

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

AIMEE MADDONNA,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES, ET AL.,

Defendants.

Case No. 6:19-cv-03551-DCC

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT HENRY
MCMASTER'S AND DEFENDANT MICHAEL LEACH'S
MOTIONS TO DISMISS**

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NATURE OF THE CASE

The State of South Carolina has a responsibility of the highest order to care for the children in foster care, who often come into the system during tumultuous periods of transition and instability. In fulfilling its legal and ethical obligations to these children, the State should ensure that they have the best opportunities to be placed in safe and loving homes. So when Plaintiff Aimee Maddonna and her family sought to volunteer with foster children, with the hope that they might welcome a child into their home and their hearts, what should have mattered was whether the Maddonnas were capable of providing a loving environment for a child in need. But for Miracle Hill Ministries—the largest and most prominent child-placement agency licensed and funded by the State to administer foster-care services on the State’s behalf in the region around Greenville, where the Maddonnas live—that was not the case.

Instead, what mattered to Miracle Hill was whether Mrs. Maddonna and her family shared the agency’s preferred religious beliefs in evangelical Protestantism. Because they do not—because the Maddonnas are Catholic—they were turned away. For Miracle Hill refuses government-funded services to any prospective foster parents who do not both belong to a church of which the agency approves and affirm their agreement with and pledge to live according to Miracle Hill’s evangelical-Christian religious beliefs.

The State, in the persons of Governor Henry McMaster and South Carolina Department of Social Services Director Michael Leach, wishes to partner with faith-based organizations to provide social services; and Mrs. Maddonna does not object. For many faith-based organizations provide important social services to people in need. But the State insists that it is not responsible for the conduct of those agencies when, under contract with the State, they discriminate in the provision of public services and the performance of state functions. The State cannot so easily wash its hands of its constitutional obligations.

When South Carolina exercises its considerable authority as *parens patriae* to intervene in the family unit to place children in state care, it bears a particular responsibility to respect constitutional limitations. It may license private agencies, such as Miracle Hill, to provide governmental services on its behalf and may pay those agencies for the services with federal and state dollars. But it may not sponsor and fund religious discrimination—or violate any other constitutional prohibition. Yet here, by licensing and underwriting discrimination in the provision of governmental services, the State violates the Establishment and Equal Protection Clauses of the U.S. Constitution. These constitutional violations are only compounded by the State’s ongoing efforts to authorize Miracle Hill’s discrimination explicitly, to exempt Miracle Hill from compliance with antidiscrimination laws, and otherwise to refuse to enforce constitutional, statutory, and regulatory antidiscrimination requirements for the provision of government-funded services.

The State’s patently unconstitutional funding, licensing, and authorization of Miracle Hill’s religious discrimination have denied and continue to deny Mrs. Maddonna the opportunity to work with children in South Carolina’s foster-care system in the same manner and to the same extent as members of Miracle Hill’s preferred faith. The State thus communicates to Mrs. Maddonna that, because of her religion, she is not an equal citizen entitled to equal treatment in the community or in the conduct of the State’s official business. This the U.S. Constitution cannot and does not countenance. The State’s motions to dismiss (ECF Nos. 19, 21) should be denied.

CONCISE STATEMENT OF FACTS

A. Foster Care in South Carolina.

South Carolina is responsible for the children removed from their families and placed in foster care in the State. It therefore administers a statewide foster-care system to provide services to these children, who are in its legal custody. The number of children in that system has risen

steadily over the last several years, today numbering approximately 4,800. Compl. ¶¶ 26, 28. Greenville County is home to the highest concentration of children in foster care in the State. *Id.* ¶ 27. But while the number of children in foster care has grown, the number of placements in foster homes has stagnated, resulting in a shortfall of nearly 2,000 homes—a crisis for the children whom the foster-care system is supposed to serve. *Id.* ¶ 29 & n.3.

To fulfill its duty to care for these children and find them appropriate foster families, the State’s Department of Social Services contracts with private child-placement agencies, which receive licenses from the State to facilitate foster-care placements on the State’s behalf and receive reimbursements from state and federal funds in exchange for the services that they perform. *Id.* ¶ 30; S.C. Code § 63-9-30(5); S.C. Code Regs. § 114-4910. The agencies conduct investigations of foster homes and make recommendations to DSS as to whether foster-family licenses should be issued; monitor foster homes for compliance; and investigate complaints of wrongdoing. Compl. ¶ 34. The agencies also exercise control over foster children’s time in the system by developing written case plans for the children assigned to them and determining appropriate home placements based on the agency’s assessment of families and of the children’s needs. *Id.* ¶¶ 35.

Federal and state law govern the agencies’ provision of these services. DSS regulations set forth the exclusive criteria to be used in foster-home investigations and licensing. *Id.* ¶ 39; S.C. Code Regs. § 114-4980(A)(2). And DSS policy explicitly forbids agencies to discriminate against prospective foster parents in the provision of foster-care services, including on the basis of religion. Compl. ¶¶ 36–38. The DSS Human Services Policy and Procedure Manual commits DSS and its programs to providing “equal opportunities to all families and children, without regard to their . . . religion.” *Id.* ¶ 37; DSS Manual § 710. It further provides that “[n]o individual shall be denied the opportunity to become a foster or adoptive parent on the basis of . . . religion.” Compl. ¶ 38; DSS Manual § 710. The agencies, as subrecipients of federal funds provided to the State, are likewise

bound by federal regulations prohibiting religious discrimination and proselytization in the administration of federally funded foster-care services. Compl. ¶¶ 40–45; 45 C.F.R. §§ 75.101(b)(1), 75.300(c), 87.3. And whatever other federal and state laws govern the funding and administration of foster-care services, the State—and therefore its subgrantee child-placement agencies performing state foster-care services—is always bound by the U.S. Constitution, which prohibits the government from funding religious discrimination.

B. Miracle Hill Ministries and State Authorization of Religious Discrimination.

Miracle Hill Ministries is the largest foster-care child-placement agency that the State licenses and funds. Compl. ¶¶ 47–48. For prospective foster families in Greenville County who want to provide traditional foster care (as opposed to therapeutic foster care for children who have more complex medical needs that require specialized care), there are few other viable options. *Id.* ¶ 50 & nn.4, 6. Indeed, over the past five years, more than 90% of all children in foster care statewide that have been assigned to agencies by DSS have been entrusted to Miracle Hill. *Id.* ¶ 50. Given its substantial government funding, Miracle Hill has the resources to provide comprehensive support to foster families. And unlike DSS, Miracle Hill permits prospective foster parents and their entire families to volunteer with children in its care. *Id.* ¶ 51. Volunteering enables families to develop the types of relationships with children in foster care that lead to long-term foster placements. *Id.* ¶ 52. It is thus a crucial first step for families—and most especially for the Maddonnas, whose own children have special needs, so ensuring a good fit between the family and a child whom they would welcome into their home is particularly important. *Id.* ¶ 81.

But there’s a catch: Miracle Hill is a religiously affiliated organization that administers its foster-care services “in a Christ-centered environment.” *Id.* ¶ 53. Because it believes that “foster parents are in a position of spiritual influence over the children in their homes,” its foster-care-inquiry form requires prospective foster parents and volunteer mentors to affirm Miracle Hill’s

evangelical-Christian doctrinal statement, to identify the church that they attend, and to provide a “personal testimony of [their] faith/salvation in Jesus Christ.” *Id.* ¶¶ 54–57. That is, Miracle Hill refuses its services to prospective foster parents whom it deems not to be followers of Christ, and those who are not active members of certain Christian churches of which Miracle Hill approves, and those who do not or cannot agree “in belief and practice” with Miracle Hill’s evangelical-Christian doctrinal statement. *Id.* ¶ 59.

By 2018, DSS had learned that Miracle Hill discriminates against prospective foster parents on the basis of their religion. *Id.* ¶ 60. Having determined that Miracle Hill was thus violating federal and state antidiscrimination laws and regulations, DSS issued Miracle Hill a temporary license and directed it, in accordance with DSS policy, to provide a written plan for coming into compliance with the law. *Id.* ¶¶ 61–62. But Miracle Hill never provided the required plan. *Id.* ¶ 63.

Rather than following through by requiring Miracle Hill to obey the law, which was necessary to ensure that the State satisfies its own constitutional obligations not to fund and license the discriminatory provision of state services, the State instead orchestrated a series of actions to allow Miracle Hill to continue to discriminate. First, Governor McMaster issued Executive Order 2018-12, directing DSS to continue funding and licensing child-placement agencies that discriminate on the basis of religion while providing state services, South Carolina law notwithstanding. *Id.* ¶¶ 64–66. Governor McMaster next successfully lobbied the U.S. Department of Health and Human Services to obtain a statewide exemption from federal antidiscrimination requirements for all faith-based foster-care agencies in South Carolina. *Id.* ¶¶ 68–71. Finally, DSS replaced Miracle Hill’s temporary license with a regular license, allowing it to continue discriminating on the basis of religion in the provision of publicly funded state services. *Id.* ¶ 72.

In other words, the State isn’t just aware of Miracle Hill’s discrimination; it has expressly and intentionally authorized, facilitated, and funded that discrimination.

C. Plaintiff Aimee Maddonna.

Having grown up in a family that was committed to providing foster homes to needy children in their community, Aimee Maddonna was determined that her own family should do the same. So she contacted Miracle Hill to see whether her family could volunteer with children assigned to the agency by the State. *Id.* ¶¶ 78–80. She hoped that through volunteering the family would develop relationships with children who might be good matches for the family, so that the Maddonnas could ultimately provide a loving home for a child in need. *Id.* ¶ 81.

She first contacted Miracle Hill in 2014, corresponding extensively with a Miracle Hill representative to answer questions about her experience with the foster-care system and her family’s ability to volunteer with foster children. *Id.* ¶ 82–83. All seemed well until Miracle Hill asked one last question: Where do the Maddonnas attend church? *Id.* ¶ 83. Mrs. Maddonna gave the name of her Catholic parish. *Id.* It was only then that Mrs. Maddonna learned that she and her family were not welcome, because Miracle Hill would not accept Catholics as volunteer mentors for children in foster care. *Id.* The representative expressed disappointment that the Maddonnas had failed the religious test, because otherwise they were a great fit for the program. *See id.*

In February 2019, Mrs. Maddonna again contacted Miracle Hill to revisit the possibility that her family would be accepted as volunteer mentors, with the hope of ultimately fostering a child. *Id.* ¶ 85. Miracle Hill again rejected Mrs. Maddonna. *Id.* ¶ 86–87. To be a part of the State’s foster-care programs administered by Miracle Hill, parents must be followers of Jesus Christ, be active in and accountable to a Christian church deemed acceptable to Miracle Hill, and agree in belief and practice with Miracle Hill’s doctrinal statement of faith. *Id.* ¶ 59. Mrs. Maddonna does not and cannot fulfill Miracle Hill’s requirements, for Miracle Hill’s doctrinal statement is inconsistent with her beliefs and her understanding of her Catholic faith. *Id.* ¶¶ 91–94.

When Mrs. Maddonna and her family were rejected initially, and when they were rejected

the second time in 2019, and at all times between and since, Miracle Hill has been licensed by the State and has been receiving federal and state funds to carry out state foster-care services. *Id.* ¶ 90.

D. Effects of the State’s Authorizing Religious Discrimination.

As a direct result of the State’s actions, prospective volunteers and foster parents like the Maddonnas are turned away from a governmental program, to their detriment, solely because they hold disfavored religious beliefs or practice a disfavored faith. The State thus artificially reduces the already grossly inadequate number of homes and families available to needy foster children (*id.* ¶¶ 28–29, 97) and thereby gravely harms the very children whom it is duty-bound to protect. And by assigning to Miracle Hill children of all religious backgrounds while allowing Miracle Hill to accept only those prospective foster parents who affirm Miracle Hill’s preferred religious beliefs, the State has effectively denied many children the opportunity to be raised in accordance with *their own* religious beliefs or with the religious requests of their biological parents—as South Carolina law requires. *Id.* ¶¶ 103–106. The State has thus expressly licensed government-funded religious discrimination in the performance of a state program, while also deepening South Carolina’s foster-care crisis and depriving vulnerable children of safe, loving homes.

ARGUMENT

On motions to dismiss for failure to state a claim, the Court accepts as true the well-pleaded facts in the Complaint and views the facts in the light most favorable to Mrs. Maddonna, drawing all reasonable inferences in her favor. *See, e.g., Lucero v. Early*, 873 F.3d 466, 469 (4th Cir. 2017). The Complaint need only contain sufficient factual matter to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). And a 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction may be granted “only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.” *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). At the pleading stage,

general factual allegations of injury resulting from the defendant’s conduct may suffice, for the Court presumes that general allegations embrace the specific facts necessary to support the claim. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). The Complaint meets these standards.

I. MRS. MADDONNA HAS PROPERLY PLEADED STANDING TO CHALLENGE THE STATE’S FUNDING, LICENSING, AND AUTHORIZATION OF RELIGIOUS DISCRIMINATION.

To establish standing, Mrs. Maddonna must allege (1) an “injury in fact” that is (2) “fairly . . . trace[able]” to defendants’ actions and is (3) “redress[able] by a favorable decision” of the Court. *Lujan*, 504 U.S. at 560–61. She alleged that she is injured by her ongoing exclusion from the South Carolina foster-care program on the basis of her religious beliefs. That Miracle Hill acts on the State’s behalf to provide public services with public funds on a discriminatory basis rather than the State does not alter the fact that the injury is fairly traceable to the State, which has the constitutional and legal obligation not to permit discrimination in the provision of state services, but which nonetheless knowingly and intentionally funded, licensed, and authorized the discrimination here. And Mrs. Maddonna’s injury is redressable by an order prohibiting the State from funding and licensing agencies that use public funds to provide public services on a discriminatory basis.

A. Injury-in-Fact.

Mrs. Maddonna has pleaded as follows: She and her family sought to volunteer through Miracle Hill with the intent to foster a child. *See* Compl. ¶¶ 78–82, 85. Miracle Hill, however, refused and continues to refuse to provide governmental foster-care services to Mrs. Maddonna, her family, and all others who do not agree to affirm Miracle Hill’s evangelical-Christian doctrinal statement—i.e., those who adhere to the tenets of their own faith rather than the dictates of Miracle Hill’s preferred faith. *Id.* ¶¶ 55–59, 83–95. The State has licensed and funded Miracle Hill to carry out these services on its behalf in a discriminatory fashion, in violation of Mrs. Maddonna’s constitutional rights. Indeed, the State has exempted *all* private agencies in South Carolina from

state antidiscrimination requirements and has successfully lobbied for an exemption from federal antidiscrimination requirements, thereby enshrining with the force of law the Maddonnas' religion-based exclusion. These allegations suffice to show that Mrs. Maddonna has suffered actual, legally cognizable injuries, namely (1) the erection and maintenance of a religious barrier to her ability to participate in publicly funded governmental foster-care services, and (2) the stigma of discrimination flowing from that religious barrier and different treatment.¹

First, by funding and licensing child-placement agencies, including Miracle Hill, that exclude prospective foster parents and volunteer mentors who do not affirm the agencies' religious beliefs, and by authorizing religious discrimination by these agencies, the State has erected and maintained a religious barrier to Mrs. Maddonna and her family's ability to participate in publicly funded governmental foster-care services on the same terms as those who meet the favored religious qualifications. For Establishment Clause claims, Mrs. Maddonna's personal contact with this government-sponsored religious disfavor is a cognizable injury-in-fact. *See, e.g., Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 258–59 (4th Cir. 2018) (“The common thread among these different forms of cognizable legal injury [in Establishment Clause cases] is ‘personal contact’ with the alleged establishment or disfavoring of religion.” (quoting *Suhre v. Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997)), *vacated on other grounds*, 138 S. Ct. 2710 (2018)). And for equal-protection claims, the injury-in-fact is “the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.” *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (“When the government erects a barrier that makes it more difficult for members of one group to obtain a

¹ Mrs. Maddonna does not premise her standing on the injuries that the State has inflicted on foster children, their biological parents, or lesbian, gay, bisexual, or transgender youths. *Cf.* ECF No. 19, at 14. Rather, the identified injuries to foster children and their biological parents demonstrate the nature and extent of the unconstitutional scheme here and underscore why there is no governmental interest sufficient to justify the State's conduct.

benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.”); *Bostic v. Schaefer*, 760 F.3d 352, 372 (4th Cir. 2014) (injury-in-fact requirement met by same-sex couple who could not marry in Virginia even though they could marry in California). Mrs. Maddonna has alleged a sufficient barrier to her access to and participation in the State’s foster-care services to constitute an injury-in-fact.

Second, by funding and licensing child-placement agencies, including Miracle Hill, that exclude prospective foster parents and volunteer mentors who do not affirm the agencies’ religious beliefs, and by authorizing the agencies’ discrimination, the State has subjected Mrs. Maddonna to the stigma of religious discrimination, which is an independent injury-in-fact. *See Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984) (“[D]iscrimination itself . . . can cause serious non-economic injuries to those persons who are denied equal treatment solely because of their membership in a disfavored group.”); *IRAP*, 883 F.3d at 259–60 (Muslim plaintiffs had standing to challenge travel ban “as members of the disfavored religion” suffering “[f]eelings of marginalization and exclusion”); *Bostic*, 760 F.3d at 372 (same-sex couple had standing to bring equal-protection challenge based on stigma of being personally subjected to discriminatory treatment); *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012) (recognizing standing to raise Establishment Clause challenge based on stigmatic harm).

The State contends that Mrs. Maddonna experienced no cognizable injury because “there is no constitutionally protected right to become a foster parent or mentor by means of volunteering with a [child-placement agency] of one’s own choosing” and no right to force child-placement agencies to associate with and perform services for any given individual. ECF No. 19, at 12. But Mrs. Maddonna does not argue that she has an unqualified right to become a foster parent or otherwise to associate with or obtain services from Miracle Hill. Rather, she has First and

Fourteenth Amendment rights not to be discriminated against on the basis of religion when seeking service from or participation in a public program, and to pursue those services on the same terms as everyone else, irrespective of her religious beliefs. *See Turner v. Fouche*, 396 U.S. 346, 362 (1970) (“We may assume that [plaintiffs] have no right to be appointed to the . . . board of education. But [they] do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory qualifications.” (footnote omitted)).²

The State also contends that Mrs. Maddonna suffered no injury because she failed to reapply to Miracle Hill—for a third time—after it purportedly altered its policy of categorically barring Catholics; and thus, the State says, it is “speculative whether the denial Plaintiff complains of will actually occur.” ECF No. 19, at 13–14. But the denial has *already* occurred: Miracle Hill has twice rejected Mrs. Maddonna and her family on the basis of her religious beliefs because she cannot agree to Miracle Hill’s evangelical-Protestant doctrinal statement.³ Compl. ¶¶ 85–95.

² Relatedly, the State suggests that Mrs. Maddonna’s equal-protection claim fails because, once turned away by Miracle Hill, she failed to pursue opportunities to foster through DSS or another private agency. ECF No. 19, at 19. It is far from clear that Mrs. Maddonna even *could* find comparable opportunities elsewhere: Miracle Hill is the largest private agency in the State, having been assigned 90% of all private placements from DSS over the last several years. Compl. ¶¶ 47–50. Two of the other three private agencies purportedly operating in the Greenville area are based more than forty miles away; the third has apparently been assigned just a single child from DSS in the last five years. *Id.* ¶ 50 & nn.4, 6. And Miracle Hill allows whole families to volunteer with foster children in its care. *Id.* ¶ 51. But more importantly, the legal standard that the State proposes—that Mrs. Maddonna must exhaust every other opportunity to foster before a cognizable injury accrues—grossly misrepresents the law. It suffices that Mrs. Maddonna was deprived of the opportunity to volunteer and foster on the same terms as everyone else and that she suffered the stigma of religiously discriminatory treatment. And while the State cites out-of-circuit cases to argue that there is no injury when a plaintiff has “not made any serious attempt to obtain the benefit it claims that it was denied” (ECF No. 19, at 19 (citation omitted)), those cases concern whether a plaintiff pursued the sought-after benefit at all and was subject to disfavor *in the first instance*—not whether a plaintiff, once rejected, must *continue* to try to obtain the benefit *elsewhere*.

³ The State’s assertion that it is “somewhat implausibl[e]” for Mrs. Maddonna to say that the evangelical-Protestant doctrinal statement is inconsistent with her Catholic faith (ECF No. 19, at 13) has no place in a motion to dismiss. And it is not for the State to judge the quality of Mrs. Maddonna’s beliefs based on what it apparently thinks a Catholic should believe. *Cf. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1731 (2018).

Whether Miracle Hill has since changed its policy does not bear on the concreteness of the injury that Mrs. Maddonna suffered. Nor does it bear on the ongoing viability of Mrs. Maddonna’s injury, for Miracle Hill continues to impose a religious test on prospective volunteers and foster parents who seek the governmental services that it provides—a test that disfavors and excludes those who do not adhere to the tenets of evangelical Christianity as delineated in Miracle Hill’s doctrinal statement (*id.* ¶ 55–59). Mrs. Maddonna does not pass that test, so she is still barred from fostering through Miracle Hill because of her religion. *Id.* ¶¶ 92–94. And the State continues to fund, license, and authorize the religious discrimination against her. *Id.* ¶ 90.⁴

B. Fair Traceability.

Fair traceability requires a “but for” causal connection between the religious discrimination that Mrs. Maddonna experienced and the State’s actions. *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 74–75 (1978). The State licenses private child-placement agencies to perform governmental foster-care services on its behalf and funds the agencies with state and federal dollars. *Id.* ¶ 30. But for the State’s ongoing funding and licensing of Miracle Hill while allowing it to discriminate, Mrs. Maddonna would not suffer discrimination on the basis of her religious beliefs in obtaining publicly funded governmental foster-care services. The State’s affirmative steps to ensure that the discrimination can continue unabated only underscore its legal

⁴ The State’s cases on speculative harm are irrelevant. In *Moose Lodge No. 107 v. Irvis*, the Supreme Court held that the plaintiff had standing to challenge race-based denials of service at a private club but not to challenge the club’s membership policy, because he had not applied for membership. 407 U.S. 163, 166–67 (1972). Mrs. Maddonna squarely challenges her ongoing exclusion from provision of a public service under a religious requirement that remains in effect and continues to bar her. As for *Southern Blasting Services, Inc. v. Wilkes County*, the plaintiffs lacked standing for a procedural-due-process challenge to a permit-application process because they had never used that process or been told that they would be denied if they tried. 288 F.3d 584, 595 (4th Cir. 2002). Mrs. Maddonna was personally and explicitly informed by Miracle Hill that she was not welcome. For this same reason, the State’s argument (ECF No. 19, at 18–19) that Mrs. Maddonna lacks the “personal contact” required to establish stigmatic injury also fails.

responsibility for Mrs. Maddonna's injuries.

The State contends that independent actions by Miracle Hill break the causal connection to Mrs. Maddonna's injury. ECF No. 19, at 14–16. But fair traceability does not require that a challenged official action “be the sole or even immediate cause of the injury.” *Sierra Club v. U.S. Dep't of Interior*, 899 F.3d 260, 284 (4th Cir. 2018) (citing *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997)). “To establish traceability, [the plaintiff] must show that the challenged action is ‘in part responsible for frustrating’” a plaintiff's exercise of her rights. *Id.* at 283 (quoting *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 316 (4th Cir. 2013)). A defendant's actions need not be “the very last step in the chain of causation.” *Bennett*, 520 U.S. at 168–69.

Miracle Hill provides child-placement services on behalf of the State by dint of the State's ongoing, uninterrupted funding and licensing of it; and Governor McMaster's and DSS's actions to exempt and shield Miracle Hill from federal and state antidiscrimination requirements are what allow it to discriminate in the provision of state services. In other words, it is only because of state funding, licensing, and authorization that Miracle Hill has provided and continues to provide governmental services in a discriminatory fashion. What is more, there is “a substantial likelihood” that Miracle Hill, as it currently operates, would not have had its license renewed but for Governor McMaster's intervention. *See Duke Power*, 438 U.S. at 74–77. In all events, foster care is uniquely a function of the State. Only by exercise of inherent state power may it interfere with parents' fundamental rights in child-rearing or restrict the liberty of the children whom it seeks to protect. Miracle Hill could not provide publicly funded foster-care services on a discriminatory basis—the injury that Mrs. Maddonna alleges—absent the State's legal authority over the children and its disbursement and authorization of the use of the funds in that way. The State has thus “enabled and virtually ensured” the harm that Mrs. Maddonna experienced, which more than establishes fair traceability. *See Sierra Club*, 899 F.3d at 283.

The cases on which the State relies stand for the proposition that an injury is not fairly traceable to the government when the injury was perpetrated by a third party and either a change in governmental policy would not have caused different behavior by that third party or it is purely speculative whether the third party's behavior would have changed. But here, the State controls whether it will license and fund private agencies to provide child-placement services and whether it will assign foster children to those agencies for placement. Hence, if the State were not contracting with Miracle Hill and paying it to perform the state services, Miracle Hill simply could not be making foster-care placements, whether on a discriminatory basis or otherwise.⁵

The State further contends that Mrs. Maddonna's injuries are "self-inflicted," and hence not fairly traceable to the State, because she could have volunteered or fostered through other private agencies or through DSS. ECF No. 19, at 16–17. But Mrs. Maddonna need not allege an absolute bar to fostering in order to establish standing. As already explained, it is enough that, because of the State's actions, she was denied access to governmental programs or services on the same terms as persons of a different religion. The possibility that some other government-funded agency might allow her to foster does not temper the fact that she was deprived of an opportunity to participate in a governmental program on the same terms as other prospective foster parents. Nor does it undercut the stigmatic and dignitary harms of being turned away by Miracle Hill.

⁵ In *Doe v. Obama*, 631 F.3d 157, 160–61 (4th Cir. 2011), a putative class of frozen embryos lacked standing to challenge an executive order removing certain limitations on stem-cell research because it was the decisions of the embryos' biological parents to donate them rather than the executive order that caused the alleged injury. In *Allen v. Wright*, 468 U.S. 737, 757–58 (1984), the plaintiffs' reduced ability to attend an integrated school was not fairly traceable to the government's failure to withhold tax-exempt status from discriminatory private schools because it was purely speculative whether loss of tax-exempt status would have motivated the schools to change their policies or caused parents to send their children to the public schools. And in *Meyer v. McMaster*, 394 F. Supp. 3d 550, 561–62 (D.S.C. 2019), state regulations on car manufacturers did not cause the plaintiff's claimed injury of not having a Tesla dealership in South Carolina because the choice to open a dealership or not inevitably remained with Tesla itself.

As the court in *Marouf v. Azar* put it in rejecting similar arguments in a case brought by a same-sex couple denied an opportunity to be foster parents based on religious criteria that they did not satisfy, the government caused the injury “both by creating a system that permits religiously affiliated grant recipients to deny federally funded services to same-sex couples *and* by failing to take any action after” becoming aware of it. 391 F. Supp. 3d 23, 37 (D.D.C. 2019). To accept the State’s position that it “cannot be held to account for a grantee’s known exclusion of persons” from a governmental program on an impermissible basis would be an “astonishing outcome” here as much as there. *Id.* at 34. Government cannot “avoid the responsibility that comes with being good stewards of [public] funds.” *Id.* Mrs. Maddonna’s injuries are fairly traceable to the State.

C. Redressability.

Finally, this Court has ample means to remedy the constitutional injuries here through the requested relief. Redressability is satisfied if “it is likely . . . that the injury will be redressed by a favorable [judicial] decision.” *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). Mrs. Maddonna need not establish that a favorable decision will relieve *every* injury suffered. *See Massachusetts v. EPA*, 549 U.S. 497, 525–26 (2007); *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982). It is enough that the relief sought would “abat[e] current violations and prevent[] future ones” (*Friends of the Earth*, 528 U.S. at 187) or that an injury could be “reduced to some extent” (*Massachusetts*, 549 U.S. at 526).⁶

The State argues that Mrs. Maddonna cannot satisfy the redressability requirement because if the Court enjoins the State from licensing and funding entities that would provide child-

⁶ To the extent that the State argues that redressability cannot be shown unless this Court is “‘sure’ that the relief sought would remedy the alleged injury” (ECF No. 19, at 17 (quoting *Frank Krasner Enters., Ltd. v. Montgomery County*, 401 F.3d 230, 234 (4th Cir. 2005))), it is mistaken. The quoted language comes from the *Frank Krasner* court’s analysis of traceability, not redressability; and it does not set a “must be sure” standard for *any* part of the standing analysis. 401 F.3d at 234.

placement services in a discriminatory manner, it is not certain that Miracle Hill or others like it would then accept families with differing religious beliefs rather than ceasing to accept contracts to provide foster-care services. ECF No. 19, at 17–18, 20. But that does not make redressability “mere speculation” (*id.*). The injury here is religious discrimination in the provision of state-funded, state-authorized foster-care services; and the remedy sought is that the State be enjoined from licensing, funding, and authorizing agencies to engage in that discrimination in the conduct of governmental programs. If the injunction is granted, every private agency acting on the State’s behalf will be required to provide government-funded services in a nondiscriminatory fashion—just as the State is required to do. Whether Miracle Hill then elects to operate a government-funded program when it must do so on those terms, or prefers instead to provide only private charitable services so that it can do so on a religiously restrictive basis, Mrs. Maddonna will no longer be turned away from participation in government-funded programs solely because of her religious beliefs—thus fully redressing her constitutional injuries.

II. MRS. MADDONNA HAS STATED A CLAIM UNDER THE ESTABLISHMENT CLAUSE.

“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson*, 456 U.S. at 244. Government must remain “neutral[] between religion and religion, and between religion and nonreligion.” *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (internal quotation marks omitted). Hence, government “may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general.” *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989) (plurality opinion).

A. The Establishment Clause tests.

The Supreme Court has developed multiple tests to determine the metes and bounds of the Establishment Clause—including the *Lemon* test, the endorsement test, the coercion test, and the

Larson test. Failure to satisfy any one is an Establishment Clause violation. *See, e.g., Mellen v. Bunting*, 327 F.3d 355, 370–71 (4th Cir. 2003).

1. *Lemon*: Governmental action violates the Establishment Clause if (1) its primary purpose is religious rather than secular; (2) its principal effect is to advance or inhibit religion; or (3) it excessively entangles government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); *see also Mellen*, 327 F.3d at 372–75. The test is disjunctive: Failure to satisfy any one part is a constitutional violation. *See Koenick v. Felton*, 190 F.3d 259, 265 (4th Cir. 1999).

Purpose is determined from the standpoint of an “objective observer” who is familiar with the facts and circumstances surrounding the official action. *McCreary County*, 545 U.S. at 862–64. Secular purposes must “be genuine, not a sham, and not merely secondary to a religious objective.” *Id.* at 864. The question is not whether a state has “any” secular purpose, but whether there is an actual secular purpose that is the “preeminent” or “primary” one. *Id.* at 864, 865 n.13 (quoting *Edwards v. Aguillard*, 482 U.S. 578, 590, 594 (1987)). Effect is determined “irrespective of government’s actual purpose,” by considering whether an objective observer aware of all the facts and circumstances would perceive that “the principal effect of [the challenged] government action . . . suggest[s] government preference for a particular religious view or for religion in general.” *Mellen*, 327 F.3d at 374 (internal quotation marks omitted). And excessive entanglement occurs when, for example, a state “delegate[s] a governmental power to religious institutions” such that religious tenets may be applied in exercising governmental authority. *See Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 123, 125–26 (1982); *accord Bd. of Educ. v. Grumet*, 512 U.S. 687, 696–97 (1994).

2. Endorsement: The endorsement test is a framework for determining impermissible religious effect, asking “whether a reasonable, informed observer would conclude that government . . . has endorsed a particular religion or religion generally.” *Wood v. Arnold*, 915 F.3d 308, 316

(4th Cir. 2019). Governmental action impermissibly endorses religion if it sends a message to “nonadherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders.’” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)).

3. Coercion: The bare-minimum guarantee of the Establishment Clause is that “government may not coerce anyone to support or participate in religion or its exercise” (*Lee v. Weisman*, 505 U.S. 577, 587 (1992)), for “the machinery of the State” must not be used “to enforce a religious orthodoxy” (*Santa Fe*, 530 U.S. at 312). “The type of coercion that violates the Establishment Clause need not involve . . . the forcible subjection of a person to religious exercises or the conditioning of relief from punishment on attendance at church services.” *DeStefano v. Emergency Hous. Grp., Inc.*, 247 F.3d 397, 412 (2d Cir. 2001). Rather, “subtle coercive pressure” is sufficient. *Lee*, 505 U.S. at 592. For government and those whom it funds “may no more use social pressure to enforce orthodoxy than [they] may use more direct means.” *Id.* at 594.

4. *Larson*: Because “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another,” denominational preferences are subject to strict scrutiny under *Larson v. Valente*. 456 U.S. at 244, 246. They are presumptively invalid and cannot stand unless the state conclusively establishes that it has a compelling governmental interest in preferring or disfavoring a faith or denomination, and that its actions are narrowly tailored to serve that compelling interest.

B. Mrs. Maddonna has adequately alleged Establishment Clause violations.

Under every test, Mrs. Maddonna has adequately alleged that the State violates the Establishment Clause. Because the tests and pertinent facts are overlapping, we analyze them together.

1. *The State impermissibly acted with a religious purpose and effect.*

The State has actively facilitated Miracle Hill's religious discrimination in providing foster-care services by funding that discrimination and by clearing the statutory and regulatory hurdles that bar it. The State contends that its secular purpose is to have "as many qualified foster and adoption agencies and homes as possible" (ECF No. 19, at 31) in order, presumably, to maximize the State's ability to place foster children in suitable homes. But if the State's principal aim were genuinely to increase the number of qualified, licensed foster homes, it would not knowingly contract for and delegate its functions to an agency that turns away qualified families like the Maddonnas because they profess disfavored beliefs. That *diminishes* the number of available foster families and hence reduces foster-care placements—a result that makes no sense, in the face of South Carolina's dramatic foster-family shortage, except as a way to protect, defend, and promote religious discrimination in the foster-care program. A secular purpose this is not.

For similar reasons, the State's actions lack a predominantly secular effect and instead impermissibly endorse religion by communicating that the State privileges Miracle Hill's religious beliefs over Mrs. Maddonna's and all others—not to mention over the best interests of the children. When Miracle Hill is licensed and specifically authorized to turn away prospective volunteers and foster parents because of their religious beliefs, the State sends the unambiguous message that those who do not subscribe to Miracle Hill's religious views are outsiders whom the State does not deem deserving of equal treatment or equal opportunity to participate in a state-funded program. Far from viewing it as a "good faith effort to generate the greatest possible number of qualified foster and adoptive homes" (ECF No. 19, at 32), the reasonable observer would recognize this system for what it is: state-sanctioned, state-funded religious discrimination that divides the citizenry into the religiously favored—like Miracle Hill—who are entitled to the full panoply of governmental services, and the disfavored—like Mrs. Maddonna—who are not.

Nor is the perception of religious endorsement tempered (*cf.* ECF No. 19, at 32) by the fact that any religious group—not just evangelical Christians—may discriminate in providing foster-care services on behalf of the State. Rather, the State’s scheme burdens all prospective foster parents who are denied service based on their beliefs; and thus it always carries a message of disfavor to some. And the religious exemption broadcasts the impermissible message that the government prefers religion over nonreligion. *See Mellen*, 327 F.3d at 374.

2. *The State impermissibly funds and supports discriminatory practices.*

The Establishment Clause also requires that governmental benefits be allocated “on the basis of neutral, secular criteria,” and that the recipients of those benefits not be defined “by reference to religion.” *Agostini v. Felton*, 521 U.S. 203, 231, 234 (1997). Funding or providing support to institutions that use public money “for religious purposes” or “to advance . . . religious objectives” violates the Establishment Clause. *Mitchell v. Helms*, 530 U.S. 793, 844, 857 (2000) (controlling opinion of O’Connor, J.); *see Columbia Union Coll. v. Oliver*, 254 F.3d 496, 504 & n.1 (4th Cir. 2001) (recognizing Justice O’Connor’s *Mitchell* concurrence as controlling, and holding that “actual diversion of government aid to religious purposes is prohibited”). Thus, the Establishment Clause prohibits private entities that receive government funding from discriminating based on religious criteria when determining whom they will serve. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589, 614–15, 621 (1988).

Here, the State impermissibly licenses, funds, and authorizes Miracle Hill’s use of public money to advance religious objectives by offering its government-funded services solely to those who affirm and attest to its evangelical-Protestant beliefs. Though the State insists that courts have long upheld governmental partnerships with faith-based organizations that provide social services (*see* ECF No. 19, at 28–30), this case is not about whether South Carolina may contract with faith-based entities. It is about whether the State violates the Establishment Clause by contracting with

entities that use the State’s imprimatur and public dollars to discriminate in the provision of government-funded social services. The State points to *no* case in which a court has upheld government funding that is put to discriminatory religious uses, and we are aware of none. For the Constitution straightforwardly mandates that government cannot and must not fund religious discrimination—not directly, and not through an intermediary. *See, e.g., Bowen*, 487 U.S. at 620–21 (remanding for determination whether grantees were “us[ing] materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith”); *Mitchell*, 530 U.S. at 840 (controlling opinion of O’Connor, J) (“[A]ctual diversion of secular government aid to religious indoctrination . . . is constitutionally impermissible.”).

3. *The State impermissibly delegates its child-placement authority to religious institutions that employ religious criteria in the exercise of that authority.*

The Establishment Clause further prohibits, as excessive entanglement, “delegating a governmental power to religious institutions” that act in furtherance of or infuse religious tenets into the exercise of that power. *See Larkin*, 459 U.S. at 123; *accord Grumet*, 512 U.S. at 696–97 (“delegating important, discretionary governmental powers to religious bodies . . . impermissibly entangl[es] government and religion” (internal quotation marks omitted)). In *Larkin*, for example, the Supreme Court held that a Massachusetts law that granted churches the right to veto applications for liquor licenses impermissibly “enmesh[ed] churches in the exercise of substantial governmental powers contrary to our consistent interpretation of the Establishment Clause.” *Id.* at 126. Because the delegated power “could be employed for explicitly religious goals [by], for example, favoring liquor licenses for members of that congregation or adherents of that faith” (*id.* at 125), and because Massachusetts failed to ensure that the power would “be used exclusively for secular, neutral, and nonideological purposes,” the challenged statute could not stand (*id.* (quoting *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 780 (1973))).

Here, the State has delegated to private child-placement agencies its authority to care for children in foster care. *See* Compl. ¶¶ 30–35. And with the State’s express authorization, Miracle Hill exercises this authority in a manner that is not “secular, neutral, and nonideological,” but instead is “for [the] explicitly religious goals” (*Larkin*, 459 U.S. at 125) of providing public services only to potential foster parents who share its faith and will proselytize the religious beliefs and exercises that it favors. Though as a private religious organization engaging in private charitable works Miracle Hill is free to serve members of its own faith and to use its charitable activities to advance that faith, the State cannot constitutionally permit, much less affirmatively authorize, Miracle Hill to operate a state program in that fashion.

4. *The State impermissibly authorizes the use of its program and resources for religious coercion and proselytization.*

Because the Establishment Clause bars government from “coerc[ing] anyone to support or participate in religion or its exercise,” it also bars the State from funding private institutions that use those funds to “coerce worship or prayer.” *DeStefano*, 247 F.3d at 411–12 (internal quotation marks omitted). “What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly.” *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77–78 (1990). For “a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.” *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (internal quotation marks omitted).

Here, Miracle Hill requires affirmance “in belief and practice” of its evangelical-Christian doctrinal statement as a precondition to becoming a volunteer mentor or foster parent. *See* Compl. ¶¶ 55–56, 59. For Mrs. Maddonna and those similarly situated, this government-funded, government-sanctioned scheme poses a quintessentially coercive choice: Hew to the dictates of your religious beliefs and forgo the publicly funded governmental program, or compromise your beliefs to participate on the same terms as everyone else. The coercive pressure exacted on

prospective foster parents like Mrs. Maddonna is only exacerbated by Miracle Hill’s stature as the most prominent child-placement agency in the area. Individuals are thus pressured to forfeit their religious beliefs to obtain access to a governmental program. This the Establishment Clause forbids. *See, e.g., Lee*, 505 U.S. at 592 (even “subtle coercive pressure” constitutes an Establishment Clause violation).

Miracle Hill also expressly requires all foster parents with whom it will work—i.e., those whom it deems religiously acceptable—to promote Miracle Hill’s favored religious views to the children placed with them. *See, e.g., Compl.* ¶¶ 54, 57. As the State notes, faith-based agencies like Miracle Hill may “view the upbringing of children and care of orphans as religious duties.” ECF No. 19, at 3. That is not the problem. It is entirely permissible, and laudable, to devote oneself to caring for needy children, whether for religious reasons or otherwise. But a state program must not be used to promote, proselytize, or coerce religion or religious activities. Hence, Miracle Hill may evangelize through its privately funded charitable work but not through its performance of this government-funded program; and the State is constitutionally obligated to ensure that the private entities with which it contracts follow that simple, clear rule. Yet the State here does just the opposite, thus violating the Establishment Clause.

5. *The State impermissibly grants exemptions that burden third parties and do not lift substantial government-imposed burdens on religious exercise.*

Though government may in some circumstances accommodate religious institutions by exempting them from generally applicable legal requirements, “accommodation is not a principle without limits.” *Grumet*, 512 U.S. at 706. To be constitutional, religious accommodations (1) must lift substantial, government-imposed burdens on the exercise of religion and (2) must not impose undue burdens on third parties. *See County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 US. 573, 613 n.59 (1989); *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 348 (1987)

(O'Connor, J., concurring)). For if the state has not imposed a substantial burden on religious exercise to begin with, an exemption from a generally applicable law is an unconstitutional religious preference. *Texas Monthly*, 489 U.S. at 15 (plurality opinion); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985). And “[i]f, in purporting to accommodate the religious exercise of some, the government imposes costs and burdens of that religious exercise on others, it favors the faith of the benefitted over the benefits and rights of the burdened.” *Irish 4 Reproductive Health v. U.S. Dep’t of Health & Human Servs.*, 2020 WL 248009, at *19 (N.D. Ind. Jan. 16, 2020); see *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005); *Texas Monthly*, 489 U.S. at 15, 18 n.8 (plurality opinion); *Caldor*, 472 U.S. at 709–10. Neither requirement is met here. Thus, all other considerations aside, the State cannot “accommodate” Miracle Hill’s religious beliefs by contracting with it to provide government services while exempting it from the nondiscrimination requirements that apply to the State itself and therefore to its contractors.

a. Exempting child-placement agencies, which contract with the State to provide governmental services, from adhering to generally applicable nondiscrimination laws does not alleviate an “exceptional government-created burden[] on private religious exercise” (*Cutter*, 544 U.S. at 720). That is because, as a matter of law, religious exercise is not substantially burdened by neutral, generally applicable legal requirements (such as the antidiscrimination requirements here) unless those requirements forbid a regulated entity “to engage in conduct proscribed by [its] religious beliefs, [] or . . . force[it] to abstain from any action which [its] religion mandates that [it] take” (*Goodall ex rel. Goodall v. Stafford Cty. Sch. Bd.*, 60 F.3d 168, 172–73 (4th Cir. 1995)).⁷

⁷ Whether religious exercise is substantially burdened by a neutral, generally applicable law (such as an antidiscrimination requirement) is a legal question, not a factual one. See *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011). Thus, even if conducting a governmental program under contract with South Carolina and funded by the state and federal governments could constitute Miracle Hill’s religious exercise, which it does not, it would be up to this Court to determine whether that exercise was substantially burdened. Here, it is not.

Though Miracle Hill may have religious reasons for choosing to provide foster-care services, acting on a religious motivation is insufficient as a matter of law to constitute a legally cognizable burden on religious exercise. *See Allegheny*, 492 U.S. at 613 n.59; *Henderson v. Kennedy*, 253 F.3d 12, 16–17 (D.C. Cir. 2001) (ban on peddling on National Mall did not substantially burden religious exercise of plaintiffs who wished to sell religious T-shirts, in part because ban was “at most a restriction on one of a multitude of means” of fulfilling their mission “to spread the gospel by ‘all available means’”). For there is no basis to conclude that Miracle Hill is *required* by its faith to contract with the state to provide child-placement services. Rather, that is just “one of a multitude of means” (*Henderson*, 253 F.3d at 17) by which Miracle Hill might engage in its ministry. *Cf. How We Help*, MIRACLE HILL MINISTRIES, <https://bit.ly/2UngKkN>. The exemptions from the nondiscrimination requirements here thus cannot “reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion” but instead impermissibly “convey a message of endorsement to slighted members of the community” (*Texas Monthly*, 489 U.S. at 15 (plurality opinion) (internal quotation marks omitted)), thus amounting to an unconstitutional governmental preference for Miracle Hill’s religion.

Relatedly, while Miracle Hill may be entitled to limit itself to serving only members of its own faith when performing privately funded charitable activities, “the fact that a person has a constitutional right . . . does not necessarily impose upon the government an obligation to subsidize that right.” *Goodall*, 60 F.3d at 172. “[I]f a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient’s exercise of its First Amendment rights.” *Agency for Int’l Dev. v. Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214 (2013). Not having one’s religious mission funded with taxpayer dollars as it carries out a governmental program is, at most, “a relatively minor burden”

(*Locke v. Davey*, 540 U.S. 712, 725 (2004)), if it is any burden at all. Hence, Miracle Hill and others like it are ineligible as a matter of law for a religious accommodation here.

b. The Establishment Clause also bars religious exemptions from neutral, generally applicable laws if the exemptions would shift costs, harms, or other burdens to nonbeneficiaries. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693, 729 n.37 (2014) (“Nor do we hold . . . that . . . corporations have free rein to take steps that impose ‘disadvantages . . . on others’ or that require ‘the general public [to] pick up the tab.’”); *Texas Monthly*, 489 U.S. at 18 n.8 (plurality opinion) (sales-tax exemption for religious periodicals impermissibly “burden[ed] nonbeneficiaries by increasing their tax bills . . . to offset the benefit bestowed on subscribers to religious publications”); *Caldor*, 472 U.S. at 710 (invalidating religious accommodation for Sabbath-observing employees in part because it imposed “substantial economic burdens” on employers and “significant burdens on other employees”).

Here, the State permits and affirmatively enables Miracle Hill to discriminate against prospective foster parents who do not affirm its evangelical-Christian beliefs, to the detriment of prospective foster parents of all other faiths, including Mrs. Maddonna. Allowing Miracle Hill to turn away prospective foster parents of whom it does not approve because they have the “wrong” religious beliefs impermissibly harms the parents by preventing them from participating in a governmental program and being considered for foster-care licenses on the same footing as religious adherents who are afforded preferred status. The harms to children in the foster-care system are even more devastating: With so critical a shortage of foster parents in South Carolina, every otherwise-qualified foster family that is turned away means one less home—one less loving family—for a child in need. And even for those children who do get placed, the exclusion of foster parents based on religion means that the children who are not themselves of the faith practiced and preferred by an entity like Miracle Hill are more likely to be put with a family who will not raise

them consistent with the religious beliefs of the children and their biological parents, contrary to South Carolina law (*see* S.C. Code Regs. § 114-550(H)(11)).

6. *The State impermissibly affords denominational preferences.*

Finally, when government favors or disfavors a religious denomination, its action is subject to strict scrutiny and presumptively does not stand. *Larson*, 456 U.S. at 246; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (explaining Establishment Clause jurisprudence and extending it to Free Exercise Clause); *Koenick*, 190 F.3d at 264 (strict scrutiny applies under Establishment Clause when government has “facially discriminate[d] between religious denominations or between religion and non-religion”).

Defendants here run afoul of this prohibition in at least two respects. First, by authorizing and specifically enabling Miracle Hill to violate generally applicable antidiscrimination laws (through exemption from state law and aggressive advocacy for exemption from federal law), the State has preferred Miracle Hill’s faith, evangelical Christianity, over all other faiths. And second, because, for the reasons just explained, government cannot accomplish through private actors what it cannot do directly, Miracle Hill’s express preference for evangelical Christians in the performance of a program for the State constitutes a denominational preference by the State itself.⁸ Hence, the State must show a compelling governmental interest in preferring evangelical Christian

⁸ It is of no moment that Mrs. Maddonna’s exclusion comes now in the form of a requirement that she sign and attest to belief in and practice of an evangelical-Christian doctrinal statement, rather than a categorical ban on Catholics. A law that distinguishes between the characteristics of religions, and thus “makes explicit and deliberate distinctions between different religious organizations,” grants denominational preferences in violation of the Establishment Clause. *Larson*, 456 U.S. at 246 n.23. That is true whether the favoritism comes in the form of specifically naming the favored or disfavored denomination, or instead by favoring or disfavoring characteristics or actions that attach to particular faiths or denominations. *See id*; *see also Grumet*, 512 U.S. at 699 (“identification here of the [favored] group . . . in terms not expressly religious” “does not end” judicial inquiry into whether statute afforded unconstitutional preference to religious group); *Lukumi*, 508 U.S. at 534 (Religion Clauses “forbid[] subtle departures from neutrality”). Even as revised, Miracle Hill’s policy imposes a denominational preference.

beliefs over all others, as well as narrow tailoring of its actions to serve only that compelling interest. *See Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015); *Larson*, 456 U.S. at 247. The State cannot meet this exacting standard, particularly at this early stage of the litigation.

The State asserts an interest in “maximizing placement opportunities for foster children.” ECF No. 19, at 24. But it has not established that its sanctioning of religious tests for prospective foster parents actually furthers that interest. Nor could it: By turning away otherwise-qualified volunteers and foster parents for practicing the wrong religion, agencies like Miracle Hill diminish the number of foster families available to children, thus also undercutting DSS’s central function of “caring for South Carolina children in its foster care system” (ECF No. 19, at 3).

The State also asserts that it has a compelling interest in “[i]ncreasing community support and options for foster child placement by maximizing the number and diversity” of child-placement agencies. ECF No. 19, at 24. But Mrs. Maddonna does not ask that the State be enjoined from partnering with faith-based agencies. Rather, she seeks only what the Constitution requires: that the State ensure that all child-placement agencies with which it contracts refrain from discriminating on the basis of religion when they provide services on behalf of and funded by the State. Nor does it follow that requiring child-placement agencies to adhere to antidiscrimination laws will cause all (or any) faith-based agencies to stop working with foster children. Many faith-based agencies that act on religious motivations provide government-funded social services on a nondiscriminatory basis. The State’s speculations to the contrary are insufficient to satisfy strict scrutiny at any stage of litigation—much less on a motion to dismiss.

The State further asserts (ECF No. 19, at 25–26) an interest in shielding itself from religious entanglement in enforcing South Carolina’s religion-matching statute (S.C. Code § 63-15-20; S.C. Code Regs. § 114-550(H)(11)), which requires that foster children be placed with families sharing the faith of their biological parents if the biological parents so desire. But the State does not explain

how or why complying with the religion-matching law results in impermissible entanglement, for it is the biological parents who specify the religion into which the child will be placed. And if there were an entanglement problem, which there is not, it would bar application of the statute whether by the State directly or through child-placement agencies. Hence, the State’s interest in avoiding entanglement is not advanced by contracting with private entities to violate the very constitutional prohibitions that the State seeks to avoid. *Cf. Norwood*, 413 U.S. at 465. And permitting faith-based agencies to impose religious tests on prospective foster parents actively inhibits the State’s asserted interest in the religion-matching law: The State boasts (ECF No. 19, at 3–4), and Mrs. Maddonna has alleged (Compl. ¶¶ 103–106), that Miracle Hill accepts for placement *children* of all faiths. The State’s assignment of, for example, Catholic, Jewish, or Muslim children to an entity that expressly refuses foster parents who do not share and affirm its evangelical-Christian religious beliefs cannot be squared with the religion-matching statute.

In short, the State’s authorizing and enabling of religious discrimination by faith-based agencies is not even rationally related to the interests that the State asserts—much less do the State’s actions survive strict scrutiny. Thus, Mrs. Maddonna has successfully pleaded that the State has afforded denominational preferences barred by the Establishment Clause.⁹

C. The State’s proffered alternative analysis is not the law and does not support the outcome that the State desires.

The State suggests that settled, binding Establishment Clause jurisprudence is “outdated” and that the Supreme Court’s recent cases substitute a “historically informed analysis.” ECF No. 19, at 26–28, 31. And the State asserts that federal and state governments have for “hundreds of years” partnered with religious ministries to provide social services, and that the courts have

⁹ As for the State’s asserted interest in not burdening faith-based agencies’ free-exercise and associational rights, for the reasons explained in Section II.B.5, *supra*, and Section IV, *infra*, these rights are as a matter of law not substantially burdened by requiring compliance with antidiscrimination requirements.

upheld these partnerships. *Id.* at 27. But “historically informed analysis” was applied in legislative-prayer cases in lieu of the Establishment Clause’s long-standing tests because of the special history of congressional chaplains, whom the First Congress authorized the same week that it voted to propose the First Amendment for ratification. *See Town of Greece v. Galloway*, 572 U.S. 565, 578–79 (2014). And declining to apply *Lemon* in *American Legion v. American Humanist Ass’n*, 139 S. Ct. 2067 (2019), to evaluate the constitutionality of a century-old memorial display does not diminish the applicability of any, much less all, settled constitutional jurisprudence to cases like this one that involve government-funded, government-licensed discrimination in the provision of social services.¹⁰ As a matter of law, Supreme Court decisions remain binding precedent unless and until the Supreme Court explicitly says otherwise. *Hohn v. United States*, 524 U.S. 236, 252–53 (1998). And the Court has never abrogated *Lemon*, *Larson*, or any of the other cases that the State here may wish to skirt. Hence, the Fourth Circuit applies *Lemon* and the rest of settled Establishment Clause jurisprudence (*see, e.g., Wood*, 915 F.3d at 313–14, 318; *IRAP*, 883 F.3d at 265; *Buxton v. Kurtinitis*, 862 F.3d 423, 431–33 (4th Cir. 2017)), as should this Court.

But even if the State were entitled to discard binding Supreme Court and Circuit precedent, its proffered substitute would avail it nothing. Whatever the State may have in mind in asserting long-standing governmental partnerships with private, religious social-service providers (*see* ECF No. 19, at 27–28), the State cannot contend that the specific practice at issue here—allowing government-contracted, government-funded agencies to employ religious criteria in operating governmental programs—was “accepted by the Framers” (*see Town of Greece*, 572 U.S. at 577).

¹⁰ Only three Justices in *American Legion* subscribed to the portion of Justice Alito’s opinion proposing to transplant the historical approach from legislative-prayer cases even to the challenged display there. *See* 139 S. Ct. at 2087–89 (plurality opinion). The majority opinion held only that “retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones.” *Id.* at 2085. And none of that has anything to do with religious discrimination in government-funded programs, which has never been allowed.

At the founding, neither the federal government nor the states were in the business of contracting for (or directly providing) social services. *See, e.g.*, Douglas Laycock, *Churches, Playgrounds, Government Dollars—And Schools?*, 131 Harv. L. Rev. 133, 143–44 (2017) (“There were no programs in which government broadly funded some private activity that both churches and secular organizations engaged in.”).¹¹

III. MRS. MADDONNA HAS STATED A CLAIM UNDER THE EQUAL PROTECTION CLAUSE.

The Equal Protection Clause mandates that government treat alike “all persons similarly situated.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). When government treats people differently based on a suspect classification such as religion, its actions are subject to strict scrutiny. *See Giarratano v. Johnson*, 521 F.3d 298, 303 (4th Cir. 2008) (citing *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (recognizing religion as suspect classification)). As Justice O’Connor put it, “the Religion Clauses . . . and the Equal Protection Clause as applied to religion[] all speak with one voice on this point: Absent the most unusual circumstances, one’s religion ought not affect one’s legal rights or duties or benefits.” *Grumet*, 512 U.S. at 715 (O’Connor, J., concurring in part and concurring in the judgment). Thus, for the same reasons that the State’s funding, licensing, and authorizing of discrimination in the provision of child-placement services trigger strict scrutiny and violate the Establishment Clause, they require strict scrutiny and invalidation under the Equal Protection Clause. *Cf. Lukumi*, 508 U.S. at 540 (“equal protection mode of analysis” applies in determining whether governmental action is neutral with respect to religion under Religion Clauses (internal quotation marks omitted)).

¹¹ Nor are local or state practices in the nineteenth century relevant in determining what was “accepted by the Framers” under the federal Establishment Clause, which was made applicable to the states only through ratification of the Fourteenth Amendment in 1868, and its incorporation was not recognized until the 1940s (*see Everson v. Bd. of Educ.*, 330 U.S. 1, 5, 14–15 (1947)).

While not disputing that “discriminating *among* religions” subjects governmental action to strict scrutiny (ECF No. 19, at 21–22 (citation omitted)), the State insists that it is not to blame for Miracle Hill’s religious discrimination and that its orchestrating and implementing the religious exemptions from antidiscrimination requirements convey a benefit to all religions, making them subject to rational-basis review only (*id.* at 24–25).¹²

Nonsense. First, the law does not permit the State to launder discrimination in the provision of governmental services through private entities, for “[a]ctivities that the . . . government could not constitutionally participate in directly cannot be supported indirectly through the provision of support for other persons engaged in such activity.” *Nat’l Black Police Ass’n v. Velde*, 712 F.2d 569, 580 (D.C. Cir. 1983). “A State’s constitutional obligation requires it to steer clear . . . of giving significant aid to institutions that practice . . . invidious discrimination.” *Norwood*, 413 U.S. at 467. Thus, just as licensing, funding, and supporting private entities that discriminate in providing a governmental service violate the Establishment Clause, so too do they violate equal protection. Second, even if the State permits agencies of all denominations to discriminate, it still funds, licenses, and authorizes discrimination on the basis of religion. The State could not defend against an equal-protection claim based on a DSS agent’s rejection of Catholic applicants by pointing to a different DSS agent who rejects Jews and a third who rejects Muslims. So it cannot time-share discrimination by proxy either. And third, whether the State discriminates against other faiths elsewhere is irrelevant here, where Mrs. Maddonna was personally subject to state-sanctioned discrimination because of her Catholic beliefs. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring) (Equal Protection Clause concerns the rights of

¹² The State also argues that Miracle Hill is not a state actor and therefore cannot be liable under the Equal Protection Clause. ECF No. 19, at 22–23. But Mrs. Maddonna did not sue Miracle Hill, so the Court need not consider whether it is a state actor.

individuals, not groups). The State's acts to further Miracle Hill's discrimination are subject to strict scrutiny and violate equal protection.¹³

IV. THE STATE IS NOT REQUIRED TO ACCOMMODATE AGENCIES' DISCRIMINATION.

Finally, the State asserts (ECF No. 19, at 33–35) that countervailing First Amendment and statutory requirements compel it to accommodate the religious discrimination of faith-based agencies with which it partners. The State is mistaken.

First, the State points (ECF No. 19, at 30, 34) to *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), as permitting or perhaps requiring the State to fund faith-based agencies that discriminate in the provision of governmental services. But *Trinity Lutheran* held only that Missouri violated the Free Exercise Clause by denying a church-run preschool a grant to purchase a rubber playground surface “solely because of [the preschool’s] religious character.” 137 S. Ct. at 2017–18, 2021, 2024–25. The school did not discriminate in admissions; it allowed open, nondiscriminatory access to the playground; and there was no evidence that the playground was used for religious purposes. *Id.* at 2017–18. The Court’s holding was thus explicitly limited: “This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.” *Id.* at 2024 n.3 (plurality opinion); *see also id.* at 2019 (majority opinion) (“denying a generally available benefit *solely* on account of religious identity imposes a penalty on the free exercise of religion” (emphasis added)); *id.* at 2021 (majority opinion) (Missouri “expressly discriminates against otherwise eligible recipients” based solely on identity). Here, by contrast, Mrs. Maddonna challenges governmental funding of private entities that put public money and delegated state

¹³ The State’s reliance on *Amos* (Dkt. No. 19, at 21–22) is misplaced. That case concerned a church’s firing of an employee who was not in religious good standing. The exemption from Title VII’s bar on religious discrimination was not unconstitutional religious favoritism because it avoided interference with church autonomy and internal governance, matters not implicated here.

authority to religious uses to advance their religion and discriminate against other faiths in providing a governmental service. Again, Mrs. Maddonna seeks not to bar the State's contracting with faith-based entities, but to require the State to ensure that its programs and services are delivered in a nondiscriminatory fashion, whether by the State itself or by contractors.

The State's suggestion that requiring compliance with antidiscrimination laws would violate child-placement agencies' freedom of association "when making personnel recruiting, screening, and selection decisions" (ECF No. 19, at 24–25, 34) similarly fails. To have an expressive-association claim, a "group," as a group, "must engage in some form of expression." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). Those who go to Miracle Hill to be foster parents or volunteer mentors are not joining an expressive association to communicate a collective message—much less having their ability to do so frustrated by the antidiscrimination requirements that allow them to participate; nor are they forming an intimate association with Miracle Hill. *Cf.*, e.g., *City of Dallas v. Stanglin*, 490 U.S. 19, 24 (1989) (no associational right where parties "are not members of any organized association; they are patrons of the same business establishment"). An agency's associational rights simply are not implicated by a requirement to serve people of all faiths equally *when under contract to provide governmental services*.

As for the State's reliance on the ministerial exception (ECF No. 19, at 24–25, 33), that exception ensures the freedom of churches to hire clergy without governmental interference, because of special solicitude for "the internal governance" of religious institutions. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188, 196 (2012). It does not apply even to non-clergy *employees*, much less does it require the State to permit religious institutions to discriminate in whom they serve in the performance of a government-funded program. The suggestion that *Hosanna-Tabor* empowers Miracle Hill to treat potential foster parents as its clergy is fatuous: Prospective foster parents are not employees of child-placement

agencies any more than they would be state employees if they sought to foster children through DSS directly. Foster parents are certified under *state* law; the children entrusted to them are in the care of the *State*. The idea that participating in a *state* program makes one a minister cannot be squared with the fact that the State is constitutionally forbidden to proselytize or promote religion.

Finally, the State asserts without argument (ECF No. 19, at 34) that it would run afoul of the federal Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(a), and the South Carolina Religious Freedom Act, S.C. Code § 1-32-40, should child-placement agencies be required to serve all people equally. But no federal or state statute may forbid what the Constitution requires. *See* U.S. Const. art. VI (Supremacy Clause). And as explained *supra*, to be constitutional, a religious accommodation “must lift ‘an identifiable [government-imposed] burden *on the exercise of religion*’” (*Allegheny*, 492 U.S. at 613 n.59 (citation omitted)) and must not unduly burden nonbeneficiaries (*Cutter*, 544 U.S. at 722). Otherwise, it impermissibly creates incentives to adopt the favored religious practice, thus “implicitly endorsing a particular religious belief” (*Hobbie v Unemp’t Appeals Comm’n*, 480 U.S. 136, 145 n.11 (1987)). To be constitutionally permissible, RFRA and the state RFA must be interpreted to incorporate Establishment Clause prohibitions. *See Cutter*, 544 U.S. at 720. They thus cannot require, or even permit, exemptions from antidiscrimination laws that allow child-placement agencies to discriminate on the basis of religion when providing a governmental service.

CONCLUSION

The motions to dismiss should be denied.

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