

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

AIMEE MADDONNA,

Plaintiff,

v.

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, *et al.*

Defendants.

Civil Docket No. 6:19-cv-448-TMC

PLAINTIFF’S MEMORANDUM IN OPPOSITION TO STATE DEFENDANTS’
MOTIONS TO DISMISS

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Date: April 16, 2019
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NATURE OF THE CASE

Plaintiff Aimee Maddonna, along with her husband and children, wants to serve needy children in the foster-care system, just as her parents did when she was a child. But when Mrs. Maddonna approached Miracle Hill Ministries, a foster-care agency licensed and funded by the State of South Carolina, she and her family were turned away. For the Maddonnas are Catholic; and Miracle Hill offers its government-funded services solely to evangelical Christians. Defendants Governor Henry McMaster and Joan Meacham, the Acting Director of the South Carolina Department of Social Services, do not dispute that Miracle Hill places children in foster homes using government funds under a government-issued license and a government contract. They do not dispute that Miracle Hill refused to serve Mrs. Maddonna because of her faith. Nor do they dispute that Miracle Hill continues to impose religious tests on prospective foster parents. Instead, they argue that they are simply not responsible for the discriminatory provision of services in South Carolina's child-welfare system. They are wrong.

The State, in the persons of Defendants McMaster and Meacham, chooses to carry out important government functions—namely, the care of needy children in the State's foster-care system and the recruitment, selection, licensing, and monitoring of foster-care families—by funding, licensing, and contracting with Miracle Hill. And knowing that Miracle Hill performs these functions in a discriminatory manner, the State continued to license and contract with Miracle Hill as a foster-care agency. More than that, the State took affirmative steps explicitly to authorize Miracle Hill's discrimination. By executive order, Governor McMaster directed DSS to permit Miracle Hill and all other faith-based agencies to continue to discriminate with impunity—in violation of federal and state laws and regulations—and ordered DSS to enshrine this exemption in DSS policy. McMaster then successfully lobbied the federal government for a statewide exemption from federal antidiscrimination protections, thereby ensuring that South Carolina could

continue to receive and use federal funds while providing social services in a discriminatory manner.

By sanctioning Miracle Hill's discrimination, the State has violated the Establishment Clause's mandate that government not privilege one religion over others. It impermissibly (1) funds religious discrimination in the provision of child-placement services; (2) delegates child-placement authority to agencies that employ religious criteria for the purpose of evangelizing foster children; (3) exempts agencies from generally applicable antidiscrimination requirements that impose no substantial burden on the agencies' religious exercise; and (4) imposes harms on innocent third parties, making them bear the cost of favoring the agencies' religious preferences. The State likewise violates the Equal Protection Clause by sanctioning discrimination on the basis of religion in the provision of a public service, and also violates the Fourteenth Amendment's Due Process Clause by burdening Mrs. Maddonna's fundamental right to be free from governmental disfavor of her Catholic faith.

By permitting government-funded agencies to turn away prospective foster parents because of their religion, the State has denied Mrs. Maddonna the opportunity to serve the children in South Carolina's foster-care system in the same manner and to the same extent as members of Miracle Hill's preferred faith. These actions communicate to Mrs. Maddonna that she is not an equal citizen and is not entitled to equal treatment in the community or in the conduct of the State's official business—all because she is Catholic. This the U.S. Constitution cannot and does not countenance. The motions to dismiss should be denied.

CONCISE STATEMENT OF FACTS

A. Foster Care in South Carolina.

South Carolina administers a statewide foster-care system to provide services to children who are in the State's care. The number of children in that system has risen steadily over the last

several years, today numbering approximately 4,500. Compl. ¶¶ 50, 102. But while the number of children in foster care has grown, the number of placements in foster homes has stagnated, resulting in a shortfall in 2018 of some 1,500 homes—a crisis for the children whom the foster-care system is supposed to serve. *Id.* ¶ 103.

The State’s Department of Social Services has chosen to contract with private child-placement agencies to fulfill its legal duty to find appropriate foster families for these children. Compl. ¶ 51. These private agencies are publicly funded and provide a variety of public services (*id.*; S.C. Code § 63-9-30(5); S.C. Code Regs. § 114-4910), which include conducting initial and relicensing investigations of foster homes and making recommendations that DSS uses to determine whether foster-family licenses should be issued, denied, reissued, or revoked. Compl. ¶ 57. The agencies also monitor foster homes for compliance, investigate complaints of wrongdoing, and exercise control over foster children’s time in the system by developing case plans and determining appropriate home placements. Compl. ¶¶ 58–59.

Federal and state laws govern the agencies’ provision of these services. DSS regulations set forth the criteria used in foster-home investigations and licensing. Compl. ¶¶ 57–58, 75(a); S.C. Code Regs. § 114-4980(A)(2). The agencies are also subject to laws and regulations specifically prohibiting discrimination in government-funded programs. For example, the DSS Human Services Policy and Procedure Manual provides that “no individual shall be denied the opportunity to become a foster or adoptive parent on the basis of . . . religion.” Manual § 710, <https://bit.ly/2Pcaagp>; Compl. ¶ 75(d). And the U.S. Department of Health and Human Services prohibits agencies that receive federal funds from engaging in religious discrimination. Compl. ¶ 75(b)–(c); 45 C.F.R. §§ 75.300(c), 87.3(d). Federal and state law permit religiously affiliated organizations to be licensed child-placement agencies that receive public funds for the provision

of child-placement services but require these organizations to comply with the law in the same manner as nonreligious organizations. Compl. ¶ 68.

To serve as child-placement agencies, private entities must be licensed by DSS. Typically, DSS issues one-year licenses to agencies that meet all federal and state requirements (including antidiscrimination requirements) and then monitors the agencies to ensure their continued compliance with the law. Compl. ¶ 52; S.C. Code Regs. § 114-4930(E). If an agency does not comply with licensing requirements, DSS may deny or revoke the agency's license (Compl. ¶ 55; S.C. Code Regs. § 114-4930(G)(1)(d)–(e)); or DSS may grant the agency a temporary license for a probationary period, during which the agency must submit to DSS a written plan for correcting the areas of noncompliance (Compl. ¶ 54; S.C. Code Regs. § 114-4930(F)).

B. Religious Discrimination in the Foster-Care System.

Mrs. Maddonna and her husband and children want to aid needy children in their community. Compl. ¶¶ 21–25. So Ms. Maddonna contacted Miracle Hill, which is one of only three licensed, nongovernmental, nontherapeutic foster-care agencies in Greenville County—where the Maddonnas live—and the largest such agency in the state. *Id.* ¶¶ 25, 28–29, 32. Importantly, Miracle Hill allows for volunteering with children before having them placed in one's home, and it allows entire families, rather than just prospective foster parents, to do so. *Id.* ¶¶ 25, 29, 32. Volunteering is an important first step to fostering because it provides the opportunity to develop relationships, helping ensure that a child and foster family are a good fit. *Id.* ¶ 31–33. Because the Maddonna children have special needs, ensuring a good fit is especially important; it also means that the Maddonnas have particularly valuable experience for serving foster children who themselves have special needs. *Id.* ¶ 33.

Mrs. Maddonna corresponded with Miracle Hill over the course of several weeks, during which she answered questions about her experience with the foster-care system and her family's

ability to volunteer with foster children. *Id.* ¶¶ 35, 37. All seemed well until Miracle Hill asked one last question: Where do the Maddonnas attend church? *Id.* Not suspecting anything amiss, Mrs. Maddonna responded with the name of her Catholic parish. *Id.* It was only then that Mrs. Maddonna learned, in no uncertain terms, that Miracle Hill disapproves and categorically excludes Catholics as foster parents or volunteer mentors. *Id.* ¶¶ 38–39.

Specifically, Miracle Hill’s Director of Development informed Mrs. Maddonna that the agency accepts volunteers and prospective foster parents only if they are Christians attending a particular type of Protestant church. *Id.* ¶ 40. Mrs. Maddonna thus learned that simply because she and her family are Catholic, they are ineligible to volunteer with, be trained by, get a foster-family license through, or receive foster-care placements from Miracle Hill. *Id.* ¶ 41. A Miracle Hill representative underscored this point by expressing disappointment that the Maddonnas had failed the religious test because otherwise the Maddonnas were a great fit for the volunteer program. *See id.* ¶ 39. Hence, because of Miracle Hill’s religious requirements, the Maddonnas were prevented from becoming a foster family or from volunteering with foster children whom the State had assigned to Miracle Hill. *Id.* ¶ 42.

C. The State Further Authorizes Religious Discrimination.

By no later than spring 2017, DSS knew that Miracle Hill discriminates against potential volunteers and foster parents based on religion. *Id.* ¶ 46. Specifically, when reviewing Miracle Hill’s license-renewal application, DSS discovered that Miracle Hill’s website describes the agency’s exclusive recruitment of evangelical Christians; that Miracle Hill’s application to be a foster parent requests information about applicants’ religious beliefs and practices; and that Miracle Hill’s manual directs staff to obtain information about prospective volunteers’ and foster parents’ religion before an applicant may be accepted. *Id.* ¶¶ 69–71. Miracle Hill requires that every prospective foster parent (1) “be a born-again believer in the Lord Jesus Christ as expressed

by a personal testimony and Christian conduct”; (2) “be in agreement without reservation with the doctrinal statement of Miracle Hill Ministries”; (3) “be an active participant in, and in good standing with, a Protestant church”; (4) “have a genuine concern for the spiritual welfare of children entrusted to their care”; and (5) “have a lifestyle that is free of sexual sin (to include pornographic materials, homosexuality, and extramarital relationships).” *See* Compl. ¶ 74. And Miracle Hill confirmed to DSS that it uses the religious information that it gathers to exclude individuals whose religious beliefs and practices do not conform with its own. *Id.* ¶ 73. Having determined that Miracle Hill was violating federal and state antidiscrimination laws and regulations, DSS issued Miracle Hill a temporary license and directed it, in accordance with DSS policy, to provide a written plan for compliance. *Id.* ¶ 79–80.

But Miracle Hill never provided the required plan. *See id.* ¶ 81. Rather than requiring it to come into compliance with the law, however, the State orchestrated a series of actions to allow Miracle Hill to continue operating as a government-funded, government-licensed child-placement agency that could continue to discriminate against prospective volunteers and foster parents on the basis of religion. First, Defendant McMaster successfully lobbied the U.S. Department of Health and Human Services to obtain a statewide exemption from HHS’s antidiscrimination requirements so that all faith-based foster-care agencies in South Carolina could discriminate in the performance of governmental services and yet still receive federal funds to perform those services. *Id.* ¶¶ 83–88, 92–93. And second, McMaster issued Executive Order 2018-12, directing DSS (and hence Defendant Meacham) to continue funding and licensing child-placement agencies that discriminate on the basis of religion while providing state services. *Id.* ¶¶ 89–90. (Relatedly, the South Carolina legislature ratified a budget proviso directing DSS to use state funds to enact rules and regulations protecting faith-based agencies from any adverse actions, such as defunding or de-licensing, that may result from discriminatory provision of services. *Id.* ¶ 91.) In other words, the

State isn't just aware of Miracle Hill's discrimination but has expressly and intentionally authorized it.

As a direct result of the State's actions, prospective volunteers and foster parents like the Maddonnas are turned away from a governmental program, to their detriment, solely because they practice a disfavored faith. Thus, the State gravely harms the very children whom DSS is duty-bound to protect. By authorizing Miracle Hill to exclude foster parents and volunteers who are not evangelical Christians, the State has artificially reduced the already grossly inadequate number of homes into which needy foster children may be placed. *See id.* ¶¶ 94–99, 101–03. And by assigning to Miracle Hill children of all religious backgrounds while allowing Miracle Hill to accept only evangelical Christians as foster parents, the State has effectively denied many children the opportunity to be raised in accordance with their own religious beliefs, or consistent with the religious requests of their biological parents, as South Carolina law requires. *Id.* ¶¶ 108–12. The State has thus expressly licensed taxpayer-funded religious discrimination in the performance of a state program while deepening South Carolina's foster-care crisis and depriving vulnerable children of safe, affirming, loving homes.

ARGUMENT

On motions to dismiss for failure to state a claim, the Court accepts as true the well-pleaded facts in the Complaint and view the facts in the light most favorable to the plaintiff, drawing all reasonable inferences in her favor. *See, e.g., Lucero v. Early*, 873 F.3d 466, 469 (4th Cir. 2017); *U.S. ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 136 (4th Cir. 2014). A complaint need only “contain sufficient factual matter. . . to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). And a 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction may be granted “only if the material jurisdictional facts are not in dispute and the moving party is

entitled to prevail as a matter of law.” *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). “At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we ‘presum[e] that general allegations embrace those specific facts that are necessary to support the claim.’” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (alteration in original) (quoting *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 889 (1990)). The Complaint meets these standards.

I. MRS. MADDONNA HAS PROPERLY PLEADED STANDING TO CHALLENGE THE STATE’S FUNDING, LICENSING, AND EXPLICIT AUTHORIZATION OF RELIGIOUS DISCRIMINATION AGAINST HER IN THE PROVISION OF GOVERNMENTAL SERVICES.

To establish standing, a plaintiff need allege only (1) an “injury in fact” that is (2) “fairly . . . trace[able]” to defendants’ actions and is (3) “redress[able] by a favorable decision” of the court. *Lujan*, 504 U.S. at 560–61. Mrs. Maddonna has alleged that she was injured by Miracle Hill’s religious discrimination against her in the provision of a public service, that the injury is fairly traceable to the State because it knowingly funded, licensed, and authorized the discrimination, and that the injury is redressable by an order prohibiting the State from contracting with entities that use public funds to provide public services on a discriminatory basis. The State’s attempts to distance itself from the religious discrimination perpetrated against Mrs. Maddonna cannot be squared with the facts pleaded in the Complaint.

A. Injury-in-Fact.

Mrs. Maddonna has pleaded that she and her family sought to volunteer through Miracle Hill in the hope of fostering a child. *See* Compl. ¶¶ 21–25, 31–35. Miracle Hill, however, refused and continues to refuse to allow her, her family, and all others who share her Catholic faith to partake of the governmental program and services that Miracle Hill provides. *Id.* ¶¶ 37–42.

The State itself concluded that Miracle Hill was violating federal and state antidiscrimination requirements and thus, in 2018, issued it only a temporary license, directing

Miracle Hill to file a written plan of compliance that should have protected the Maddonnas' legal right not to be turned away on religious grounds from a government-funded foster-care program. But the State then interrupted the normal license-renewal process. The governor lobbied for an exemption from federal antidiscrimination requirements and issued an exemption from state requirements, and the State issued Miracle Hill a regular license renewal. By doing so, the State enshrined with the force of law the Maddonnas' religion-based exclusion from the State's child-placement program, violating Mrs. Maddonna's constitutional rights.

These allegations suffice to show that Mrs. Maddonna has suffered tangible, cognizable stigmatic injuries. First, by contracting with private agencies that refuse to provide services to members of other faiths, the State has erected and maintained a religious barrier to Mrs. Maddonna's ability to become a foster parent. For Establishment Clause claims, Mrs. Maddonna's personal contact with this government-sponsored religious disfavor is a cognizable injury in fact. *See, e.g., Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 258–59 (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 Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997)), *vacated on other grounds*, 138 S. Ct. 2710 (2018) (Mem). And for equal-protection claims, the injury-in-fact is “the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.” *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (“When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.”); *Bostic v. Schaefer*, 760 F.3d 352, 372 (4th Cir. 2014) (injury-in-fact requirement met by same-sex couple who could not marry in Virginia even

though they could marry in California). Mrs. Maddonna has alleged a sufficient barrier to her access to and participation in the State’s foster-care services to constitute an injury-in-fact.

Second, by authorizing Miracle Hill to disfavor and exclude Mrs. Maddonna based on religion, the State has subjected her to the stigma of discrimination—also an 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.”); *IRAP*, 883 F.3d at 259–60, 262 (Muslim plaintiffs had standing to challenge travel ban “as members of the disfavored religion” who were suffering “feelings of marginalization and exclusion”), *vacated on other grounds*, 138 S. Ct. 2710 (2018) (Mem); *Bostic*, 760 F.3d at 372 (holding that same-sex couples had standing to bring equal-protection and substantive-due-process challenges to Virginia’s marriage laws based on stigma after being personally subjected to discriminatory treatment); *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2007) (recognizing standing to raise Establishment Clause challenge based on stigmatic harm inflicted by state action).

The State contends that Mrs. Maddonna experienced no cognizable injury because “there is no constitutionally protected right to become a foster parent or mentor by means of volunteering with a [child-placement agency] of one’s own choosing” and no right to force child-placement agencies to associate with and perform services for any given individual. Doc. 12-1 at 10–11. But Mrs. Maddonna does not argue that she has an unqualified right to become a foster parent or otherwise to associate with or obtain services from Miracle Hill. Rather, she has the First and Fourteenth Amendment rights not to be discriminated against on the basis of religion when seeking service from or participation in a public program.¹

¹ Mrs. Maddonna does not seek to represent, or premise her standing on, the injuries that the State has inflicted on foster children, their biological parents, or lesbian, gay, bisexual, or transgender youths. *Cf.* Doc. 12-1, at 11–12 n.6. Rather, the identified injuries to foster children

The State also suggests that Mrs. Maddonna’s injury is “speculative” because she does not allege that she applied for a foster-parent license from Miracle Hill or that her application to volunteer with Miracle Hill was formally denied. Doc. 12-1 at 11. That argument is doubly incorrect. Mrs. Maddonna corresponded with Miracle Hill for weeks when applying to be a volunteer mentor—a crucial step for the Maddonnas’ becoming a foster family. *See* Compl. ¶¶ 35–42. When she disclosed that her family is Catholic, Miracle Hill flatly rejected her, explaining that because of their faith, the Maddonnas are categorically ineligible to be volunteer mentors under an ongoing discriminatory policy that Miracle Hill describes on its website and has reported to DSS. *Id.* ¶¶ 37–40, 69–73. Miracle Hill continues its discriminatory policy, *id.* ¶ 7, a fact Mrs. Maddonna *also* alleged that she recently contacted Miracle Hill to confirm, *id.* ¶ 49. That Mrs. Maddonna did not also submit a futile foster-parent application after having been expressly rejected as a volunteer mentor and potential foster parent is immaterial; her injuries are actual, concrete, ongoing and not in the least speculative.²

B. Fair Traceability.

Mrs. Maddonna has alleged that South Carolina farms out child-placement services to

and to the rights of their biological parents demonstrate the nature and extent of the unconstitutional scheme here and underscore why there is no legitimate—let alone sufficient—governmental interest justifying the State’s conduct, which is contrary to the children’s best interests.

² The cases that the State cites on speculative harm have no bearing here. In *Moose Lodge No. 107 v. Irvis*, the Supreme Court held that the plaintiff had standing to challenge race-based denials of service at a private club but not to challenge the club’s discriminatory membership policy, because he had been denied service but had not applied for membership. 407 U.S. 163, 166–67 (1972). Mrs. Maddonna squarely challenges her ongoing exclusion based on religion after having been excluded under a policy that remains in effect and continues to apply to her. As for *Southern Blasting Services, Inc. v. Wilkes County*, the plaintiffs lacked standing for a procedural-due-process challenge to a permit-application process because they had never used that process or been told by the permitting authority that they would be denied if they did apply. 288 F.3d 584, 595 (4th Cir. 2002). Mrs. Maddonna, by contrast, was affirmatively, directly, and personally informed by Miracle Hill that her kind is not welcome and would not be served.

private agencies like Miracle Hill. *Id.* ¶¶ 27, 45. The State licenses, monitors, and funds these private agencies to perform this governmental service. *Id.* When Governor McMaster learned that Miracle Hill was using religious criteria to discriminate against prospective foster parents, he ordered that Miracle Hill and agencies like it be permitted to impose these religious tests—without risking loss of their state contracts or any other repercussions, all law to the contrary notwithstanding. And he successfully lobbied the federal government for a statewide exemption from federal antidiscrimination requirements so that Miracle Hill and entities like it could continue to discriminate in the operation of a federally funded program and the provision of federally funded social services. *Id.* ¶¶ 82–93. Defendant Meacham and DSS then implemented these exemptions. Hence, not only did the State not act to halt or remedy Miracle Hill’s discriminatory operation of a governmental program, but it took affirmative steps to ensure that the discrimination could continue unabated. Federal standing doctrine’s traceability requirement imposes a “but for” causal connection between the religious discrimination that Mrs. Maddonna experienced and the State’s actions. *Duke Power Co. v. Carolina Env’tl. Study Grp., Inc.*, 438 U.S. 59, 74–75 (1978). These allegations are more than sufficient to show that the harms to Mrs. Maddonna are fairly traceable to the State.

The State nevertheless contends that the independent actions by Miracle Hill break the causal connection to Mrs. Maddonna’s injury. Doc. 12-1 at 12–13. But fair traceability does not require that a challenged official action “be the sole or even immediate cause of the injury.” *Sierra Club v. U.S. Dep’t of Interior*, 899 F.3d 260, 284 (4th Cir. 2018) (citing *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997)) (rejecting government’s argument that it was not directly responsible for pathway of privately built pipeline because, but for agency’s grant of right-of-way, pipeline “could not have been authorized in its currently proposed form”). “To establish traceability, [the plaintiff] must show that the challenged action is ‘in part responsible for frustrating’” a plaintiff’s exercise

of her rights. *Id.* at 283 (quoting *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 316 (4th Cir. 2013)). Defendant’s actions need not be “the very last step in the chain of causation.” *Bennett*, 520 U.S. at 169.

Miracle Hill provides child-placement services on behalf of the State by dint of the State’s decisions to license, authorize, and fund it. And it is because of McMaster’s and DSS’s actions that Miracle Hill has been exempted from federal and state antidiscrimination requirements, thus allowing Miracle Hill to continue to provide governmental services in a discriminatory fashion, to Mrs. Maddonna’s detriment. Indeed, there is “a substantial likelihood” that Miracle Hill, as it currently operates, would not have had its license renewed but for the intervention of the state defendants. *See Duke Power*, 438 U.S. at 74–77. The State has thus “enabled and virtually ensured” the harm that Mrs. Maddonna experienced, which more than establishes fair traceability. *Sierra Club*, 499 F.3d at 283.³

The State further contends that Mrs. Maddonna’s injuries are “self-inflicted,” and hence not fairly traceable to them, because she could have volunteered or fostered through other private agencies or through DSS directly. Doc. 12-1 at 14. But Mrs. Maddonna need not allege an absolute bar to fostering in order to establish standing. As already explained, it is enough to allege that,

³ The State mistakenly relies on *Doe v. Obama*, 631 F.3d 157 (4th Cir. 2011), and *Allen v. Wright*, 468 U.S. 737 (1984). In *Doe*, a putative class of frozen embryos lacked standing to challenge an executive order removing certain limitations on stem-cell research because it was the decisions of the embryos’ biological parents who donated the embryos for research—rather than the executive order—that caused the embryos’ alleged injury. 631 F.3d at 160–61. And in *Allen*, the plaintiffs’ reduced ability to attend an integrated school was not fairly traceable to the government’s failure to withhold tax-exempt status from discriminatory private schools because it was purely speculative whether a loss of tax-exempt status would have motivated the schools to amend their enrollment policies or parents to send their children to integrated public schools. 468 U.S. at 758. Here, by contrast, the State controls whether it will license, contract with, and fund private agencies to provide child-placement services, and whether it will assign foster children to those agencies for placement. Hence, but for state action, Miracle Hill could neither discriminate in foster-care-placement activities nor be involved in foster-care placements at all.

because of a defendant’s actions, she was denied access to governmental programs or services on the same terms as persons of a different religion. The possibility that some other government-funded agency might allow Catholics to be foster parents does nothing to temper the stigmatic and dignitary harms of being turned away by Miracle Hill.

C. Redressability.

Finally, this Court has ample means to remedy the constitutional injuries here through the requested declaratory and injunctive relief. Redressability is satisfied if “it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable [judicial] decision.” *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). A plaintiff need not establish that a favorable decision will relieve every injury suffered. *See Massachusetts v. EPA*, 549 U.S. 497, 525–26 (2007); *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982). It is enough that the relief sought would “abat[e] current violations and prevent[] future ones” (*Friends of the Earth*, 528 U.S. at 187) or that an injury could be “reduced to some extent” by the Court (*Massachusetts*, 549 U.S. at 526).⁴

The State argues that Mrs. Maddonna cannot satisfy the redressability requirement because if the Court enjoins the State from licensing, contracting with, and funding entities that would provide child-placement services in a discriminatory manner, it is not certain that Miracle Hill or others like it would then accept Catholics rather than discontinuing as child-placement agencies. Doc. 12-1 at 15. But that does not make redressability “mere speculation” (*id.*). For Mrs. Maddonna is not seeking an order requiring Miracle Hill (or anyone else) to accept her as a

⁴ To the extent that the State argues that redressability cannot be shown unless the Court is “‘sure’ that the relief sought would remedy the alleged injury” (Doc. 12-1 at 15 (quoting *Frank Krasner Enters., Ltd. v. Montgomery Cty.*, 401 F.3d 230, 234 (4th Cir. 2005))), it is mistaken. The quoted language comes from the *Frank Krasner* court’s analysis of traceability, not redressability. *See* 401 F.3d at 234. And it does not set a “must be sure” standard for *any* part of the standing analysis. *See id.*

volunteer or foster parent. The injury here is discrimination on the basis of religion in the provision of state-authorized, state-funded foster-care services; and the remedy sought is that the State be enjoined from licensing, authorizing, and enabling state-funded child-placement agencies to engage in that discrimination in the conduct of governmental programs. If the injunction is granted, every private entity that serves as a licensed child-placement agency will be required to provide government-funded services in a nondiscriminatory fashion. Whether Miracle Hill then elects to operate a government-funded program when it must do so on those terms, or prefers instead to provide private charitable services on a religiously restrictive basis, Mrs. Maddonna will no longer be turned away from participation in government-funded programs solely because she is Catholic—thus fully redressing her constitutional injuries.⁵

II. MRS. MADDONNA HAS STATED A CLAIM UNDER THE ESTABLISHMENT CLAUSE.

“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson*, 456 U.S. at 244. Government must remain “neutral[] between religion and religion, and between religion and nonreligion.” *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). Hence, government “may not place its prestige, coercive authority, or resources behind a single

⁵ Because Mrs. Maddonna alleges that she was harmed by the State’s financing of foster-care services that employ religious criteria when determining who may participate (Compl. ¶ 14), the State misconstrues her to be asserting taxpayer standing. Mrs. Maddonna’s standing here is direct: She alleges that she was harmed by personally experiencing government-funded policies and practices that disfavor and disadvantage her because she is Catholic. Standing to challenge the imposition of regulatory requirements that are more onerous for certain faiths than others is direct for those who are affected by the requirements. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S.125, 145 (2011) (“[I]f a law or practice, including a tax credit, disadvantages a particular religious group or a particular nonreligious group, the disadvantaged party would not have to rely on *Flast* to obtain redress for a resulting injury.”); *see also, e.g., Larson*, 456 U.S. at 239–41. Having her tax dollars used to fund religious discrimination against her is a cognizable direct injury to Mrs. Maddonna, regardless of whether it might also be a taxpayer injury.

religious faith or behind religious belief in general.” *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989) (plurality opinion).

A. The Establishment Clause tests.

The Supreme Court has imposed multiple tests to determine the metes and bounds of the Establishment Clause—including the *Lemon* test, the endorsement test, the coercion test, and the *Larson* test. Failure to satisfy any one is an Establishment Clause violation. *See, e.g., Mellen v. Bunting*, 327 F.3d 355, 370–71 (4th Cir. 2003).

1. *Lemon*: Governmental action violates the Establishment Clause if (1) its primary purpose is religious rather than secular; (2) it has the principal effect of advancing or inhibiting religion; or (3) it excessively entangles government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); *see also Mellen*, 327 F.3d at 372–75. The test is disjunctive: Failure to satisfy any one part is a constitutional violation. *See Koenick v. Felton*, 190 F.3d 259, 265 (4th Cir. 1999).

Purpose is determined from the standpoint of an “objective observer” who is familiar with the facts and circumstances surrounding the official action. *McCreary Cty.*, 545 U.S. at 862–64. The secular purpose must “be genuine, not a sham, and not merely secondary to a religious objective.” *Id.* at 864. The pertinent question is not whether the state has “any” secular purpose, but whether there is an actual secular purpose that is the “preeminent” or “primary” one. *Id.* at 864, 865 n.13 (quoting *Edwards v. Aguillard*, 482 U.S. 578, 590, 594 (1987)).

Effect is determined “irrespective of government’s actual purpose,” by considering whether an objective observer aware of all the facts and circumstances would perceive that “the principal effect of [the challenged] government action . . . suggest[s] government preference for a particular religious view or for religion in general.” *Mellen*, 327 F.3d at 374 (internal quotation marks omitted).

Finally, excessive entanglement occurs when, for example, the state “delegate[s] a governmental power to religious institutions” such that religious tenets may be applied in exercising governmental authority. *See Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 123, 125–26 (1982); *accord Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 696–97 (1994).

2. Endorsement: In this Circuit, the endorsement test is a framework for determining impermissible religious effect. *Wood v. Arnold*, 915 F.3d 308, 316 (4th Cir. 2019). The test “asks whether a reasonable, informed observer would conclude that government . . . has endorsed a particular religion or religion generally.” *Id.* Governmental action impermissibly endorses religion if it sends the message to “nonadherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders.’” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)).

3. Coercion: The bare-minimum guarantee of the Establishment Clause is “that government may not coerce anyone to support or participate in religion or its exercise.” *Lee v. Weisman*, 505 U.S. 577, 587 (1992). “The type of coercion that violates the Establishment Clause need not involve . . . the forcible subjection of a person to religious exercises or the conditioning of relief from punishment on attendance at church services.” *DeStefano v. Emergency Hous. Grp., Inc.*, 247 F.3d 397, 412 (2d Cir. 2001). Rather, “subtle coercive pressure” is sufficient, especially when exerted against children. *See Lee*, 505 U.S. at 592. For government and those whom it funds “may no more use social pressure to enforce orthodoxy than [they] may use more direct means.” *Id.* at 594.

4. *Larson*: Because “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another,” denominational preferences

are subject to strict scrutiny under *Larson v. Valente*. 456 U.S. at 244, 246. They are presumptively invalid and cannot stand unless the state conclusively establishes that it has a compelling governmental interest in preferring or disfavoring a faith or denomination, and that its actions are narrowly tailored to serve that compelling interest.

B. Mrs. Maddonna has adequately alleged Establishment Clause violations.

Under every test, Mrs. Maddonna has adequately alleged that the State has violated the Establishment Clause. Because the tests and pertinent facts are overlapping, we analyze them together.

1. The State impermissibly acted with a religious purpose and effect.

a. The State actively facilitated Miracle Hill’s religious discrimination in providing foster-care services by funding that discrimination and by clearing the statutory and regulatory hurdles that bar it. Notably, McMaster issued an executive order directing DSS not to enforce controlling state antidiscrimination law when contracting for foster-care services. He also successfully petitioned the federal government for a statewide exemption from federal antidiscrimination regulations. And DSS (i.e., Defendant Meacham) implemented the exemptions that McMaster orchestrated, turning a blind eye to Miracle Hill’s discriminatory practices.

b. The State contends that its secular purpose is to have “as many qualified foster and adoption agencies and homes as possible” (Doc. 12-1 at 30) in order, presumably, to maximize the State’s ability to have all foster children placed in suitable homes. But if the State’s principal aim had genuinely been to increase the number of qualified, licensed foster homes, it would not have knowingly and enthusiastically turned over the recruitment, investigation, and selection of foster parents to an agency that turns away qualified families—like the Maddonnas—because they profess a disfavored faith. That action diminishes the number of available foster families and hence reduces foster-care placements—a result that makes no sense in the face of South Carolina’s

dramatic foster-family shortage, except as a way to protect, defend, and promote religious discrimination in the foster-care program. A secular purpose that is not.

c. For similar reasons, the State’s actions lack a predominantly secular effect and instead impermissibly endorse religion by communicating that the State privileges Miracle Hill’s religious beliefs over Mrs. Maddonna’s and all others—not to mention over the best interests of the children for whom the State is obligated to find suitable homes. When Miracle Hill is licensed and specifically authorized to turn away prospective volunteers and foster parents because of their religious beliefs, the State sends the unambiguous message that those who do not subscribe to Miracle Hill’s religious views are outsiders whom the State does not deem deserving of equal treatment or equal opportunity to participate in a state-funded program. Far from viewing it as a “good faith effort to generate the greatest possible number of qualified foster and adoptive homes” (Doc. 12-1 at 31), the reasonable observer would recognize this system for what it is: state-sanctioned, state-funded religious discrimination that divides the citizenry into the religiously favored—like Miracle Hill—who are entitled to the full panoply of governmental services, and the disfavored—like Mrs. Maddonna—who are not.

2. *The State impermissibly funds and supports private foster-care agencies’ discriminatory practices.*

The Establishment Clause also requires that governmental benefits be allocated “on the basis of neutral, secular criteria,” and that the recipients of those benefits not be defined “by reference to religion.” *Agostini v. Felton*, 521 U.S. 203, 231, 234 (1997). Funding or providing support to institutions that use public money “for religious purposes” or “to advance . . . religious objectives” violates the Establishment Clause. *Mitchell v. Helms*, 530 U.S. 793, 844, 857 (2000) (controlling opinion of O’Connor, J.); see *Columbia Union Coll. v. Oliver*, 254 F.3d 496, 504 & n.1 (4th Cir. 2001) (recognizing Justice O’Connor’s *Mitchell* concurrence as controlling, and holding that “actual diversion of government aid to religious purposes is prohibited”). Thus, the

Establishment Clause prohibits private entities that receive governmental funding from discriminating based on religious criteria when determining whom they will serve. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589, 614–15, 621 (1988); *Bradfield v. Roberts*, 175 U.S. 291, 298–99 (1899).

Here, the State licenses, funds, authorizes, and supports Miracle Hill in its use of public money to fund and advance sectarian religious objectives because Miracle Hill offers its government-funded services solely to evangelical Christians.

Though the State insists that courts have long upheld governmental partnerships with faith-based organizations that provide social services (*see* Doc. 12-1 at 28–29), this case is not about whether South Carolina violates the Establishment Clause by contracting with faith-based entities. Rather, it is about whether the State violates the Establishment Clause by contracting with entities that use the State’s imprimatur and taxpayer dollars to discriminate in the provision of government-funded social services. And the State points to no case in which a court has upheld governmental funding that is put to discriminatory religious uses. *Cf. id.* at 28–29. The Constitution straightforwardly mandates that government cannot and must not fund religious discrimination—not directly, and not through an intermediary that delivers a government-funded service. *See, e.g., Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 425 (8th Cir. 2007) (prison program requiring participants to meet religious test to enroll held unconstitutional); *see also Bowen*, 487 U.S. at 620–21 (remanding for district court to consider whether grantees were “us[ing] materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith”); *Mitchell*, 530 U.S. at 840 (controlling opinion of O’Connor, J) (“[A]ctual diversion of secular government aid to religious indoctrination . . . is constitutionally impermissible.”).

3. *The State impermissibly delegates its child-placement authority to religious institutions that employ religious criteria in the exercise of that authority.*

The Establishment Clause further prohibits, as excessive entanglement, “delegating a governmental power to religious institutions” that act in furtherance of or infuse religious tenets into the exercise of that power. *See Larkin*, 459 U.S. at 123; *accord Kiryas Joel*, 512 U.S. at 696–97 (“delegating important, discretionary governmental powers to religious bodies . . . impermissibly entangl[es] government and religion” (internal quotation marks omitted)). In *Larkin*, for example, the Supreme Court held that a Massachusetts law that granted churches the right to veto applications for liquor licenses impermissibly “enmesh[ed] churches in the exercise of substantial governmental powers contrary to our consistent interpretation of the Establishment Clause.” *Id.* at 126. Because the delegated power “could be employed for explicitly religious goals [by], for example, favoring liquor licenses for members of that congregation or adherents of that faith” (*id.* at 125), and because Massachusetts failed to ensure that the power would “be used exclusively for secular, neutral, and nonideological purposes,” the challenged statute could not stand (*id.* (quoting *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 780 (1973))).

Here, the State has delegated to private child-placement agencies the authority to carry out the State’s duty to care for children in foster care. *See* Compl. ¶¶ 51–59. The private agencies find potential foster parents, investigate them, and work with DSS to license them and to place children in the homes. *See id.* And with the State’s blessing and express authorization, Miracle Hill exercises this authority in a manner that is not “secular, neutral, and nonideological,” but instead is “for [the] explicitly religious goals” of providing public services only to potential foster parents who share its faith and will proselytize the religious beliefs and exercises that it favors. Though as a private religious organization engaging in private charitable works Miracle Hill is free to serve members of its own faith and to use its charitable activities to advance that faith, the State cannot

constitutionally permit, much less affirmatively authorize, Miracle Hill to operate a governmental program in that fashion.

4. *The State impermissibly grants religious exemptions that burden innocent third parties like Mrs. Maddonna, and that do not lift substantial government-imposed burdens on religious exercise.*

Though government may in some circumstances accommodate religious institutions by exempting them from generally applicable legal requirements, “accommodation is not a principle without limits.” *Kiryas Joel*, 512 U.S. at 706. To be constitutional, religious accommodations must satisfy two requirements: (1) they must lift substantial, government-imposed burdens on the exercise of religion; and (2) they must not impose undue burdens on third parties. *Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 613 n.59 (1989) (quoting *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 348 (1987) (O’Connor, J., concurring)); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985). For if the state has not imposed a substantial burden on religious exercise to begin with, an exemption from a generally applicable law is an unconstitutional religious preference. *Texas Monthly*, 489 U.S. at 15 (plurality opinion) (sales-tax exemption for religious periodicals held impermissible); *Caldor*, 472 U.S. 703 at 709–10 (statute granting Sabbath observers absolute right not to work on their Sabbath, without extending similar right to nonreligious employees, held impermissible). And if in purporting to accommodate some people’s religious exercise the state imposes costs or burdens on others, it unconstitutionally favors the religion of those being benefited over the religious beliefs, rights, and interests of nonbeneficiaries. *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005); *Texas Monthly*, 489 U.S. at 15, 18 n.8 (plurality opinion). Neither requirement is met here.

- a. Exempting child-placement agencies, which contract with the State to provide governmental services, from adhering to generally applicable nondiscrimination laws does not

alleviate an “exceptional government-created burden[] on private religious exercise” (*Cutter*, 544 U.S. at 720), because nondiscrimination requirements impose no such burden.

Whether religious exercise is substantially burdened by a religiously neutral, generally applicable law (such as federal and state antidiscrimination requirements) is a legal question decided by the courts. *See Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011). Thus, whether or not conducting a governmental program under contract with South Carolina and funded by the state and federal governments could constitute Miracle Hill’s religious exercise, which we do not concede, it would be up to this Court to determine whether that exercise was substantially burdened. Here, it is not.

It is insufficient as a matter of law for Miracle Hill merely to be acting on a religious motivation. *See Allegheny*, 492 U.S. at 613 n.59. Religious exercise is not substantially burdened by neutral, generally applicable legal requirements (such as the federal and state nondiscrimination requirements here) unless those requirements forbid a regulated entity “to engage in conduct proscribed by [its] religious beliefs, [or . . . force[it] to abstain from any action which [its] religion mandates that [it] take.” *Goodall ex rel. Goodall v. Stafford Cty. Sch. Bd.*, 60 F.3d 168, 172–73 (4th Cir. 1995); *accord, e.g., Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001).

Though Miracle Hill may choose to provide services because of its religious beliefs, there is no basis here to conclude that it is *required* by its faith to contract with the state to provide child-placement services. Rather, that is just “one of a multitude of means” by which Miracle Hill might (and does) engage in its ministry. *See Henderson*, 253 F.3d at 16–17 (ban on vending on National Mall did not substantially burden religious exercise of plaintiffs who sought to sell T-shirts with religious messages, in part because ban was “at most a restriction on one of a multitude of means” of fulfilling their mission “to spread the gospel by ‘all available means’”); *cf. How We Help, MIRACLE HILL MINISTRIES*, <https://bit.ly/2UngKkN> (identifying other programs in which Miracle

Hill engages). Hence, the exemptions from the nondiscrimination requirements here cannot “reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion” but instead impermissibly “convey a message of endorsement to slighted members of the community” (*Texas Monthly*, 489 U.S. at 15 (plurality opinion) (internal quotation marks omitted)), thus amounting to an unconstitutional governmental preference for Miracle Hill’s religion.

Relatedly, while Miracle Hill may be entitled to limit itself to serving only members of its own faith when performing privately funded charitable activities, “the fact that a person has a constitutional right . . . does not necessarily impose upon the government an obligation to subsidize that right.” *Goodall*, 60 F.3d at 172. “[I]f a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient’s exercise of its First Amendment rights.” *Agency for Int’l Dev. v. Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214 (2013). Not having one’s religious mission funded with taxpayer dollars as it carries out a governmental program is, at most, “a relatively minor burden” (*Locke v. Davey*, 540 U.S. 712, 725 (2004)), if it is any burden at all. Hence, Miracle Hill and others like it are ineligible for a religious accommodation here.

b. The Establishment Clause also bars religious exemptions from neutral, generally applicable laws if the exemptions would shift costs, harms, or other burdens on to nonbeneficiaries. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693, 729 n.37 (2014) (“Nor do we hold . . . that . . . corporations have free rein to take steps that impose ‘disadvantages . . . on others’ or that require ‘the general public [to] pick up the tab.’”); *Cutter*, 544 U.S. at 722. Thus, in *Caldor*, the Supreme Court invalidated a religious accommodation for employees who are Sabbath observers, in part because it imposed “substantial economic burdens” on employers and “significant burdens on other employees.” 472 U.S. at 710. And in *Texas Monthly*, the Supreme

Court invalidated a sales-tax exemption for religious periodicals because it “burden[ed] nonbeneficiaries by increasing their tax bills by whatever amount [was] needed to offset the benefit bestowed on subscribers to religious publications.” 489 U.S. at 18 n.8 (plurality opinion). *See generally Kiryas Joel*, 512 U.S. at 706–07 (limitations on religious exemptions are necessary to honor “neutrality as among religions”).

Here, the State permits and affirmatively enables Miracle Hill to discriminate against non-evangelical Christians when providing child-placement services, to the detriment of prospective foster parents of all other faiths, including Mrs. Maddonna. Allowing Miracle Hill to turn away Catholics, Jews, Muslims, atheists, and others of whom Miracle Hill does not approve, impermissibly harms would-be foster parents who are of the “wrong religion” because it prevents them from participating in a governmental program and being considered for foster-care licenses on the same footing as members of the religion to which the State has afforded preferred status.

The harms to children in the foster-care system are even more devastating. With so critical a shortage of foster parents in South Carolina, every otherwise-qualified foster family that is turned away means one less home—one less loving family—for children in need. And even for those children who do get placed, the exclusion of foster parents based on religion means that the children who are not themselves of the faith practiced and preferred by an entity like Miracle Hill are more likely to be put with a family who will not raise them consistent with the religious beliefs of the children and their biological parents, contrary to South Carolina law (*see* S.C. Code Regs. § 114-550(H)(11)).

5. *The State impermissibly authorizes the use of its program and resources for religious coercion and proselytization.*

Because the Establishment Clause bars government from “coerc[ing] anyone to support or participate in religion or its exercise,” it also bars the state from funding private institutions that use those funds to “coerce worship or prayer.” *DeStefano*, 247 F.3d at 411–12 (internal quotation

marks omitted). “What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly.” *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77–78 (1990). For “a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.” *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (internal quotation marks omitted).

Here, Miracle Hill not only rejects potential foster parents for not being evangelical Christians, but it expressly requires all foster parents with whom it does work—i.e., those whom it deems religiously acceptable—to promote Miracle Hill’s favored religious views to the children placed with them. *See, e.g.*, Compl. ¶ 74. As the State notes, faith-based child-placement agencies like Miracle Hill may see the provision of foster-care services “as a religious ministry, and . . . view the upbringing of children and care of orphans as religious duties.” Doc. 12-1 at 3. That is not the problem. It is entirely permissible, and laudable, to devote oneself to caring for needy children, whether for religious reasons or otherwise. But a governmental program must not be used to promote, proselytize, or coerce religion or religious activities. Hence, Miracle Hill may evangelize through its privately funded charitable work but not through its performance of this government-funded program; and the State is constitutionally obligated to ensure that the private entities with which it contracts follow that simple, clear rule. Yet the State here does just the opposite, thus violating the Establishment Clause.

6. *The State impermissibly affords a denominational preference.*

Finally, when government favors or disfavors a particular religious denomination, its action is subject to strict scrutiny and presumptively does not stand. *Larson*, 456 U.S. at 246; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (explaining Establishment Clause jurisprudence and extending it to Free Exercise Clause); *Koenick*, 190 F.3d

at 264 (strict scrutiny applies under Establishment Clause when government has “facially discriminate[d] between religious denominations or between religion and non-religion”).

Defendants here run afoul of this prohibition in at least two respects. First, by authorizing and specifically enabling Miracle Hill to violate generally applicable antidiscrimination laws through granting exemptions from state law and aggressively advocating for an exemption from federal law, the State has preferred Miracle Hill’s faith, evangelical Christianity, over Catholicism, Judaism, and all other faiths. And second, because for the reasons just explained government cannot accomplish through private actors what it cannot do directly, Miracle Hill’s express preference for evangelical Christians in the performance of a program for the State constitutes a denominational preference by the State.

Hence, the State must show a compelling governmental interest in preferring evangelical Christians over all other faiths, as well as narrow tailoring of its actions to serve only that compelling interest. *See Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015); *Larson*, 456 U.S. at 247. Defendants cannot meet this exacting standard, particularly at this early stage of the litigation.

The State asserts a governmental interest in “maximizing placement opportunities for foster children.” Doc. 12-1 at 22. But the State has not established that its sanctioning of religious tests for prospective foster parents actually furthers that interest. Nor could it: By turning away otherwise-qualified volunteers and foster parents for being of the wrong faith, agencies like Miracle Hill diminish the number of foster families available to children, thus also undercutting DSS’s central function of “caring for South Carolina children in its foster care system” (Doc. 12-1 at 2).

The State also asserts that it may allow religious discrimination by child-placement agencies because it has a compelling interest in “[i]ncreasing community support and options for foster child placement by maximizing the number and diversity” of child-placement agencies. Doc.

12-1 at 22. But Mrs. Maddonna does not ask for the State to be enjoined from partnering with faith-based agencies. Rather, she seeks only what the Constitution requires—namely, that the State ensure that all child-placement agencies with which it contracts refrain from discriminating on the basis of religion when they provide services on behalf of and funded by the government. Nor does it follow that requiring child-placement agencies to adhere to antidiscrimination laws will cause all (or any) faith-based agencies to stop working with foster children. Many faith-based agencies that act on religious motivations provide government-funded social services on a nondiscriminatory basis. The State’s speculations to the contrary are insufficient to satisfy strict scrutiny at any stage of litigation—much less on a motion to dismiss.

The State further asserts (Doc. 12-1 at 23) an interest in shielding itself from religious entanglement in enforcing South Carolina’s religion-matching statute (S.C. Code § 63-15-20; S.C. Code Regs. § 114-550(H)(11)), which requires foster children to be placed with families sharing the religious faith of their biological parents if the biological parents so desire. But the State does not explain how or why complying with the religion-matching law results in impermissible entanglement, for the biological parents are the ones who specify the religion for the application of foster children. And if there were an entanglement problem, which there is not, it would bar application of the statute whether by the State directly or through child-placement agencies. Hence, the State’s interest in avoiding entanglement is not advanced by contracting with private entities to violate the very constitutional prohibitions that the State seeks to avoid. *Cf. Norwood*, 413 U.S. at 465 (what states are forbidden to do directly they are also forbidden to do by proxy). And permitting faith-based agencies to impose religious tests on prospective foster parents actively inhibits, rather than advances, the State’s asserted interest in the religion-matching law: The State boasts (Doc. 12-1 at 3–4), and Mrs. Maddonna has alleged (Compl. ¶¶ 108–12), that Miracle Hill accepts for placement *children* of all faiths. The State’s assignment of, for example, Catholic,

Jewish, or Muslim children to an entity that expressly refuses foster parents of those faiths cannot be squared with the religion-matching statute.

In short, the State’s authorizing and enabling of religious discrimination by faith-based agencies is not even rationally related to the interests that the State asserts—much less do the State’s actions survive strict scrutiny. Thus, Mrs. Maddonna has successfully pleaded that the State has afforded denominational preferences barred by the Establishment Clause.⁶

C. The State’s proffered alternative analysis is not the law and does not support the outcome that the State desires.

The State suggests that settled, binding Establishment Clause jurisprudence is “outdated” and that the Supreme Court’s recent cases substitute a “historically informed analysis.” Doc. 12-1 at 27–30. And the State asserts that federal and state governments have for “hundreds of years” partnered with religious ministries to provide social services, and that the courts have upheld these partnerships, so that should end the inquiry. *Id.* at 27. But “historically informed analysis” in lieu of the Establishment Clause’s long-standing tests applies solely to legislative-prayer cases, because of the special history of congressional chaplains, whom the First Congress authorized the same week that it voted to propose the First Amendment for ratification. *See Town of Greece v. Galloway*, 572 U.S. 565, 578–79 (2014); *Marsh v. Chambers*, 463 U.S. 783, 788 (1983). As a matter of law, Supreme Court decisions remain binding precedent unless and until the Supreme Court explicitly says otherwise (*Hohn v. United States*, 524 U.S. 236, 252–53 (1998)), and the Court has never abrogated *Lemon*, *Larson*, or the other cases that the State here may wish to skirt. Hence, the Fourth Circuit applies *Lemon* and the rest of the settled Establishment Clause jurisprudence (*see, e.g., Wood*, 915 F.3d at 313–14, 318; *IRAP*, 883 F.3d at 265; *Buxton v.*

⁶ As for Defendants’ asserted interest in not burdening faith-based agencies’ free-exercise and associational rights, for the reasons explained in Section V, *infra*, these rights are as a matter of law not substantially burdened by requiring compliance with antidiscrimination law.

Kurtinitis, 862 F.3d 423, 431–33 (4th Cir. 2017)), as should this Court. But even if the State were entitled to discard binding Supreme Court and Circuit precedent, its proffered substitute would not help it here. Whatever the State may have in mind in asserting long-standing governmental partnerships with private, religious social-service providers (*see* Doc. 12-1 at 27–28), the State cannot contend that allowing government-contracted, government-funded agencies to employ religious criteria in operating governmental programs was “accepted by the Framers” (*see Town of Greece*, 572 U.S. at 577). At the founding, neither the federal government nor the states were in the business of contracting for (or directly providing) social services.

III. MRS. MADDONNA HAS STATED A CLAIM UNDER THE EQUAL PROTECTION CLAUSE.

The Equal Protection Clause mandates that government treat alike “all persons similarly situated.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). When government treats people differently based on a suspect classification such as religion, its actions are subject to strict scrutiny. *See Giarratano v. Johnson*, 521 F.3d 298, 303 (4th Cir. 2008) (citing *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (recognizing religion as suspect classification)). As Justice O’Connor put it, “the Religion Clauses . . . and the Equal Protection Clause as applied to religion[] all speak with one voice on this point: Absent the most unusual circumstances, one’s religion ought not affect one’s legal rights or duties or benefits.” *Kiryas Joel*, 512 U.S. at 715 (O’Connor, J., concurring in part and concurring the judgment). Thus, for the same reasons that the State’s funding, licensing, and authorization of discrimination in the provision of child-placement services trigger strict scrutiny and violate the Establishment Clause, they require strict scrutiny and invalidation under the Equal Protection Clause as well. *Cf. Lukumi*, 508 U.S. at 540 (“equal protection mode of analysis” applies in determining whether governmental action is neutral with respect to religion under Religion Clauses (internal quotation marks omitted)).

While not disputing that “discriminating *among* religions” subjects governmental action to

strict scrutiny (*see* Doc. 12-1 at 24 (quoting *Amos*, 483 U.S. at 339)), the State insists that it is not to blame for Miracle Hill’s religious discrimination and that issuing the executive order, requesting a statewide waiver from federal law, and then implementing the religious exemptions from antidiscrimination requirements are neutral actions conveying a benefit to all religions, making them subject to rational-basis review only.⁷ *Id.* at 24–25.

But again, the law does not permit the State to launder discrimination in the provision of governmental services through private entities, for “[a]ctivities that the . . . government could not constitutionally participate in directly cannot be supported indirectly through the provision of support for other persons engaged in such activity.” *See Nat’l Black Police Ass’n v. Velde*, 712 F.2d 569, 580 (D.C. Cir. 1983). “A State’s constitutional obligation requires it to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination.” *Norwood*, 413 U.S. at 467. Thus, just as licensing, funding, and supporting entities that use public dollars to discriminate in providing a governmental service violates the Establishment Clause, so too does it violate equal protection. *See Brown v. Califano*, 627 F.2d 1221, 1235 (D.C. Cir. 1980) (“The Constitution’s prohibition against governmental support of . . . invidious discrimination is too obvious and well-established to require elaboration . . .”). Thus, the State’s acts to further Miracle Hill’s discrimination are subject to strict scrutiny and violate Equal Protection.

IV. MRS. MADDONNA HAS STATED A CLAIM UNDER THE DUE PROCESS CLAUSE.

The Due Process Clause protects individuals’ fundamental rights against unjustified governmental intrusion. *See Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997). When government burdens a fundamental right, its action is subject to strict scrutiny. *See id.* at 720. The

⁷ The State also argues that Miracle Hill is not a state actor and therefore cannot be liable under the Equal Protection Clause. Doc. 12-1 at 25–26. Plaintiff did not sue Miracle Hill, so the Court need not consider whether Miracle Hill is a state actor. Miracle Hill likely *would* be deemed a state actor under *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), given its contractual relationship with the State to care and provide foster placements for children in state custody.

right to be free from governmental disfavor toward one’s religious denomination is a fundamental right.⁸ *See id.* (explaining that the “liberty” protected by the Due Process Clause includes “the specific freedoms protected by the Bill of Rights”); *Larson*, 456 U.S. at 244 (explaining Establishment Clause right). By contracting with, licensing, and funding agencies that impose religious tests in providing governmental services, the State contravenes that fundamental right, subjecting its actions to strict scrutiny that cannot be survived.

The State here misunderstands the nature of the right asserted, perhaps unaware that religious-discrimination claims were historically brought as substantive-due-process claims before the Religion Clauses were incorporated against the states. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923) (fundamental liberty interest under Due Process Clause implicated by official religious discrimination). The State contends that religious-discrimination claims must be brought under the First Amendment, citing *Albright v. Oliver*, 510 U.S. 266 (1994). But *Albright* holds merely that police-misconduct claims typically—but not always—should be brought under the Fourth Amendment.⁹ If the State’s expansive reading of *Albright* were correct, *Meyer* would no longer be good law. But it is. *See, e.g., Kerry v. Din*, 135 S. Ct. 2128, 2134 (2015) (relying on *Meyer*). Though the due-process claim may be duplicative, it is not an improper attempt to find greater protection in the Fourteenth Amendment than in the First, for either way, *Larson*’s strict-

⁸ The State argues that “executive action” triggers a threshold “shock the conscience” requirement for substantive-due-process claims. Doc. 12-1 at 19–20. But the problem is not just the executive order. The State violates Plaintiff’s fundamental rights by funding and licensing faith-based agencies that impose religious tests on those who seek the governmental services.

⁹ Substantive due process is still an option in some police-misconduct cases that “shock the conscience.” *Sacramento v. Lewis*, 523 U.S. 833 (1998). And the Fourth Circuit’s executive-action cases that the State also cites (*see* Doc. 12-1 at 19) deal with only non-fundamental liberty interests in governmental benefits. Here, the State has limited Mrs. Maddonna’s access to South Carolina’s foster-care program by favoring Miracle Hill’s religion over Catholicism. Because this religious preference implicates the fundamental First Amendment liberty interest in not being officially disfavored based on one’s religion, it may be brought as a substantive-due-process claim as well as under the Establishment Clause.

scrutiny requirement is “the guide for analyzing these claims” (*Albright*, 510 U.S. at 281).

V. PROHIBITING FAITH-BASED AGENCIES FROM DISCRIMINATING AGAINST PROSPECTIVE FOSTER PARENTS WOULD NOT VIOLATE THE FREE EXERCISE CLAUSE OR FEDERAL OR STATE STATUTES.

Finally, the State asserts (Doc. 12-1 at 32–34) that countervailing First Amendment and statutory requirements compel it to accommodate the religious discrimination of faith-based agencies with which it partners. The State is mistaken.

First, the State points (Doc. 12-1 at 22, 34) to *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), as permitting or perhaps requiring the State to fund faith-based agencies that discriminate in the provision of governmental services. But *Trinity Lutheran* held only that Missouri violated the Free Exercise Clause by denying a church-run preschool a grant to purchase a rubber playground surface “solely because of [the preschool’s] religious character.” 137 S. Ct. at 2017–18, 2021, 2024–25. The school did not discriminate in admissions; it allowed open, nondiscriminatory access to the playground; and there was no evidence that the playground was used for religious purposes. *Id.* at 2017–18. The Court’s holding was thus explicitly limited: “This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.” *Id.* at 2024 n.3 (plurality opinion); *see also id.* at 2019 (majority opinion) (“denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion”); *id.* at 2021 (majority opinion) (Missouri “expressly discriminates against otherwise eligible recipients” based solely on identity). Here, by contrast, Mrs. Maddonna challenges governmental funding of private entities that put public money and delegated state authority to religious uses to advance their religion and discriminate against other faiths in providing a governmental service. Again, Mrs. Maddonna seeks not to bar the State’s contracting with faith-based entities, but to require the State to ensure that its programs and services are delivered in a nondiscriminatory

fashion, whether by the State itself or by contractors.

The State’s suggestion that requiring compliance with antidiscrimination laws would violate child-placement agencies’ freedom of association “when making personnel recruiting, screening, and selection decisions” (Doc. 12-1 at 33 & n.19) similarly fails. To have an expressive-association claim, a “group,” as a group, “must engage in some form of expression.” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). Those who go to Miracle Hill to be foster parents or volunteer mentors are not joining an expressive association to communicate a collective message—much less having their ability to do so frustrated by the antidiscrimination requirements that allow them to participate; nor are they forming an intimate association with Miracle Hill.¹⁰ Any possible associational rights of faith-based agencies simply are not implicated by a requirement to serve people of all faiths equally when under contract to provide governmental services to the public.

As for the State’s reliance on the ministerial exception (Doc. 12-1 at 23, 32–33), that exception ensures the freedom of churches to hire clergy without governmental interference because of special solicitude for “the internal governance” of religious institutions. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188, 196 (2012). It does *not* apply even to non-clergy *employees*, much less does it require government to permit faith-based religious institutions to discriminate in whom they serve in the performance of a government-funded program. The apparent suggestion that *Hosanna-Tabor* empowers Miracle Hill to treat

¹⁰ *Cf.*, e.g., *City of Dallas v. Stanglin*, 490 U.S. 19, 24 (1989) (no associational right where parties “are not members of any organized association; they are patrons of the same business establishment”); *Fields v. City of Tulsa*, 753 F.3d 1000, 1012 (10th Cir. 2014) (police officer’s freedom of intimate association not infringed by order to perform regular job duties at Islamic Society event because officer “was never required to be anything more than an outsider with respect to the Islamic Society”); *Miller v. City of Cincinnati*, 622 F.3d 524, 538 (6th Cir. 2010) (requiring groups to coordinate with City officials to arrange for use of space inside City Hall did not significantly burden expressive association).

potential foster parents as its clergy is fatuous: Prospective foster parents are not employees of child-placement agencies any more than they would be DSS employees if they sought to foster children through DSS directly. Foster parents are instead certified under *state* law; the children entrusted to them are in the care of the *State*; and the idea that participating in a *state* program makes one a minister of the gospel cannot be squared with the fact that the State is constitutionally forbidden to proselytize or promote religion.

Finally, Defendants assert without argument (Doc. 12-1 at 33) that the State would run afoul of the federal Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(a), and the South Carolina Religious Freedom Act, S.C. Code § 1-32-40, should child-placement agencies be required to serve all people equally regardless of religion. But no federal or state statute may require what the Constitution forbids. *See* U.S. Const. art. VI (Supremacy Clause). An “accommodation of religion, in order to be permitted under the Establishment Clause, must lift ‘an identifiable [government-imposed] burden *on the exercise of religion*’” (*Allegheny*, 492 U.S. at 613 n.59 (quoting *Amos*, 483 U.S. at 348 (O’Connor, J., concurring))) and must not unduly burden nonbeneficiaries (*Cutter*, 544 U.S. at 722). Otherwise, it impermissibly creates an incentive to adopt the favored religious practice, thus “implicitly endorsing a particular religious belief” (*Hobbie v Unemp’t Appeals Comm’n*, 480 U.S. 136, 145 n.11 (1987)). RFRA and the state RFA must be interpreted to incorporate Establishment Clause prohibitions. *See Cutter*, 544 U.S. at 720. They cannot require, or even permit, exemptions from antidiscrimination laws that allow child-placement agencies to discriminate on the basis of religion when providing a governmental service.

CONCLUSION

The motions to dismiss should be denied.

/s/ Aaron J. Kozloski
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