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.	Case No. 6:19-cv-1567 (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 Plaintiffs have *not* been denied the opportunity to foster children in the SC Foster Care Program by HHS, but instead have decided not to seek such opportunities because one particular private organization declined to work with them; 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 in a manner consistent with Miracle Hill's decades-long practice. All of those facts add up to the conclusion that Plaintiffs' Complaint fails to support the Court's jurisdiction and fails to state any claim against the Federal Defendants. Plaintiffs' Opposition does not show otherwise and the Court should dismiss this suit.

ARGUMENT

I. Plaintiffs Lack Standing to Sue the Federal Defendants.

The Motion to Dismiss shows that Plaintiffs lack standing to bring this suit against HHS because their alleged injury 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)—Plaintiffs' injury is not traceable to HHS, nor redressable by the relief sought. Fed. Defs.' Mem. in Support of their Mot. to Dismiss ("Mem.") at 8–14, ECF No. 50-1. Plaintiffs also may not assert injury as taxpayers or assert alleged injuries to unidentified third-party foster children, Mem. at 14–17, something Plaintiffs concede in their

opposition brief they are not attempting to do. Pls.' Mem. of Law in Opp'n to Mots. to Dismiss ("Opp'n") at 10 n.5, ECF No. 61. Plaintiffs fail to rebut the Federal Defendants' demonstration that they lack standing.

A. Plaintiffs Fail to Show Traceability for Their Alleged Injuries.

Plaintiffs contend they have established that their alleged injuries are traceable to the Federal Defendants because HHS "continue[s] to fund" South Carolina under the Title IV-E program and because of the January 23 conditional exception. Opp'n at 16. Neither ground provides a basis for standing.

As to the former, Plaintiffs cannot rely on the mere fact that HHS issues grants to South Carolina to establish traceability. Plaintiffs contend that, in the absence of such funding, their alleged interaction with Miracle Hill would not have occurred in a "government-funded program." Opp'n at 17; *see also id.* at 20 (Plaintiffs seek to "hold Defendants responsible *for* . . . funding the discriminatory conduct"). But that argument fundamentally collapses into one based on taxpayer standing, which is insufficient to satisfy Article III. *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 avoided the traceability defects that doomed their suit. 631 F.3d at 159. But the mere fact of federal funding in *Doe* was not enough to establish traceability. Rather, the court looked to the underlying conduct allegedly causing injury and determined that such conduct was not traceable to the Government. *Id.* at 161 (analyzing the "independent decision of biological parents to donate embryos for research"). Similarly here, the underlying conduct causing Plaintiffs' alleged injury was not federal funding of South Carolina, but the alleged actions by Miracle Hill. *See* Opp'n at 17 (Plaintiffs suffered injury as a result of "being turned away" by

Miracle Hill). Accordingly, the fact that the Federal Defendants provide grants to South Carolina does not establish traceability as to the Federal Defendants.

The January 23 conditional exception issued to South Carolina likewise does not make Plaintiffs' alleged injuries traceable to the Federal Defendants. Under Fourth Circuit precedent, the conditional exception cannot form a basis for tracing to the Federal Defendants an injury arising from *Miracle Hill's* actions. The Complaint alleges that Miracle Hill declined to work with Plaintiffs because of its own religious beliefs, not federal policy. Thus, Miracle Hill was an "intervening cause" of the injury alleged. Mem. at 11 (quoting *Doe v. Obama*, 631 F.3d at 161). Plaintiffs' citation, Opp'n at 13, of Supreme Court cases concerning the existence of impermissible barriers in government programs is inapposite because each of those cases involved discrimination *directed by* government policy, not actions based on a private party's personal beliefs. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477–78 (1989) (challenge to Richmond City Council plan that included race-based quotas for government contractors); *Ne. Fla. Chapter of Assoc. General Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 658 (1993) (challenge to city ordinance that "accord[ed] preferential treatment to certain minority-owned businesses in the award of city contracts").

Rather than contend with the dispositive effect of *Doe v. Obama*, Plaintiffs hang their hat on the assertion that in the absence of the conditional exception, the State "would not have allowed such conduct by" Miracle Hill and, therefore, Plaintiffs would not have suffered discrimination in the "*public* child welfare system." Opp'n at 17, 19. This does not establish that South Carolina's decision to continue licensing Miracle Hill, let alone that Miracle Hill's own actions, are traceable to the Federal Defendants. If Plaintiffs' rule were the law, the Fourth Circuit would have held that the plaintiff's injury in *Frank Krasner* was traceable to a county law where that law was a "deal-

breaker" that led a third-party not to rent space to the plaintiff. *Frank Krasner*, 401 F.3d at 236. But the Fourth Circuit did the opposite, concluding that it lacked jurisdiction to consider claims against the county based on the third-party's decision. *Id.* Plaintiffs again fail to distinguish this Circuit precedent. The Federal Defendants do not control the State's licensure of child placing agencies and, thus, there is no standing against them to press claims that Miracle Hill's conduct was "authoriz[ed]" in the State foster care system. *See* Mem. at 13 (no traceability where alleged injury arose from a separate state regulatory regime) (citing *Mirant Potomac River, LLC v. EPA*, 577 F.3d 223, 230 (4th Cir. 2009)).[1]

In any event, the Court need not accept the truth of Plaintiffs' hypothetical contention that the State would not have licensed Miracle Hill absent the conditional exception. Only well-pleaded facts, not bald speculation about counterfactual events, are entitled to a presumption of truth at the motion to dismiss stage. *See Roake v. Forest Preserve Dist. of Cook Cty.*, 849 F.3d 342, 347 n.4 (7th Cir. 2017) (a "conclusory and hypothetical assertion that" plaintiff would have been terminated if he had not resigned was "pure conjecture" and thus was "not a well-pleaded factual allegation entitled to a presumption of truth on a motion to dismiss" (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 680–81 (2009))); *see also Precision Imaging of N.Y., P.C. v. Allstate Ins. Co.*, 263 F. Supp. 3d 471, 478 (S.D.N.Y. 2017) ("More fundamentally, this kind of counterfactual speculation is insufficient to satisfy the basic plausibility pleading requirement.").

Moreover, Plaintiffs' speculative assertion is undermined by the Complaint's own allegations. Although Plaintiffs claim that Miracle Hill would not have received a permanent

[1] By arguing for the application of these controlling legal principles, the Federal Defendants do not express any agreement with Plaintiffs' claims against the State. *Contra* Opp'n at 16 n.9. Instead, the Court simply lacks jurisdiction to reach the merits of the State's licensure of Miracle Hill in evaluating the claims against the Federal Defendants.

"standard CPA license" absent the conditional exception, Compl. ¶ 116, ECF No. 1, the Complaint also quotes an Executive Order issued by the State before the conditional exception that says "DSS shall not deny licensure to faith-based CPAs solely on account of their religious identity or sincerely held religious beliefs," *id.* ¶ 64. Plaintiffs also cite a statement by Miracle Hill's CEO that absent "guidance from Washington," he expected "we'll receive another provisional license," a license that the Complaint alleges was subsequently received "as . . . anticipated." *Id.* ¶¶ 65, 66. Finally, Plaintiffs repeatedly emphasize the quality of Miracle Hill's services and the large proportion of the State's foster care population that it serves. *Id.* ¶ 43 ("Miracle Hill is South Carolina's largest provider of foster care services . . . ."); *id.* ¶ 46 (Miracle Hill "provide[s] comprehensive support to families throughout the licensing process and beyond"). Altogether, these allegations support the opposite inference from Plaintiffs' position—that the State would have continued to license Miracle Hill as a child placing agency regardless of HHS' actions.

B. Plaintiffs Fail to Show Redressability for Their Alleged Injuries.

Plaintiffs' redressability arguments fare no better for much the same reasons. Plaintiffs effectively concede that they have not shown that Miracle Hill will change its conduct based on the relief Plaintiffs seek. In response to Defendants' arguments on this score, Plaintiffs simply say that "does not matter." Opp'n at 22, 23. But it does matter. For Plaintiffs to obtain relief on claims that a foster care agency refused to consider them as foster parents based on the agency's own beliefs rather than any governmental policy, they must bring suit against the foster care agency that refused them, not HHS. *See* Mem. at 12 (no redressability where court cannot compel non-party causing injury to act (citing *Frank Krasner*, 401 F.3d at 236)).

Instead, Plaintiffs again argue that without the January 23 conditional exception, "every licensed CPA in South Carolina [would] be required to provide government-funded, public child

welfare services in a nondiscriminatory fashion." Opp'n at 21. The premise of that statement is false, however, because HHS has no control over the State's decisions regarding which entities to license as child-placing agencies in the State foster care system. Even if the Court ordered the Federal Defendants to cease issuing grants to the State under Title IV-E so long as Miracle Hill receives funds from the State, it would still be speculative to say that the State would then de-license Miracle Hill (instead of simply electing to maintain Miracle Hill's licensure without federal funds for reimbursement). Thus, Plaintiffs fail in their attempt to distinguish *Doe v. Obama*, *Frank Krasner*, or any of the other precedents Federal Defendants cite because, as Plaintiffs recognize, those cases involve the very situation here—a third party that "stand[s] between the relief requested and redressing the injuries alleged," Opp'n at 23.

Plaintiffs' reliance on *Marouf v. Azar*, 391 F. Supp. 3d 23 (D.D.C. 2019), is misplaced for similar reasons. As an initial matter, *Marouf* is an out-of-circuit district court decision, and thus the court in that case was not bound by the Fourth Circuit precedent discussed above that dooms Plaintiffs' standing here. Regardless, however, *Marouf* did not involve grants to states under the Title IV-E foster care program but, instead, unrelated programs where the district court concluded that HHS *itself* selected the grantee that allegedly engaged in discriminatory conduct. *Id.* at 36 (reasoning that standing was shown because the alleged injury turned on HHS's selection of an organization "as a federal grantee"). Because the Federal Defendants do not and did not select Miracle Hill as a grantee, *Marouf* is inapposite.[2]

Plaintiffs finally rely again on their speculative assertion that the State would not have continued licensing Miracle Hill in the absence of the conditional exception from HHS. All of the

[2] *Dumont v. Lyon*, 341 F. Supp. 3d 706 (E.D. Mich. 2018), is irrelevant for similar reasons. There, the state government defendants contracted directly with the intervenor-defendants that allegedly caused plaintiffs' injuries. *Id.* at 713–15.

reasons discussed above regarding lack of traceability further demonstrate lack of redressability as to the Federal Defendants based on the State's licensure decisions. And there is still another reason why Plaintiffs lack redressability: this is not a damages action, and therefore Plaintiffs are entitled to relief only to the extent they can show that such relief would redress their injuries going forward. *Cf. Los Angeles v. Lyons*, 461 U.S. 95, 105, 111 (1983) (holding that establishing a case or controversy to seek equitable relief requires showing a likelihood of future injury, as otherwise even a plaintiff that has suffered injury in the past "is no more entitled to an injunction than any other citizen"). Plaintiffs' Complaint does not contain any allegation—not even a speculative or conclusory one—that the State will cease licensing Miracle Hill if the Court grants the requested equitable relief against the Federal Defendants. Nor could Plaintiffs establish standing on this basis in any event: standing cannot be based on speculation about future events. Mem. at 13–14.

II. Plaintiffs Fail to State a Claim Against the Federal Defendants.

A. Plaintiffs Fail to State Claims Based on Others' Alleged Actions.

The Federal Defendants' 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), Plaintiffs cannot state claims based on the alleged action of Miracle Hill or on South Carolina's expenditure of federal grant funds to faith-based sub-grantees that South Carolina selects and licenses. Mem. at 18–22. That is because "[m]ere approval of or acquiescence" in another's actions is not enough to hold the Government responsible for those actions; instead, those actions must have been the product of "coercive power" or "significant encouragement" by the Government. Mem. at 18 (quoting *Blum*, 457 U.S. at 1004–05). The Complaint does not meet that standard.

As to Miracle Hill, Plaintiffs seem nearly to concede the point. Rather than attempt to

distinguish *Blum*, Plaintiffs state that they "do not seek to hold Defendants liable for Miracle Hill's actions," but rather HHS's decision to "grant[] a waiver from a federal nondiscrimination regulation" that purportedly "allow[ed] for" Miracle Hill's alleged conduct. Opp'n at 24–25. Plaintiffs thus seem to recognize that they cannot hold the Federal Defendants directly responsible for Miracle Hill's actions under *Blum* but, instead, must base their 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 Plaintiffs nor encouraged it to do so. In light of that lack of coercion or encouragement, there is no basis under *Blum* to impute Miracle Hill's alleged action to the Federal Defendants. *See Blum*, 457 U.S. at 1003; *id.* at 1004–05 ("[m]ere approval" or "acquiescence" not enough to impute conduct to government). Neither is there any basis under *Milburn*. Plaintiffs attempt to distinguish *Milburn* in a footnote, Opp'n at 25 n.15, by claiming that the state in that case "did not knowingly fund or license abusive foster parents." Opp'n at 25 n.15. To the contrary, the complaint in *Milburn* alleged that the defendant state officials "displayed gross negligence and deliberate indifference to [the child's] welfare in that they continued his placement in the foster home of the [foster parent] defendants," even as the officials received reports from hospital employees of suspected child abuse. 871 F.2d at 475–76. Regardless, however, *Milburn* did not turn on the level of state officials' knowledge of abuse, even though they "might have intervened" to stop the private acts at issue. The *Milburn* court instead rejected the claims against the state officials because the complaint did not meet *Blum*'s encouragement or coercion standard. *Milburn*, 871 F.2d at 479. Plaintiffs ignore *Milburn*'s express reliance on *Blum*.

The 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 21–22 (citing Compl. ¶ 33). 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. Plaintiffs simply assert that the Federal Defendants "provid[e] funding to Miracle Hill"—an assertion that is false and contrary even to the Complaint's own allegations. Compl. ¶ 33 (alleging that South Carolina "uses [federal] funds, as well as state funds, to reimburse licensed CPAs for the services they provide"). In any event, Plaintiffs fail to explain how, under *Blum* and *Milburn*, the Federal Defendants are responsible for the State's decision to reimburse Miracle Hill (including with federal dollars the State receives). And *Blum*'s principles apply fully in the Establishment Clause context. *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. Plaintiffs Fail to State a Claim Based on the Conditional Exception.

Finally, the Federal Defendants explained in their opening brief that Plaintiffs fail to state a claim based on the January 23 conditional exception, whether under the Establishment Clause (because the exception is a neutral accommodation of religious freedom motivated by secular concerns) or equal protection (because Plaintiffs were not denied equal treatment by the exception). Mem. at 23–28. Plaintiffs fail to rebut these arguments.

1. Plaintiffs' argument as to their equal protection claim appears to be based on a misunderstanding. Plaintiffs contend that the Federal Defendants have not "challenge[d] the merits" of their claim, Opp'n at 37, but that is precisely what the Federal Defendants did in explaining that Miracle Hill's alleged action cannot be attributed to HHS under *Blum* and *Milburn*. There is no other basis to allege an equal protection claim against HHS. Plaintiffs cannot rely on the January 23 conditional exception itself as the necessary *personal* denial of equal treatment to

Plaintiffs. Mem. at 28.

2. Plaintiffs' Establishment Clause arguments similarly lack merit.[3] To begin, Plaintiffs fail to 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 *Lemon*'s first prong, Plaintiffs assert that the two secular purposes for the conditional exception that the Federal Defendants pointed to are a "sham." Opp'n at 31. However, Plaintiffs point to no support for their assertion that HHS's reasons for issuing the conditional exception were pretextual and that HHS actually had a secret "predominant purpose" to advance religion. It is not enough to merely assert in the Complaint, without more, that HHS's reasons were pretextual. *See Mellen v. Bunting*, 327 F.3d 355, 372–73 (4th Cir. 2003) (government's characterization of a purpose as secular is entitled to deference so long as it is "sincere" and not "disingenuous[]"); *see also* Mem. at 24 (bare assertion of bad intent is insufficient under federal pleading standards (citing *Iqbal*, 556 U.S. at 680–81)).

Instead of alleging any basis for a finding of pretext, Plaintiffs make arguments that HHS's reasons for issuing the conditional exception were faulty. Opp'n at 31 (arguing that the conditional exception will not maximize the number of foster families and cannot be supported by RFRA). But *Lemon*'s purpose prong is not akin to arbitrary-and-capricious review. Plaintiffs do not dispute that the purposes HHS gave for the conditional exception 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. 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 adequately

[3] Plaintiffs appear to recognize that their arguments under *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), are inapposite to the Federal Defendants, given that they expressly limit their *Larkin*-based arguments to the State Defendants. *See* Opp'n at 25–26.

allege that concededly secular purpose was pretextual).

3. Plaintiffs spend the lion's share of their argument on *Lemon*'s second prong, whether the conditional exception has a "primary effect that neither advances nor inhibits religion." *Wood v. Arnold*, 915 F.3d 308, 314 (4th Cir. 2019). Plaintiffs first argue that Miracle Hill's receipt of public funds is unlawful because the government is "funding religious activity." Opp'n at 26–28. But the fact that Miracle Hill recruits only foster parents having particular religious beliefs does not mean that it is using government funds for "religious activity." The funds are used to reimburse child placement activities, not religious activities. Mem. at 3 (citing 42 U.S.C. § 674(a)(3); 45 C.F.R. § 1356.60(c)). Plaintiffs furnish no response to the Fourth Circuit's decision in *Columbia Union College v. Oliver*, 254 F.3d 496 (4th Cir. 2001), where the court upheld the eligibility for state grants of 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." *Id.* at 508. Miracle Hill's status as a recipient of public funds for non-religious foster placement activities that applies a religious preference in recruiting foster parents is indistinguishable in this respect from the college in *Columbia Union*.

Plaintiffs also argue that the conditional exception unconstitutionally coerces the exercise of religion because they feel pressure to "adopt Miracle Hill's religious beliefs." Opp'n at 28–30. Plaintiffs' dispute is once again with Miracle Hill, not HHS. Indeed, the coercion test described in *Lee v. Weisman*, 505 U.S. 577 (1992), was "confine[d]" by the "dominant fact[]" in that case that "State officials *direct[ed]* the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools." *Id.* at 586 (emphasis added); *see also id.* at 587 (school principal "decided that an invocation and a benediction should be given" and "chose the

religious participants").[4] Here, HHS did not direct Miracle Hill not to work with Plaintiffs.

The conditional exception, which merely allows South Carolina to accommodate Miracle Hill's religious exercise, is nowhere near the sort of state action that could satisfy the *Lee* coercion test. Otherwise, Title VII's exemption of religious organizations from that statute's religious discrimination provision would be similarly unconstitutional. By virtue of that exemption, employees of religious organizations presumably feel pressure to accede to their employers' religious beliefs in the same sense as alleged here. Nonetheless, the Supreme Court has upheld Title VII's exemption for religious organizations because the relevant test is whether the "*government itself*" has advanced religion, not whether it has accommodated a private entity's beliefs. Mem. at 25–26 (citing *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987)); *see also Amos*, 483 U.S. at 327, 337 & n.15 (Title VII exemption does not reflect a "governmental endorsement of religious discrimination"). Plaintiffs' additional allegations that Miracle Hill forces prospective foster parents to proselytize children in foster care are not adequately pleaded and thus need not be presumed true by the Court. Mem. at 21. And regardless, those allegations are irrelevant to claims against the Federal Defendants; there are no allegations that HHS, whether through the conditional exception or otherwise, has even acquiesced in Miracle Hill's purported forced proselytization by foster parents, let alone that HHS has encouraged or coerced it to engage in such behavior. *Id.*

[4] It is also unclear whether *Lee*'s coercion test even applies outside of the narrow context of prayer and other religious practices in schools. *See Lee*, 505 U.S. at 586–87 (rejecting an invitation to reconsider *Lemon* because "the controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools" were controlling); *Myers v. Loudoun Cty. Pub. Sch.*, 418 F.3d 395, 406 (4th Cir. 2005) ("The Court has reflected upon the important role that indirect coercion plays in determining if a *public school activity* violates the Establishment Clause." (emphasis added)).

Plaintiffs further argue that the conditional exception fails the Establishment Clause's test for religious accommodations. Opp'n at 33–36. Plaintiffs are 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 by lifting a burden on Miracle Hill's religious exercise, coupled with a referral condition that minimizes any burden the accommodation imposes on others. Moreover, there is no special test for religious accommodations; they are evaluated according to the *Lemon* factors. *Madison v. Riter*, 355 F.3d 310, 316 (4th Cir. 2003) (applying *Lemon* to religious accommodation statute).

Plaintiffs nevertheless argue that any governmental accommodation of religion fails unless it "lift[s] *substantial*, government-imposed burdens on the exercise of religion." Opp'n at 33 (emphasis added). Plaintiffs are wrong that such a substantiality rule exists or that the conditional exception fails to lift a burden on religious exercise. To begin, Plaintiffs' 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 because it 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 *County of Allegheny* on religious accommodations under the Establishment Clause. Moreover, Plaintiffs' argument, Opp'n at 34–36, that the Federal Defendants' accommodation efforts were not required by the Free Exercise Clause or RFRA is irrelevant. The Government may take action

under the Establishment Clause to accommodate religion even where doing so is not required. *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").[5]

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 which foster parents to work with are motivated by core precepts of its religious faith. Compl. ¶¶ 8, 120; 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 it to the choice of acting contrary to its 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 refused 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 such coverage would "seriously violate[] their religious beliefs" and where refusal to provide coverage would result in financial penalties).

Plaintiffs also argue that the conditional exception is impermissible because it "plainly burdens Plaintiffs" by "inflicting discriminatory harm and erecting practical barriers to fostering."

[5] Plaintiffs' argument is further undermined by a recent decision in the Western District of Michigan. That decision found that enforcement of the federal regulation at issue in this case against another state (Michigan) as to a faith-based foster care agency in Michigan that objected on religious grounds to recommending same-sex couples as potential foster parents would likely violate the agency's rights under RFRA. *Buck v. Gordon*, No. 1:19-cv-286, 2019 WL 4686425 (W.D. Mich. Sept. 26, 2019). That holding, preliminarily enjoining the enforcement of the regulation against Michigan as to that agency, is in tension with the relief that Plaintiffs seek here—an injunction ordering HHS to rescind an *exception* from enforcement of that regulation for a faith-based foster care agency.

Opp'n at 33. But the conditional exception does neither thing. The conditional exception does not endorse Miracle Hill's religious views, but only accommodates them, and it contains a referral condition that ensures the exception applies only insofar as an entity is willing to refer prospective foster parents to another entity or to the State. There is also little authority for the idea that an accommodation cannot impose *any* burden on non-beneficiaries. Indeed, Title VII's accommodation of religious organizations upheld in *Amos* surely imposes burdens on non-beneficiaries by allowing for the possibility that employees of religious organizations may be subject to employment discrimination. *See Amos*, 483 U.S. 327. And Plaintiffs' citation of *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), is inapposite; there, 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 at issue here, with its referral condition, bears no resemblance to such a law.

Finally, the recent decision in *American Legion v. American Humanist Association*, 139 S. Ct. 2067 (2019), only reinforces the permissibility of the January 23 conditional exception. Plaintiffs seek to avoid this conclusion by asserting that there is no "established, religiously expressive . . . practice" in this case, Opp'n at 33 (quoting *Am. Legion*, 139 S. Ct. at 2085), but they ignore the allegation in their own complaint that for over 30 years, Miracle Hill has been recruiting only Christian foster parents, Mem. at 27 (citing Compl. ¶ 47). The existence of that longstanding policy shows that HHS's neutral effort to accommodate Miracle Hill's religious beliefs is consistent with the "ideals of respect and tolerance embodied in the First Amendment." *Am. Legion*, 139 S. Ct. at 2090.

CONCLUSION

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

Dated: October 11, 2019

Respectfully submitted,

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