

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FATMA MAROUF, *et al.*,)
)
)
 Plaintiffs,)
)
 v.) Case No. 1:18-cv-378 (APM)
)
 ALEX AZAR, in his official capacity as)
 Secretary of the UNITED STATES)
 DEPARTMENT OF HEALTH AND HUMAN)
 SERVICES, *et al.*,)
)
 Defendants.)

JOINT LCvR 16.3 (d) MEET AND CONFER REPORT

Pursuant to Federal Rule of Civil Procedure 26(f), Local Civil Rule 16.3, this Court’s Order on June 28, 2019, setting an Initial Scheduling Conference, and this Court’s Minute Order on July 2, 2019, resetting the Initial Scheduling Conference, counsel for Plaintiffs Fatma Marouf and Bryn Esplin (“Plaintiffs”),¹ Defendants United States Department of Health and Human Services (“HHS”); Administration for Children and Families (“ACF”); Office of Refugee Resettlement (“ORR”); Alex Azar, in his official capacity as Secretary of HHS; Lynn Johnson, in her official capacity as Assistant Secretary for ACF; and Jonathan Hayes, in his official capacity as Director of ORR (collectively, the “Federal Defendants”); and Defendant United States Conference of Catholic Bishops (“USCCB,” and, together with Federal Defendants, “Defendants”) conferred on August 7, 2019. The Parties hereby submit this Joint Meet and Confer Statement.

¹ Pursuant to this Court’s June 12, 2019 Memorandum Opinion, the Court dismissed Plaintiff National LGBT Bar Association (the “LGBT Bar”) from this case for lack of standing. ECF No. 48. Plaintiffs reserve the right to appeal the LGBT Bar’s dismissal from this case. Defendants will oppose any appeal, as the dismissal was appropriate under the relevant law.

A. Statement of the Case

(1) Plaintiffs' Statement: Plaintiffs are a married same-sex couple who were unlawfully denied the opportunity to become foster or adoptive parents to a child or children under the Unaccompanied Refugee Minor ("URM") program or the Unaccompanied Alien Child ("UAC") program because of religious beliefs regarding their sexual orientation and sex and the same-sex character of their marriage.

Federal Defendants unlawfully award federal grant funds to USCCB to perform services relating to the URM and UAC programs. USCCB and its sub-grantees apply religious criteria in providing federally funded services under the URM and UAC programs, including religious requirements that discriminate against prospective foster and adoptive parents on account of their sexual orientation and sex and the same-sex character of their marriage. Federal Defendants were on notice that USCCB and its sub-grantees would administer URM and UAC grant funds in such a manner, and Federal Defendants failed to implement adequate safeguards to prevent USCCB and its sub-grantees from so administering these funds. USCCB and its sub-grantee in fact used these funds to discriminate against Plaintiffs on the basis of USCCB's religious beliefs regarding Plaintiffs' sexual orientation and sex and the same-sex character of their marriage. And, after Plaintiffs notified Federal Defendants that USCCB's sub-grantee had engaged in such sectarian discrimination against them under the URM and UAC programs, Federal Defendants failed to take corrective action.

By awarding URM and UAC grant funds to USCCB with knowledge that it would use such funds to engage in such sectarian discrimination, and by failing to take corrective action after being notified that USCCB's sub-grantee had so used such funds, Federal Defendants improperly acted with a predominantly religious purpose and with a primary effect of advancing

USCCB's religion and beliefs, impermissibly caused harm, and improperly coerced religious belief and practice. Moreover, in doing so, Defendants impermissibly discriminated against Plaintiffs based on religion, sexual orientation, sex, and the same-sex character of their marriage. And, by enabling USCCB and its sub-grantee to use a religious test to deny Plaintiffs the ability to apply to become foster or adoptive parents under the URM or UAC program, Federal Defendants impermissibly burdened Plaintiffs' exercise of their fundamental right to marry. For these reasons, Plaintiffs bring claims against Federal Defendants for violation of the First and Fifth Amendments to the United States Constitution.

(2) *Federal Defendants' Statement:* Plaintiffs' claims against Federal Defendants should be dismissed or judgment should be entered for Federal Defendants. Without limitation, Federal Defendants may raise the following defenses to Plaintiffs' claims.

First, Federal Defendants have not violated and are not violating the Establishment Clause or the Fifth Amendment of the Constitution through their grant relationship with USCCB concerning the provision of foster care services to youth under the UAC and URM programs in the Dallas-Fort Worth area of Texas. The Establishment Clause does not prohibit Federal Defendants from awarding grants to religious entities where those entities provide secular services and where the Government did not have a primary purpose or effect of advancing religion in doing so, including where those services are provided in a manner consistent with the entities' religious beliefs. As for Plaintiffs' Fifth Amendment claims, Plaintiffs cannot show that Federal Defendants may be held legally responsible for the alleged actions of sub-grantee Catholic Charities of Fort Worth ("CCFW"), rendering any analysis of that entity's conduct irrelevant.

Second, in light of the Court's decision on the issue of taxpayer standing, Plaintiffs lack standing to challenge any aspect of the UAC and URM programs beyond Federal Defendants' grant relationship with USCCB concerning the provision of foster care services in the Dallas-Fort Worth area of Texas.

Third, Federal Defendants may argue at summary judgment that Plaintiffs lack standing to bring any claim against Federal Defendants or that their claims have become moot.

(3) USCCB's Statement: For the reasons outlined by the Federal Defendants, the claims against USCCB should be dismissed or judgment should be entered for USCCB. USCCB receives grants through the URM and UAC programs, and it allocates those funds to foster-service providers, for use in a manner consistent with Catholic teaching. In addition to the defenses identified by the Federal Defendants and without limitation, USCCB further maintains that Plaintiffs are not entitled to relief because the Government has an obligation to accommodate religious beliefs under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq., and doing so does not violate the U.S. Constitution.

B. Matters Discussed Pursuant to Local Rule 16.3(c)

(1) Dispositive Motions and Discovery: There are no dispositive motions by Defendants regarding Plaintiffs' claims currently pending before this Court. The Court resolved motions to dismiss by the Federal Defendants and USCCB. *See* Mem. Op., June 12, 2019 (ECF No. 48). The Parties agree that fact discovery should begin and that the Court should set a deadline for dispositive motions as shown in the attached proposed Scheduling Order. The Parties believe the case could be resolved by summary judgment, as discussed in subsection (6) below.

(a) *USCCB's Statement:* Defendant USCCB believes that this case involves primarily legal issues and that stipulations can and will obviate the need for substantial fact discovery from USCCB and third-party CCFW. USCCB and CCFW are religious nonprofits with limited staff and resources, making discovery unduly burdensome. To eliminate or narrow discovery and streamline this proceeding, USCCB proposes that the Parties further meet and confer regarding the facts Plaintiffs believe should be established as to USCCB and CCFW before any discovery occurs.

(2) Joinder of Parties/Amendments to Pleadings/Narrowing of Issues: Plaintiffs do not anticipate joining any other parties. The Parties agree the Court should set a deadline to join parties two weeks after the deadline to serve initial disclosures as set forth in the Parties' proposed Scheduling Order, or on September 25, 2019, and a deadline to amend pleadings two weeks before the deadline to serve requests for production and interrogatories set forth in the Parties' proposed Scheduling Order, or October 30, 2019. The Parties agree that any Party seeking leave to amend pleadings after this deadline may do so upon a showing of good cause and with the Court's consent, pursuant to Fed. R. Civ. P. 16(b)(4).

The Parties will endeavor to reach agreement with each other about any undisputed factual or legal issues wherever possible and will attempt to narrow any disputed factual and legal issues before, during, and after discovery.

(a) *USCCB's Statement:* Defendant USCCB believes that this case turns primarily on legal issues that require minimal factual development as to USCCB and non-party CCFW. Accordingly, USCCB has proposed that the Parties agree to stipulations regarding the relevant facts involving USCCB and CCFW. Plaintiffs have indicated they are amenable to considering such stipulations. Accordingly, the Parties will be in discussions regarding stipulations proposed

by USCCB, and hope to be able to provide the Court with an initial draft at (or before) the scheduling conference.

(3) Magistrate Assignment: The Parties do not believe that the case should be assigned to a magistrate judge.

(4) Settlement Possibilities: Pursuant to the Court's request, counsel for the Parties conferred on several occasions with respect to a potential settlement. *See* Joint Status Report, Dec. 14, 2018 (ECF No. 38); Joint Status Report, Feb. 8, 2019 (ECF No. 44). While the Parties agree that these discussions were made in good faith, the Parties were unable to reach an agreement. Joint Status Report, Feb. 8, 2019 (ECF No. 44). Plaintiffs remain open to continuing settlement discussions with Defendants, subject to the guiding principles Plaintiffs provided to Defendants as set forth in the Parties' February 8, 2019 Joint Status Report. *Id.* at 6. Federal Defendants and USCCB remain willing to discuss settlement of Plaintiffs' claims based on the Government's efforts to stand up additional providers for both the URM and UAC programs in the Dallas-Fort Worth area where Plaintiffs could apply to foster a child, but do not believe settlement is feasible at this time.

(5) Alternative Dispute Resolution ("ADR"): The Parties are aware of the ADR process but do not believe that the case would benefit from referral to ADR at this time.

(6) Dispositive Motions Deadline: The Parties agree that this case may be resolved, in whole or in part, by summary judgment. Proposed deadlines by which the Parties must file dispositive motions and cross-motions, oppositions, and replies are included in the Parties' proposed Scheduling Order. The proposed deadlines do not preclude the Parties from filing dispositive motions at any time in advance of those dates as permitted by the Federal Rules of Civil Procedure.

(7) Initial Disclosures: The Parties do not believe they should stipulate to dispense with the initial disclosures required by Fed. R. Civ. P. 26(a)(1). The Parties agree to extend the deadline by which they must serve initial disclosures until two weeks after the date of the Scheduling Conference. The Parties do not believe changes should be made in the scope or form of those disclosures.

(8) Discovery: The Parties' respective positions on the matters set forth in topic 8 are stated below:

(a) *Plaintiffs' Statement*: Plaintiffs anticipate at this time that they will seek discovery from Defendants and/or third parties relevant to the following factual allegations: (1) Federal Defendants were on notice that USCCB and its sub-grantees would apply religious criteria in providing federally funded services under the URM and UAC programs, including religious requirements that discriminate against prospective foster and adoptive parents on account of their sexual orientation and sex and the same-sex character of their marriage, and Federal Defendants failed to implement adequate safeguards to prevent USCCB and its sub-grantees from so administering URM and UAC grant funds; (2) USCCB and its sub-grantee in fact used these funds to discriminate against Plaintiffs on the basis of USCCB's religious beliefs regarding Plaintiffs' sexual orientation and sex and the same-sex character of their marriage; and (3) after Plaintiffs notified Federal Defendants that USCCB's sub-grantee had engaged in such sectarian discrimination against them under the URM and UAC programs, Federal Defendants failed to take corrective action. Plaintiffs have attached a proposed Scheduling Order that contains proposed deadlines related to the completion of discovery. Plaintiffs propose limiting Requests for Admission ("RFAs") to no more than fifty (50) RFAs served on each side, excluding RFAs for the purpose of authenticating documents. Plaintiffs propose limiting

Requests for Production (“RFPs”) to no more than sixty (60) RFPs served on each Party. Plaintiffs ask for leave to increase the limit on interrogatories set forth in Fed. R. Civ. P. 33 to fifty (50) interrogatories served on each Party. Plaintiffs do not believe a protective order is needed in this case at this time, but they remain open to proposing a stipulated protective order should the need arise.

(b) *Federal Defendants’ Statement:* Federal Defendants anticipate issuing limited discovery to Plaintiffs concerning the allegations in the Amended Complaint (or any additional amended complaint). For example, and without limitation, Federal Defendants may seek discovery concerning Plaintiffs’ alleged interaction with Catholic Charities of Fort Worth and their efforts to become foster parents to youth in the UAC and URM programs.

Federal Defendants propose limiting RFAs to no more than thirty (30) RFAs served by each side, excluding RFAs for the purpose of authenticating documents. Federal Defendants propose limiting RFPs to no more than thirty (30) RFPs served by each side. Federal Defendants propose maintaining the limits on interrogatories set forth in Fed. R. Civ. P. 33(a)(1), except that the Federal Defendants should be treated as one “party” for purposes of the limits in that rule.

Federal Defendants further object to Plaintiffs’ proposed “Deadline for Good Faith Completion of Responses to Written Discovery Requests Pursuant to Fed. R. Civ. P. 33 and 34.” This deadline is unnecessary in light of the Parties’ agreed deadline for service of such discovery requests and the provisions under the Rules setting deadlines for responses and objections to such requests. The deadline could also be construed to prevent parties from taking a “reasonable time” to produce documents in response to a request for production, as is permitted by Fed. R. Civ. P. 34(b)(2)(B). Finally, the concept of “good faith completion” is unclear and could

provoke discovery disputes. Such a nebulous concept should not be included in the Court's Scheduling Order.

Federal Defendants also state that Plaintiffs' statement concerning discovery provides insufficient information about the "anticipated extent of discovery," Local Civil Rule 16.3(c)(8), specifically as relates to category one of the proposed discovery. Accordingly, Plaintiffs' statement does not adequately "outlin[e] the discovery plan," Local Civil Rule 16.3(d). Federal Defendants are therefore unable to assess whether Plaintiffs' proposed discovery period is appropriate, whether a protective order may be necessary, or what limits should be imposed on discovery.

Category one in Plaintiffs' statement could encompass discovery concerning Federal Defendants' grant relationship with USCCB under the URM and UAC programs that goes far beyond the claims in this case. For example, this category could encompass grants by Federal Defendants in relation to services other than foster care, or in other geographic areas of the country, or for a time period beyond the grants in place at the time of the alleged interaction between Plaintiffs and CCFW. To the extent Plaintiffs intend to seek such discovery, that should not be permitted as it would not be relevant to their claims or proportional to the needs of the case. Plaintiffs' taxpayer standing claims have been dismissed and they accordingly lack any basis to challenge the government's relationship with USCCB on a nationwide basis. Moreover, if Federal Defendants were ultimately obligated to produce documents concerning all grants to USCCB under the URM and UAC programs over an extended period of time, Plaintiffs' proposed discovery period would likely be too short to accommodate review and production of the large volume of Electronically Stored Information they would be seeking. The Court should require that Plaintiffs provide additional information about their discovery plan with respect to

category one in their statement at the Scheduling Conference in order to permit the Parties and the Court to engage in an informed discussion about these issues.

(c) *USCCB's Statement*: USCCB joins the Federal Defendants' statement on this topic. USCCB further reserves its right to seek a protective order depending on the scope and extent of the discovery sought by Plaintiffs.

(9) Discovery of Electronically Stored Information ("ESI"): The Parties anticipate that this case will require some, but not significant, discovery of ESI. The Parties have discussed the disclosure, discovery, and preservation of electronically stored information and will confer on the form or forms in which it should be produced. The Parties do not believe a detailed ESI protocol is needed in this case at this time, but they remain open to proposing a stipulated ESI protocol should the need arise.

(10) Claims of Privilege: The Parties have discussed potential claims of privilege or protection. The Parties are preparing an agreement with respect to asserting claims of privilege or protection after production and will present the agreement to the Court to include in an order under Federal Rule of Evidence 502.

(11) Proposed Expert Discovery Plan: Plaintiffs believe that expert discovery may be necessary in this litigation. Federal Defendants believe that expert discovery is unlikely to be necessary in this litigation. USCCB does not believe expert testimony will be necessary or relevant. To the extent expert discovery becomes necessary, the Parties do not believe the requirement of exchange of expert witness reports and information pursuant to Fed. R. Civ. P. 26(a)(2) should be modified. The Parties believe there should be a deadline for each Party to identify all proposed experts, as set forth in the Parties' proposed Scheduling Order.

(12) Class Action: The case does not involve a class action.

(13) Bifurcation: The Parties do not believe that trial should be bifurcated or managed in phases. The Parties agree that fact and expert discovery should be managed in phases, as set forth in the Parties' proposed Scheduling Order.

(14) Pretrial Conference: The Parties agree that a pretrial conference should be scheduled to take place four weeks after the Court rules on any filed motions for summary judgment and that a trial date be scheduled at that pretrial conference.

(15) Trial Date: The Parties agree that the Court should set a trial date at the pretrial conference sixty (60) days after the pretrial conference based upon the schedule of the Court and the schedule of the Parties.

(16) Other Matters: The Parties agree to electronic service of discovery in this action. The Parties further agree that they will discuss the proposed dates and locations of any and all depositions and seek to reach agreements on such dates and locations before serving deposition notices.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

MICHELLE BENNETT
Assistant Branch Director

s/ James R. Powers
JAMES R. POWERS (TX Bar No. 24092989)
Trial Attorney, Federal Programs Branch
U.S. Department of Justice,
Civil Division
1100 L Street, NW, Room 11218
Washington, DC 20005
Telephone: (202) 353-0543
james.r.powers@usdoj.gov

Counsel for Federal Defendants

HOGAN LOVELLS US LLP

By: s/ Kenneth Y. Choe
Kenneth Y. Choe (pro hac vice)
Jessica L. Ellsworth (DC Bar No. #484170)
Jennifer A. Fleury (DC Bar No. #187503)
James A. Huang (pro hac vice)
Brendan C. Quinn (DC Bar No. #1616841)
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
Telephone: (202) 637-5600
Facsimile: (202) 637-5910
jessica.ellsworth@hoganlovells.com
ken.choe@hoganlovells.com
jennifer.fleury@hoganlovells.com
james.huang@hoganlovells.com

s/ David T. Raimer

David T. Raimer (DC Bar No. #994558)
Anthony J. Dick (DC Bar No. #1015585)

JONES DAY

51 Louisiana Ave. NW
Washington, DC, 20001-2113
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
dtraimer@jonesday.com
ajdick@jonesday.com

Leon F. DeJulius, Jr. (pro hac vice)

John D. Goetz (pro hac vice)

JONES DAY

500 Grant Street, Suite 4500 Pittsburgh, PA
15219-2514
Telephone: (412) 391-3939
Facsimile: (412) 394-7959
lfdejulius@jonesday.com
jdgoetz@jonesday.com

*Counsel for Defendant United States
Conference of Catholic Bishops*

Ann Stanton (pro hac vice)

HOGAN LOVELLS US LLP
1601 Wewatta Street, Suite 900
Denver, CO 80202
Telephone: (303) 899-7300
Facsimile: (303) 899-7333
ann.stanton@hoganlovells.com

Camilla B. Taylor (pro hac vice)

Jamie A. Gliksberg (pro hac vice)

**LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.**

105 West Adams, 26th Floor
Chicago, IL 60603-6208
Telephone: (312) 663-4413
ctaylor@lambdalegal.org
jgliksberg@lambdalegal.org

Kenneth D. Upton, Jr. (pro hac vice)

**AMERICANS UNITED FOR
SEPARATION OF CHURCH AND
STATE**

1310 L Street, N.W., Suite 200
Washington, D.C. 20005
Telephone: (202) 898-2133
upton@au.org

* Admitted in Texas and Oklahoma only.

Supervised by Richard B. Katskee, a member
of the D.C. Bar.

Counsel for Plaintiffs

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v.)	Case No. 1:18-cv-378 (APM)
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SERVICES, <i>et al.</i> ,)	
)	
<i>Defendants.</i>)	

[PROPOSED] SCHEDULING ORDER

The Court having considered the Parties’ positions at the Status Conference on August 28, 2019, and good cause having been shown, it is hereby

ORDERED that the following scheduling order is adopted for this case:

Initial Disclosures	September 11, 2019
Deadline to Join Parties	September 25, 2019
Deadline to Amend Pleadings	October 30, 2019
Deadline for Service of Written Discovery Requests Pursuant to Fed. R. Civ. P. 33 and 34	November 13, 2019
[Plaintiffs’ proposed] Deadline for Good Faith Completion of Responses to Written Discovery Requests Pursuant to Fed. R. Civ. P. 33 and 34	December 20, 2019
Close of Fact Discovery	February 14, 2020
Deadline to Exchange Initial Expert Reports	February 28, 2020
Deadline to Exchange Rebuttal Expert Reports	March 28, 2020

Close of Expert Discovery	April 24, 2020
Deadline to File Dispositive Motions	June 24, 2020
Deadline to File Oppositions to Dispositive Motions	30 days from filing of the Motion to which it responds
Deadline to File Replies to Dispositive Motions	14 days from filing of the Opposition to which it responds
Pretrial Conference Date	28 days from ruling on all dispositive motions, but not before September 4, 2020
Trial Date	60 days from Pretrial Conference

SO ORDERED.

DATE: _____

Amit P. Mehta
United States District Court Judge