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-00448-TMC **DEFENDANT HENRY MCMASTER'S REPLY IN SUPPORT OF THE MOTION TO DISMISS**

I. INTRODUCTION.

The Complaint labors unsuccessfully to find constitutional violations where none exist, and nothing in the Opposition shows otherwise. In an effort to paper over the deficiencies in her claims, Plaintiff's Opposition relies on unpled and facially implausible allegations and creative recharacterizations of the facts. As to standing, for example, contrary to Plaintiff's repeated assertions that she was "turned away" or "excluded," the admitted fact is that she never attempted to foster a child through Miracle Hill, the Department of Social Services ("DSS"), or any other child-placing agency ("CPA"). Further, Plaintiff disavows taxpayer standing and concedes she suffered no concrete injury—just hurt feelings when one child-placing agency ("CPA") referred her to other nearby CPAs. In addition, by failing to argue standing for her Due Process claim, Plaintiff tacitly concedes she has none.

The merits of Plaintiff's claims fare no better. She defends her Establishment Clause claim by arguing Governor McMaster's accommodation of faith-based CPAs "privilege[s] one religion over others" and "has preferred Miracle Hill's faith, evangelical Christianity, over Catholicism, Judaism, and all other faiths." (ECF No. 20 at 2, 27.) But the Governor's Executive Order and request for a federal waiver—the two acts by which he allegedly established a religion—accommodate *all* religious CPAs equally, regardless of their faith, sect, or denomination, and his actions do not limit the ability of *any* qualified individuals to foster or volunteer.

Plaintiff defends her Equal Protection claim by arguing Governor McMaster's acts erected a "barrier to her access to and participation in the State's foster-care services" and caused her to be

"turned away from a governmental program." (*Id*. at 7, 10.) She has not, however, alleged any facts that would show she was prevented from, or even inconvenienced in, pursuing her alleged desire to foster or volunteer. Instead, she concedes that, if she wished, she could have fostered or volunteered with other CPAs in her area or with DSS itself. (*See id*. at 13–14.)

Finally, the Opposition shows the non-viability of her Due Process claim. In fact, she all but admits it. She alleges the Governor's actions burdened her family's "right to exercise the religion of their choosing" and "penalized their exercise of their fundamental rights to exercise their religion" by permitting one CPA to refer them to another in light of their Catholic faith. (Compl. at ¶¶ 159, 162.) Her Opposition, however, effectively admits that neither the referral nor the Governor's accommodation burdened or penalized the exercise of her faith because she could have served as a foster parent or volunteer with other nearby CPAs or DSS.

II. CLARIFICATION OF THE FACTS.

In her Opposition, Plaintiff repeatedly raises and relies on allegations that are not pled in her Complaint, are unrelated to the Governor's Executive Order or request for a federal waiver, or are facially implausible. The true facts regarding the most egregious of her assertions are set out below:[1]

- Plaintiff has not been denied the opportunity to be a foster parent. (*Contra* ECF No. 20 at 2, 5, 9, 25.) The Complaint does not allege or support an inference that Plaintiff ever applied to foster through Miracle Hill, any other CPA, or DSS directly. Indeed, Plaintiff expressly admits she never applied for a foster license at all (*id.* at 11), despite being aware she could foster through other CPAs and DSS (*see* Compl. ¶¶ 28, 48).
- Plaintiff has not been denied participation in a government program. (*Contra* ECF No. 20 at 2, 7, 14, 19, 25.) The Complaint alleges only that Miracle Hill told her that, if she applied to volunteer, the ministry would not choose her. But volunteer opportunities at Miracle Hill are not the relevant "government program." They are but one component of a much larger State program to provide foster care. Plaintiff does not—and cannot—allege she has been turned away from *that* program. Instead, she admittedly and knowingly spurned all other avenues open to her to participate in that program.

[1] The Opposition states the Governor does not "dispute" a number of allegations in the Complaint. (*See* ECF No. 20 at 1.) But a Motion to Dismiss is not intended to resolve disputes concerning a complaint's factual allegations. Instead, the court and parties proceed by accepting *arguendo* the well-pled allegations of the complaint. This does not amount to admission.

- Governor McMaster has not privileged one religion over others. (*Contra id.* at 2, 19, 27.) The waiver request and Executive Order on which her claims against the Governor depend belie this assertion. Neither of them privilege one faith over any other, and they both expressly apply to and protect all faith-based CPAs. (*See* ECF Nos. 12-2, 12-3.)
- Governor McMaster's actions have not reduced the number of foster homes. (*Contra* ECF No. 20 at 7, 18, 27.) The Complaint never asserts this, and Plaintiff cannot shoehorn in new allegations. Further, Plaintiff offers nothing but speculation to believe that accommodating Miracle Hill and other faith-based CPAs shrinks (rather than *increases*) the pool of foster homes. *Trzaska v. L'Oreal USA, Inc.*, 865 F.3d 155, 165 (3d Cir. 2017) ("[A] district court should not credit mere speculation or unsupported conclusions and unwarranted inferences."); *Skraggs v. NGK Spark Plugs, Inc.*, No. 2:15-cv-11357, 2015 WL 8485248, at *2 (S.D. W. Va. Sept. 1, 2015) ("Scenarios that are the products of speculation—not factual allegations—do not make what is possible plausible.").
- Miracle Hill does not discriminate in whom it serves. (*Contra* ECF No. 20 at 20–21, 24, 28.) CPAs like Miracle Hill serve foster *children*, not foster *parents* or *volunteers*. Miracle Hill serves any child, and—more to the point—Governor McMaster's actions do not allow faith-based CPAs to discriminate among the children they serve. The Complaint lacks any allegation to the contrary, and the Court can and should ignore unpled factual assertions.
- Miracle Hill does not use government funds to proselytize foster children. Of all Plaintiff's mischaracterizations, this is the most pernicious because it seems intended to inflame and taint the analysis and because it is entirely absent from the Complaint. Plaintiff asserts "the State" (a conflation of two individual defendants into a single, abstract, and allegedly malicious bad actor) uses Miracle Hill as a proxy to coerce, inculcate, evangelize, and proselytize foster children. (*Id.* at 20–21, 25–26.) But the Complaint nowhere alleges Miracle Hill proselytizes foster children at all, let alone by means of government funding, and the sole citation Plaintiff provides for this outrageous charge makes no mention whatsoever of proselytization. (*See id.* at 26 (citing Compl. ¶ 74).) This bogeyman is unpled, unsupported, and false, and should play no part in the Court's consideration.

III. ARGUMENT.

A. Plaintiff still lacks standing.[2]

As an initial matter, Plaintiff has disclaimed any standing to bring her claims based on her taxpayer status or based on the deprivation of a putative right to volunteer or foster through a CPA of her own choosing. (*See* ECF No. 20 at 10, 15 n.5.) Thus, Plaintiff effectively concedes she lacks

[2] In her Opposition, Plaintiff concedes she cannot assert injuries on behalf of foster children or their biological parents (*see* ECF No. 20 at 10 n.1), yet she continues to attempt to do so (*see id.* at 7, 18, 25, 27). The court should accept Plaintiff's concession and ignore claims premised on injuries to third parties that Plaintiff admits she has no business trying to bring.

standing to bring any of her claims on these bases.[3] Instead, Plaintiff asserts standing solely on the ground that Governor McMaster's actions allegedly caused her a stigmatic injury. (*See id.* at 8–14.) But even where a Plaintiff relies on stigmatic injuries, the Fourth Circuit has emphasized that "a plaintiff still must carry the burden of demonstrating each element of standing," *Deal v. Mercer Cty. Bd. of Educ.*, 911 F.3d 183, 188 (4th Cir. 2018), as "there is of course no sliding scale of standing." *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1085 (4th Cir. 1997) (quotation marks omitted). Here, Plaintiff's allegations grounded on stigmatic injuries do not meet her burden.

1. Injury-in-fact. Courts have cautioned that the concept of stigmatic injury is "particularly elusive" in the context of Establishment Clause claims.[4] *Suhre*, 131 F.3d at 1085. "[T]he allegation of injury in the form of a stigma alone is insufficient to support standing; there must also be a 'cognizable injury caused by personal contact *with the offensive conduct*.'" *Sarsour v. Trump*, 245 F. Supp. 3d 719, 729 (E.D. Va. 2017) (emphasis added) (quoting *Suhre*, 131 F.3d at 1090). Plaintiffs must "identify a[] personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982).

Here, the allegedly offensive conduct Plaintiff points to is "the State's" alleged "authorizing Miracle Hill to disfavor and exclude Mrs. Maddonna," and the resulting alleged injury is "the stigma of discrimination." (ECF No. 20 at 10.) Plaintiff, however, cannot rely on stigma alone as

[3] The Complaint, fairly read, bases Plaintiff's standing on her taxpayer status and alleged injury from the inability to volunteer or foster through a CPA of her choice. (*See* ECF No. 1 ¶¶ 12–14, 131–32.) Thus, the court should dismiss the complaint for the reasons stated in the memorandum supporting the motion to dismiss. (*See* ECF No. 12-1 at 9–19.)

[4] The Fourth Circuit's recent expansive view of stigmatic-injury standing goes beyond the Constitution's case-or-controversy limitation and the Fourth Circuit or Supreme Court, given the chance, should rein in the more extravagant holdings in this area. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018) (declining to "decide whether the claimed dignitary interest establishes an adequate ground for standing" because other grounds for standing existed).

an alleged injury. *See Valley Forge*, 454 U.S. at 485; *Sarsour*, 245 F. Supp. 3d at 729. Plaintiff also points to "the State['s]" "contracting with private agencies that refuse to provide services to members of other faiths," claiming the resulting injury is the "erect[ion] and maint[enance of] a religious barrier to Mrs. Maddonna's ability to become a foster parent." (ECF No. 20 at 9.) As explained above, however, none of the Governor's actions erected a barrier of any kind to Plaintiff becoming a foster parent, and, in any event, Plaintiff has never even applied to become a foster parent.

As for her Equal Protection claim, Plaintiff's asserted stigmatic injury is likewise insufficient because she "has not made any serious attempt to obtain the benefit [she] claims that [she] was denied," *i.e.*, a foster-care licensing, and "courts have required that a plaintiff who challenges a barrier to [a benefit] . . . actually make [an attempt to obtain the benefit], or at least establish standing by proving that [she] very likely would have [attempted to obtain the benefit] but for the alleged discrimination." *MGM Resorts Int'l Global Gaming Dev., LLC v. Malloy*, 861 F.3d 40, 47, 50 (2d Cir. 2017) (applying *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993) and *Heckler v. Mathews*, 465 U.S. 728 (1984)).[5] Here, neither the waiver request nor the Executive Order expressly favor any religion; Plaintiff concedes she never applied to become a foster parent; and there is no allegation that Plaintiff would be barred from becoming a foster parent if she did apply. Because her allegedly stigmatic injuries do not suffice, Plaintiff lacks standing to bring her Establishment Clause and Equal Protection claims.[6]

2. Traceability. As to traceability, Plaintiff argues her "injury" is attributable to Governor McMaster because he did not limit Miracle Hill's associational decisions, but instead allowed Miracle Hill the choice of whether to partner with volunteers in accordance with its religious beliefs.

[5] *See also Am. Atheists, Inc. v. Shulman*, 21 F. Supp. 3d 856, 864, 866 (E.D. Ky. 2014) (rejecting stigmatic injury where plaintiffs failed to "establish that [plaintiff] expressing [disfavored] beliefs could never qualify" for a benefit, as (i) the policy at issue "do[es] not expressly favor certain [religious beliefs]," (ii) plaintiffs still "may be eligible" for the benefit, and (iii) plaintiffs "never sought classification" to obtain the benefit (interpreting *City of Jacksonville*, 508 U.S. 656)).

[6] Plaintiff asserts no injury to support standing to bring her Due Process claim.

(*See* ECF No. 20 at 11–12.) This is precisely the type of argument rejected repeatedly in *Allen v. Wright*, 468 U.S. 737 (1984), *Doe v. Obama*, 631 F.3d 157 (4th Cir. 2011), and *Frank Krasner Enters. Ltd. v. Montgomery Cty.*, 401 F.3d 230, 234–35 (4th Cir. 2005).

Plaintiff's attempts to whistle past *Allen*, *Doe*, and *Krasner* are unpersuasive. Governor McMaster does not dispute that traceability requires "but for" causation or that the challenged action need not be the sole or immediate cause of the injury or the last step in the chain of causation. *See Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978); *Sierra Club v. U.S. Dep't of Interior*, 899 F.3d 260 (4th Cir. 2018).[7] But these unremarkable general propositions, on which Plaintiff's entire argument rests, do not end the analysis. The more specific principle here is that, where an executive action allows a private third party to make a decision, and the executive action safeguards the independence of that decision by removing incentives for the third party to decide one way or the other, an alleged injury arising from the third party's decision is not traceable to the executive action. *See Doe*, 631 F.3d at 162. Here, Governor McMaster's actions removed any incentive for Miracle Hill to partner or not partner with Plaintiff and thus ensured that Miracle Hill alone would make the independent, unfettered decision Plaintiff now challenges. The alleged injury stemming from Miracle Hill's decision is thus not fairly traceable to the Governor. *See id.*[8]

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[7] Both *Duke* and *Sierra Club* involve government action designed to permit construction efforts by third parties, namely of nuclear power plants and an oil pipeline. Injuries resulting from construction were deemed traceable to government action because, without government action the plants and pipeline would not have been built. Here, however, in the absence of Governor McMaster's actions, Miracle Hill could still independently decide not to partner with Plaintiff. The Governor simply removed one incentive for Miracle Hill in making that decision.

[8] Plaintiff argues *Doe* and *Allen* are distinguishable but does not explain why. In fact, her descriptions of *Doe* and *Allen*—inserting relevant facts—show they are on all fours with this case. (ECF No. 20 at 13 n.3 ("[Plaintiff] lack[s] standing to challenge an Executive Order removing certain limitations on [Miracle Hill's associational choices] because it was the decisions of [Miracle Hill]—rather than the Executive Order—that caused [Plaintiff's] alleged injury."); *id.* ("[P]laintiff['s] reduced ability to [volunteer or foster through a CPA of her choice] was not fairly traceable to the government's failure to withhold [CPA-licensing] from [allegedly] discriminatory private [CPA] because it was purely speculative whether a loss of [CPA-licensing] would have motivated the [CPA] to amend [its associational] policies or [allowed Plaintiff] to [volunteer or foster through a CPA of her choice].").)

3. Redressability. Plaintiff again relies on generalities rather than specific legal principles that apply to the allegations in her Complaint. But as explained in *Lujan*, "[w]hen . . . a plaintiff's asserted injury arises from the government's allegedly unlawful . . . lack of regulation[] of *someone else*, . . . redressability ordinarily hinge[s] on the response of the . . . regulable[] third party to the government action or inaction . . . and it becomes the burden of the plaintiff to adduce facts showing [the third party's unfettered] choices have been or will be made in such manner as to . . . permit redressability of injury." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992).

Here, Plaintiff has not asserted that, if "the State [is] enjoined from licensing, authorizing, or enabling state-funded child-placement agencies to engage in [religious] discrimination" (ECF No. 20 at 15), then Miracle Hill or other CPAs will change their associational policies in a way that allows her to volunteer or foster through them when she previously could not have done so. Rather, she blithely asserts it makes no difference whether Miracle Hill or other CPAs change their policies or instead shutter their doors in response to the injunction she seeks. (*See id.*) Not only does this response ignore *Lujan*, it also demonstrates Plaintiff has no interest in redressing injuries to her personally but rather is interested in "invalidat[ing] laws" because she "disagrees with them," an endeavor courts may not aid. *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011).

B. Plaintiff still fails to state a claim for a Due Process Clause violation.

Plaintiff does not dispute that, as a threshold matter, she may only maintain a substantive due process claim challenging an executive action if the executive action may fairly be said to shock the conscience. (*See* ECF No. 20 at 32 n.8.) Plaintiff does not claim any of the Governor's actions meet that threshold but, instead, suggests the challenged actions of "the State"—"funding and licensing faith-based agencies"—are not executive actions and thus need not meet the test. (*See id.*) This is nonsensical. Plaintiff sued the Governor and the Director of DSS, not "the State,"

and, with regard to the Governor, her Complaint challenges his waiver request and Executive Order, both of which are executive actions. Plaintiff does not allege that Governor McMaster funds or licenses CPAs, and, to the extent he is involved in doing so, that would be executive action too. The Court should dismiss this claim because she has not even attempted to meet the threshold test.

Even if she met the threshold test, Plaintiff fails to identify a fundamental right infringed by a challenged action she may assert in a substantive due process claim. First, Plaintiff does not dispute that the alleged rights to volunteer with a specific CPA or to foster children are not fundamental rights. (*See* ECF No. 12-1 at 10–11, 20.) Second, Plaintiff may not assert Free Exercise rights in a substantive due process claim. *See Albright v. Oliver*, 510 U.S. 266, 273 (1994).[9] Third, Plaintiff fails to allege Governor McMaster's actions infringed on any asserted fundamental right. Even the

[9] Plaintiff contends *Albright* is inapposite because it should be read to apply only to police-misconduct claims that should be brought under the Fourth Amendment (*see* ECF No. 20 at 32), but *Albright*'s language is not so limited, and other courts have had no difficulty applying its rule to Free Exercise claims, *see Hardy v. Unknown Agee*, No. 14-2230, 2015 WL 13782958, at *3 (6th Cir. May 8, 2015); *Baines v. Hicks*, No. 3:14CV616, 2016 WL 7380558, at *20 (E.D. Va. Dec. 20, 2016); *Hoye v. Clarke*, No. 7:14cv00124, 2015 WL 3407609, at *8 (W.D. Va. May 27, 2015).

Plaintiff also suggests "the State" is "perhaps unaware that religious discrimination claims were historically brought as substantive-due-process claims before the Religion Clauses were incorporated against the states," citing *Meyer v. Nebraska*, 262 U.S. 390 (1923), and that "the State's expansive reading of *Albright*" cannot be "correct" because *Meyer* is still "good law," as it was cited recently in *Kerry v. Din*, 135 S. Ct. 2128 (2015). (ECF No. 20 at 32.) Plaintiff, however, blithely ignores what *Kerry* had to say about *Meyer*:

> To be sure, this Court has at times indulged a propensity for grandiloquence when reviewing the sweep of implied rights, describing them so broadly that they would include not only the interests [plaintiff] asserts but many others as well. For example: "Without doubt, the liberty guaranteed by the Due Process Clause denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, and to worship God according to the dictates of his own conscience." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). But this Court is not bound by dicta, especially dicta that have been repudiated by the holdings of our subsequent cases.

Kerry, 135 S. Ct. at 2134.

Opposition argues only that "the State" infringed on her right "[b]y contracting with, licensing, and funding" CPAs like Miracle Hill. (ECF No. 20 at 32.) But, again, Plaintiff has not sued "the State," and the Governor is not alleged to have contracted with, licensed, or funded Miracle Hill. As Plaintiff fails to meet the threshold test and fails to allege infringement of a cognizable fundamental right, Governor McMaster's actions are subject to rational-basis review, and Plaintiff has neither alleged nor argued that his actions would not meet that standard.

C. Plaintiff still fails to state a claim for an Equal Protection Clause violation.

Plaintiff does not dispute the rule that government action "affording a uniform benefit to all religions" is subject to only rational basis review if it "is neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion," *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987), or that Governor McMaster's actions qualify as these sorts of actions. Instead, Plaintiff relies on *Norwood v. Harrison*, 413 U.S. 455 (1973), and cases applying it, to argue the Equal Protection Clause prohibits the government from providing support to private organizations engaged in racial discrimination. Apparently, Plaintiff believes the principle espoused in *Norwood* trumps the rule expressed in *Amos*.

If anything, the reverse is true. Rational basis review under *Amos* applies to exemptions that are made equally available to all religious organizations, notwithstanding *Norwood*'s prohibition against government support of racially discriminatory organizations, which the *Norwood* Court itself expressly distinguished from neutral laws accommodating religion. *See Hsu ex rel. Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 868–69 (2d Cir. 1996); *Lown v. Salvation Army, Inc.*, 393 F. Supp. 2d 223, 236–37 (S.D.N.Y. 2005) (citing *Norwood*, 413 U.S. at 469–70). Thus, rational basis review applies, and Plaintiff has not argued the Governor's actions would not satisfy that standard.

D. Plaintiff still fails to state a claim for an Establishment Clause violation.[10]

1. Governor McMaster's actions were motivated by a secular purpose and their principal effect neither advanced nor inhibited religion.

Governor McMaster's Executive Order and waiver request were motivated by legitimate secular purposes and had a principal effect that neither advanced nor inhibited religion. (*See* ECF No. 12-1 at 22–23, 30–31.) In response, Plaintiff raises a single, implausible argument to challenge Governor McMaster's motivation. She argues his claimed secular purpose—namely, having as many qualified CPAs and homes as possible—is a sham because, according to Plaintiff, the Governor's decision to license and accommodate religious providers somehow *shrinks* the available pool of homes. (*See* ECF No. 20 at 18.) Notably, this assertion is not pled in the Complaint and, even if it were, it is nonsensical. It is undisputed that *any* qualified individual of *any* religion (or of none) may be licensed as a foster parent in any county in this State by DSS itself or through a myriad of CPAs. Accordingly, accommodating CPAs like Miracle Hill has *no effect* on the pool of available homes because other prospective foster parents may serve with other local CPAs or with DSS directly.[11]

Plaintiff's assertion regarding the "principal effect" of Governor McMaster's actions likewise falls flat. Plaintiff argues the effect of Governor McMaster's actions is to "endorse religion by communicating that the State privileges Miracle Hill's religious beliefs over Mrs. Maddonna's and all others." (ECF No. 20 at 19.) But her argument is belied by the facts conceded in her Complaint. No reasonable observer could possibly conclude that Governor McMaster values Miracle Hill's beliefs over anyone else's. For one, the Executive Order and waiver request apply to any and all faith-based CPAs regardless of their faith or denomination. (*See* ECF Nos. 12-2 and 12-3.)

[10] Plaintiff's Opposition outlines and analyzes a number of analytical tests. (ECF No. 20 at 16–18.) As explained in the Governor's initial memo, the proper test is the historically-informed analysis used by the Supreme Court in all its recent Establishment Clause cases. But regardless of what test is used, the result is the same—the Governor has not established a State religion.

[11] In fact, accommodating faith-specific CPAs likely *expands* the pool of homes by broadening the range of available CPAs and by allowing such CPAs to employ their relationships within their faith communities to recruit others who share their specific religious mission and motivation.

Further, it is undisputed *the State itself*, through DSS, will license any qualified prospective foster parent regardless of his or her faith or lack thereof. It would be nonsensical to think the State values Protestant Christians more highly than, say, Sikhs, when the State treats them as equals and will gladly license both. *Am. Atheists, Inc. v. City of Detroit Dev. Auth.*, 567 F.3d 278, 292 (6th Cir. 2009) ("No reasonable, reasonably informed observer . . . would infer from the churches' participation in this program, alongside and on equal terms with dozens of secular entities, that the agency endorsed or approved of the churches' religious views. The program's breadth, evenhandedness and eminently secular objectives help to break the link between the government and religious indoctrination.").

2. State funding of providers like Miracle Hill is constitutionally permissible.

Plaintiff's argument regarding the funding of supposedly "discriminatory" practices (ECF No. 20 at 20) fails for at least three reasons. First, and most fundamentally, she misunderstands whom faith-based CPAs serve. CPAs serve the *recipients* of the services (foster children), not the fellow-*providers* (foster parents).[12] It is the former who are the intended beneficiaries of the State's foster care program and of the related funds. When the distinction between the recipients of services and the providers of those services is properly understood, Plaintiff's argument crumbles.[13] Faith-based CPAs like Miracle Hill serve *all* children regardless of their faith, and Governor McMaster's Executive Order and waiver request recognize and require this.

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[12] The relevant Code chapter—Chapter 11 of Title 63 of the South Carolina Code—is titled "*Children's Services* Agencies" (emphasis added). Likewise, the relevant DSS policies emphasize the purpose of the State's foster care program is to serve foster *children* and, in so doing, merely to "collaborate with other stakeholders and agencies *that serve a child*," such as "foster placements" and "placement providers." *See* DSS Human Servs. Policy & Proc. Manual § 500, *available at* https://dss.sc.gov/media/1969/fostercare_2019-04-22.pdf (emphasis added); *id.* at § 510.1 (same).

[13] This distinction likewise distinguishes a case Plaintiff relies on (*see* ECF No. 20 at 20). The key analytical fact in *Prison Fellowship Ministries* was that the ability of program *recipients* (the individuals in the state's custody) to participate was dependent on their religious belief. *See Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 425 (8th Cir. 2007). Here, in contrast, faith-based foster agencies serve *their* recipients—the foster children in the state's custody—without regard to the children's religious beliefs, and Governor McMaster's Executive Order and the federal waiver recognize and require this even-handed treatment.

Second, Plaintiff incorrectly implies there are no cases upholding the constitutionality of government funding of groups who limit their leadership, membership, or volunteers to co-religionists. (*See* ECF No. 20 at 20.)[14] Such cases abound. *See, e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (affirming constitutionality of funding religious group that places religious criteria to determine membership and leadership);[15] *Mitchell v. Helms*, 530 U.S. 793 (2000) (upholding constitutionality of program providing federal funds provided to states, which, in turn provided them to public and private schools, including "pervasively sectarian" schools); *Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006) (holding state not only *may* but *must* provide funds and benefits to religious group expressly restricting its membership to those who affirm its statement of faith and agree to live by religious principles); *Columbia Union Coll. v. Oliver*, 254 F.3d 496 (4th Cir. 2001) (upholding constitutionality of program granting state funds to a religious college that had hiring and admission preferences to denomination members).[16]

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[14] The authority Plaintiff cites for the contrary proposition (*see* ECF No. 20 at 20) are distinguishable because they involved the private use of government funds to engage in religious indoctrination—something that, as already noted, Plaintiff has not pled in the instant suit and which, in any event, Governor McMaster's challenged actions did not authorize.

[15] The church operated a childcare ministry that "admits students of any religion," *Trinity Lutheran*, 137 S. Ct. at 2017, but, in keeping with the doctrine of its denomination—the Lutheran Church Missouri Synod—restricted church membership and leadership to those who affirm the church's teaching. *See* Brief Statement of the Doctrinal Position of the Missouri Synod, *available at* https://www.lcms.org/about/beliefs/doctrine/brief-statement-of-lcms-doctrinal-position#church.

[16] *See also* 20 U.S.C. § 1681(a)(3) (religious schools receiving federal financial assistance are exempt from Title IX's prohibition on sex discrimination where prohibition "would not be consistent with the religious tenets of such organization[s]"); *Fed. Law Protections for Religious Liberty* ¶ 20 (Att'y Gen., Oct. 6, 2017) ("[T]he federal government may not condition receipt of a federal grant or contract on the effective relinquishment of a religious organization's hiring exemptions or attributes of its religious character."); Exec. Order 13559 (Nov. 22, 2010) ("The Nation's social service capacity will benefit if all eligible organizations, including faith-based . . . organizations, are able to compete on an equal footing for Federal financial assistance," and, while such groups may not discriminate "against *beneficiaries* or *prospective beneficiaries* of the social service programs on the basis of religion or religious belief," the groups *may* retain their "independence, autonomy, . . . [and] religious character" by selecting "board members on a religious basis") (emphasis added).

3. The State has not delegated its authority to faith-based providers.

Plaintiff argues "the State" (presumably the Governor, though it's unclear) has violated the Establishment Clause by delegating child-placing authority to faith-based CPAs who choose to partner only with same-faith foster parents. (*See* ECF No. 20 at 21.) This argument is premised on Plaintiff's misapplication of the case law and mischaracterization of the facts. As to the former, the case Plaintiff relies on is easily distinguishable. In *Larkin*, a state law granted churches the right to veto applications for liquor licenses—an impermissible delegation. *See Larkin v. Grendel's Den, Inc*., 459 U.S. 116–17 (1982). Here, however, the State has not delegated to private CPAs the type of unconstrained and final authority that was present in *Larkin*. Quite the opposite. DSS retains the final word on whether to license a foster parent and where to place a foster child. *See* S.C. Code Ann. § 63-11-60; S.C. Code Ann. Regs. 114-550(C)(3), (G), (K), and -4980(a)(2)(d).

Plaintiff likewise misstates the relevant facts. According to Plaintiff, Miracle Hill exercises the State's authority "'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." (ECF No. 20 at 21.) But Miracle Hill gladly serves all foster children regardless of their faith, and Plaintiff's new assertion regarding proselytization was not pled. Further, nothing in the Executive Order or the waiver request authorizes CPAs or foster parents to ignore the statutory and regulatory duty to respect the religious beliefs and wishes of the foster child and their parents.

4. Governor McMaster's accommodation of faith-based providers lifts a substantial burden from them without imposing it on anyone else, least of all Plaintiff.

Plaintiff argues the Governor's actions are an improper religious preference because they (1) fail to lift a substantial burden from Miracle Hill's and others' religious exercise and (2) allegedly impose a burden on "innocent third parties like Ms. Maddonna." (*See* ECF No. 20 at 24.) Her argument is wrong on both counts. As to the burden lifted from Miracle Hill, Plaintiff is incorrect when she hypothesizes that Miracle Hill's foster care ministry is not motivated by religious duty.

The documents incorporated into her Complaint reveal otherwise. (*See* ECF Nos. 12-2, 12-3, and 12-4 (recognizing faith-based CPAs like Miracle Hill are compelled by their faith to provide foster care and, without an accommodation, they will be forced either to abandon their religious duty to care for children in need or abandon their religious convictions about how to perform that duty).)

Further, Plaintiff contradicts herself when she implies that closing down its foster care operations would be a light burden on Miracle Hill since it could find other ways to help foster children (ECF No. 20 at 23), but elsewhere admits Miracle Hill views foster placement as a religious duty and can only engage in this duty with a license (*id.* at 13 n.3, 21, 26). Nor can Plaintiff mask the nature of the burden by arguing it involves only the loss of government funds—"a relatively minor burden." (*Id*. at 24.) Even assuming that defunding would be minor, Plaintiff overlooks a far greater burden imposed on a CPA that holds fast to its faith—the loss of the CPA's license. *That* is no minor burden, and Plaintiff's obfuscation should not be permitted to mask its substantial nature.

Plaintiff's next argument—that Governor McMaster's accommodation of faith-based CPAs places a burden on someone else (ostensibly Plaintiff)—likewise fails. Rather than identify any burden that is shifted and on whom it is placed, Plaintiff merely recycles her erroneous claim that allowing one private CPA to partner with co-religionists somehow "prevents" other prospective foster parents "from participating in a governmental program." (*Id*. at 25.) As discussed above, this assertion is facially incorrect and is contradicted elsewhere in Plaintiff's briefing.

5. *Plaintiff has not pled—and cannot plausibly plead—that religious providers coerce or proselytize foster children.*

The crux of Plaintiff's fifth argument is that Miracle Hill supposedly "expressly requires all foster parents with whom it does work . . . to promote Miracle Hill's favored religious views to the children placed with them." (ECF No. 20 at 26.) As already explained, this argument is not pled in the Complaint and, in any event, nothing in the Executive Order or waiver request authorizes, allows, or encourages religious proselytization. Plaintiff's last-minute assertion of unpled, inflammatory facts should be rejected and should play no role in the analysis of the allegations actually pled.

6. Governor McMaster has treated all sects and denominations equally.

Plaintiff argues the Governor's accommodation of all faith-based CPAs amounts to a denominational preference. (ECF No. 20 at 26–27.) But this argument does not become correct merely by her frequent reiteration, and the Governor has already explained the defects in this particular argument. Plaintiff further argues "the State has not established" that its desire to maximize placement options for foster children is actually furthered by its policy of accommodating faith-based CPAs. (*Id.* at 27.) But the Governor need not empirically prove that accommodation of religious CPAs succeeds in this goal. No Establishment Clause test requires that. Rather, it suffices to assert a plausible secular interest and to implement it in such a way that a reasonable observer would perceive its even-handed treatment of CPAs of any (or no) denominational affiliation. He has done this, and Plaintiff's attempt to impose some additional, higher requirement is incorrect.

Lastly, Plaintiff complains the Governor has not explained how or why the accommodation of faith-based CPAs helps the State *avoid* religious entanglement. (ECF No. 20 at 28.) The reason is simple. In the absence of faith-based CPAs, entanglement would occur when a biological parent requests a child be placed with a foster family who are, for example, "born again" Christians or who are "devout Jews." Without faith-based CPAs, it would be up to DSS not only to keep track of each foster parent's professed religious affiliation but—more problematically—to assess the specific nuances of his or her faith and, in some cases, determine the depth and sincerity of the foster parent's devotion (*e.g.*, "is she 'born again'?" or "is he sufficiently observant to be 'devout'?").

IV. CONCLUSION.[17]

The Court should dismiss with prejudice Plaintiff's claims against Governor McMaster.

[*SIGNATURE PAGE ATTACHED*]

[17] Nothing in Plaintiff's Opposition rebuts the arguments made in Part II.D.3 (ECF No. 12-1 at 32–34), and the Governor reasserts and incorporates them by reference herein.

Respectfully submitted

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ Miles E. Coleman

Miles E. Coleman
Federal Bar No. 11594
E-Mail: miles.coleman@nelsonmullins.com
104 S. Main Street / 9th Floor
Greenville, SC 29201
(864) 373-2352

Jay T. Thompson
Federal Bar No. 09846
E-Mail: jay.thompson@nelsonmullins.com
Ethan J. Bercot
Federal Bar No. 12830
E-Mail: ethan.bercot@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

OFFICE OF THE ATTORNEY GENERAL

Robert D. Cook, South Carolina Solicitor General
Federal Bar No. 285
E-Mail: bcook@scag.gov
Post Office Box 11549
Columbia, SC 29211
(803) 734-3970

Attorneys for Governor Henry McMaster

Greenville, South Carolina
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