25-27; ECF No. 131 at 9-12, 15-18.

C. Federal Defendants themselves invited the notice-and-comment claim.

In late 2022, HHS disclosed that its 2021 rule, which was intended to dilute the 2016 rule's nondiscrimination protections, was vacated. ECF No. 108-1 at 6-7. Yet Federal Defendants still insist that, under HHS's unreviewable discretionary enforcement powers, it can continue to ignore the 2016 rule altogether. To be clear: Federal Defendants attempted—by notice-and-comment rulemaking—to amend or repeal the 2016 nondiscrimination rule—itself a product of notice-and-comment rulemaking. Until their efforts at notice-and-comment rulemaking failed, they had always viewed and treated the rule as legislative. Now, having failed to amend or repeal it with notice-and-comment rulemaking, they cast their decision to ignore the 2016 rule as a mere procedure or practice. *Children's Hosp. of the King's Daughters, Inc. v. Azur*, 896 F.3d 615, 620 (4th Cir. 2018), on which Federal Defendant's rely for their about-face, provides no support for use of discretionary nonenforcement to erase a legislative rule.

Finally, even government policies that don't require notice-and-comment rulemaking (for whatever reason) can't just be rescinded without a reasoned explanation. HHS's continued reliance on the same Notice of Nonenforcement related to the failed 2021 rulemaking is particularly suspect: Having just declared that the Conditional Exception Letter was wrong as a matter of law in how it granted the exemption, how could it qualify as a suitably reasoned explanation for the agency to do the same thing using another vehicle—and not explain why the fatal flaw of the Letter wasn't also a fatal flaw of the Notice, which, after all, didn't just do the same thing, but compounded the error by giving the exemption to all CPAs nationwide? And having failed to

amend or repeal the 2016 rule, what reasoned explanation could possibly be given for HHS's continued use of the Notice to avoid abiding by the rule? Absent such explanations, reliance on the Notice is arbitrary and capricious. *Casa de Maryland v. U.S. Dep't of Homeland Sec.*, 924 F.3d 684, 703-04 (4th Cir. 2019).

CONCLUSION

The Governor's Executive Order prospectively permits contracted CPAs to discriminate based on religion when performing government functions with respect to the State's foster-care program and fails to account for the burdens and harms to third parties such as potential foster parents. It cannot be a lawful accommodation under the Religious Freedom Act and clearly violates the Establishment Clause.

Similarly, HHS's attempt to use a blanket, prospective Notice of Nonenforcement of 45 C.F. R. § 75.300 (2016) as both a substitute for its admittedly unlawful Conditional Exception Letter and, later, a way to avoid enforcing the rule's protections against religious discrimination anywhere, against anyone, at any time violates APA. The Notice neither meets the requirements of a RFRA accommodation nor properly serves as a shortcut to repealing a legislative rule.

The Court should grant summary judgment in favor of Mrs. Maddonna.

Greenville, South Carolina
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