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.	)	Civil Action No. 6:19-cv-03551-TMC

DEFENDANT HENRY MCMASTER'S REPLY IN SUPPORT OF THE MOTION TO DISMISS

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I. INTRODUCTION.

Plaintiffs' Complaint labors unsuccessfully to find constitutional violations where none exist, and nothing in her Opposition shows otherwise. In an effort to paper over the deficiencies in her claims, the Opposition relies on facially implausible allegations, unsupported conclusions, and creative recharacterizations of the facts. As to standing, for example, Plaintiff repeatedly asserts she was "turned away" or "excluded" from a "governmental program," but the admitted fact is that she has never, at any time, attempted to foster a child through the Department of Social Services ("DSS") or through one of the private child-placing agencies ("CPAs") in her area who gladly work with any qualified applicant. She further concedes she has not applied to mentor or foster a child through Miracle Hill following Miracle Hill's adoption of a policy welcoming Roman Catholic applicants.

From these exaggerations and speculations, Plaintiff purports to extract two injuries: (1) the hurt feelings she allegedly felt when one CPA referred her to other nearby CPAs, and (2) the Governor's supposed imposition of a "barrier" to her participation in the State's foster care system—this despite her admitted ability to work directly with DSS and various private CPAs.

These "injuries" do not suffice to establish constitutional standing. The Fourth Circuit has held that plaintiffs lack standing to assert Establishment Clause claims based on alleged "stigma" or "barriers" when the State is itself willing to provide the desired service while simultaneously accommodating those who cannot provide the services due to their sincerely held religious beliefs. *See Ansley v. Warren*, 861 F. 3d 512 (4th Cir. 2017) (affirming dismissal for lack of standing in a suit challenging a statute that allowed state magistrates with sincere religious objections to recuse themselves from performing marriages but ensured that other, non-objecting state employees would be available to provide the requested services); *see also Barber v. Bryant*, 860 F.3d 345 (5th Cir. 2017) (affirming dismissal for lack of standing in a suit alleging Mississippi's Governor violated the Establishment and Equal Protection clauses by implementing a statute that, among other things, accommodated faith-based CPAs by preventing them from being penalized for making foster care decisions based on their sincere religious beliefs).

The merits of Plaintiff's claims fare no better. She defends her Establishment Clause claim by arguing Governor McMaster's even-handed accommodation of all faith-based CPAs somehow "privileges Miracle Hill's religious beliefs over Mrs. Maddonna's" and forces her to engage in religious exercise. (ECF No. 24 at 19, 22–23, 25, 27.) But the Governor's Executive Order and request for a federal waiver—the acts by which he allegedly established a religion—accommodate *all* religious CPAs equally, regardless of their faith, sect, or denomination; they do not hinder *any* qualified individuals from being licensed as a foster parent, regardless of her religion or irreligion; and they do not coerce, encourage, or discourage Ms. Maddonna from engaging in or abstaining from religious exercise. Further, Plaintiff's argument ignores the many cases in which courts have upheld the constitutionality of government funding of groups who limit their leadership, membership, or volunteers to co-religionists.

The viability of Plaintiff's Establishment Clause claim is further undercut because, as other courts have held in the foster care context, the relief she seeks is an unconstitutional infringement on faith-based CPAs' constitutional and statutory rights. *See, e.g.*, *Buck v. Gordon*, No. 1:19-cv-286, 2019 WL 4686425 (W.D. Mich. Sept. 26, 2019) (holding thus in a case involving an attempt to deprive faith-based CPA's of state licensure and funding). Indeed, the Supreme Court is poised to rule on the question, having recently granted a faith-based CPA's petition for certiorari presenting the issue: "Whether a government violates the First Amendment by conditioning a religious agency's ability to participate in the foster care system on taking actions and making statements that directly contradict the agency's religious beliefs?" *See* Supreme Court of the United States, Order List (Feb. 24, 2020) at 4 (granting the petition for certiorari in *Fulton et al. v. City of Philadelphia et al.*, Case No. 19-123); *see also Fulton et al. v. City of Philadelphia et al.*, Petition for Certiorari at 2 (July 22, 2019).[1]

[1] *Available at* https://www.supremecourt.gov/orders/courtorders/022420zor_mjo1.pdf and https://www.supremecourt.gov/DocketPDF/19/19-123/108931/20190722174037071_Cert%20Petition%20FINAL.pdf, respectively.

Plaintiff defends her Equal Protection claim by misstating the applicable standard and arguing the Governor must answer for the independent actions of a private CPA. (ECF No. 24 at 31–33.) But she has not alleged any facts that would show she was prevented from, or even inconvenienced in, pursuing her alleged desire to foster or volunteer, much less that the Governor has prevented or inconvenienced her. Instead, she concedes that, if she wished, she could have fostered or volunteered with other CPAs in her area or with DSS itself. (*See id.* at 14, 28; Compl. [ECF No. 1] at ¶ 50.)

II. CLARIFICATION OF THE FACTS.

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

- Plaintiff has not been prevented from becoming a foster parent or volunteer and has not been "turned away" or denied participation in a government program. (*Contra* ECF No. 24 at 2, 7–10, 12, 14, 16, 20, 26–27.) The Complaint alleges only that Plaintiff, despite knowing that Miracle Hill now welcomes foster applications from Roman Catholics, chose not to apply to Miracle Hill because she suspected Miracle Hill would have declined to work with her. But fostering and volunteer opportunities at Miracle Hill are not the relevant "government program." Plaintiff does not—and cannot—allege she has been turned away from *the State's broader foster care* program. Instead, she admittedly and knowingly spurned all other avenues open to her to participate in that program.
- Governor McMaster has not privileged or preferred one religion over others. (*Contra id.* at 19, 25, 27.) The waiver request and Executive Order on which her claims depend belie this assertion. Neither of them privileges one faith over any other, and they both expressly apply to and protect all faith-based CPAs. (*See* ECF Nos. 19-1, 19-2.)
- Governor McMaster's actions have not reduced the number of foster homes. (*Contra* ECF No. 24 at 7, 19, 26, 28.) The Complaint concedes otherwise,[2] and Plaintiff cannot now shoehorn in new allegations. Further, Plaintiff offers nothing but her own speculation that accommodating Miracle Hill and other faith-based CPAs shrinks (rather than *increases*) the pool of homes. *Trzaska v. L'Oreal USA, Inc.*, 865 F.3d 155, 165 (3d Cir. 2017) ("[A] district court should not credit mere speculation or unsupported conclusions and unwarranted inferences."); *Skraggs v. NGK Spark Plugs, Inc.*, No. 2:15-cv-11357, 2015

[2] The Complaint concedes that "over the last several years"—*i.e.*, from before the Governor's actions until now—"the number of foster-care home placements has remained relatively flat." (ECF No. 1 at ¶¶ 28–29. Further, the authority Plaintiff cites in her Complaint indicates the pool of available foster homes has been *growing*. *Compare id.* at ¶ 29 (alleging in late 2019, there was a "shortfall of nearly 2,000 homes") (citing *The Numbers*, CARE2FOSTER, https://bit.ly/35rFdvX) *with The Numbers*, CARE2FOSTER (noting that as of March 2020, there is a shortfall of only 1,675 homes).

WL 8485248, at *2 (S.D. W. Va. Sept. 1, 2015) ("Scenarios that are the products of speculation—not factual allegations—do not make what is possible plausible.").

- Governor McMaster has not authorized CPAs to discriminate in whom they serve. (*Contra* ECF No. 24 at 1–2, 5, 8, 12–13, 20–22, 28.) CPAs like Miracle Hill serve foster *children*, not foster *parents* or *volunteers*. Miracle Hill serves any child, and—more to the point—Governor McMaster's actions do not allow faith-based CPAs to discriminate among the children they serve. The Complaint lacks any allegation to the contrary, and the Court can and should ignore unpled factual assertions.
- Governor McMaster has not authorized CPAs to proselytize children much less to use government funds to do so. (*Contra* ECF No. 24 at 22–23.) Plaintiff asserts "the State" (a conflation of two individual defendants into a single, abstract, and allegedly malicious bad actor) uses Miracle Hill as a proxy to coerce, evangelize, and proselytize foster children. (*Id.*) But the Governor's challenged actions—the Executive Order and request for a federal waiver—do not authorize or encourage private CPAs to proselytize at all, let alone by means of government funding. (*See* ECF No. 19-1, 19-2.) This bogeyman is unsupported and false, and it should play no part in the Court's consideration.

III. ARGUMENT.

A. Plaintiff still lacks standing.[3]

Plaintiff has disclaimed standing to bring her claims based on taxpayer status or on the putative right to volunteer or foster through a CPA of her choosing. (*See* ECF No. 24 at 10.) She thus effectively concedes she lacks standing to bring any of her claims on these bases. Instead, Plaintiff asserts standing solely on the ground that the Governor's actions allegedly caused her a stigmatic injury or erected a barrier to her ability to foster. (*Id.* at 9–11.) But even when a Plaintiff relies on stigmatic injuries, the Fourth Circuit has emphasized she "still must carry the burden of demonstrating each element of standing," *Deal v. Mercer Cty. Bd. of Educ.*, 911 F.3d 183, 188 (4th Cir. 2018), as "there is of course no sliding scale of standing." *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1085 (4th Cir. 1997) (quotation marks omitted). Here, Plaintiff's allegations do not meet her burden.

1. Plaintiff still has not alleged a cognizable injury.

Courts have cautioned that the concept of stigmatic injury is "particularly elusive" in the context of Establishment Clause claims. *Suhre*, 131 F.3d at 1085. "[T]he allegation of injury in the

[3] Plaintiff concedes she cannot rely on injuries incurred by foster children or their biological parents (*see* ECF No. 24 at 9 n.1), yet she still tries to do so (*id.* at 7, 26–29). The Court should accept her concession and ignore claims premised on "injuries" to others that Plaintiff admits she cannot bring.

form of a stigma alone is insufficient to support standing; there must also be a 'cognizable injury caused by personal contact *with the offensive conduct*.'" *Sarsour v. Trump*, 245 F. Supp. 3d 719, 729 (E.D. Va. 2017) (emphasis added) (quoting *Suhre*, 131 F.3d at 1090). Plaintiffs must "identify a[] personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982).

In her Opposition, Plaintiff winnows down her laundry list of grievances, speculations, and perceived slights, and rests her standing on only two alleged injuries: (1) the "barriers" she allegedly faced in her efforts to become foster mentor or parent, and (2) the "stigma" she supposedly felt when one private CPA directed her to DSS or to other CPAs that would gladly assist her in mentoring or fostering. (ECF No. 24 at 9.) As to the former, Plaintiff's claim that the Governor has imposed "practical barriers" to her fostering or volunteering is not plausibly pled. If, as Plaintiff repeatedly (and incorrectly) claims, the injury she suffered was being "turned away" from a "government program," it is utterly implausible for her to argue that the ability to participate in that program by working hand-in-hand with the State agency responsible for its administration is a "barrier" to her participation. Plaintiff concedes she could pursue volunteering or fostering with other CPAs or with DSS itself, but alleges she would prefer to partner with Miracle Hill due to its alleged size and experience. (*See* Compl. ¶ 50; *see also* ECF No. 24 at 14.) But even assuming *arguendo* that Miracle Hill is more efficient or experienced than other CPAs or DSS, Plaintiff's desire to partner with a particular CPA of her choosing is not a cognizable injury giving rise to constitutional standing when other licensed CPAs *or the State itself* can and gladly will provide the desired benefit.

Indeed, the Fourth Circuit has said as much, holding that so long as a State is willing and able to provide a citizen with a desired opportunity or assistance, that citizen is not injured by the fact that one of the State's employees (much less a private contractor) is unable, due to his sincere religious

objection, to assist her. *Ansley v. Warren*, 861 F. 3d 512 (4th Cir. 2017). In *Ansley*, the legislature of North Carolina enacted a statute permitting State magistrates to temporarily recuse themselves from performing marriages as a way of accommodating some magistrates' sincerely-held religious beliefs. *Id*. at 516. The statute ensured that another magistrate would be available in the same county to conduct the marriage without undue delay. *Id*. Three couples filed a lawsuit claiming this accommodation violated the Establishment Clause. *Id*. The District Court dismissed for lack of standing, and the Fourth Circuit affirmed, noting the absence of any injury since "the state has not impeded or restricted their ability to get married." *Id.* at 518.[4] *See also Barber v. Bryant*, 860 F.3d 345 (5th Cir. 2017) (holding plaintiffs lacked stigmatic injury standing in a suit raising Establishment and Equal Protection Clause challenges to a statute that, among other things, accommodated faith-based CPAs by forbidding the State and its agencies from taking adverse action toward such CPAs for decisions arising from their sincerely-held religious beliefs).[5]

Plaintiff's claim of stigmatic injury is likewise implausible for it is contradicted by her concession that DSS itself (a state agency in the Governor's Cabinet) would gladly have worked with her, as would other CPAs. A subjective claim of stigmatic injury, especially when contradicted by the alleged facts, is insufficient to support standing, *see Valley Forge*, 454 U.S. at 485; *Sarsour*, 245 F. Supp. 3d at 729, and Plaintiff's assertion of stigmatic injury standing does not relieve her of the burden to plead plausible and factually supported bases for her standing. *See Deal v. Mercer Cty.*

[4] Although the Plaintiffs in *Ansley* relied on taxpayer standing, the Fourth Circuit's holding and analysis is nevertheless applicable here, as the Opinion expressly noted that the Plaintiffs' unsuccessful attempt to rely on taxpayer standing was necessitated by the fact that they could not establish any direct injury and thus had no other standing on which to rely. *Id*.

[5] Because the District Court enjoined the statute prior to its effective date, the plaintiffs in *Barber* did not base their standing on a specific instance of religious accommodation under the statute. *Barber v. Bryant*, 193 F.Supp.3d 677, 687 (S.D. Miss. 2016); *Barber*, 860 F.3d at 355. The Fifth Circuit's holding is nevertheless instructive, teaching that the State's enactment of a religious accommodation was not something the plaintiffs could "encounter" to establish standing because the challenged statutory scheme "does nothing to compel the behavior of these plaintiffs; it only restricts the actions of state government officials." *Barber*, 860 F.3d at 353–55.

Bd. of Educ., 911 F.3d 183, 188 (4th Cir. 2018) (noting even where a plaintiff relies on stigmatic injuries, he "still must carry the burden of demonstrating each element of standing"); *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 208 (4th Cir. 2017) (stating "'unwarranted inferences,' 'unreasonable conclusions,' and 'naked assertions devoid of further factual enhancement' are not entitled to the presumption of truth") (quoting *SD3, LLC v. Black & Decker Inc.*, 801 F.3d 412, 422 (4th Cir. 2015)); *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1085 (4th Cir. 1997).

Notably, Plaintiff concedes there is no "unqualified right to become a foster parent or otherwise to associate with or obtain services from Miracle Hill." (ECF No. 24 at 10.) She nevertheless argues she has a constitutionally right "not to be discriminated against on the basis of religion when seeking service from or participation in a public program." (*Id.* (citing *Turner v. Fouche*, 396 U.S. 346, 362 (1970) for the proposition that there is a "constitutional right to be considered for public service without the burden of invidiously discriminatory qualifications").) Plaintiff's argument, however, is undone by her own Complaint and Opposition, which concede she is welcome to participate in "public service" in the relevant "government program"—namely the foster care program administered by DSS. Similarly, her reliance on *Turner* is inapposite, as she already has the very thing that *Turner* required, namely the "right to be considered for public service without the burden of invidiously discriminatory qualifications," because Plaintiff could (and still can) be licensed by the State if she had applied to DSS. *See MGM Resorts Int'l Global Gaming Dev., LLC v. Malloy*, 861 F.3d 40, 47, 50 (2d Cir. 2017) (holding the plaintiffs lacked standing for their Equal Protection claim because they had not "made any serious attempt to obtain the benefit" they claim they were denied) (applying *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993) and *Heckler v. Mathews*, 465 U.S. 728 (1984)). Plaintiff's allegedly stigmatic injuries do not establish standing to bring her claims.

As for her Equal Protection claim, Plaintiff's asserted stigmatic injury is likewise insufficient because she "has not made any serious attempt to obtain the benefit [she] claims that [she] was denied," *i.e.*, a foster-care license, and "courts have required that a plaintiff who challenges a barrier to [a benefit] . . . actually make [an attempt to obtain the benefit], or at least

establish standing by proving that [she] very likely would have [attempted to obtain the benefit] but for the alleged discrimination." *MGM Resorts*, 861 F.3d at 47, 50 (applying *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993) and *Heckler v. Mathews*, 465 U.S. 728 (1984)).[6] Here, neither the waiver request nor the Executive Order expressly favor any religion; Plaintiff concedes she never applied to DSS to become a foster parent nor did she apply to Miracle Hill after its decision to welcome Roman Catholics; and there is no allegation that she would be barred from becoming a foster parent if she did apply. Because her allegedly stigmatic injuries do not suffice, Plaintiff lacks standing to bring her claims.

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

Plaintiff argues her alleged injuries are traceable to Governor McMaster because his removal of an incentive (*i.e.*, his withholding of a penalty) for CPAs to make certain associational choices makes the CPAs' subsequent choices attributable to him. (*See* ECF No. 24 at 12–15.) These are the same type of arguments rejected in *Allen v. Wright*, 468 U.S. 737 (1984),[7] *Doe v. Obama*, 631 F.3d 157 (4th Cir. 2011), and *Frank Krasner Enters. Ltd. v. Montgomery Cty.*, 401 F.3d 230, 234–35 (4th Cir. 2005).

Plaintiff's attempts to whistle past *Allen*, *Doe*, and *Krasner* are unpersuasive. Governor McMaster does not dispute that traceability requires generally "but for" causation or that the challenged action need not be the sole or immediate cause of the injury or the last step in the chain of causation. *See Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978); *Sierra Club v. U.S. Dep't of Interior*, 899 F.3d 260 (4th Cir. 2018).[8] But these unremarkable general

[6] *See also Am. Atheists, Inc. v. Shulman*, 21 F. Supp. 3d 856, 864, 866 (E.D. Ky. 2014) (rejecting stigmatic injury where plaintiffs failed to "establish that [plaintiff] expressing [disfavored] beliefs could never qualify" for a benefit, as (i) the policy at issue "do[es] not expressly favor certain [religious beliefs]," (ii) plaintiffs still "may be eligible" for the benefit, and (iii) plaintiffs "never sought classification" to obtain the benefit (interpreting *City of Jacksonville*, 508 U.S. 656)).

[7] A portion of *Allen* not relevant here described standing as a "prudential" matter and was later abrogated by *Lexmark Intern. Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014).

[8] Both *Duke* and *Sierra Club* involve government action designed to permit construction efforts by third parties, namely of nuclear power plants and an oil pipeline. Injuries resulting from

propositions, on which Plaintiff's entire argument rests, do not end the analysis. The more specific principle here is that, where an executive action allows a private third party to make a decision, and the executive action safeguards the independence of that decision by removing incentives for the third party to decide one way or the other, an alleged injury arising from the third party's decision is not traceable to the executive action. *See Doe*, 631 F.3d at 162. Here, Governor McMaster's actions removed any incentive for Miracle Hill to partner or not partner with Plaintiff and thus ensured that Miracle Hill alone would make the independent, unfettered decision Plaintiff now challenges. This independence is borne out by the fact that Miracle Hill adopted its more ecumenical stance *after* the Governor had *removed* any incentive for it to do so. Neither the alleged injury stemming from Miracle Hill's prior decision nor the potential "injury" that Plaintiff speculates *might* have occurred if she had bothered to apply following the dismissal of her first suit are fairly traceable to the Governor. *See id.*

3. Plaintiff's alleged injuries are still not redressable through the relief she seeks.

Plaintiff concedes it is mere speculation whether Miracle Hill or other faith-based CPAs would alter their associational practices in response to an Order from this Court enjoining the Governor and DSS from licensing and contracting with them, but she argues that the alternative—namely the forced revocation of Miracle Hill's license, the loss of hundreds of foster families, and the removal of hundreds of foster children from its partner homes—would suffice to make her whole. (ECF No. 24 at 15–16.) Not so. The government's closure of Miracle Hill's foster care program would not redress the "practical barriers" Plaintiff supposedly faces. Rather, in a perverse irony, it would *entrench* the very injury of which she complains and would leave her with precisely the same options she has now, *i.e.*, DSS and the other local, private CPAs. Likewise, a shutdown of Miracle Hill would not

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construction were deemed traceable to government action because, without government action the plants and pipeline would not have been built. Here, however, in the absence of Governor McMaster's actions, Miracle Hill could still independently decide not to partner with Plaintiff. The Governor's generally-applicable actions simply had the effect of removing one incentive or penalty for Miracle Hill in making that decision.

redress Plaintiff's alleged feelings of inferiority that were supposedly caused by the Governor because it would effect no change on her ability to participate in the State's foster care program. Both before and after a possible shutdown of Miracle Hill, Plaintiff was (and still is) welcome to apply to participate in the foster care system in South Carolina, and DSS was (and still is) willing to receive her application. The shuttering of Miracle Hill would not change that. Plaintiff's argument reveals she has no interest in redressing injuries to her personally, but rather is interested in "invalidat[ing] laws" because she "disagrees with them," an endeavor courts may not aid. *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011).

B. Plaintiff still fails to state a claim for an Equal Protection Clause violation.

Plaintiff's attempt to salvage her Equal Protection claim incorrectly asserts that the Governor's challenged actions should be evaluated under strict scrutiny. (ECF No. 24 at 31.) Not so. Although government actions "discriminating *among* religions are subject to strict scrutiny," government actions "affording a uniform benefit to *all* religions" are assessed under rational basis review. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987). The rational basis test applies to situations that (as here) involve Equal Protection challenges to a government decision exempting *all* religious organizations from a nondiscrimination policy and allowing them to limit their membership and leadership to co-religionists. *Hsu ex rel. Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 868–69 (2d Cir. 1996).

Plaintiff compounds her error by conflating Miracle Hill and the Governor, arguing that although Governor McMaster treated all faith-based CPAs equally and accommodated them without regard to their sects or denominations, he should nevertheless be answerable for Miracle Hill's alleged independent decision. (ECF No. 24 at 32.) But that is not the rule set out in *Amos* and illustrated in *Hsu*. Rather, the analysis focuses on the government action itself, not the independent decisions of the private entity or individual. The Governor's actions accommodated all faith-based CPAs even-handedly and thus rational basis review applies. *See Amos*, 483 U.S. at 339. Plaintiff makes no

attempt to rebut the Governor's argument that his challenged actions satisfy rational basis review, and thus she effectively concedes that they do.

C. Plaintiff still fails to state a claim for an Establishment Clause violation.[9]

1. Governor McMaster's actions were motivated by a secular purpose and their principal effect neither advanced nor inhibited religion.

Governor McMaster's Executive Order and waiver request were motivated by legitimate secular purposes and had a principal effect that neither advanced nor inhibited religion. (*See* ECF No. 19 at 31–32.) In response, Plaintiff raises a single, implausible argument to challenge Governor McMaster's motivation. She argues his claimed secular purpose—namely, having as many qualified CPAs and homes as possible—is a sham because, according to Plaintiff, the Governor's decision to license and accommodate religious providers somehow *shrinks* the available pool of homes. (*See* ECF No. 20 at 18.) This is both nonsensical and unsupported by the allegations of the Complaint. It is undisputed that *any* qualified individual of *any* religion (or of none) may be licensed as a foster parent in any county in this State by DSS itself or through a myriad of CPAs. Accordingly, accommodating CPAs like Miracle Hill does not reduce or limit the pool of available homes because other prospective foster parents may serve with other local CPAs or with DSS directly.[10] And even if Plaintiff had alleged facts to support a different view (which she has not), it would be insufficient to rebut the Governor's plausible proffered reason. *See Wood v. Arnold*, 915 F.3d 308, 315 (4th Cir. 2019) (noting *Lemon's* first test "requires an 'inquiry into the *subjective intentions* of the government'" and "imposes a 'fairly low hurdle'" for the government to meet) (emphasis in original).

[9] Plaintiff's Opposition outlines and analyzes a number of analytical tests. (ECF No. 20 at 16–18.) As explained in the Governor's initial memo, the proper test is the historically-informed analysis used by the Supreme Court in all its recent Establishment Clause cases. But regardless of what test is used, the result is the same—the Governor has not established a State religion.

[10] In fact, accommodating faith-specific CPAs *expands* the pool of homes by broadening the range of available CPAs and allowing them to employ their relationships within their faith communities to recruit others who share their religious mission and motivation. *See also* note 2, *supra*.

Plaintiff's assertion regarding the "principal effect" of Governor McMaster's actions likewise falls flat. She argues the effect of Governor McMaster's actions is to "endorse religion by communicating that the State privileges Miracle Hill's religious beliefs over Mrs. Maddonna's and all others." (ECF No. 24 at 19.) But her argument is belied by the facts conceded in her Complaint. No reasonable observer could possibly conclude that Governor McMaster values Miracle Hill's beliefs over anyone else's. For one, the Executive Order and waiver request apply to any and all faith-based CPAs regardless of their faith or denomination. (*See* ECF Nos. 19-1 and 19-2.) Further, it is undisputed *the State itself*, through DSS, will license any qualified prospective foster parent regardless of his or her faith or lack thereof. It would be nonsensical to think the State values Protestant Christians more highly than, say, Sikhs, when the State treats them as equals and will gladly license both. *Am. Atheists, Inc. v. City of Detroit Dev. Auth.*, 567 F.3d 278, 292 (6th Cir. 2009) ("No reasonable, reasonably informed observer . . . would infer from the churches' participation in this program, alongside and on equal terms with dozens of secular entities, that the agency endorsed or approved of the churches' religious views. The program's breadth, evenhandedness and eminently secular objectives help to break the link between the government and religious indoctrination.").

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

Plaintiff's argument regarding the funding of supposedly "discriminatory" practices (ECF No. 24 at 20–21) fails for at least three reasons. First, and most fundamentally, she misunderstands whom faith-based CPAs serve. CPAs serve the *recipients* of the services (foster children), not the fellow-*providers* (foster parents).[11] It is the former who are the intended beneficiaries of the State's foster care program and of the related funds. When the distinction between the recipients of

[11] The relevant Code chapter—Chapter 11 of Title 63 of the South Carolina Code—is titled "*Children's Services* Agencies" (emphasis added). Likewise, the relevant DSS policies emphasize the purpose of the State's foster care program is to serve foster *children* and, in so doing, merely to "collaborate with other stakeholders and agencies *that serve a child*," such as "foster placements" and "placement providers." *See* DSS Human Servs. Policy & Proc. Manual § 500, *available at* https://dss.sc.gov/media/1969/fostercare_2019-04-22.pdf (emphasis added); *id.* at § 510.1 (same).

services and the providers of those services is properly understood, Plaintiff's argument crumbles. Faith-based CPAs like Miracle Hill serve *all* children regardless of their faith, and Governor McMaster's Executive Order and waiver request recognize and require this.

Second, Plaintiff incorrectly states that "the State points to no case in which a court has upheld government funding that is put to discriminatory religious uses, and [Plaintiff's counsel] are aware of none." (*See* ECF No. 24 at 21.) Plaintiff's statement is surprising, in part because the Governor's Motion to Dismiss cited a number of them (*see* ECF No. 19 at 30 and n.23),[12] and in part because Plaintiff herself relies on such a case—*Mitchell v. Helms*, 530 U.S. 793 (2000)—in which both the plurality *and* Justice O'Connor's concurrence held the provision of government funding to pervasively sectarian schools did not violate the Establishment Clause. *See Mitchell*, 497 U.S. at 810 (plurality op.); *id.* at 836–37 (O'Connor, J., concurring). Both the plurality and the concurrence reached this conclusion despite the fact that the Roman Catholic schools receiving the federal funds exercised religious preferences in their hiring of faculty and in their admission of the students themselves. *See id.* at 904–05 nn.23 & 25 (Souter, J., dissenting) (noting the schools in question operated under the "supervision and authority of the Archbishop of New Orleans and their parish pastors," "require attendance at daily religion classes," "require attendance at mass," "exercise a religious preference in accepting students" and in hiring, and would terminate employees "for lifestyle contrary to the teachings of the Roman Catholic church").

3. The State has not impermissibly delegated its authority to faith-based providers.

Plaintiff argues "the State" (presumably the Governor, though it's unclear) has violated the Establishment Clause by delegating child-placing authority to faith-based CPAs who choose to partner only with same-faith foster parents. (*See* ECF No. 24 at 21–22.) But the case Plaintiff relies on is easily distinguishable. In *Larkin*, a state law granted churches the right to veto applications

[12] *See also Business Leaders in Christ v. Univ. of Iowa*, 360 F.Supp.3d 885 (S.D. Iowa 2019) (ruling the state not only may but *must* provide funds and benefits to a religious group that (1) restricted its membership to those who affirm its statement of faith and agree to live by religious principles, and (2) used those funds and benefits to support the group and its members in religious exercise).

for liquor licenses—an impermissible delegation. *See Larkin v. Grendel's Den, Inc*., 459 U.S. 116 (1982). Here, however, the State has not delegated to private CPAs the type of unconstrained and final authority that was present in *Larkin*. Quite the opposite. DSS retains the final word on whether to license a foster parent and where to place a foster child. *See* S.C. Code Ann. § 63-11-60; S.C. Code Ann. Regs. 114-550(C)(3), (G), (K), and -4980(a)(2)(d).

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

Plaintiff argues that Governor McMaster's accommodation of faith-based CPAs somehow coerces her to compromise her religious beliefs or to adopt Miracle Hill's beliefs to participate in the state's foster care system. (ECF No. 24 at 22–23.) It is an undisputed and admitted fact, however, that Plaintiff could (and still can) seek licensure directly from DSS and could (and still can) choose to partner with another licensed CPA regardless of her religious beliefs. It is similarly undisputed that only DSS can license a prospective foster parent (regardless of whether she partners with a CPA); that DSS will gladly license any qualified applicants regardless of their faith or lack thereof; and that DSS would gladly consider Plaintiff's application if she chose to apply for licensure rather than merely pursuing litigation. It is ludicrous for Plaintiff to mischaracterize the State's welcoming posture toward any qualified applicant as coercion to support, engage in, or adopt religious beliefs or exercise. It is similarly ludicrous to claim the Executive Order and request for waiver "authorize" CPAs to proselytize children when they plainly do no such thing.

5. *Governor McMaster's accommodation of faith-based providers lifts a substantial burden from them without imposing it on anyone else, least of all Plaintiff.*

Plaintiff argues the Governor's actions are an improper religious preference because they (1) fail to lift a substantial burden from Miracle Hill's and others' religious exercise and (2) allegedly impose a burden on "innocent third parties like Ms. Maddonna." (*See* ECF No. 24 at 23–27.) Her argument is wrong on both counts. As to the burden lifted from Miracle Hill, Plaintiff is incorrect when she hypothesizes that Miracle Hill's foster care ministry is not motivated by religious duty. The documents incorporated into her Complaint reveal otherwise. (*See* ECF Nos. 19-1, 19-2, and

19-3 (recognizing faith-based CPAs are compelled by their faith to provide foster care and, without an accommodation, they will be forced either to abandon their religious duty to care for children in need or abandon their religious convictions about how to perform that duty).) Further, Plaintiff contradicts herself when she implies that closing down its foster care operations would be a light burden on Miracle Hill since it could find other ways to help foster children (ECF No. 24 at 25), but elsewhere admits Miracle Hill views foster placement as a religious duty and can only engage in this duty with a license. Nor can Plaintiff mask the nature of the burden by arguing it involves only "a relatively minor" loss of funding. (*Id.*) Plaintiff overlooks a far greater burden imposed on a CPA that holds fast to its faith—the loss of the CPA's license. *That* is no minor burden, and Plaintiff's obfuscation should not be permitted to mask its substantial nature.

Plaintiff's argument that Governor McMaster's accommodation of faith-based CPAs places a burden on someone else (ostensibly Plaintiff) likewise fails. Rather than identify any burden that is shifted and on whom it is placed, Plaintiff merely recycles her erroneous claim that allowing one private CPA to partner with co-religionists somehow "prevents" other prospective foster parents "from participating in a governmental program." (*Id.*) As discussed above, this assertion is facially incorrect and is contradicted elsewhere in Plaintiff's briefing.

6. Governor McMaster has treated all sects and denominations equally.

Plaintiff argues the Governor's accommodation of all faith-based CPAs amounts to a denominational preference. (ECF No. 24 at 27–29.) But this argument does not become correct merely by her frequent reiteration, and the Governor has already explained the defects in this particular argument. (*See* Parts III.B. and III.C.1, *supra*; see also ECF No. 19 at Part II.B.)

IV. CONCLUSION.[13]

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

[13] Plaintiff's arguments in Part II.C of the Opposition (ECF No. 24 at 29–31), fail to rebut the Governor's arguments regarding the proper, historically-informed Establishment Clause standard. Rather than reiterate them here, the Governor refers the Court to his prior arguments on that topic.

Respectfully submitted

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