

**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.

Case No. 6:19-cv-448 (TMC)

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

INTRODUCTION

At the motion to dismiss stage, the facts before this Court are those that are pleaded in the Complaint in non-conclusory fashion. Here, those facts are that Plaintiff has *not* been denied the opportunity to work with children in the SC Foster Care Program but instead has decided not to seek such opportunities because one particular private organization declined to work with her; that the organization's decision was motivated by its religious beliefs, not any government policy; that South Carolina, not HHS, decides which entities are licensed and funded under the SC Foster Care Program; and that the only HHS action at issue, the January 23 conditional exception issued to the State, was an exercise of enforcement discretion that neutrally accommodates religious liberty. All of those facts add up to the conclusion that Plaintiff's Complaint fails to support the Court's jurisdiction and fails to state any claim against the Federal Defendants. Plaintiff's Opposition does not show otherwise and the Court should dismiss this suit.

ARGUMENT

I. Plaintiff Lacks Standing to Sue the Federal Defendants.

The Motion to Dismiss shows that Plaintiff lacks standing to bring this suit against HHS because her alleged injury—denial of an opportunity to volunteer with foster children—was caused by a non-party, Miracle Hill, acting pursuant only to its own religious beliefs. Thus, as dictated by precedent—principally *Doe v. Obama*, 631 F.3d 157 (4th Cir. 2011); *Allen v. Wright*, 468 U.S. 737 (1984); and *Frank Krasner Enters., Ltd. v. Montgomery Cty.*, 401 F.3d 230 (4th Cir. 2005)—Plaintiff's injury is not traceable to HHS, nor redressable by the relief sought. Fed. Defs.' Mem. in Support of their Mot. to Dismiss ("Mem.") at 9–15, ECF No. 29-1. And Plaintiff may not assert injury as a taxpayer. Mem. at 15–18. Plaintiff fails to rebut these points.

A. Plaintiff Lacks Taxpayer Standing.

Much of Plaintiff's argument against these dispositive principles in her Opposition brief is

devoted to re-characterizing her injury as one that more directly relates to the Federal Defendants but that runs directly into the rule against taxpayer standing. Specifically, Plaintiff argues that her injury is not just “suffering religious discrimination”—referring to conduct undertaken only by Miracle Hill—but that she suffered this discrimination “in the provision of a governmental service that is bought and paid for with federal . . . dollars.” Pl.’s Mem. in Opp’n to Fed. Defs.’ Mot. to Dismiss (“Opp’n”) at 7, ECF No. 39. In so arguing, Plaintiff appears to be trying to invoke taxpayer standing under the guise of a purported “direct injury” theory. Plaintiff makes this attempt explicit elsewhere in her brief, where she states that her “direct injury” arises from the use of “tax dollars . . . to fund religious discrimination.” *Id.* at 11 n.1. She argues that if HHS “did not grant the federal funds” to South Carolina, “Miracle Hill could not continue to provide federally funded services” in a manner she deems unlawful. *Id.* at 8.

The fundamental rule against taxpayer standing forecloses this argument. *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 599 (2007). Were it otherwise, the plaintiffs in *Doe v. Obama*, who similarly alleged that the Government had permitted federal funding of conduct that violated their constitutional rights, would have surely avoided the standing defects that doomed their suit. 631 F.3d at 159. But the *Doe* court could not rely on the fact of federal funding for jurisdiction. It instead looked to the underlying conduct allegedly causing injury and determined that such conduct was not traceable to the Government.

Plaintiff does not respond to the precedents cited in the Motion that taxpayer standing does not lie in this case. Mem. at 15–18. Instead, Plaintiff asserts that parties have “[s]tanding to challenge the imposition of regulatory requirements that are more onerous for certain faiths than others” and that injury inflicted by such differential treatment is “direct for those who are affected by the requirements.” Opp’n at 11 n.1. That rule does not apply here. The conditional exception imposes no “regulatory requirements” on Plaintiff, nor does it directly subject her to any burdens, as would a

tax, for example. *Compare Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 145 (2011) (citing *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 8 (1989) (plurality op.)).

B. Plaintiff Fails to Show Traceability or Redressability for Her Alleged Injury.

1. In responding to Federal Defendants’ traceability arguments, Plaintiff labors to distinguish *Doe v. Obama* and *Allen v. Wright*. To her credit, she fairly synthesizes the rule of those cases, in a fashion fatal to the Complaint: “an injury is not fairly traceable to the government when the injury was perpetrated by a third party and a change in governmental policy either would not have caused different behavior by that third party or it is purely speculative whether the third party’s behavior would have changed.” Opp’n at 8. That is precisely the situation here. The Complaint alleges that Miracle Hill’s alleged action was based on its religious beliefs, not federal policy. Thus, Miracle Hill was an “intervening cause” of the injury alleged. Mem. at 13 (quoting *Doe v. Obama*, 631 F.3d at 161).

The referral condition that HHS included in the exception issued to the State further demonstrates the essential disconnect between Miracle Hill’s alleged action and the Federal Defendants. Mem. at 13–14. Plaintiff responds by claiming that HHS’s conditional exception “license[s] agencies to turn away families without a referral.” Opp’n at 9. That is false. To be sure, HHS stated that it imposed the referral condition on the understanding that no sub-grantee had religious objections to such referrals (which could raise Religious Freedom Restoration Act (“RFRA”) concerns requiring further analysis). But absent such objections, the condition plainly applies. Mem., Ex. A, ECF No. 29-2. Plaintiff has not pointed to any such objections from Miracle Hill. Plaintiff also argues that a referral does nothing to “temper the stigmatic and dignitary harms of being turned away *by Miracle Hill*.” Opp’n at 9 (emphasis added). Plaintiff’s language is telling as she again shows that her quarrel is fundamentally with Miracle Hill, not the Federal Defendants.

2. Plaintiff's redressability arguments fare no better. Plaintiff states that she is "not seeking an order requiring Miracle Hill (or anyone else) to accept her as a volunteer or foster parent," but rather an injunction that "every private entity that serves as a licensed child-placement agency will be required to provide government-funded services in a nondiscriminatory fashion." Opp'n at 10. That statement of the relief sought shows how far afield Plaintiff's Complaint strays from the particular injury that is actually alleged, namely her interaction with *one* sub-grantee of the State. Plaintiff has not shown that the relief sought against the Federal Defendants is likely to redress the injury allegedly caused by that sub-grantee. The only basis to seek relief as to "every private entity" in the State is through taxpayer standing, which Plaintiff cannot sustain.

Moreover, Plaintiff's injuries are not redressable for the additional reason that HHS has no control over the State's decisions about which entities to license as child-placing agencies in the State foster care system. Plaintiff has only two responses, neither of which is successful. First, she again characterizes her injury as a taxpayer challenge to the manner in which federal funds are expended, Opp'n at 11, but that theory of standing is foreclosed. Second, Plaintiff responds that the existence of multiple causes of an injury does not necessarily defeat redressability. Federal Defendants do not dispute that basic point, but that does not relieve Plaintiff of the burden to "demonstrate standing for each claim [s]he seeks to press and for each form of relief that is sought." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (citation omitted). And that means that Plaintiff must show "that each defendant caused [the] injury and that an order of the court against each defendant could redress the injury." *Calzone v. Hawley*, 866 F.3d 866, 869 (8th Cir. 2017) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). Plaintiff has not shown that any order against the Federal Defendants, standing alone, is likely to redress any cognizable injury. She cannot stitch together inadequate standing allegations against multiple parties to create an Article III case or controversy.

II. Section 701(a)(2) Forecloses Plaintiff's APA Claims.

The Motion to Dismiss also showed that Plaintiff's challenge to the January 23 conditional exception to the State is foreclosed from APA review because it represents an agency "decision not to prosecute or enforce" that is "presumed immune from judicial review under § 701(a)(2)." Mem. at 18–22 (quoting *Heckler v. Chaney*, 470 U.S. 821 (1985)).¹

Plaintiff argues that the conditional exception is reviewable because it is "not an individual, retrospective enforcement determination." Opp'n at 12. To begin, Plaintiff misconstrues the conditional exception, deeming it a "general declaration" concerning "a whole swath of regulated entities." Opp'n at 15. The conditional exception concerns only one grant to one entity, South Carolina, in one federal program. And rather than being a "general declaration," the exception is the product of a careful balancing of factors based on the particular facts before the agency involving Miracle Hill and similarly situated faith-based grantees in South Carolina. Mem. at 19–20. Moreover, the exception is conditional on South Carolina ensuring that its sub-grantees refer potential foster parents for service with other entities, thus rendering meritless Plaintiff's assertions that it is a *de facto* rule applicable to all sub-grantees for all time.

Even if Plaintiff were correct that the conditional exception is a "classwide, prospective policy," Opp'n at 12, Plaintiff provides no precedential support for the proposition that the *Chaney* presumption of non-reviewability is limited to retrospective determinations, or enforcement decisions limited to particular entities. Indeed, Plaintiff's argument is inconsistent with the facts and reasoning of *Chaney* itself. The non-enforcement decision in that case was not an individualized decision by the FDA to forgo enforcement of the Federal Food, Drug, and Cosmetic Act against a single alleged

¹ Plaintiff devotes a substantial portion of her response to attacking a straw man, arguing that *Chaney* does not bar review of agency action that is allegedly unconstitutional. Opp'n at 17–19. Federal Defendants agree and are not seeking dismissal of Counts III, IV, or V on this basis. Mem. at 18. But Counts I and II, which depend on the APA for subject matter jurisdiction, are foreclosed in light of section 701(a)(2).

violator. Rather, the plaintiffs in *Chaney* requested that the FDA enforce the statute’s misbranding prohibition against the use of certain drugs for capital punishment by taking “various investigatory and enforcement actions” against “drug manufacturers,” “prison administrators,” and “all [others] in the chain of distribution”; the FDA, however, *categorically* concluded that its enforcement discretion “should not be exercised to interfere with this particular aspect of state criminal justice systems.” 470 U.S. at 824–25. In short, *Chaney* establishes that the question under section 701(a)(2) is whether the type of agency decision at issue is inherently discretionary in nature, not the number of people to whom it applies. Moreover, at the core of *Chaney*’s reasoning was the idea that courts lack a basis to second-guess agency decisions about how “resources are best spent” or whether certain enforcement activity “best fits the agency’s overall policies.” *See* 470 U.S. at 831. Those kinds of decisions necessarily take account of agency policy and budgetary priorities that extend beyond any particular case and that encompass prospective judgments about the agency’s work.

Plaintiff’s other attempts to avoid the dispositive impact of *Chaney* and *Sierra Club v. Larson*, 882 F.2d 128 (4th Cir. 1989), are unavailing. Plaintiff invokes dicta in *Chaney* that leaves open the possibility that the presumption of non-reviewability “may” be overcome if an agency has “‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.” 470 U.S. at 833 n.4 (citation omitted). Plaintiff fails to show that HHS could “justifiably be found” to have abdicated its statutory responsibilities. To begin, section 75.300(c) is not the product of any statutory requirement, rendering this possible exception irrelevant because there is no “statutory responsibility” at issue. And in any case, the fact- and circumstance-dependent limitations HHS placed on the exception refute any characterization of it as an “abdication” of responsibility or expression of “general policy.”

Finally, Plaintiff is unable to distinguish *Larson*. Opp’n at 16. As in *Larson*, the conditional exception here concerns only one entity potentially subject to enforcement action, South Carolina.

And contrary to Plaintiff's assertion, the Fourth Circuit did not rely on South Carolina's progress in complying with federal law. Instead, the court rejected the plaintiff's "attempts to characterize the Regional Administrator's letter . . . as a finding . . . that South Carolina was maintaining effective control." *Larson*, 882 F.2d at 131. The court held judicial review was not "intended" "to check the Secretary's decision to encourage compliance through informal means or to determine that an enforcement action is unnecessary in a given state." *Id.* at 132.

III. Plaintiff Fails to State a Claim Against the Federal Defendants.

A. Plaintiff Fails to State Claims Based on Others' Alleged Actions.

The Motion to Dismiss also showed that, under *Blum v. Yaretsky*, 457 U.S. 991 (1982), and *Milburn by Milburn v. Anne Arundel Cty. Dep't of Social Servs.*, 871 F.2d 474 (4th Cir. 1989), Plaintiff cannot state claims based on the alleged action of Miracle Hill or on South Carolina's expenditure of federal grant funds on faith-based sub-grantees that it selects and licenses. Mem. at 22–26. That is because "[m]ere approval of or acquiescence" in another's actions is not enough to hold the Government responsible for those actions; such actions must, instead, have been the product of "coercive power" by the Government or "significant encouragement." Mem. at 23 (quoting *Blum*, 457 U.S. at 1004–05). The Complaint does not meet that standard.

1. As to Miracle Hill, Plaintiff seems nearly to concede the point. In attempting to distinguish *Blum*, Plaintiff states that she is not challenging "any purely private decision by Miracle Hill to turn her away," but rather HHS's decision to "clear the regulatory hurdles that would ordinarily bar" Miracle Hill's alleged conduct. Opp'n at 32. Plaintiff thus seems to recognize that she cannot hold Federal Defendants directly responsible for Miracle Hill's actions under *Blum* but, instead, must base her claims on federal action. But here the only federal action alleged is the conditional exception, which neither coerced Miracle Hill to decline to work with Plaintiff nor significantly encouraged it to do so.

Plaintiff asserts that a “nominally private entity” may be treated as a state actor when “it has been delegated a public function by the [s]tate.” Opp’n at 31 (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 296 (2001)). But Plaintiffs’ Opposition recognizes that that rule is not relevant here. *Brentwood* involved the question whether a “private entit[y] named as [a] defendant[.]” was a state actor “subject to liability for [its own] constitutional violations,” a question Plaintiff concedes has “no bearing here.” Compare Opp’n at 31 with *Brentwood*, 531 U.S. at 290, 293 (question was whether non-profit membership corporation was state actor for purposes of suit challenging the corporation’s actions).² In contrast to *Brentwood*, the question here is whether the conduct of other actors can be imputed to the Federal Defendants, the situation in *Blum*. See *Blum*, 457 U.S. at 1003 (observing that the case was “obviously different” from one where a court must determine if private party is a state actor). And *Milburn* confirms that the standards of *Blum* apply to considering such claims. *Milburn*, 871 F.2d at 479 (rejecting claims against state officials “who might have intervened” to stop private acts at issue).

Plaintiff also cites the proposition that the “state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.” Opp’n at 29 (quoting *Norwood v. Harrison*, 413 U.S. 455, 465 (1973)). That rule is perfectly consistent with *Blum*’s statement that the Government may be responsible for others’ conduct where it results from “coercive power” or “significant encouragement” by the Government. The Complaint contains no allegation supporting any such inducement, encouragement, or promotion of Miracle Hill’s alleged action. The conditional exception, which at best represents an arguable acquiescence in that conduct, does not suffice. See *Blum*, 457 U.S. at 1004–05 (“[m]ere approval” or “acquiescence” not enough to impute

² *Blum* did recognize that the government may be held responsible where it has delegated “powers that are ‘traditionally the exclusive prerogative of the State’” to a private party. *Blum*, 457 U.S. at 1005 (citation omitted). But “[t]he care of foster children is not traditionally the exclusive prerogative of the State.” *Milburn*, 871 F.2d at 479.

conduct to government).

2. Federal Defendants are also not the proper party against whom to assert claims based on South Carolina's decisions regarding which child-placing agencies to license or reimburse with federal funds. Mem. at 25–26 (citing Compl. ¶ 60, ECF No. 1). The Federal Defendants have no control over those decisions and, indeed, the Federal Defendants have no direct relationship with Miracle Hill in regard to the SC Foster Care Program. Plaintiff tries to minimize this point by re-characterizing the Federal Defendants' argument to be only an objection that federal grant money "passes through the State" before reaching sub-grantees. Opp'n at 25. That is mistaken. The key is that the Federal Defendants play *no role* in determining which entities may serve as child-placing agencies under South Carolina law or in selecting which entities receive reimbursement. Thus, to the extent Plaintiff roots her claim in the fact that Miracle Hill is a licensed child-placing agency receiving reimbursement for expenses from the State (including with federal dollars the State receives), she has provided the Court no basis under *Blum* and *Milburn* to say that the Federal Defendants are responsible for such actions. And the principles of *Blum* apply fully in the Establishment Clause context, regardless of any suggestions to the contrary in Plaintiff's Opposition. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring in part and concurring in the judgment) ("an Establishment Clause violation must be moored in government action of some sort").

B. Plaintiff Fails to State a Claim Based on the Conditional Exception.

Finally, Plaintiff fails to state a claim based on the conditional exception, whether under the Establishment Clause (because the exception is a neutral accommodation of religious freedom motivated by secular concerns), equal protection (because Plaintiff was not denied equal treatment by it), or substantive due process (because it was not fatally arbitrary). Mem. at 27–33. Plaintiff's arguments as to her equal protection and due process claims warrant little further discussion, as she

simply repackages her state action arguments as to the former and ignores the Fourth Circuit's fatal arbitrariness test as to the latter. *See* Opp'n at 33–35. Although Plaintiff primarily focuses her Opposition on the Establishment Clause, her arguments are unavailing.

1. To begin, Plaintiff does little to rebut the Federal Defendants' application of the first and third aspects of the *Lemon* test. She does not substantively respond to the Federal Defendants' arguments about *Lemon*'s third prong concerning excessive entanglement between government and religion, effectively conceding that HHS has cleared that hurdle. As to the first *Lemon* prong, Plaintiff omits the relevant standard, under which the Government need only “show that it had a plausible secular purpose for its action” that was not “pretextual.” Mem. at 27 (quoting *Wood v. Arnold*, 915 F.3d 308, 315 (4th Cir. 2019), *cert. filed*, No. 18-1438). Instead, Plaintiff argues that HHS's reasons for issuing the conditional exception were not good enough. Opp'n at 22–23. But *Lemon*'s purpose prong is not akin to arbitrary-and-capricious review. Plaintiff does not dispute that the purposes for the conditional exception apparent on its face are secular—to comply with RFRA and to ensure the continued availability of entities to serve the welfare of children in the SC Foster Care Program. Nor does Plaintiff provide any basis to conclude these purposes were a sham. The Court need go no further. *Lambeth v. Bd. of Comm'rs of Davidson Cty., N.C.*, 407 F.3d 266, 270 n.2 (4th Cir. 2005) (affirming dismissal where plaintiffs failed to allege that concededly secular purpose was pretextual).

2. Plaintiff spends the lion's share of her argument on *Lemon*'s second element, whether the conditional exception has a “primary effect that neither advances nor inhibits religion.” *Wood*, 915 F.3d at 314. Plaintiff first argues that the conditional exception carries a message of disfavor for those persons “denied service” in relation to it. Opp'n at 23–24. Plaintiff is incorrect, however, that the conditional exception contemplates *any* person being denied the opportunity to be a foster parent in the SC Foster Care Program. While it is certainly true that a person may not be able to work with a particular child-placing agency, the exception's referral condition shows that the Federal

Defendants took steps to ensure that there will be another option for a prospective foster parent. By Plaintiff's own admission, HHS's efforts have succeeded in her case and she has multiple options available for working with children, Compl. ¶ 28; that she has not sought those opportunities is not evidence of any governmental disfavor of her religion (or favoritism of Miracle Hill's). In this respect, HHS's action is no different than Title VII's exemption of religious organizations from the prohibition against religious discrimination in employment, an accommodation affirmed in *Amos*. The Government does not endorse an entity's religious beliefs through such neutral efforts at accommodation. See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 & n.15 (1987) (rejecting that Title VII exemption "conveys a message of governmental endorsement of religious discrimination" and stating that, to fail *Lemon*'s second prong, "the government itself" must have "advanced religion through its own activities and influence").

That Miracle Hill recruits only foster parents having particular religious beliefs also does not mean that it is using government funds "for religious purposes." Opp'n at 24. Plaintiff provides no support for the proposition that government aid violates the Establishment Clause if it reaches entities, for example, that select employees or students on the basis of religion (analogous circumstances to this case). Contrary precedent shows why she cannot. *Columbia Union Coll. v. Oliver*, 254 F.3d 496, 508 (4th Cir. 2001) (upholding state grants to a college affiliated with the Seventh-day Adventist Church, even though the college "gave an express preference in hiring and admissions to members of the Church"); *Mitchell v. Helms*, 530 U.S. 793, 804 (2000) (plurality op.) (upholding aid program where district court found that "pervasively sectarian" schools were among those receiving aid). Receiving payment for secular services provided in a manner that is consistent with one's religious beliefs does not show a "primary effect of advancing religion." See *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988) (evidence that publicly funded work "happen[s] to coincide with the [grantee's] religious views" does not show advancement of religion). By contrast, the Complaint contains no

allegation that Miracle Hill has received any governmental reimbursement for religious materials or indoctrination, for example.

3. Plaintiff further argues that the conditional exception fails the Establishment Clause's test for religious accommodations. Opp'n at 25–29. Plaintiff is wrong. The Government “may (and sometimes must) accommodate religious practices” without violating the Establishment Clause and the limits of permissible state accommodation “are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.” *Amos*, 483 U.S. at 334. “There is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.” *Id.* The conditional exception exhibits precisely that kind of benevolent neutrality through its lifting of a burden on Miracle Hill's religious exercise, coupled with a referral condition minimizing any burden of that accommodation on others. Moreover, there is no special test for religious accommodations; they are evaluated according to the *Lemon* factors like any other Establishment Clause claim. *Madison v. Riter*, 355 F.3d 310, 316 (4th Cir. 2003) (applying *Lemon* to religious accommodation statute).

Plaintiff nevertheless argues that any governmental accommodation of religion fails unless it “lift[s] *substantial*, government-imposed burdens on the exercise of religion.” Opp'n at 25 (emphasis added). Plaintiff is wrong that such a rule of substantiality applies or that the conditional exception fails to lift a burden on religious exercise. To begin, Plaintiff's support for this purported rule is *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), which expressly stated that “the concept of accommodation plainly ha[d] no relevance” to the case and involved the display of a crèche at a government building, not any attempt to lift burdens on religious exercise. *Id.* at 613 n.59. Thus, it can hardly be said that the Court broke new ground in restricting accommodations under the Establishment Clause. Plaintiff's other cited cases are similarly beside the point, as they concern the standard for a *plaintiff* seeking to state a claim against the government

*under RFRA or the Free Exercise Clause.*³ Those cases do not apply because the Government may take action under the Establishment Clause to accommodate religion even where doing so is not required by the Free Exercise Clause (or RFRA). See *Madison*, 355 F.3d at 317 (statutory accommodation permissible even though “Congress has no constitutional duty to remove or to mitigate the government-imposed burdens on prisoners’ religious exercise”).

In any event, the primary effect of HHS’s action *is* to lift a substantial government-imposed burden on religious practice. According to the facts alleged in the Complaint and stated in HHS’s decision letter, Miracle Hill’s decisions regarding the foster parents with which it will work are motivated by core precepts of its religious faith. Compl. ¶ 74; Mem., Ex. A at 1–2. Applying section 75.300(c)’s religious non-discrimination provision to South Carolina imposes a burden on Miracle Hill by putting them to the choice of acting contrary to their religious beliefs or possibly losing government funding. The Establishment Clause permits the Government to lift burdens that would impose economic costs on parties if they refuse to act contrary to their faith. Cf. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720 (2014) (under RFRA, federal requirement to provide contraceptive coverage imposed a substantial burden on religious exercise as to persons who believed that providing this coverage would “seriously violate[] their religious beliefs” and where refusal to provide coverage would result in financial penalties).

Plaintiff next argues that an accommodation cannot “shift costs, harms, or other burdens to nonbeneficiaries” and that the conditional exception does this by “prevent[ing]” persons “from participating in a governmental program” “on the same footing” as others. Opp’n at 28. This contention is without support in the Complaint, which does not allege that Plaintiff has been denied the opportunity to be a volunteer or foster parent in the State foster care system on the basis of religion.

³ *Goodall ex rel. Goodall v. Stafford Cty. Sch. Bd.*, 60 F.3d 168, 172–73 (4th Cir. 1995); *Henderson v. Kennedy*, 253 F.3d 12, 14 (D.C. Cir. 2001).

Thus, Plaintiff cannot meet the standard for which she argues. In any event, there is little authority for the idea that an accommodation cannot impose *any* burden on non-beneficiaries of *any* kind. In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), the Court struck down a statute in which “religious concerns automatically control[led] over all secular interests” and that took “no account of the convenience or interests” of third parties. *Id.* at 708–10. The exception issued by HHS, with its referral condition, bears no resemblance to such a law.

4. Finally, Plaintiff makes two other arguments that have no basis in the Complaint or the conditional exception. She first argues that HHS has “impermissibly authorize[d] the use of federal funds for religious coercion and proselytization,” on the basis of her assertion that Miracle Hill “expressly requires all foster parents with whom it does work . . . to promote Miracle Hill’s favored religious views to the children placed with them.” Opp’n at 29. Nothing in the record supports either of these points. Plaintiff has not alleged that Miracle Hill proselytizes its beliefs to the children in the care of the foster parents it recruits. At most, the Complaint alleges that Miracle Hill works only with foster *parents* that share its religious beliefs, not that it requires parents to impose any religious values on foster children. Compl. ¶ 74. Moreover, HHS has not authorized any such proselytization and the Complaint does not show otherwise.⁴

Second, Plaintiff asserts that the conditional exception represents a denominational preference subject to strict scrutiny because HHS has “preferred Miracle Hill’s faith, evangelical Christianity, over all others faiths.” Opp’n at 30. The conditional exception does not support this assertion; the face of the document does not express a preference for any particular religious faith, let alone Miracle Hill’s beliefs in particular. Mem., Ex. A. The absence of any facial preference is dispositive: “when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially

⁴ In any event, Plaintiff would lack standing to raise this issue. She concedes that she is not asserting the rights of third parties like foster children, nor could she. Mem. at 18 n.5.

differentiates among religions” and, if it does not, the *Lemon* test applies instead. *Hernandez v. Comm’r of Internal Revenue*, 490 U.S. 680, 695 (1989) (no denominational preference where statute did not make “explicit and deliberate distinctions between different religious organizations” but “appl[ie]d instead to all religious entities”).

CONCLUSION

For the foregoing reasons, the Court should dismiss the Complaint.

Dated: June 10, 2019

Respectfully submitted,

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