

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
NORTHERN DIVISION**

BETHEL MINISTRIES, INC., )  
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)  
*Plaintiff,* )  
) Case No. 1:19-cv-01853-SAG  
DR. KAREN B. SALMON, et al. )  
)  
) **Oral Argument Requested**  
*Defendants.* )  
)  

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**PLAINTIFF’S REPLY IN SUPPORT OF  
MOTION FOR PRELIMINARY INJUNCTION**

Plaintiff Bethel Christian Academy does not have a policy or practice of discriminating against its students based on sexual orientation or gender identity. All academically qualified students are welcome and held to identical conduct standards. Yet without any complaints, evidence of discriminatory behavior, or even a facially discriminatory policy, Defendants—through an unprecedented and irregular process—banished Bethel from its state voucher program for its religious beliefs and conduct policies. Since that time, Bethel has been losing vulnerable students from low-income families who relied on BOOST vouchers to attend its school. Adding insult to injury, Defendants now demand that Bethel repay tuition dollars of \$102,600—monies that Bethel received as partial compensation for educating children enrolled in BOOST. Bethel needs a preliminary injunction to stop Defendants’ discriminatory application of the BOOST nondiscrimination provisions to Bethel, to stop Defendants from enforcing a six-figure penalty against this school, and to readmit Bethel to BOOST as soon as possible.

The facts have been laid out in Bethel’s principle brief in support of its motion. But two factual clarifications are necessary in response to Defendants’ Opposition brief.

First, the BOOST nondiscrimination provision in effect for the 2016-17 and 2017-18 school years simply prohibited discrimination in admissions based on sexual orientation. It did not require schools to adopt specific nondiscrimination statements or written admissions policies. Quite the opposite: the BOOST language specifically promised that “[n]othing herein shall require any school or institution to adopt any . . . *policy* that conflicts with its religious or moral teachings.” (emphasis added). Defendants’ ex post facto claim that Bethel must justify *not* including statements about sexual orientation in its various written policies is simply incorrect—and an argument raised for the first time in litigation. *See* Defs.’ Opp. to Pl.’s Mot. for Prelim. Inj. (Defs.’ Opp.) at 6-7, ECF No. 22.<sup>1</sup>

As Bethel has consistently noted, all academically qualified students are welcome—regardless of their sexual orientation, sexual attraction, or sexual identification. Decl. of Claire Dant in Supp. of Pl.’s Mot. for Prelim. Inj. (Dant Decl.) at ¶ 14, ECF No. 19-3. Given that Bethel prohibits all students from engaging in sexual communication or conduct of any kind, and that it only enrolls children up through the eighth grade, it is no surprise that sexual orientation has simply never been an issue. Defs.’ Opp. at 16, ECF No. 22.

Second, Bethel has standing to seek preliminary relief. Defendants applied the new gender identity requirements to Bethel prior to their enactment. *See* Defs.’ Reply in Supp. of Mot. to Dismiss at 8-9, ECF No. 18 (stating that it was proper to consider gender expression while evaluating compliance with the sexual orientation provision); *see also* Defs.’ Opp. at 20, ECF No. 22 (admitting that the Board considered Bethel’s biological sex policy while evaluating sexual

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<sup>1</sup> An affirmative requirement that Bethel address sexual orientation in its policies is noticeably absent from Defendants’ written communications to Bethel, including its expulsion letter (Ex. 6 to Pl.’s Mot. for Prelim. Inj., ECF No. 19-10), clawback letter (Ex. 7 to Pl.’s Mot. for Prelim. Inj., ECF No. 19-11), and examples of edited handbook language (Ex. 8 to Pl.’s Mot. for Prelim. Inj., ECF No. 19-12).

orientation). Defendants have also been clear that Bethel's religious beliefs and policies render it ineligible for BOOST. *See* Defs.' Mem. in Supp. of Mot. to Dismiss at 31-32, ECF No. 16-1. Reapplication for admission to BOOST would therefore be futile.

Moreover, Defendants' claim that an injunction is inappropriate because future appropriations for the BOOST program are not guaranteed is ironic at best, as Defendants were obviously operating under the assumption that the program would continue when they decided to expel Bethel for two years instead of just one. *See* Defs.' Opp. at 3, 10, ECF No. 22; *see also* Ex. 7 to Pl.'s Mot. for Prelim. Inj. at 0079, ECF No. 19-17 (expelling Bethel from BOOST for two years). And comments made to the *Baltimore Sun* by a single Maryland lawmaker do not constitute a serious argument that the BOOST program will not be reauthorized for the 2020-21 academic year. *See* Ex. 2 to Defs.' Opp. at 7, ECF No. 22-2. BOOST has been funded annually—and at increasing rates—since its inception in 2016. Many, if not most, government programs are funded on an annual basis. State defendants cannot circumvent injunctive relief simply by contending that financial reauthorization is uncertain. Even if the legislature failed to reauthorize BOOST, an injunction would not harm Defendants.<sup>2</sup> But if Bethel is denied a preliminary injunction, the school will continue to be irreparably harmed by its exclusion from BOOST. Bethel seeks immediate readmission to BOOST so that it can accept students transferring with BOOST vouchers this academic year, and so that its current students (and those forced to leave due to lack of BOOST funding) can compete for BOOST vouchers for the 2020-21 school year.

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<sup>2</sup> If the Maryland legislature ever ends the BOOST program, the Court and parties will deal with its effect on this case at that time.

## ARGUMENT

Bethel seeks a preliminary injunction to achieve three things: to stop the Defendants' unconstitutional application of the BOOST sexual orientation and gender identity nondiscrimination requirements to Bethel, to stop the \$102,600 clawback, and to readmit Bethel to the BOOST voucher program. Pl.'s Mem. in Supp. of Mot. for Prelim. Inj. (Pl.'s MPI) at 5, ECF No. 19-1.<sup>3</sup> As fully articulated in Bethel's leading brief and for the reasons below, this Court should grant Bethel's motion.

**I. Bethel is likely to succeed on the merits of its Free Exercise and Free Speech claims.**

**A. Bethel is likely to succeed on its Free Exercise claim because Defendants have failed to apply the BOOST policies neutrally, articulate a compelling interest, or choose the least restrictive means of achieving their goals.**

*Employment Division v. Smith*, 494 U.S. 872 (1990), is not the Supreme Court's only pronouncement on Free Exercise. As explained in its opening brief, Bethel is likely to succeed on its free exercise claim precisely because Defendants have *not* been neutral in their application of BOOST to Bethel. They have gone out of their way to reinterpret the then-in effect BOOST sexual orientation nondiscrimination provision, ignored BOOST's safe harbor for religious policies, and used unprecedented and even unlawful processes to exclude Bethel from BOOST. Strict scrutiny therefore applies. Defendants do not have a compelling interest in their enforcement of the objectionable nondiscrimination provision against Bethel, nor have they pursued their interest in the least restrictive means.

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<sup>3</sup> In their Opposition brief, Defendants argue that this Court should not "enjoin future application of the BOOST Nondiscrimination Clause as a whole and with respect to all potentially eligible schools[.]" Defs.' Opp. at 9, ECF No. 22. Bethel does not ask for such broad relief. Bethel merely asks the Court to enjoin Defendants from continuing to discriminatorily enforce the BOOST nondiscrimination provision's sexual orientation and gender identity requirements against Bethel.

**1. Defendants have not applied the BOOST nondiscrimination provisions neutrally, but have instead targeted, showed hostility towards, and expressly discriminated against Bethel for its religious beliefs.**

First, strict scrutiny applies here for three independent reasons: Defendants targeted Bethel for its religious beliefs, acted out of hostility toward those religious beliefs, and expressly discriminated against Bethel because of those religious beliefs. Pl.’s MPI at 18, ECF No. 19-1. Based on their response brief, the Defendants seem to (incorrectly) believe that Bethel is arguing that *Smith* is not good law. *See* 494 U.S. at 879 (holding that strict scrutiny did not apply for free exercise claims against neutrally applied laws of general applicability). *Smith* is good law, for now.<sup>4</sup>

But Defendants’ argument misses the point and ignores the fact that in other cases where—as here—the law or enforcing entity demonstrated targeting or outright hostility toward the plaintiff’s religious beliefs or practices, strict scrutiny applied. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (explaining that laws that are not neutral to religion must satisfy strict scrutiny); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1729 (2018) (enforcement of nondiscrimination provision unconstitutional when based on an impermissible hostility towards and disrespect of plaintiff’s religious beliefs); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017) (applying strict scrutiny to a policy that “expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character.”). Indeed, the Court has “been careful to distinguish such [neutrally applied] laws from those that single out the religious for disfavored treatment.” *Trinity Lutheran*, 137 S. Ct. at 2020.

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<sup>4</sup> *But see Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634 (2019) (Alito, J., concurring in a denial of *certiorari* and, with three other justices, calling *Smith* into question).

Strict scrutiny applies here precisely because Defendants did *not* neutrally apply the BOOST sexual orientation nondiscrimination provision to Bethel. Neutral enforcement necessarily entails enforcing the plain language of a law as written—not as it is imagined or desired to be. Bethel was sanctioned not because it discriminated against an applicant based on sexual orientation (it didn't), nor because it had a policy that facially discriminated against an applicant based on sexual orientation (it doesn't). Bethel was targeted because of its religious beliefs and conduct requirements.<sup>5</sup> The BOOST Board decided that the religious beliefs about marriage and biological sex that Bethel published in its handbook were insufficiently orthodox. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”). This is targeting, not neutral enforcement. And religious targeting demands strict scrutiny.

Defendants' actions also arose out of hostility for Bethel's religious beliefs. As outlined in Bethel's lead brief, several factors demonstrate Defendants' hostility toward Bethel's religious beliefs and practices, including the Defendants' communications with Bethel, the comments Defendants made at their public meetings, and their unlawful deviation from the regular decision-making process required by Maryland's open meetings law. Pl.'s MPI at 22-25, ECF No. 19-1.

And, finally, as noted in Bethel's opening brief, Defendants have expressly discriminated against Bethel by excluding this school from a public benefit for which it otherwise qualifies solely because of its religious character and beliefs. *See id.* at 25-27.

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<sup>5</sup> Defendants concede that they targeted Bethel but attempt to euphemize this “targeting” as a necessary part of “enforcement activity.” *See* Defs.' Opp. at 18, ECF No. 22.

**2. Defendants do not have a compelling interest in discriminating against Bethel.**

Second, under a strict scrutiny analysis, Defendants must seek to advance a compelling governmental interest. They failed to do so in this case because they never identified an interest particularized to Bethel. *See* Pl.’s MPI at 27, ECF No. 19-1; *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–32 (2006) (strict scrutiny “requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.”). In their Opposition, the Defendants claim that they have an interest in “preventing the stigmatic harm that arises from government endorsement of discrimination of education” and rely on *Roberts v. U.S. Jaycees*, for the proposition that “eliminating discrimination and assuring its citizens equal access to publicly available goods or services. . . serves compelling state interests of the highest order.” *See* Defs.’ Opp. at 22, ECF No. 22, *quoting* 468 U.S. 609, 624 (1984). But in *Roberts*, the Court specifically noted that the plaintiffs in that case did not contend that the [Minnesota Human Rights] “Act ha[d] been applied in [that] case for the purpose of hampering the organization's ability to express its views.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984). The opposite is true here, especially where there is no scintilla of actual discrimination.

In this case, Maryland law does not require the Defendants to examine private schools’ handbooks. It does not require that religious schools adopt or broadcast statements explicitly stating that they do not discriminate on the basis of sexual orientation or gender identity. It does not require that the schools hide their religious beliefs or delete references to those beliefs from their statements of faith or handbooks. *See* Ex. 2 to Pl.’s Mot. for Prelim. Inj. (H.B. 150) ECF No. 19-6; 2019 Md. Laws ch. 565 at 151. Precisely at issue in this case is the fact that Defendants gave Bethel a choice: abandon your problematic views or lose state funding. *See* Defs.’ Opp. at 17, ECF

No. 22. The Defendants applied the law in a manner designed to hamper Bethel's ability to express its religious views on marriage and biological sex. The Defendants have no compelling interest in forcing Bethel to abandon, hide, or muzzle its religious beliefs and the policies that those beliefs inform in their internal publications and conduct policies. And the Defendants certainly have no compelling interest in prosecuting mere phantasms of discrimination by way of silencing religious schools on important moral and theological matters.

**3. Defendants have not pursued their interests in the least restrictive means.**

Third, Defendants failed to pursue their interest in the least restrictive means. Defendants bear the burden of showing they lack "other means of achieving [their] desired goal without imposing a substantial burden on the exercise of religion by [Bethel]." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014). And that includes "prov[ing] that it actually *tried* other methods to address the problem." *Reynolds v. Middleton*, 779 F.3d 222, 231 (4th Cir. 2015) (emphasis original). In light of the First Amendment interests at stake, the government must show "that it seriously undertook to address the problem with less intrusive tools" and demonstrate that those "alterative measures . . . would fail to achieve the government's interests . . ." *Id.* at 231-32.

Defendants have presented no evidence that they considered alternatives that were less restrictive of Bethel's free exercise. As Bethel previously explained, Defendants' censorship of Bethel's handbook and statement of faith is not the least intrusive way to eliminate discrimination in education, especially when the students and their parents choose which BOOST-eligible school they want to attend. Pl.'s MPI at 29, ECF No. 19-1.

In this case, no actual incident of discrimination had been alleged. And Defendants had at least a few alternative means of enforcement to choose from. For starters, Defendants could only enforce the nondiscrimination provision for the 2016-17 and 2017-18 school years as it actually

applied under Maryland law at the time—without the inclusion of gender identity provisions and only as applied to admissions. *See* Ex. 2 to Pl.’s Mot. for Prelim. Inj. (H.B. 150) at 0062, ECF No. 19-6. Second, the Defendants could continue to ensure compliance with the nondiscrimination provisions as they did before they launched their inquisition—by requiring participating schools to confirm that they do and will not discriminate against students through written assurances. Pl.’s Ver. Compl. at ¶ 87, ECF No. 1. Third, Defendants could have respected the religious accommodation provision included in the statute by the legislature and determined that the law did not require Bethel and similar schools to mute their religious beliefs about marriage or biological sex. But none of those alternatives would have satisfied Defendants’ apparent desire to force Bethel to abandon or muzzle its religious and theologically informed beliefs concerning marriage and biological sex.

For these reasons, Bethel is therefore likely to prevail on its Free Exercise claim.

**B. Bethel is also likely to succeed on its Free Speech claim because Defendants applied the BOOST policies in an unjustifiably discriminatory manner.**

Bethel is also likely to prevail on its Free Speech claims against Defendants for the reasons articulated in their initial brief supporting this motion, namely that the Defendants have engaged in viewpoint and content-based discrimination of Bethel’s speech, and that their application of the BOOST nondiscrimination policies impose unconstitutional conditions on the receipt of state benefits. *See* Pl.’s MPI at 31-34, ECF No. 19-1.

But Defendants’ argument that it may permissibly regulate Bethel’s speech because the “admissions policy is conduct” (and therefore not protected speech) warrants further discussion. Defs.’ Opp. at 15, ECF No. 22. To make their point, Defendants trot out the specter of racial discrimination, suggesting that Bethel’s language alerting students, parents, and staff to its religious beliefs about marriage and biological sex in its statement of faith and handbook is akin

to an employer posting a “White Applicants Only” sign. *See id.* at 16, quoting *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006). This comparison would be slightly less offensive if the point was relevant;<sup>6</sup> but the example and principle the Defendants attempt to enlist does not actually support their cause. In that case, the Court used the example to distinguish between a government policy compelling a law school to send scheduling emails on behalf of military recruiters (a merely clerical task attached to the use of a room) and governmental requirements that required students to recite a pledge of allegiance or force “a Jehovah’s Witness to display the motto ‘Live Free or Die[.]’” *See* 547 U.S. at 62. Here, the Defendants’ enforcement actions more clearly align with the latter examples—they do not attempt to regulate Bethel’s clerical speech, but rather Bethel’s speech that fundamentally describes its religious views on marriage and biological sex.

And the comparisons are ridiculous on their face. A student conduct policy explaining that *children* shall not engage in sexual conduct or speech while at school is not the same as an employer’s sign announcing that “Blacks need not apply.” Nor does a conduct code explaining that all people are made in God’s image and likeness as male or female implicate the dehumanizing heritage of Jim Crow. Defendants cannot credibly argue that Bethel’s statement on marriage constitutes a policy that discriminates against its students—all of whom are minors and the oldest of them only fourteen years old.

At bottom, Defendants have demanded that Bethel alter its handbook—not its conduct—as a condition of readmission to BOOST. And as discussed above, the State cannot justify its

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<sup>6</sup> This comparison is particularly offensive in Bethel’s case, given that the school loves and serves a student population that is 85% non-white and represents approximately 40 nations. *See* Pl.’s Ver. Compl. at ¶¶ 38-39, ECF No. 1.

content and viewpoint-based discrimination. Therefore, Bethel is likely to prevail on the merits of its Free Speech claim.

**II. Bethel will suffer irreparable harm without a preliminary injunction.**

Without an injunction, Bethel will continue to suffer irreparable harm. First, the loss of constitutional rights—even for minimal periods of time—is irreparable. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). Second, Bethel will be uniquely harmed in ways that are significant for a church-run ministry. Bethel operates the school as part of its religious mission. Pl.’s Ver. Compl. at ¶ 28, ECF No. 1. Since 1984, that mission has been to create an environment where students can learn to “know, love, and serve the Lord Jesus Christ” and where they can be equipped to become “lights to the world.” *Id.* at ¶ 29. Bethel’s expulsion from the BOOST program means that, despite the school’s best efforts to find a work-around, some students who desire Bethel’s loving education and formation are being deprived of it. Bethel has already lost nine students due to lack of BOOST funding, and many more prospective students. *See* Dant Decl. at ¶¶ 38-41, ECF No. 19-3. This attrition will continue unless Bethel is readmitted to BOOST. *See id.* ¶ 42. Though Defendants may see these student losses as “merely incidental” (Defs.’ Opp. at 24 n.3, ECF No. 22), Bethel cares deeply about the irretrievably lost ministry opportunities to serve these vulnerable children.

Third, the loss of BOOST funds has also forced Bethel to reduce its staff and its efforts to backfill positions at the school. And because the Board also went out of its way to disqualify Bethel from participating in programs that provide student access to textbooks and laptops, and that help with building facility upkeep, Bethel has had to reallocate resources to cover expenses for which it previously received aid. *See* Dant Decl. ¶¶ 35-36, ECF No. 19-3.

Fourth, Defendants will continue to pursue their “clawback” of the \$102,600 in tuition money awarded to Bethel for the 2016-17 and 2017-18 school years. Defendants fail to

acknowledge that their pursuit of the clawback has real and immediate consequences for Bethel. *See* Pl.’s Ver. Compl. at ¶ 142, ECF No. 1; Defs.’ Opp. at 24, ECF No. 22 (arguing that Bethel has not shown that it suffered any direct penalization). If Bethel does not comply with this aggressive measure, the Defendants will likely refer their claim to a tuition refund to collections, which will further damage the school financially and reputationally.

### **III. The balance of equities favors Bethel.**

The balance of equities heavily favors awarding injunctive relief to Bethel. Injunctive relief will allow Bethel to vindicate its constitutional rights, and it will stop Defendants from discriminating against Bethel on the basis of its religious beliefs. Moreover, it will allow financially vulnerable students who wish to continue to attend Bethel to do so. And parents and students searching for a new school will have an additional school to choose from when selecting where to apply their BOOST voucher. Moreover, stopping the “clawback” makes no significant impact on Defendants, but allowing it to proceed implicates severe consequences for Bethel, its students, and its staff.

Defendants attempt to argue that Bethel delayed in seeking this preliminary injunction. *See* Defs.’ Opp. at 24, ECF No. 22. That claim mischaracterizes the timeline of events. Although Defendants expelled Bethel from BOOST at a June 2018 board meeting, they did not notify Bethel of that decision until August 2018. Ex. 6 to Pl.’s Mot. for Prelim. Inj. at 0076-77, ECF No. 19-10. Defendants then waited till shortly before Christmas 2018 to demand repayment of the \$102,600 paid to Bethel for educating BOOST students. Ex. 7 to Pl.’s Mot. for Prelim. Inj. at 0079-80, ECF No. 19-11. Throughout the spring of 2019, Bethel attempted to work with Defendants to find a mutually acceptable solution, but to no avail. Defendants sent Bethel a letter in February of 2019 explaining, among other things, that Bethel could regain eligibility by censoring its student

handbook. Ex. 15 to Pl.'s Mot. for Prelim. Inj. at 0313-314, ECF No. 19-19. And in May 2019, Defendants sent Bethel examples of how other schools had modified their handbooks to retain BOOST eligibility. Ex. 8 to Pl.'s Mot. for Prelim. Inj. at 0082-0092, ECF No. 19-12. Bethel only resorted to filing legal action in June 2019 after the school was left without viable alternative relief. Lastly, Defendants conveniently neglect to mention that it was not till they filed their Motion to Dismiss two months later that they officially pronounced Bethel's religious beliefs and conduct policies in violation of the newly expanded BOOST nondiscrimination provision. Defs.' Mem. in Supp. of Mot. to Dismiss at 31-32, ECF No. 16-1. The school should not be penalized for trying to seek a reasonable solution to this conflict for months and resorting to litigation only when no alternative remained.

Defendants essentially concede that without this Court's preliminary injunction, Bethel cannot participate in the BOOST program for the 2020-21 school year, which Bethel hopes to do. *See* Defs.' Opp. at 13, ECF No. 22. If last year's deadlines are any indication, the application window for schools to apply for BOOST eligibility for the 2020-2021 academic year will close in December 2019 (*see id.* at 11), with student applications due by mid-April 2020. Bethel's motion for injunctive relief is therefore timely.

#### **IV. An injunction against Defendants serves the public interest.**

An injunction against the Defendants serves the public interest in a variety of ways, but the most important way is that it halts government discrimination against a religious school because of its religious beliefs and consequently mitigates the negative repercussions that Bethel's students, their families, and the school itself must endure. *See Giovana Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) ("upholding constitutional rights surely serves the public interest"). Threats by one lawmaker to dissolve the BOOST program if Bethel is included simply underscores

the state's hostility to this church-run school. Permitting government hostility towards religion to continue unchecked does not serve the public interest.

### CONCLUSION

In conclusion, Bethel has demonstrated that it is likely to succeed on the merits of its claims and that it meets the other requirements for injunctive relief. This Court should therefore enjoin the Defendants from enforcing the clawback against Bethel and should allow Bethel to participate in the BOOST program as soon as possible.

Dated this 26th day of November, 2019.

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Respectfully submitted,

*/s/ John R. Garza*

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