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 RESPONSE TO DEFENDANT MCMASTER'S NOTICE OF SUPPLEMENTAL AUTHORITY

Defendant McMaster has alerted the Court to the recent Supreme Court decision in *American Legion v. American Humanist Ass'n*, No. 17-1717 (U.S. June 20, 2019). Doc. 44.

The Court in *American Legion* declined to apply *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to evaluate the constitutionality of a World War I memorial cross on government property, principally because the cross is nearly 100 years old, having stood undisturbed since 1925. The majority opinion merely held that "retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones."[1] Slip op. at 21. The holding does not in any way diminish *Lemon*'s applicability to cases like this one, which involves government-funded, government-licensed discrimination in the provision of social services. Nor does it diminish the applicability of the several alternative Establishment Clause tests that Mrs. Maddonna identified in her responses to Defendants' motions to dismiss, under each of which Defendants' actions are unconstitutional. *See* Doc. 20 at 15–29; Doc. 39 at 19–30. As a matter of law, Supreme Court decisions remain binding precedent unless and until the Supreme Court

[1] Only three Justices joined the portion of Justice Alito's opinion proposing to transplant the test from legislative-prayer cases to the challenged cross display. *See* slip op. at 24–28 (plurality opinion).

explicitly says otherwise. *Hohn v. United States*, 524 U.S. 236, 252–53 (1998). But even if this Court were instead free to substitute a "historically informed analysis" here, Defendants would fare no better, because their actions simply are not a historical practice: Governor McMaster and HHS issued waivers from applicable federal and state law in March 2018 and January 2019.

As for the two-Justice concurrence criticizing the settled law on standing and stigmatic harm, slip op. at 1 (Gorsuch, J., concurring), that opinion merely underscores that the law *does* recognize stigmatic harm as a cognizable injury. And not only does Mrs. Maddonna have standing based on that type of harm, but she has an additional, independent basis for standing because she was personally excluded from participating in a governmental program because of her religious beliefs—an injury that Governor McMaster acknowledges is sufficient for standing, *see* Doc. 44 at 1.

In short, *American Legion* has no bearing in this case.

Greenville, South Carolina
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/s/ Aaron J. Kozloski

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