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

Eden Rogers et al., Plaintiffs, v. United States Department of Health and Human Services, et al., Defendants.	)	Civil Action No. 6:19-cv-01567-TMC **DEFENDANT HENRY MCMASTER'S REPLY IN SUPPORT OF THE MOTION TO DISMISS**

I. INTRODUCTION.

Plaintiffs' 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 their claims, Plaintiffs rely on facially implausible allegations, unsupported conclusions, and creative recharacterizations of the facts. As to standing, for example, they repeatedly assert they were "turned away" from a government program, were hindered from becoming foster parents, and were stigmatized by the Governor when one private child-placing agency ("CPA") referred them to other nearby CPAs. It is undisputed, however, that Plaintiffs were (and still are) welcome to seek a foster care license from the South Carolina Department of Social Services ("SCDSS") and to partner with other CPAs who would gladly work with them. Accordingly, they suffered no injury, much less one traceable to the Governor and redressable by this Court.

The merits of their claims fare no better. As to their Establishment Clause claim, they argue the Governor's accommodation of faith-based CPAs somehow benefits one religion over others and, incredibly, that it somehow forces Plaintiffs to engage in religious exercise. But the Executive Order and request for a federal waiver—the two documents in which the Governor allegedly established a State religion—accommodate *all* religious CPAs of *any* faith, sect, or denomination, and they do not hinder *any* qualified individuals from being licensed as a foster parent, regardless of her religion or irreligion. Further, Plaintiffs ignore the many cases in which courts have upheld the constitutionality of government funding of groups who limit their leadership, membership, or volunteers to co-religionists. As to their Equal Protection claim, Plaintiffs misstate the applicable standard and incorrectly argue the Governor afforded a denominational preference to Christianity, despite the fact that the Executive Order and letter to HHS plainly protect and accommodate *all* faith-based CPAs equally.

Finally, Plaintiffs fail to mention a recent District Court ruling holding the relief Plaintiffs seek here is an unconstitutional infringement on faith-based CPAs' constitutional and statutory rights. *Buck v. Gordon*, No. 1:19-cv-286, 2019 WL 4686425 (W.D. Mich. Sept. 26, 2019). This Court, too, should conclude that the Governor's accommodation of faith-based CPAs was permissible, because the alternative would itself be unconstitutional and would violate the law.

II. CLARIFICATION OF THE FACTS.

Plaintiffs' Opposition raises and relies on allegations that are unrelated to the Governor's actions, are contrary to the admitted facts, or are facially implausible. The most egregious are corrected below:

- Plaintiffs have not been prevented from becoming foster parents and have not been denied participation in a government program. (*Contra* ECF No. 61 at 11 (arguing Plaintiffs were "turned away from a government program"); *id*. at 1, 10, 14, 18, 20.) Fostering opportunities at Miracle Hill, however, are not the relevant "government program." They are but one component of a much larger State program to provide foster care. Plaintiffs do not—and cannot—allege they have been turned away from *that* program. Instead, they admittedly and knowingly spurned the avenues open to them to participate in it.
- Despite repeating the charge dozens of times, Plaintiffs have not plausibly pled they faced discrimination based on their sexual orientation. (*Contra id*. at 2, 5–7, 10–21, 36–37, 39–40.) Rather, they concede Miracle Hill referred them to SCDSS or other CPAs on *another* basis, namely that Plaintiffs did not attend a Christian church. (Compl. ¶ 81.) Further, the Governor's Executive Order and letter to HHS plainly do not authorize or seek leave for CPAs to discriminate on the basis of sexual orientation.
- Plaintiffs concede they cannot assert claims on behalf of others or rest their standing on injuries supposedly incurred by others, including the supposed proselytization of foster children. (ECF No. 61 at 10 n.5). Further, neither the Executive Order nor the Governor's letter to HHS authorize proselytization by CPAs. Nevertheless, Plaintiffs repeatedly attempt to inject these irrelevant claims into the analysis. (*See id.* at 1, 8, 29, 30.) The Court should accept Plaintiffs' concession and ignore claims Plaintiffs have no business trying to bring.

III. ARGUMENT.

A. Plaintiffs still lack standing.

As an initial matter, Plaintiffs have disclaimed any standing to bring their claims based on taxpayer status or based on the deprivation of a putative right to volunteer or foster through a CPA of their own choosing. (*See* ECF No. 61 at 3 n.3, 10 n.5, and 14.) Thus, Plaintiffs effectively concede they lack standing to bring any claims on these bases. Instead, Plaintiffs assert standing solely on the ground that Governor McMaster's actions allegedly caused them a stigmatic injury or erected "practical barriers" to their ability to foster. (*Id.* at 10.) But even where a plaintiff relies on stigmatic injuries, the Fourth Circuit has emphasized that she "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). Here, Plaintiffs' allegations grounded on stigmatic injuries do not meet their burden.

1. Plaintiffs still have not alleged a cognizable injury.

Courts have cautioned that the concept of stigmatic injury is "particularly elusive" in the context of Establishment Clause claims. *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) (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 Sep. of Church & State, Inc.*, 454 U.S. 464, 485 (1982).

In their Opposition, Plaintiffs winnow down their laundry list of grievances, speculations, and perceived slights, and rest their standing on only two alleged injuries: (1) the "stigma" they supposedly felt when one private CPA directed them to SCDSS or to other CPAs that would gladly assist them in seeking licensure, and (2) the "practical barriers" they allegedly faced in their efforts to become foster parents. (*See* ECF No. 61 at 10.) As to the former, Plaintiffs' claim of stigmatic injury—*i.e.*, that the Governor made them feel "inferior and less worthy of serving as foster parents" (*id.* at 6)—is not plausibly pled for it is contradicted by the Complaint's concession that SCDSS itself (a state agency in the Governor's Cabinet) would gladly have worked with them, as would other CPAs. (*See* Compl. ¶¶ 24–25, 82; *see also* ECF No. 61 at 12–13.) A subjective claim of stigmatic injury, especially when contradicted by the alleged facts, is insufficient to support standing, *see Valley Forge*, 454 U.S. at 485; *Sarsour*, 245 F. Supp. 3d at 729, and Plaintiffs' assertion of stigmatic injury standing does not relieve them of their burden to plead plausible and factually supported bases for their standing. *See Deal v. Mercer Cty. Bd. of Educ.*, 911 F.3d 183, 188 (4th Cir. 2018) (noting even where a plaintiff relies on stigmatic injuries, he "still must carry the burden of demonstrating each element of standing"); *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 208 (4th Cir. 2017) (stating "'unwarranted inferences,' 'unreasonable conclusions,' and 'naked assertions devoid of further factual enhancement'

are not entitled to the presumption of truth") (quoting *SD3, LLC v. Black & Decker Inc.*, 801 F.3d 412, 422 (4th Cir. 2015)); *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1085 (4th Cir. 1997).

Plaintiffs' allegation of "practical barriers" to fostering fares no better. Plaintiffs concede in their Complaint that they could pursue fostering with other CPAs or with SCDSS itself, but they allege they would prefer to partner with Miracle Hill due to its alleged efficiency and experience. (*See* Compl. ¶¶ 24–25, 82; *see also* ECF No. 61 at 13.) But even assuming *arguendo* that Miracle Hill is more efficient or experienced than other CPAs or SCDSS, Plaintiffs' desire to partner with a particular CPA of their choosing is not a cognizable injury giving rise to constitutional standing when other licensed CPAs or the State itself can and gladly will provide the desired benefit, namely foster care licensure. If, as Plaintiffs repeatedly (and incorrectly) claim, the injury they have suffered is being "turned away from a government program" (ECF No. 61 at 11; *see also id.* at 1, 10, 14, 18, 20), it is utterly implausible for them to argue that the ability to participate in that program by working hand-in-hand with the State agency responsible for its administration is a "barrier" to their participation.

Notably, Plaintiffs concede "there is no constitutional right to become a foster parent by volunteering with a CPA of one's own choosing" and "there is no constitutional right to force Miracle Hill to associate with Plaintiffs." (*Id.* at 14.) They nevertheless argue "there is a constitutionally protected right to be free from disfavor . . . in a government program." (*Id.* (citing *Turner v. Fouche*, 396 U.S. 346, 362 (1970) for the proposition that there is a "constitutional right to be considered for public service without the burden of invidiously discriminatory qualifications").) Plaintiffs' argument, however, is undone by their own Complaint, which concedes they are welcome to participate in "public service" in the relevant "government program"—namely the foster care program administered by SCDSS. (*See* Compl. ¶¶ 24–25.) Similarly, their reliance on *Turner* is inapposite, as they already have the very thing that *Turner* required, namely the "right to be considered for public service without the burden of invidiously discriminatory qualifications," because Plaintiffs could (and still can) be licensed by the State if they had applied to SCDSS. *See MGM Resorts Int'l Global Gaming Dev., LLC v. Malloy*, 861 F.3d 40, 47, 50 (2d Cir. 2017) (holding the plaintiffs lacked standing for their Equal Protection claim because they had not "made any serious attempt to obtain the benefit" they claim they were denied) (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)). Plaintiffs' allegedly stigmatic injuries do not establish standing to bring their claims.

2. Plaintiffs' alleged injuries are still not traceable to the Governor.

Plaintiffs argue their alleged injuries are traceable to Governor McMaster because his removal of an incentive (*i.e.*, his withholding of a penalty) for CPAs to make certain associational choices makes the CPAs' subsequent choices attributable to him. (*See* ECF No. 61 at 14–15, 19–20.) These are the same type of arguments rejected 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).

Plaintiffs do not respond to the Governor's traceability arguments based on *Allen*, *Doe*, and *Krasner* (*see* ECF No. 57 at 13–16),[1] and the arguments they choose to assert instead are unpersuasive. The Governor 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. But these general propositions, on which Plaintiffs' argument rest, 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 or penalties 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 Plaintiffs and thus ensured that Miracle Hill alone would make the independent decision Plaintiffs now challenge. The alleged injury stemming from Miracle Hill's decision is thus not fairly traceable to the Governor.

3. Plaintiffs' alleged injuries are still not redressable through the relief they seek.

Plaintiffs argue the relief they seek will redress their alleged injuries because if this Court were to enjoin the Governor and SCDSS from licensing or contracting with CPAs that partner only with co-religionists, then "there will be no more CPAs that discriminate." (ECF No. 61 at 20.) It is entirely speculative, however, that such an injunction would have the effect of causing Miracle Hill to abandon

[1] Elsewhere in their Opposition, Plaintiffs attempt to distinguish these cases as to the redressability of their alleged injuries (*see* ECF No. 61 at 23–24), a topic discussed later in this Reply.

its convictions, thus Plaintiffs have not shown the relief would redress their alleged injury. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) ("When . . . 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.").

In response, Plaintiffs argue that even if Miracle Hill *will not* abandon its religious convictions, the other possible outcome—namely the forced revocation of Miracle Hill's license, the loss of hundreds of foster families, and the removal of hundreds of foster children from its partner homes—would suffice to make them whole. (ECF No. 61 at 20–21.) Not so. The government's closure of Miracle Hill's foster care program would not redress the "practical barriers" Plaintiffs supposedly face. Rather, in a perverse irony, it would *entrench* the very injury of which they complain and would leave them with precisely the same options they have now, *i.e.*, SCDSS and the other local, private CPAs. Likewise, a shutdown of Miracle Hill would not redress Plaintiffs' alleged feelings of inferiority that were supposedly caused by the Governor because it would effect no change on their ability to participate in the State's foster care program. Both before and after a possible shutdown of Miracle Hill, Plaintiffs were (and still are) welcome to participate in the foster care system in South Carolina, and SCDSS was (and still is) willing to accept their application. The shuttering of Miracle Hill would not change that. Plaintiffs' argument reveals they have no interest in redressing injuries to them personally, but rather are interested in "invalidat[ing] laws" because they "disagree[] with them," an endeavor courts may not aid. *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011).

4. Plaintiffs' reliance on Marouf *and* Dumont *is inapt.*

Plaintiffs rely on two rulings from other jurisdictions concluding other plaintiffs had standing to challenge foster care actions. (*See* ECF No. 61 at 2–4, 11–15, 17–18.) These rulings, of course, have no authority in this District. Further, they were wrongly decided or are distinguishable. In *Marouf*, for example, there was only one agency in the area through which an applicant could foster a refugee child. *See Marouf v. Azar*, No. 18-cv-00378 (APM), 2019 WL 2452315 (D.D.C. June 12, 2019). Here, in contrast, Plaintiffs concede there were (and still are) other local agencies or SCDSS through whom they

could foster. In addition, in *Marouf*, the private agency's ability to place refugee children in foster homes was both recent and uniquely dependent on the federal government's authority over immigration related matters. Here, in contrast, there is a long history of private foster care agencies in South Carolina (including Miracle Hill) and across the country predating state involvement in or funding of foster care.

As for *Dumont v. Lyon*, 341 F. Supp. 3d 706 (E.D. Mich. 2018), the ruling was wrongly decided as a matter of law for all the reasons set out in his Motion to Dismiss and this Reply. Further, the *Dumont* court's erroneous standing analysis was shielded from appellate review by the subsequent settlement in the suit,[2] and that the remainder of *Dumont's* reasoning was effectively undone by a later District Court ruling after a realignment of the parties. *See* Part III.D, *infra* (discussing *Buck v. Gordon*, No. 1:19-cv-286, 2019 WL 4686425, at *7–10 (W.D. Mich. Sept. 26, 2019)).[3] Accordingly, *Dumont* is of extremely limited, if any, persuasive value.

B. Plaintiffs still fail to state a claim for an Equal Protection Clause violation.

Plaintiffs' attempt to salvage their Equal Protection claim is rife with legal and analytical deficiencies and unwarranted inferences. For example, they misstate the applicable standard by wrongly asserting that state actions favoring religion over non-religion are evaluated under strict scrutiny. (ECF No. 61 at 37.) Not so. Although government actions "discriminating *among* religions are subject to strict scrutiny," government actions "affording a uniform benefit to *all* religions" are assessed under rational basis review. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987).[4] The rational basis test applies to situations that (as here) involve

[2] *Dumont* was brought by a same-sex couple represented by the ACLU and alleged the accommodation of faith-based CPAs violated the Establishment and Equal Protection Clauses. In 2018, while the suit was pending, the state elected a new Attorney General whose views on the issue aligned with the plaintiffs, and the state promptly settled the suit and implemented the policies plaintiffs sought. *See Buck v. Gordon*, No. 1:19-cv-286, 2019 WL 4686425, at *7–10 (W.D. Mich. Sept. 26, 2019).

[3] Plaintiffs neglect to mention this recent ruling.

[4] Indeed, the very case Plaintiffs quote in support of their assertion that strict scrutiny is used to review laws benefiting all religions equally—*Larson v. Valente*, 456 U.S. 228, 246 (1982)—says no such thing. Rather, both the sentence they quote and the surrounding context in *Larson* are explicitly clear that strict scrutiny applies only when reviewing governmental actions that distinguish "*among* sects" and "*between* sects." *Id.* (emphasis added) (citations and internal quotation marks omitted). Indeed, *Larson* recognizes that a different standard applies when reviewing laws that benefit all religions equally. *Id.* at 252. It is unclear how Plaintiffs reached their contrary, incorrect conclusion.

Equal Protection challenges to a government decision exempting *all* religious organizations from a nondiscrimination policy and allowing them to limit their membership and leadership to co-religionists. *Hsu ex rel. Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 868–69 (2d Cir. 1996).

Plaintiffs also misapprehend the nature of Governor McMaster's actions, stating incorrectly that his "actions clearly afford a denominational preference to evangelical Christianity." (ECF No. 61 at 37.) Their argument, however, is contradicted by the text of the Executive Order and the Governor's letter to HHS, both of which, on their faces, protect and accommodate *all* faith-based CPAs equally. (*See* ECF Nos. 57-1 and 57-2.) Plaintiffs strain to find a denominational preference where none exists, arguing (i) that the Governor acted only after learning of Miracle Hill's situation, (ii) that his letter to HHS specifically mentions Miracle Hill as an illustration of the need for a waiver, and (iii) that Plaintiffs are unaware of other CPAs who have benefited from the Executive Order or from HHS' waiver. (*See* ECF No. 61 at 37–38.) However, the fact that the Governor took action to accommodate all religious CPAs after first learning of the need illustrated by Miracle Hill does not demonstrate he was "motivated" by a desire to benefit one denomination (*id*. at 37),[5] nor does it demonstrate that his actions actually afforded a benefit to one sect or denomination *while denying it to others*. The Governor's actions accommodated all faith-based CPAs even-handedly and thus rational basis review applies. *See Amos*, 483 U.S. at 339.

Nor can Plaintiffs make out a plausible Equal Protection claim simply by disagreeing with the merits and efficacy of the calculus contained in the legitimate governmental purposes the Governor has offered to explain his actions. (ECF No. 61 at 38–39 (disagreeing that a diverse group of CPAs will lead to a diverse group of foster homes).) Such disagreements are insufficient to invalidate governmental actions under rational basis review. *See Pulte*, 909 F.3d at 693 (stating the government "is not required to produce evidence showing the rationality of its classification" and the actions "must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for" them). Plaintiffs' argument that the Governor's decision to accommodate religious providers somehow *shrinks* the available pool of homes (ECF No. 61 at 38–39) is nonsensical, for it

[5] In any event, speculation about an official's "actual motivation" is "irrelevant" to the inquiry. *Pulte Homes Corp. v. Montgomery Cty.*, 909 F.3d 685, 693 (4th Cir. 2018).

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 SCDSS itself or through a myriad of CPAs.[6]

Finally, Plaintiffs' effort to save their claims of sexual orientation discrimination (*see* ECF No. 61 at 39–40) suffers from two fatal flaws. First, Plaintiffs have not plausibly alleged that *they themselves* were subjected to any sexual orientation discrimination, much less by any party to this case. Rather, they admit that Miracle Hill had a different reason for its decision, namely that Plaintiffs are not members of a Christian church. (*See* Compl. ¶ 81). Plaintiffs' generalized allegations that Miracle Hill espouses a traditional view of marriage and their speculation that—in unspecified situations involving unidentified applicants who are not parties to this suit—may have declined to partner with same-sex couples (*see* ECF No. 61; Compl. ¶¶ 49, 52–53) are irrelevant here because (a) they do not allege *Plaintiffs themselves* were subjected to sexual orientation discrimination, and (b) their speculation is at odds with Miracle Hill's expressly stated reason for its decision. *See Massy v. Ojaniit*, 759 F.3d 343, 353 (4th Cir. 2014) ("[Courts] are not obliged to accept allegations that 'represent unwarranted inferences, unreasonable conclusions, or arguments,' or that 'contradict matters properly subject to judicial notice or by exhibit.'"). The second defect in Plaintiffs' argument is that even if Miracle Hill's decision to refer them to other providers were based on Plaintiffs' orientation, nothing in the Governor's Executive Order or letter to HHS contemplates, much less authorizes, referrals on that basis, thus the Court need not accept the allegation. *Massy*, 759 F.3d at 353.

C. Plaintiffs still fail to state a claim for an Establishment Clause violation.

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

Plaintiffs argue the State Defendants violated the Establishment Clause by delegating the authority to recruit, screen, and support foster parents to CPAs, including faith-based CPAs who choose to partner only with same-faith foster parents. (*See* ECF No. 61 at 25–26.[7]) This argument is premised

[6] 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 religious mission and motivation.

[7] Even assuming that caring for foster children is a distinctively "government function," Plaintiffs offer no authority to support the non sequitur that a third party's encouragement and support of individuals who apply to SCDSS for a foster license (as all applicants must do) is also a distinctly governmental function. Even if it is, the State has not impermissibly delegated it for the reasons explained above.

on Plaintiffs' misapplication of the case law and mischaracterization of the facts. As to the law, the cases Plaintiffs rely on are 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). So too in *Grumet*, the New York legislature had impermissibly delegated complete authority over public education in a region to a Jewish community. *See Bd. of Ed. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 697–98 (1994). And as to the facts, the State here has *not* delegated to private CPAs the unconstrained and final authority that was present in *Larkin* and *Grumet*. Quite the opposite. SCDSS 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 Regs. 114-550(C)(3), (G), (K), and -4980(a)(2)(d).

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

Plaintiffs' objections to the funding of CPAs who partner only with co-religionists fails for at least two reasons. First, and most fundamentally, they misunderstand whom faith-based CPAs serve. CPAs serve the *recipients* of the services (foster children), not the fellow-*providers* (foster parents).[8] It is the former who are the intended beneficiaries of the State's foster care program and related funds. When the distinction between the recipients and providers of the services is understood, Plaintiffs' argument crumbles. Faith-based CPAs like Miracle Hill serve *all* children without discrimination and regardless of their faith, and the Governor's Executive Order and waiver request recognize and require this.

Second, Plaintiffs incorrectly state 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. 61 at 26.) 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 placed religious criteria to determine membership and leadership);[9] *Columbia Union Coll. v. Oliver*, 254 F.3d

[8] Chapter 11 of Title 63 of the S.C. Code is titled "*Children's Services* Agencies." Likewise, SCDSS policies emphasize the purpose of the State's foster care program is to serve *foster children* and, in so doing, merely to "collaborate" with "foster placements" and "placement providers." DSS Policy & Proc. Manual §§ 500, 510.1, *available at* https://dss.sc.gov/media/1969/fostercare_2019-04-22.pdf.

[9] The church operated a childcare ministry that admitted students of any religion, but, in keeping with the doctrine of its denomination—the Lutheran Church Missouri Synod—restricted membership and leadership to fellow believers. *See* Brief Statement of the Doctrinal Position of Missouri Synod, *available at* https://www.lcms.org/about/beliefs/doctrine/brief-statement-of-lcms-doctrinal-position#church.

496 (4th Cir. 2001) (upholding constitutionality of program granting state funds to a religious college that had denominational hiring and admissions preferences); *Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006) (holding the state not only may but *must* provide funds and benefits to religious group restricting its membership to those who affirm its statement of faith and agree to live by religious principles); *Business Leaders in Christ v. Univ. of Iowa*, 360 F.Supp.3d 885 (S.D. Iowa 2019) (same).[10]

Indeed, in *Mitchell v. Helms*, 530 U.S. 793 (1990), both the plurality *and* Justice O'Connor's concurrence (on which Plaintiffs rely) held the provision of government funding to pervasively sectarian schools did not violate the Establishment Clause. *See Mitchell*, 497 U.S. at 810 (plurality op.); *id*. at 836–37 (O'Connor, J., concurring). Both the plurality and the concurrence reached this conclusion despite the fact that the Roman Catholic schools receiving the federal funds exercised religious preferences in their hiring of faculty and in their admission of the students themselves. *See id*. at 904–05 n.23 & 25 (Souter, J., dissenting) (noting that the schools in question operated under the "supervision and authority of the Archbishop of New Orleans and their parish pastors," "require attendance at daily religion classes," "require attendance at mass," "exercise a religious preference in accepting students" and in hiring the "principals and teachers in its schools," and would terminate employees "for lifestyle contrary to the teachings of the Roman Catholic church").

3. The Governor has not coerced Plaintiffs or anyone else to support religious exercise or to adopt Miracle Hill's religious beliefs.

Plaintiffs argue that Governor McMaster's accommodation of all faith-based CPAs somehow coerces them "to engage in and support religious exercise" and "to adopt Miracle Hill's religious

[10] *See also Petruska v. Gannon Univ.*, 462 F.3d 294, 309 (3d Cir. 2006) (holding a private Catholic college's receipt of state and federal funding did not limit the college's right to use religious criteria in hiring decisions); 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).

beliefs" in order to participate in the state's foster care system. (ECF No. 61 at 28–30.) It is an undisputed and admitted fact, however, that Plaintiffs could (and still can) seek licensure directly from SCDSS and could (and still can) choose to partner with another licensed CPA regardless of their religious beliefs, religious exercise, or lack thereof. It is similarly undisputed that only SCDSS can license a prospective foster parent (regardless of whether she partners with a CPA); that SCDSS will gladly license any qualified applicants regardless of their faith or lack thereof; and that SCDSS would gladly accept Plaintiffs application and make use of their home if they chose to apply for licensure rather than merely pursuing litigation. *See* S.C. Code Ann. § 63-11-60; S.C. Code Regs. 114-550(C)(3), (G), (K), and -4980(a)(2)(d). It is ludicrous for Plaintiffs to mischaracterize the State's welcoming posture toward them or any qualified applicants, regardless of their faith, as coercion to support, engage in, or adopt religious beliefs or exercise.

4. Even under Lemon*, Governor McMaster's actions were permissible.*

Plaintiffs argue that under the outdated *Lemon* test, the Governor's even-handed accommodation of all faith-based CPA's constituted an establishment of a State religion. (ECF No. 61 at 30–33.) But even assuming *Lemon* is still the controlling test, Plaintiffs have failed to establish a violation. First, Plaintiffs argue the Governor's secular purpose for his actions is merely a "sham" because they disagree with his policy determination that the best way to enlarge the pool of foster homes is to have a broad and diverse range of CPAs. (*See* ECF No. 61 at 31.) In support of their argument, Plaintiffs say they have alleged facts supporting their different view, but even if they did (and a review of the portions of the Complaint they rely on reveals only conclusory assertions, not facts), it would be insufficient to rebut the Governor's plausible proffered reason. *See Wood v. Arnold*, 915 F.3d 308, 315 (noting *Lemon's* first test "requires an 'inquiry into the *subjective intentions* of the government'" and "imposes a 'fairly low hurdle'" for the government to meet) (emphasis in original) (citations omitted).

Next, Plaintiffs argue the Governor's actions had the "primary effect" of advancing religion because (according to them) a reasonable observer would conclude he was promoting a specific religion, as well as promoting "religion over non-religion." (ECF No. 61 at 31.) But that conclusion would be utterly unreasonable. The Executive Order and waiver request apply to all faith-based CPAs equally, regardless of their faith or denomination, and it is undisputed *the State itself*, through SCDSS, will license

any qualified prospective foster parents regardless of their faith or lack thereof. It would be nonsensical for an observer to think the State values 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."). In short, even if *Lemon* is still the controlling test, state licensure of, contracting with, and accommodation of religious child welfare providers does not run afoul of the Establishment Clause.[11]

5. Plaintiffs have not shown the Governor's accommodation of faith-based CPAs is unconstitutional.

Plaintiffs dispute the Governor's argument that his accommodation of faith-based CPAs was not only permitted but was *required* by the Constitution and by state and federal law. They first argue that "Defendants are not able to point to any government-imposed burden on religious exercise that is alleviated" by the Governor's actions. (ECF No. 61 at 33.) The absurdity of this argument is demonstrated by the fact that Plaintiffs' own Complaint, the documents incorporated in it, their Opposition, and Defendants' filings in this suit uniformly and undisputedly recognize that (i) some faith-based CPAs, including Miracle Hill, feel a religious duty and obligation to partner only with co-religionists, (ii) some faith-based CPAs, including Miracle Hill, feel a religious duty and obligation to care for abused, neglected, or unwanted children in foster care, and (iii) had the Governor not intervened, faith-based CPAs, including Miracle Hill, would have been forced by the government to abandon these deeply and sincerely held religious convictions and obligations. (*See, e.g.*, Compl. 41–42, 47–48, 56–57, 70, 81; ECF No. 61 at 5–6, 15.) This is a textbook example of lifting a substantial, government-imposed burden on the exercise of religion.

Plaintiffs further argue that the Governor's lifting of that burden is impermissible because, by doing so, he imposed an undue burden on Plaintiffs. (ECF No. 61 at 33.) Again, their argument proves

[11] Plaintiffs do not dispute, and thus concede, the Governor's argument that his actions are permissible under *Lemon*'s third prong because they avoid excessive entanglement with religion.

too much. Rather than identify any burden that is shifted and on whom it is placed, Plaintiffs merely recycle their erroneous claim that allowing one private CPA to partner with co-religionists somehow hinders other prospective foster parents from fostering. (*Id.* at 33–34.[12]) As discussed above, this assertion is facially incorrect and is contradicted elsewhere in Plaintiffs' Complaint and briefing.

Plaintiffs next address the Governor's argument that the "ministerial exception" articulated and recognized by the Supreme Court and Fourth Circuit compelled his accommodation of faith-based CPAs' right to partner only with co-religionist foster parents. Their attempt to avoid this argument, however, is based on their misunderstanding of the ministerial exception, which they state applies only to "employment decisions" and "employees," and thus is inapplicable here since they "are not seeking to become employees of Miracle Hill." (*Id.* at 34.) They are incorrect. The ministerial exception applies not only to employees but to anyone, including a volunteer, who partners with a religious organization and participates in a role that the organization believes to have spiritual responsibility. *See Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177 (5th Cir. 2012) (agreeing that even volunteer or part-time musicians who perform important roles in a religious organization's activities fall within the ministerial exception); *see also* U.S. Dept. of Labor, Wage and Hour Division, Opinion Letter FLSA2018-29 (December 21, 2018) (opining unpaid members of a religious group were not employees but nevertheless did "fall squarely within the ministerial exception recognized in Hosanna-Tabor), *available at* https://www.dol.gov/whd/opinion/FLSA/2018/2018_12_21_29_FLSA.pdf.

D. The relief Plaintiffs seek was recently ruled to be an unconstitutional infringement on faith-based foster agencies' First Amendment rights.

As noted above, Plaintiffs dispute the Governor's argument that his accommodation of faith-based CPAs was necessary to avoid violating their First Amendment and statutory rights. (ECF No. 61 at 34–36.) But a recent District Court ruling in a case involving similar issues reached exactly that conclusion. *See Buck v. Gordon*, No. 1:19-cv-286, 2019 WL 4686425, at *7–9 (W.D. Mich. Sept. 26, 2019). That suit initially started out somewhat similarly to this one, when a same-sex couple

[12] In addition, Plaintiffs yet again attempt to assert the claims of others, arguing that the Governor's accommodation supposedly "burdens children in foster care." (ECF No. 61 at 34.) As noted above, however, and as conceded by Plaintiffs (ECF No. 61 at 10 n.5), they cannot rely on or assert harms or claims supposedly incurred by others, and this Court should ignore such assertions.

represented by the ACLU sued the state alleging the state's historic accommodation faith-based CPAs violated the Establishment and Equal Protection Clauses. *Id*. at *7 (summarizing the *Dumont* litigation). A District Court initially denied the state's and the intervening CPAs' Motions to Dismiss. Shortly thereafter, in the 2018 election, the voters selected a new Attorney General whose views aligned with the plaintiffs. *Id*. The state subsequently settled the *Dumont* suit.

The state later began imposing the very sanctions on faith-based CPAs that the Plaintiffs in the instant litigation seek. *See id*. at *8 –9 (noting that under the terms of the settlement agreement, the state initiated the process of cancelling the contracts and revoking the licenses of CPAs who would not abandon their sincerely held religious beliefs regarding the operation of their ministries). The CPAs and some affected foster parents sued, alleging the sanctions leveled against the CPAs—the same sanctions Plaintiffs in the instant suit seek to have *this Court* impose—violated the First Amendment and their statutory rights. *Id*. at *9–10.[13] The District Court agreed and preliminarily enjoined the imposition of those sanctions, ruling it was likely that the penalizing of the CPAs would be found to violate their Free Exercise and Free Speech rights and would constitute a violation of RFRA. *Id*. at *10–12. Notably, the court agreed with a number of the arguments raised in the instant suit by Governor McMaster. *See, e.g., id*. at *12 (noting the state's interest in expanding the pool of foster homes is not hindered but is *facilitated* by allowing faith-based CPAs to refer applicants to other providers). In sum, the ruling in *Buck* supports the Governor's arguments in the instant litigation; indicates his accommodation of faith-based CPAs was both permissible and required by the First Amendment, state and federal law, and controlling case law; and indicates the relief Plaintiffs seek would itself be unconstitutional and contrary to the law.

IV. CONCLUSION.

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

[*SIGNATURE PAGE ATTACHED*]

[13] The new suit kept the same parties but realigned them. The former intervenors are now the plaintiffs; the former plaintiffs are now the intervenors; and the named state officials are still the defendants.

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
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
October 11, 2019