

**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-3551 (TMC)

**FEDERAL DEFENDANTS' MOTION TO DISMISS**

Defendants United States Department of Health and Human Services (“HHS”); Administration for Children and Families (“ACF”); Alex Azar, in his official capacity as Secretary of HHS; and Lynn Johnson, in her official capacity as Assistant Secretary of ACF (collectively the “Federal Defendants”), file this Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

For the reasons set forth in the attached Memorandum, Federal Defendants respectfully request that the Court dismiss Plaintiff’s Complaint against the Federal Defendants pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim.

Dated: March 13, 2020

Respectfully submitted,

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**FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR  
MOTION TO DISMISS**

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### NATURE OF THE CASE

Plaintiff contends that there are far too few foster parents in South Carolina, caused by an increase in the number of children in need in the wake of the opioid epidemic. Compl. ¶¶ 28, 29, ECF No. 1. She estimates that there are 2,000 fewer licensed foster care providers in the State than children in the State’s foster care system. *Id.* She avers that she wants to help this vulnerable population by volunteering with children in foster care. *Id.* ¶ 77. And she admits that she is aware of opportunities in her area, both through the State and through private organizations, to work with foster children. *Id.* ¶¶ 50, 88.

But Plaintiff has not sought those opportunities. Plaintiff instead seeks to work with one particular private organization, Miracle Hill Ministries, an entity that recruits and helps train foster parents to help meet that large and growing need in South Carolina. Miracle Hill declined to work with Plaintiff on the basis of its sincerely held religious beliefs. If that organization will not work with her, Plaintiff demands that this Court issue equitable relief against the Federal Defendants (or “HHS”) that could threaten federal funding of the State foster care system or remove a key service provider from it. That relief could exacerbate the very shortfall in foster care homes Plaintiff decries, a counterproductive solution to the shortage she alleges. Indeed, Plaintiff acknowledges that Miracle Hill is the “largest nontherapeutic foster program in the State” and she alleges that it has placed “*more than 90%* of all children in foster care statewide that have been assigned to private child-placement agencies.” *Id.* ¶ 50 (emphasis added).

Given the allegations of the Complaint, it is pure speculation that any relief this Court might issue against the Federal Defendants would cause Miracle Hill to change its policy of working only with foster parents and volunteers who share Miracle Hill’s religious beliefs. It is just as likely, if not more so, that Miracle Hill would refuse and cease providing services under

South Carolina's foster care program. It is to no one's benefit, and certainly not children who need foster families, for the largest child-placing agency in South Carolina to cease providing services to the State's foster care population. That outcome would not solve any shortfall in foster home placements.

Given this background, the Complaint should not pass the starting line because the Court lacks jurisdiction and Plaintiff fails to state a claim.

*First*, Plaintiff lacks standing to sue the Federal Defendants. Plaintiff alleges injury in her capacity as a prospective volunteer with foster children based on Miracle Hill's alleged refusal to work with her. But that injury affords Plaintiff no basis to sue the Federal Defendants; it is *Miracle Hill*, not the Federal Government, that caused that alleged injury by applying its own independent criteria regarding the volunteers with which it will work. Miracle Hill is not a party to this litigation, and it is pure speculation to suppose that granting Plaintiff the relief she seeks against the Federal Government would lead Miracle Hill to begin working with Plaintiff or otherwise redress her alleged injury. Plaintiff also lacks standing to challenge two of the HHS actions alleged in the Complaint for the additional reason that those actions post-date Plaintiff's alleged injury.

*Second*, the Court lacks jurisdiction to hear Plaintiff's claims under the Administrative Procedure Act ("APA") (Counts IV and V). Plaintiff challenges HHS's conditional decision not to enforce a portion of its grant regulations against South Carolina, as well as its decision not to enforce that regulation pending a new rulemaking. Those non-enforcement decisions are a classic exercise of agency discretion that is presumptively precluded from APA review.

*Third*, Plaintiff fails to state a claim against the Federal Defendants. Plaintiff has not shown that the Federal Defendants may be held legally responsible for Miracle Hill's actions or for South Carolina's decision to license and fund Miracle Hill. As for the actual federal actions alleged in

the Complaint, Plaintiff cannot show that HHS's enforcement decisions violate the Constitution. HHS's decision to conditionally except South Carolina from enforcement of a portion of one of its grant regulations in certain circumstances is not an establishment of religion, but is instead a neutral accommodation of religious freedom that furthers key secular goals, including ensuring a robust network of service providers in the South Carolina foster care system. The same goes for HHS's notice of non-enforcement regarding that regulation. And HHS's enforcement decisions did not themselves deny Plaintiff equal treatment.

In sum, and for the reasons that follow, the Court should dismiss all claims against the Federal Defendants for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim pursuant to Rule 12(b)(6).

## STATEMENT OF THE FACTS

### I. Statutory and Regulatory Background

Plaintiff's claims against the Federal Defendants concern HHS's award of grants to South Carolina under Title IV-E of the Social Security Act, which authorizes federal funding to states "[f]or the purpose of enabling each State to provide, in appropriate cases, foster care" programs for eligible children. 42 U.S.C. § 670. To be eligible for Title IV-E payments, a state must submit a foster care plan containing certain features for HHS approval. *Id.* § 671(a). States with a compliant plan receive Title IV-E funding for a portion of the state's foster care maintenance payments for each statutorily eligible child in foster care. *Id.* § 674(a)(1). A state may also receive reimbursement for administrative expenses necessary for the provision of child placement services and the proper and efficient administration of the Title IV-E state plan. *Id.* § 674(a)(3). These expenses may include activities such as training, case management, and recruitment and licensing of foster homes. 45 C.F.R. § 1356.60(c). States have discretion to engage third parties to provide

many of these services. Title IV-E does not contemplate or express any preference regarding whether these third parties should or should not be faith-based.

Title IV-E prohibits states and their subgrantees from “deny[ing] to any person the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the person, or of the child involved.” 42 U.S.C. § 671(a)(18)(A). The statute does not include a prohibition on denials based on religious beliefs. Instead, an HHS regulation, rooted in an HHS “public policy requirement,” provides that no person may be “denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on . . . religion.” 45 C.F.R. § 75.300(c). A separate HHS regulation authorizes the agency to issue “[e]xceptions on a case-by-case basis” from this and other grant regulations where not otherwise required by law. *See* 45 C.F.R. § 75.102(b).

## **II. HHS Grants South Carolina’s Exception Request**

In response to a request from the State, HHS granted South Carolina an exception from section 75.300(c)’s religious non-discrimination provision on January 23, 2019. Ex. A at 4.<sup>1</sup> South Carolina sought the exception in connection with its use of federal funds to reimburse faith-based organizations that provide services under the State’s Title IV-E Foster Care Program (“the SC Foster Care Program”).

One such faith-based organization, Miracle Hill Ministries, figured prominently in HHS’s decision to grant the exception, as it does in Plaintiffs’ Complaint. Miracle Hill is a licensed child-placing agency in South Carolina that, among other things, recruits people to serve as foster parents

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<sup>1</sup> The Court may consider the attached letter from HHS to Governor McMaster without converting this motion to one for summary judgment because the letter “was integral to and explicitly relied on in the complaint” and there can be no serious dispute as to its authenticity. *See Phillips v. LCI Int’l, Inc.*, 190 F.3d 609, 618 (4th Cir. 1999); *see, e.g.*, Compl. ¶ 71 (citing and characterizing the letter).

in the SC Foster Care Program and assists them in obtaining foster-care licenses. Compl. ¶¶ 4, 49<sup>2</sup>; Ex. A at 1. In its request for an exception, South Carolina informed HHS that Miracle Hill exclusively recruits foster parents of a particular religion, a criterion that Miracle Hill applies on the basis of its sincere religious beliefs. Ex. A at 1–2. South Carolina also informed HHS that Miracle Hill is a prominent provider in South Carolina, recruiting up to 15% of the foster care families in the SC Foster Care Program. *Id.*; *see also* Compl. ¶ 50 (alleging Miracle Hill is the “largest nontherapeutic foster program in the State”). Given Miracle Hill’s substantial role in assisting with foster care placement in South Carolina, the State told HHS that it “would have difficulty continuing to place all children in need of foster care” if Miracle Hill were to forgo licensure and funding. Ex. A at 2.

HHS granted South Carolina’s requested exception as to “Miracle Hill or any other subgrantee in the SC Foster Care Program that uses similar religious criteria in selecting among prospective foster care parents.” Ex. A at 4. HHS’s decision was based in part on its determination that the burden imposed on the free exercise rights of Miracle Hill and similarly situated religious entities by section 75.300(c)’s religious non-discrimination provision was not justifiable under the Religious Freedom Restoration Act (“RFRA”). RFRA provides that the Federal Government may not “substantially burden a person’s exercise of religion” unless it demonstrates that the burden “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering” that interest. 42 U.S.C. § 2000bb-1(a), (b). HHS concluded that section 75.300(c)’s religious non-discrimination provision imposed a substantial burden on Miracle Hill’s exercise of religion and that refusing the State’s requested exception would fail RFRA’s test. Ex. A at 3. HHS

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<sup>2</sup> As they must at this stage, the Federal Defendants assume the truth of the Complaint’s factual allegations for purposes of this motion, but not those allegations pleaded in only conclusory fashion or that state legal conclusions. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–81 (2009).

also based its exception decision on its determination that enforcing section 75.300(c) in a manner that could result in Miracle Hill withdrawing from the SC Foster Care Program “would . . . cause a significant programmatic burden . . . by impeding the placement of children into foster care.” *Id.*

HHS granted the exception contingent on South Carolina requiring Miracle Hill (and any other subgrantee using the exception) “to refer potential foster parents that do not adhere to the subgrantee’s religious beliefs to other subgrantees in the SC Foster Care Program” or to the State itself for service. *Id.* at 4. Through this condition, HHS ensured that the exception would accommodate Miracle Hill’s religious beliefs without preventing individuals from having an opportunity to serve as foster parents in the SC Foster Care Program.

### **III. Notice of Non-enforcement and Notice of Proposed Rulemaking Regarding Section 75.300(c)**

Two subsequent actions related to section 75.300(c) are also raised in Plaintiff’s Complaint. First, in November 2019, HHS issued a notice of non-enforcement concerning a group of rules promulgated and amended at 81 Fed. Reg. 89,393 (Dec. 12, 2016). Among these rules was section 75.300(c). HHS concluded that, in amending and promulgating these rules, the agency had failed to either perform an adequate analysis required by the Regulatory Flexibility Act (“RFA”) or certify that the rules’ economic impact on “small entities” would not be “significant.” 84 Fed. Reg. 63,809, 63,809–11 (Nov. 19, 2019). Given these deficiencies and HHS’s concern that the rules may in fact have significant effects on small entities, HHS decided it would not enforce these rules pending re-promulgation to address these concerns. *Id.* at 63,811. Rather than exempt only “small entities” from enforcement on this basis, HHS exercised its discretion not to enforce the regulations as to any entities because “[a]pplying these rules differently to agency grantees depending on size would be unfair, create increased compliance costs for all entities as

they seek to determine whether they are or are not still subject to the rules, and impose additional administrative burdens on the Department disproportionate to the benefit of enforcement.” *Id.*

Second, on the same day it issued its notice of non-enforcement, HHS also issued a proposed rule to modify or repeal the provisions at issue in the notice of non-enforcement. 84 Fed. Reg. 63,831 (Nov. 19, 2019). Among other things, HHS proposed to revise section 75.300(c) to state: “It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services, to the extent doing so is prohibited by federal statute.” 84 Fed. Reg. at 63,832. HHS proposed that this revision would simplify compliance by avoiding potential conflicts between statutory requirements, such as RFRA, and HHS public policy requirements. *Id.* at 63,833. HHS also expressed concern about the possibility that subgrantees with religious objections to certain aspects of section 75.300(c) could leave federally supported programs in the absence of this change, “likely reduc[ing] the effectiveness of programs funded by federal grants by reducing the number of entities available to provide services under these programs.” *Id.* at 63,832.

That rulemaking remains pending; HHS has not promulgated any final rule yet.

#### **IV. Plaintiff and Her Claims Against the Federal Defendants.**

Plaintiff Aimee Maddonna, a Greenville County resident, alleges that she contacted Miracle Hill in September or October 2014 and February 2019, seeking to volunteer with children in foster care through Miracle Hill. Compl. ¶¶ 82–88. Miracle Hill declined to work with Plaintiff because of its religious conviction that it should work only with volunteers who share Miracle Hill’s religious beliefs. *Id.* Plaintiff alleges that she was thereby “prevented from becom[ing] [a] volunteer mentor[] to children in the State’s care that DSS assigned to Miracle Hill.” *Id.* ¶ 95.

Plaintiff's Complaint raises four claims against the Federal Defendants. Counts IV and V raise APA claims challenging HHS's January 23 decision to grant South Carolina a conditional exception from section 75.300(c)'s religious non-discrimination provision, its decision to issue a notice of non-enforcement of section 75.300(c), and its decision to disburse funds to the SC Foster Care Program. Plaintiff asserts that these actions are arbitrary and capricious, contrary to law, and contrary to constitutional rights. Compl. ¶¶ 140–48. Counts I through III challenge the same federal actions under the Establishment Clause and the Fifth Amendment's equal protection component. *Id.* ¶¶ 109–30. Plaintiff characterizes the Federal Defendants as “enabling” Miracle Hill's allegedly discriminatory conduct by awarding grants to South Carolina and then excepting South Carolina from section 75.300(c)'s religious non-discrimination provision. Compl. ¶ 117. Plaintiff asks the Court to declare unlawful and set aside the January 23 conditional exception and to enjoin the Federal Defendants from implementing or relying on the exception, as well as the notice of non-enforcement of section 75.300(c). *Id.* at 32 ¶¶ c, f. She also seeks declaratory and injunctive relief concerning the Federal Defendants' award of Title IV-E grants to South Carolina, to prevent HHS from “expending or providing public funds to foster-care child-placement agencies that use discriminatory religious criteria to perform contracted-for government services.” *Id.* at 31–32 ¶¶ a, e.

Plaintiff previously brought suit against the State and Federal Defendants based on similar allegations of injury. *See Maddonna v. U.S. Dep't of Health & Human Servs.*, No. 6:19-cv-448-TMC (D.S.C.). This Court dismissed Plaintiff's complaint for lack of standing. Ex. B, Order, *Maddonna I*, No. 6:19-cv-448-TMC, ECF No. 68 (Nov. 13, 2019) (“*Maddonna I* Order”). The Court held Plaintiff could not rely for injury on her status as a taxpayer. *Id.* at 13–15. It also held

her alleged denial of opportunity to volunteer with Miracle Hill was not traceable to the Federal Defendants because the denial predated the January 23 conditional exception. *Id.* at 15–17.

## ARGUMENT

Plaintiff’s Complaint against the Federal Defendants should be dismissed for lack of subject matter jurisdiction and for failure to state a claim. As to the former ground, the Court lacks jurisdiction to consider any of Plaintiff’s claims against the Federal Defendants because she lacks standing to bring them. The jurisdictional defects are double for Plaintiff’s APA claims, which challenge actions committed to agency discretion by law. As to the merits, the Complaint fails to state a claim and thus should be dismissed under Rule 12(b)(6) even if the Court had jurisdiction.

### **I. Plaintiff Lacks Standing to Sue the Federal Defendants.**

As the party invoking federal jurisdiction, Plaintiff bears the burden of establishing the three elements that constitute the “irreducible constitutional minimum of standing,” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)—namely, that she has “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citation omitted). Standing is necessary for Plaintiff to establish the existence of an Article III case or controversy and, thus, to invoke the jurisdiction of the federal courts. *See, e.g., Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 103–04 (1998). “Where, as here, a case is at the pleading stage, the plaintiff must ‘clearly . . . allege facts demonstrating’ each element [of standing].” *Spokeo*, 136 S. Ct. at 1547 (alteration in original) (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).

Plaintiff fails to establish standing to sue the Federal Defendants.

#### **A. Plaintiff Lacks Standing to Sue the Federal Defendants on the Basis of Miracle Hill’s Alleged Actions.**

Plaintiff appears to base her standing to sue primarily on the ground that Miracle Hill

declined to work with her as a volunteer with foster children. *See* Compl. ¶ 95 (alleging denial of opportunity to volunteer based on Miracle Hill’s application of religious criteria in selecting the volunteers). Plaintiff lacks standing to sue the Federal Defendants on this basis for two interrelated reasons. First, Miracle Hill’s decision not to assist Plaintiff as a volunteer is not fairly traceable to the Federal Defendants. Miracle Hill caused the alleged injury to Plaintiff by applying its own criteria for selecting the volunteers with which it will work, not any policy of the Federal Defendants. Second, Plaintiff has not shown that a favorable decision against the Federal Defendants is likely to redress her asserted injury, rather than to cause Miracle Hill to cease providing services under the SC Foster Care Program.

1. To establish Article III standing, Plaintiff must demonstrate both that her alleged injury is “fairly traceable to the defendant’s allegedly unlawful conduct” and that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan*, 504 U.S. at 561, 590 (citation omitted). Where an alleged injury “hinge[s] on the response of [a] regulated (or regulable) third party to the government action” that is not before the court, it is “substantially more difficult to establish” standing. *Id.* at 562 (citation omitted).

Consistent with Supreme Court precedent, the Fourth Circuit has held that “where a third party . . . makes the independent decision that causes an injury, that injury is not fairly traceable to the government” because the third party’s decision is an “intervening cause of the injury.” *Doe v. Obama*, 631 F.3d 157, 161–62 (4th Cir. 2011). For similar reasons, fatal difficulties arise in attempting to show redressability where a non-party has caused the alleged injury because the court is unable to issue relief compelling the non-party to refrain from taking the action causing the injury or to take other action to redress it. *See Frank Krasner Enters., Ltd. v. Montgomery Cty.*, 401 F.3d 230, 236 (4th Cir. 2005). As the Fourth Circuit has explained, “[a]n injury sufficient

to meet the causation and redressability elements of the standing inquiry must result from the actions of the [defendant], not from the actions of a third party beyond the Court’s control.” *Doe v. Va. Dep’t of State Police*, 713 F.3d 745, 755 (4th Cir. 2013) (quoting *Mirant Potomac River, LLC v. EPA*, 577 F.3d 223, 226 (4th Cir. 2009)).

In line with these principles, the Fourth Circuit has repeatedly denied standing to plaintiffs challenging government policies where the plaintiff’s alleged injury was caused by the actions of a third party. For example, the Fourth Circuit held in *Doe v. Obama* that the decision by private parties to donate their embryos for federally funded stem cell research was not fairly traceable to the federal government, despite the “fact that the government permit[ted]” that conduct by lifting restrictions on federal funding of such research. 631 F.3d at 162. Similarly, in *Frank Krasner*, a third-party venue refused to rent space to the plaintiff for his gun show because of a county law prohibiting any county money from going to locations that hosted gun shows. The court held that the plaintiff’s claim against the county failed the traceability and redressability elements because his injury stemmed from the venue’s refusal to rent space to him, not the county law that made it “perhaps prohibitively” more expensive for the venue to rent space to the plaintiff. 401 F.3d at 232–33, 236. The court further held that it could not compel the venue to rent space to the plaintiff because the venue was not a party to the suit. *Id.* at 236.

The Supreme Court also rejected an assertion of standing premised on injuries caused by the actions of third parties not before the Court in *Allen v. Wright*, 468 U.S. 737, 739–40 (1984), *abrogated on other grounds by Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). In *Allen*, the Court held that parents of public school children lacked standing to challenge the government’s grant of tax-exempt status to racially discriminatory private schools because the plaintiff’s asserted injury—segregated public education—depended upon the

decisions of third parties not before the Court. Among other things, the Court noted that it was speculative “whether withdrawal of [the] tax exemption from any particular school would lead the school to change its policies.” *Id.* at 758. The plaintiffs in *Allen* lacked standing even though, like here, they had alleged that the Government’s conduct was unconstitutional and, thus, that enjoining it would necessarily halt the allegedly unconstitutional action. *See id.* at 745 n.12.

2. Plaintiff’s Complaint suffers the same essential defect found in all of these cases: it was the actions of a third party—here, Miracle Hill—that caused Plaintiff’s alleged injury. *See, e.g.,* Compl. ¶ 95 (“Because of the religious requirements that *Miracle Hill inserts* into its provision of foster-care services, the Maddonnas were prevented from becoming volunteer mentors to children . . . .”) (emphasis added). Plaintiff thus cannot establish traceability or redressability.

Starting with traceability, Plaintiff expressly pleads that Miracle Hill declined to assist Plaintiff in volunteering with foster children because of its own religious beliefs, not any federal criteria or policy. *See id.* Plaintiff points to no federal policy that requires Miracle Hill to recruit foster parents only if they share Miracle Hill’s beliefs, because no such policy exists. Miracle Hill is thus an “intervening cause” of the Plaintiff’s alleged injury, and that injury is not fairly traceable to the Federal Defendants. *Doe v. Obama*, 631 F.3d at 161.

Plaintiff seeks to escape this problem by alleging that the Federal Defendants had “knowledge” of Miracle Hill’s beliefs and “enabl[ed]” its actions by granting South Carolina a conditional exception from section 75.300(c)’s religious non-discrimination provision, issuing a notice of non-enforcement of section 75.300(c), and by continuing to fund the SC Foster Care Program. *See* Compl. ¶¶ 8, 97. Those allegations only confirm the lack of causal connection between the alleged injury and the Federal Defendants because those allegations necessarily imply that the direct cause of the injury at issue was not the government, but the third party that was

purportedly “enabled.” The Fourth Circuit has rejected traceability even where the government “permit[ted]” the third-party action that allegedly caused plaintiff’s injury by lifting restrictions on federal funding. *Doe v. Obama*, 631 F.3d at 162. In *Doe*, the fact that the government’s decision to lift funding restrictions may have in some remote sense arguably enabled the third-party actions that allegedly injured the plaintiffs was not enough to establish that those actions were traceable to the government. The same rule applies here, particularly where HHS did not “permit” Miracle Hill’s actions, but merely chose not to disqualify the State from receiving Title IV-E reimbursement for allowable administrative expenses in relation to Miracle Hill’s work.

Plaintiff’s Complaint similarly fails to establish that her asserted injury is redressable by the relief she requests against the Federal Defendants. The inability to work with Miracle Hill is the core injury Plaintiff alleges and, because Miracle Hill is not a party to this litigation, this Court cannot require the opposite. That alone is largely dispositive of Plaintiff’s attempt to invoke the Court’s jurisdiction. *See Frank Krasner*, 401 F.3d at 236 (no redressability against county government on basis of third-party venue’s decision not to rent space to plaintiff because the court could not “compel” the non-party venue to act).

Even as to the relief that might be directed against the Federal Defendants, any such relief would do nothing more than raise a speculative chance of remedying Plaintiff’s alleged injury. Plaintiff seeks equitable relief preventing application of the January 23 conditional exception for South Carolina and HHS’s notice of non-enforcement, as well as relief preventing continued federal funding of the SC Foster Care Program so long as Miracle Hill adheres to its beliefs. But HHS cannot force Miracle Hill to continue accepting funds from South Carolina or to continue working within the State’s foster care system. Plaintiff alleges that Miracle Hill’s actions were the result of deeply held religious convictions. Compl. ¶¶ 53–57. It is, thus, speculative at best that

the removal of the January 23 conditional exception or notice of non-enforcement, or a declaration that continued federal funding of the SC Foster Care Program is unlawful, would actually lead Miracle Hill to reverse its position and begin working with Plaintiff. *See, e.g., Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 43–44 (1976) (plaintiff lacked standing because even if the government withheld favorable tax treatment from third-party hospitals that were causing the plaintiff’s alleged injury, it was “just as plausible” that the hospitals “would elect to forgo” that tax treatment rather than change their behavior).

It is also speculative that granting relief against the Federal Defendants would cause South Carolina to cease licensing Miracle Hill as a child-placing agency, a decision over which the Federal Defendants have no control. *Cf. Mirant Potomac River*, 577 F.3d at 230 (petitioner failed to show traceability to sue federal agency because the alleged injury arose from a state regulatory regime separate from federal regulations and “each [regulatory scheme] received final approval from different sovereigns through different processes”). It makes no difference that the State is a defendant; Plaintiff has the burden to “demonstrate standing for each claim [she] seeks to press and for each form of relief that is sought,” including her claims against the Federal Defendants. *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (citation omitted).

In sum, the Federal Defendants were not the cause of Plaintiff’s alleged injury, and issuing the relief Plaintiff requests against the Federal Defendants would not likely redress Plaintiff’s alleged injury. Plaintiff lacks standing to sue the Federal Defendants.<sup>3</sup>

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<sup>3</sup> Plaintiff does not appear to allege any reliance on taxpayer standing in her Complaint. She would lack taxpayer standing in any event, for the reasons set forth in the Government’s prior briefing in *Maddonna I* and in this Court’s decision dismissing that case. *Maddonna I* Order at 13–15; *see also Maddonna I*, Fed. Defs.’ Mem. re Mot. to Dismiss at 15–18, ECF No. 29-1.

**B. Plaintiff Lacks Standing to Challenge HHS Actions Post-dating Her Alleged Injury.**

Plaintiff's complaint also contains allegations concerning two federal actions that postdate Miracle Hill's alleged refusal to work with her—HHS's notice of non-enforcement and its notice of proposed rulemaking issued in November 2019. Both of those actions are over 9 months after Plaintiff's most recent interaction with Miracle Hill in February 2019. Compl. ¶¶ 85, 86. Although Plaintiff lacks standing entirely for the reasons stated above, the absence of standing is particularly pronounced as to these two HHS publications. That is because these two HHS publications necessarily could not have "caused" any injury to Plaintiff where Plaintiff was allegedly injured long before they were issued. *Cf. Maddonna I* Order at 16 ("Accordingly, at the time Plaintiff was denied the ability to volunteer with or foster through Miracle Hill in 2014, the actions of which she complains had not taken place, and, therefore, cannot conceivably have caused or even contributed to Plaintiff's alleged harm."). Just as the Court found a lack of standing in the first iteration of this case, it should hold that Plaintiff lacks standing to challenge HHS actions post-dating her alleged injury.

**II. The Court Lacks Jurisdiction to Consider Plaintiff's APA Claims Regarding Agency Enforcement Decisions.**

The APA precludes review of agency actions that are "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), and district courts accordingly lack jurisdiction to consider APA claims concerning such actions. *Angelex Ltd. v. United States*, 723 F.3d 500, 502 (4th Cir. 2013). The January 23 conditional exception and the notice of non-enforcement reflect HHS's decisions not to enforce a portion of its regulation in certain circumstances. That is a matter committed to HHS's discretion by law and thus precluded from review under section 701(a)(2). Accordingly, the

challenges to HHS enforcement discretion in Counts IV and V should be dismissed for lack of subject matter jurisdiction.

In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Supreme Court held that “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is . . . generally committed to an agency’s absolute discretion” and is therefore “presumed immune from judicial review under § 701(a)(2).” *Id.* at 831–32. As the *Chaney* Court explained, an agency’s decision whether or not to enforce is similar in significant ways to a prosecutor’s decision whether or not to indict—“a decision which has long been regarded as the special province of the Executive Branch.” *Id.* at 832; *see also United States v. Armstrong*, 517 U.S. 456, 464 (1996) (“[T]he decision whether or not to prosecute . . . generally rests entirely in [the prosecutor’s] discretion.”).

An agency’s decision not to enforce a regulation involves “a complicated balancing of a number of factors which are peculiarly within [an agency’s] expertise.” *Chaney*, 470 U.S. at 831. These factors include assessing whether any violation has occurred at all, “whether agency resources are best spent” on any particular enforcement action, and whether such action “best fits the agency’s overall policies.” *Id.* “The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.” *Id.* at 831–32.

The Fourth Circuit has similarly explained that the “judiciary is ill-equipped to oversee executive enforcement decisions, whereas the agency is equipped to decide where to focus scarce resources, how to handle delicate federal-state relations and how to evaluate the strengths and weaknesses of particular cases.” *Sierra Club v. Larson*, 882 F.2d 128, 133 (4th Cir. 1989); *see also id.* (reasoning that the “separation of powers” underpins the “presumption of the unreviewability of administrative agency decisions not to pursue enforcement in particular instances”). The presumption against review of agency non-enforcement decisions applies even

where an agency “gives a ‘reviewable’ reason for otherwise unreviewable action,” such as construing a statute in deciding that an enforcement action would not be supportable. *ICC v. Brotherhood of Locomotive Eng’rs*, 482 U.S. 270, 283 (1987).

**A. The Conditional Exception is Not Reviewable.**

The January 23 conditional exception from HHS is the type of non-enforcement decision that is “presumed immune” from judicial review under the APA. *See Chaney*, 470 U.S. at 831–32. Plaintiff’s APA claims necessarily take issue with a non-enforcement decision—specifically, HHS’s conditional decision not to enforce 45 C.F.R. § 75.300(c)’s religious non-discrimination provision against South Carolina as to Miracle Hill and similarly situated faith-based subgrantees of the State. HHS reached that decision based on a balance of factors, including the agency’s judgment about the restrictions imposed by RFRA on the agency’s enforcement discretion and the “significant programmatic burden” that would attend enforcement of the regulation. *See Ex. A* at 3–4. Moreover, the agency’s decision was conditional on South Carolina requiring Miracle Hill and other subgrantees invoking the exception to refer potential foster parents to other subgrantees in the SC Foster Care Program or to the State itself, further demonstrating the discretionary balancing of policy priorities that attended HHS’s non-enforcement decision. *See id.*

Under Fourth Circuit case law, these characteristics render the January 23 conditional exception non-reviewable under the APA. For example, in *Larson*, the Fourth Circuit considered the Federal Highway Administration’s alleged failure to enforce the Highway Beautification Act’s (“HBA’s”) provisions regarding outdoor advertising against South Carolina. 882 F.2d at 129. The HBA required states participating in the Federal Highway Administration’s highway beautification program to maintain “effective control” over outdoor advertising and permitted the Secretary of Transportation to institute enforcement proceedings for failure to maintain such control, including

by withholding a portion of federal highway funds. *Id.* Although an agency investigation indicated that South Carolina was not maintaining “effective control” over its outdoor advertising, the agency “declined to take any further corrective action.” *Id.* at 130. The Fourth Circuit held that this decision was an unreviewable exercise of discretion, concluding that the statute’s definition of “effective control” “forewarn[ed] states of their obligations under the law,” but did not state “a requirement that the Secretary follow these guidelines when deciding whether to bring an enforcement action.” *Id.* at 132. Put differently, the requirement to maintain effective control did not provide “standards which govern the threshold decision of whether to formally enforce the statute by withholding funds from a particular state.” *Id.* Accordingly, the court held there was “no law to apply” in cabining the Secretary’s enforcement discretion and thus “appellant ha[d] failed to overcome the presumption of unreviewability.” *Id.*

*Larson* is on all fours here. Just like in *Larson*, “South Carolina already receives federal . . . funds,” and HHS’s decision to grant an exception “was a non-coercive one declining to proceed toward further action to withhold a portion of these funds,” a decision that “judicial review” was not “intended” to address. *Id.* Plaintiff has not alleged that any statute obligates HHS to take enforcement action for the violation of its grant regulations, nor could she. To the contrary, an HHS regulation, 45 C.F.R. § 75.102(b), expressly gives HHS discretion to issue exceptions from its grant regulations, including section 75.300(c). Section 75.102(b) sets forth no meaningful standard for deciding whether an exception should be granted, but merely provides that HHS “may” grant exceptions except where otherwise required by law, further demonstrating the lack of constraints on the agency’s enforcement discretion here. *See Chaney*, 470 U.S. at 830 (section 701(a)(2) of the APA applies where there is “no meaningful standard against which to judge the agency’s exercise of discretion”).

**B. The Notice of Non-Enforcement is Not Reviewable.**

The notice of non-enforcement is similarly unreviewable. Although the notice is not cabined to a particular entity or set of factual circumstances, the presumption against reviewability of enforcement decisions applies with equal force. Once again, the Supreme Court’s decision in *Chaney* provides dispositive guidance.

The non-enforcement decision in *Chaney* was not an individualized decision by the FDA to forgo enforcement of the Federal Food, Drug, and Cosmetic Act against a single alleged violator. Rather, the plaintiffs in *Chaney* requested that the FDA enforce the statute’s misbranding prohibition against the use of certain drugs for capital punishment by taking “various investigatory and enforcement actions” against “drug manufacturers,” “prison administrators,” and “all [others] in the chain of distribution”; the FDA, however, *categorically* concluded that its enforcement discretion “should not be exercised to interfere with this particular aspect of state criminal justice systems.” 470 U.S. at 824–25. In short, *Chaney* establishes that the question under section 701(a)(2) is whether the type of agency decision at issue is inherently discretionary in nature. Moreover, at the core of *Chaney*’s reasoning was the idea that courts lack a basis to second-guess agency decisions about how “resources are best spent” or whether certain enforcement activity “best fits the agency’s overall policies.” *See* 470 U.S. at 831. Those kinds of decisions necessarily take account of agency policy and budgetary priorities that extend beyond any particular case and that encompass prospective judgments about the agency’s work.

HHS’s decision not to enforce the regulations denoted in the notice of non-enforcement while a further rulemaking proceeds was informed by concerns related to compliance costs, fairness, and administrative burden. *See* 84 Fed. Reg. at 63,811. Those kinds of non-legal considerations are well within the agency’s discretion and, per *Chaney*, are unreviewable.

### **III. Plaintiff Fails to State a Claim Against the Federal Defendants.**

Plaintiff also raises Establishment Clause and equal protection claims against the Federal Defendants in Counts I and II. The Complaint appears to support these claims with three sets of allegations: 1) the alleged actions of Miracle Hill and Federal Defendants' purported failure to prevent them; 2) the State of South Carolina's expenditure of federal grant funds on faith-based sub-grantees, including Miracle Hill; and 3) the Federal Defendants' issuance of the January 23 conditional exception and the notice of non-enforcement of section 75.300(c). None of these allegations is an adequate basis for Plaintiff's constitutional claims against the Federal Defendants. Plaintiffs have not adequately alleged that the Federal Defendants may be held legally responsible for Miracle Hill's actions or South Carolina's licensing and funding decisions. And the challenged HHS enforcement decisions do not violate the Constitution under any of the relevant standards. Plaintiff's constitutional claims against the Federal Defendants should be dismissed.

#### **A. Plaintiff Fails to State a Claim Against the Federal Government Based on Miracle Hill's Alleged Actions.**

To hold the government legally responsible for the action of a private party, a plaintiff must show that "there is a sufficiently close nexus between the State and the challenged action of the [private party] so that the [challenged] action of the [private party] may be fairly treated as that of the State itself." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (citation omitted). "The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Id.* The government's "[m]ere approval of or acquiescence in the initiatives of a private party" is not sufficient to meet this standard. *Id.* at 1004–05. Instead, to attribute a third party's actions to the government, those actions must have been the product of "coercive power" by the government or of "significant encouragement, either overt or covert," by the government. *Id.* The government

will thus not be held responsible for others' acts, even where those acts were allegedly authorized by the government, if the acts were the result of "judgments made by private parties without standards established by the State." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 43–44, 52–53 (1999) (quoting *Blum*, 457 U.S. at 1008) (alterations omitted); *see also id.* (no state action in private parties' decisions to withhold payment for disputed medical treatments, even though Pennsylvania's workers' compensation laws authorized such withholding pending an independent review process to determine a treatment's reasonableness).

The Complaint falls far short of establishing state action for which the Federal Defendants can be held responsible. Plaintiff's claims rest on the alleged decision of a private party, Miracle Hill, to decline to work with her as a volunteer. Compl. ¶ 95. The Complaint does not allege that the Federal Defendants compelled or significantly encouraged Miracle Hill's decision. Rather, the Complaint alleges that Miracle Hill's decision not to work with Plaintiff was the result of Miracle Hill's own religious beliefs. *See id.* That is not a sufficient basis to hold the government liable. *See Blum*, 457 U.S. at 1004–05.

Indeed, the Fourth Circuit has previously affirmed dismissal of foster-care-related claims against government defendants on state action grounds for reasons that are dispositive here. *See Milburn v. Anne Arundel Cty. Dep't of Social Servs.*, 871 F.2d 474 (4th Cir. 1989). *Milburn* involved claims under 42 U.S.C. § 1983 based on a state government's decision to place the plaintiff with foster parents that physically abused him. *Id.* at 475–76. The court concluded that the state could not be held responsible for the foster parents' actions because it "did not order or cause the action complained of," nor did the state "encourage" those actions. *Id.* at 479. Similarly, the Federal Defendants here did not order, cause, or encourage Miracle Hill's alleged decision not

to work with Plaintiff. *Milburn* accordingly shows that Plaintiff cannot seek relief against the Federal Defendants on the basis of Miracle Hill's decision.

Plaintiff attempts to escape the straightforward lack of state action here by alleging that the Federal Defendants were aware of Miracle Hill's religious beliefs and failed to impose adequate safeguards to prevent or respond to Miracle Hill's allegedly discriminatory actions, *see* Compl. ¶¶ 8, 97, 118(j), but that is insufficient to state a claim. The Supreme Court and Fourth Circuit have long rejected claims of state responsibility for private conduct where the government had notice of the conduct but did not act to prohibit it. For example, in *Blum*, the Court held that a state was not responsible for a private nursing home's allegedly improper discharge or transfer of patients even when the state was notified of the nursing home's conduct and adjusted the patients' Medicaid benefits accordingly. *Blum*, 457 U.S. at 1004–05. The premise of the plaintiff's foster-care-related claims in *Milburn* was likewise that the state had failed to exercise adequate care in preventing harms to him at the hands of his foster parents, and the Fourth Circuit rejected those claims for lack of state action. 871 F.2d at 475–76 (summarizing plaintiff's claim that the state “displayed gross negligence and deliberate indifference” through his continued placement in the foster home). Here, Plaintiff's allegations amount to no more than “[m]ere approval of or acquiescence in” Miracle Hill's alleged conduct. That is insufficient to establish governmental liability. *Blum*, 457 U.S. at 1004–05.

That Miracle Hill receives public funds to carry out services under the SC Foster Care Program also does not render the Federal Defendants liable for Miracle Hill's conduct. In analogous circumstances, the Supreme Court rejected an attempt to characterize a nonprofit private school as a state actor, even when “nearly all of the students at the school [had] been referred to it” by various governmental entities and “[i]n recent years, public funds [had] accounted for at

least 90% and in one year 99%, of respondent school’s operating budget.” *Rendell-Baker v. Kohn*, 457 U.S. 830, 832 (1982). The Court explained that the school was not “fundamentally different from many private corporations whose business depends primarily” on government contracts. *Id.* at 840–41. “Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.” *Id.*

Nor does the fact that Miracle Hill administers public services on behalf of children in the State foster care system change the high burden Plaintiff must meet to show coercion or significant encouragement by the Federal Government. “That a private entity performs a function which serves the public does not make its acts state action.” *Id.* at 842. An entity performing functions that serve the public becomes a state actor on that basis only when carrying out powers that are “traditionally exclusively reserved to the State” as attributes of sovereignty, “such as eminent domain” or the administration of elections. *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352–53 (1974) (citing cases). Under Fourth Circuit case law, the care of foster children does not meet this restrictive standard. *Milburn*, 871 F.2d at 479 (“The care of foster children is not traditionally the exclusive prerogative of the State.”).

In sum, Plaintiff has failed to show that the Federal Defendants may be held legally responsible for Miracle Hill’s alleged actions. Thus, her claim against the Federal Defendants arising from the decisions made by Miracle Hill should be dismissed under Rule 12(b)(6).

**B. Plaintiff Fails to State a Claim Against the Federal Government Based on South Carolina’s Licensing and Funding Decisions.**

Plaintiff also takes issue with the alleged expenditure of federal funds on faith-based subgrantees, specifically Miracle Hill. But that allegation also fails to state a claim against the Federal Defendants for reasons similar to the Miracle Hill-related allegations, namely, that

Plaintiff has not alleged any action by South Carolina for which the Federal Defendants can be held legally responsible.

The Federal Defendants themselves do not expend federal funds on the activities of Miracle Hill or on the activities of any other non-state entity, faith-based or not, under the SC Foster Care Program. Instead, it is *South Carolina* that licenses child-placing agencies for participation in the state's foster care system, Compl. ¶ 31, and it is *South Carolina* that contracts with and distributes money to these entities as reimbursement for applicable expenses, *id.* ¶¶ 30, 40. Plaintiff's Complaint recognizes that, under Title IV-E of the Social Security Act, HHS provides funding only to South Carolina, "which directs the federal funding to South Carolina's licensed child-placement agencies." *Id.* ¶ 40. Plaintiff is correct—HHS has no direct grant or contractual relationship with Miracle Hill, or any other sub-grantee of South Carolina, for purposes of the Title IV-E program.

Just as Plaintiff failed to establish that the Federal Defendants are responsible for Miracle Hill's actions, she has failed to show that the Federal Defendants may be held responsible for South Carolina's decision to license or issue funding to Miracle Hill (or any other child-placing agency). Plaintiff has not alleged that the State's decisions regarding licensure or funding were the product of any coercion or encouragement by the Federal Defendants. *Blum*, 457 U.S. at 1004–05. And the Federal Defendants' mere acquiescence in those decisions through their continued funding of grants to South Carolina cannot support a finding of federal action. *See id.* The Federal Defendants thus are not the proper party against whom to test this claim.

Faced with these dispositive defects, Plaintiff takes one step back and challenges HHS's award of grants to *South Carolina* under the Title IV-E program. But there is no plausible basis to say that that action, standing alone, raises any concern under the Establishment Clause or the

Fifth Amendment. Moreover, as this Court previously held, taxpayers lack standing to challenge the expenditure of government funds in the absence of any particularized injury. Plaintiff fails to state a claim against the federal government on this basis.

**C. Plaintiff Fails to State a Claim Based on HHS’s Enforcement Decisions.**

Plaintiff also attempts to state constitutional claims based on the January 23 conditional exception and the notice of non-enforcement. Plaintiff fails to meet the standards applicable to each of the constitutional provisions she invokes, and her claims should be dismissed.<sup>4</sup>

1. HHS’s actions do not violate the Establishment Clause. According to the well-worn test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Establishment Clause requires that “government conduct (1) must be driven in part by a *secular purpose*; (2) must have a *primary effect* that neither advances nor inhibits religion; and (3) must not *excessively entangle* church and State.” *Wood v. Arnold*, 915 F.3d 308, 314 (4th Cir. 2019) (quoting *Moss v. Spartanburg Cty. Sch. Dist. 7*, 683 F.3d 599, 608 (4th Cir. 2012)); *see also Lambeth v. Bd. of Comm’rs of Davidson Cty., NC*, 407 F.3d 266, 268–69 (4th Cir. 2005) (applying *Lemon* test in affirming the dismissal of an Establishment Clause claim under Rule 12(b)(6)). HHS’s actions easily meet each of these requirements.

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<sup>4</sup> It is unclear whether Plaintiff intends to also challenge the notice of proposed rulemaking regarding section 75.300(c). Regardless, any such challenge to that intermediate step in the rulemaking process should be dismissed as related to non-final agency action. “Proposed rules meet neither of the two requirements for final agency action: (i) They are not the ‘consummation of the agency’s decisionmaking process,’ and (ii) they do not determine ‘rights or obligations,’ or impose ‘legal consequences.’” *In re Murray Energy Corp.*, 788 F.3d 330, 334 (D.C. Cir. 2015) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)); *see also Long Term Care Partners, LLC v. U.S.*, 516 F.3d 225, 233 (4th Cir. 2008) (quoting 5 U.S.C. § 704 (“Judicial review under the APA is limited to ‘final agency action . . . .’”). Any such claim would be unripe for similar reasons. *See Texas v. United States*, 523 U.S. 296, 300 (1998) (“A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.”)

First, HHS's actions were driven by a secular purpose. The purpose prong of the *Lemon* test "imposes a fairly low hurdle" and simply requires the government to "show that it had a plausible secular purpose for its action" that was not "pretextual." *Wood*, 915 F.3d at 315. The government's purpose need not even have been "exclusively secular," so long as "advancing religion" was not the "*predominant purpose*" of the action. *Id.*; *see also McCreary Cty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005) (secular purpose cannot be "merely secondary to a religious objective" and "not a sham").

The January 23 HHS letter to Governor McMaster explains at least two secular purposes supporting HHS's conditional exception: first, to comply with the requirements of RFRA; and second, to ensure the continued availability of entities to serve the welfare of children in the SC Foster Care Program. Ex. A at 3–4. Similarly, the notice of non-enforcement explains its secular purpose of addressing concerns related to Regulatory Flexibility Act compliance, compliance costs, fairness, and administrative burden. 84 Fed. Reg. at 63,811. These are all legitimate and plausible secular purposes, and Plaintiff has not alleged any basis to say they were pretextual. *See Lambeth*, 407 F.3d at 270 n.2 (affirming dismissal where complaint did not allege that concededly secular purpose was pretextual). Moreover, Plaintiff has not made any non-conclusory allegation that the Federal Defendants had any purpose of advancing religion at all, let alone that such a purpose was "predominant." Plaintiff's conclusory allegation that Federal Defendants had a "primary purpose" of advancing religion, Compl. ¶ 118(a), is not sufficient under federal pleading standards to survive dismissal. *See Iqbal*, 556 U.S. at 680–81 (allegation that government officials subjected plaintiff to harsh conditions "solely on account of [his] religion, race, and/or national origin" was "conclusory" and, thus, "not entitled to be assumed true"). Plaintiff's threadbare assertion of the *Lemon* test's first prong will not suffice.

Second, the primary effect of HHS’s enforcement decisions neither advances nor inhibits religion. The second *Lemon* prong asks whether “the principal effect of government action is to suggest” to a “reasonable, informed observer” a “government preference for a particular religious view or for religion in general.” *Wood*, 915 F.3d at 316 (citation omitted). The notice of non-enforcement, which does not relate specifically to religion or faith-based grantees at all, certainly does not suggest to a reasonable observer a government preference for particular religious views or for religion in general.

Neither does the January 23 conditional exception, especially when viewed in the context provided by that letter. *See id.* at 317 (challenged government conduct must be viewed in its full context) (citing *Lambeth*, 407 F.3d at 271). As an initial matter, HHS’s recognition that faith-based entities may participate as providers in the SC Foster Care Program does not advance religion; the Establishment Clause permits religious organizations to participate as providers of secular services under government programs. *Kendrick*, 487 U.S. at 609. HHS’s January 23 letter recognizes both the strict statutory requirement of religious accommodation imposed by RFRA and the programmatic burden on South Carolina’s foster care system that would come with losing a large provider like Miracle Hill. With those premises in mind, the letter grants an exception from the religious non-discrimination provision of section 75.300(c) while imposing a condition that Miracle Hill and other faith-based entities using the exception refer prospective foster parents to other agencies when they are unable to work with them.

This context would indicate to a reasonable, informed observer that HHS’s conditional exception did not express a preference for any particular religious view or for religion in general. Instead, the agency worked to ensure that no prospective foster parent will be prevented from serving children in the SC Foster Care Program on the basis of any person’s or entity’s religious

beliefs, while reasonably accommodating Miracle Hill's religious beliefs. That action neither advances nor inhibits religion; it is fundamentally neutral toward the religious views of Plaintiff, Miracle Hill, and anyone else. Indeed, accommodations of religious practice are a permissible, and often required, form of government action. *See, e.g., Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (“[The Supreme Court] has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.” (citation omitted)).

The Supreme Court's decision in *Amos* upholding Title VII's exemption of religious organizations from the prohibition against religious discrimination in employment is instructive here. *Amos* teaches that the government does not endorse an entity's religious beliefs through such neutral efforts at accommodation. *See id.* at 327, 337 & n.15 (rejecting argument that Title VII exemption “conveys a message of governmental endorsement of religious discrimination” and stating that, to fail *Lemon's* second prong, “the *government itself*” must have “advanced religion through its own activities and influence”). The January 23 conditional exception bears the same essential characteristics of neutrality.

HHS's enforcement decisions also do not have a primary effect of advancing religion simply because they may not prevent Miracle Hill from receiving payment for providing secular services that the organization administers in a manner consistent with its religious beliefs. *See Kendrick*, 487 U.S. at 621 (evidence that publicly funded work “happen[s] to coincide with the [grantee's] religious views” does not show advancement of religion). The Establishment Clause does not prohibit government aid from reaching private entities that select employees or students on the basis of religion (analogous circumstances to this case). *See Columbia Union Coll. v. Oliver*, 254 F.3d 496, 508 (4th Cir. 2001) (upholding state grants to a college affiliated with the

Seventh-day Adventist Church, even though the college “gave an express preference in hiring and admissions to members of the Church”); *Mitchell v. Helms*, 530 U.S. 793, 804 (2000) (plurality op.) (upholding aid program where district court found that “pervasively sectarian” schools were among those receiving aid).

Third, HHS’s enforcement decisions do not create an excessive entanglement between church and state. The final prong of the *Lemon* test prohibits “‘comprehensive, discriminating, and continuing state surveillance’ of religious exercise.” *Lambeth*, 407 F.3d at 273 (quoting *Lemon*, 403 U.S. at 619). A showing of such “comprehensive surveillance” is “necessary” to show a violation of this aspect of *Lemon*. *Id.* (quoting *Mueller v. Allen*, 463 U.S. 388, 403 (1983)). Neither of the challenged enforcement decisions require any kind of “pervasive monitoring” or comprehensive surveillance of religious exercise. *See id.* To the contrary, the conditional exception works to avoid government entanglement with religious practice by accommodating Miracle Hill’s religious views, so long as the State ensures compliance with the religiously neutral condition of making referrals when Miracle Hill is unable to work with a prospective foster parent.

Thus, under the *Lemon* test, the Complaint fails to state an Establishment Clause claim against the Federal Defendants on the basis of HHS’s enforcement decisions.

2. Plaintiff also cannot state an equal protection claim on the basis of HHS’s enforcement decisions. An equal protection claim must be tied to a personal denial of equal treatment, and there is no plausible basis to allege that either challenged enforcement decision personally denied Plaintiff equal treatment. The Supreme Court has held that “stigma” and “value interests” alone are not judicially cognizable injuries when they are not tied to a personal denial of equal protection. *See Allen*, 468 U.S. at 755–56 (“Our cases make clear, however, that [stigmatic] injury accords a basis for standing only to those persons who are personally denied equal treatment

by the challenged discriminatory conduct.” (citation omitted)). Plaintiff has alleged no direct interaction between herself and the Federal Defendants. The January 23 conditional exception, which HHS issued to Governor McMaster, and the publicly displayed notice of non-enforcement do not meet that test. Thus, Plaintiff’s equal protection claim related to HHS’s enforcement decisions must be tied to the alleged actions of Miracle Hill, and Plaintiff cannot state a claim on that basis against the Federal Defendants for the reasons described above.

### **CONCLUSION**

For the foregoing reasons, the Federal Defendants respectfully request that the Court dismiss the Complaint as to the Federal Defendants for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Rule 12(b)(6).

Dated: March 13, 2020

Respectfully submitted,

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# **Exhibit A**



ADMINISTRATION FOR  
**CHILDREN & FAMILIES**

Office of the Assistant Secretary | 330 C Street, S.W., Suite 4034  
 Washington, DC 20201 | www.acf.hhs.gov

January 23, 2019

Governor Henry McMaster  
 State House  
 1100 Gervais Street  
 Columbia, SC 29201

Re: Request for Deviation or Exception from HHS Regulations 45 CFR § 75.300(c)

Dear Governor McMaster:

This correspondence responds to your letter of February 27, 2018, to the Acting Assistant Secretary for Children and Families, written “on behalf of South Carolina and faith-based organizations” operating under South Carolina’s Title IV-E Foster Care Program (“the SC Foster Care Program”). As clarified through follow-up telephone calls, your letter requested that the SC Foster Care Program be granted an exception from U.S. Department of Health and Human Services’ (“HHS” or the “Department”) regulations at 45 CFR § 75.300(c), prohibiting subgrantees from selecting among prospective foster parents on the basis of religion, to the extent that such prohibition conflicts with a subgrantee’s religious exercise. We understand that one such faith-based subgrantee, Miracle Hill Ministries (“Miracle Hill”), exclusively recruits foster parents of a particular religion and accounts for up to 15% of your total foster care placements. We also understand that you believe that there are other participating faith-based organizations with similar religious exercise concerns and that other entities in the SC Foster Care Program do not have the same conflicts with § 75.300(c) and would work with prospective foster parents of different faiths or no faith.

Section 75.300(c) says:

(c) It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Recipients must comply with this public policy requirement in the administration of programs supported by HHS awards.

These requirements are broader than the nondiscrimination requirements specified in the Foster Care Program Statute, 42 U.S.C. § 671(a)(18), which says:

(a) Requisite features of State plan. In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—(18) not later than January 1, 1997, provides that neither the State nor any other entity in the State that receives funds from the Federal Government and is involved in adoption or

foster care placements may—(A) deny to any person the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the person, or of the child, involved; or (B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

The statutory requirements of § 671(a)(18) are incorporated into the grant for the SC Foster Care Program through 45 CFR § 75.300(a), which requires “that Federal funding is expended and associated programs are implemented in full accordance with U.S. statutory and public policy requirements.” Other federal civil rights statutes may likewise apply to the SC Foster Care Program directly, as a recipient of federal financial assistance, or through 45 CFR § 75.300(a). Your letter did not request an exception from § 75.300(a).

In support of your exception request, you state that South Carolina has more than 4,000 children in foster care, that South Carolina needs more child placing agencies, and that faith-based organizations “are essential” to recruiting more families for child placement. You specifically cite Miracle Hill, a faith-based organization that recruits 15% of the foster care families in the SC Foster Care Program, and you state that, without the participation of such faith-based organizations, South Carolina would have difficulty continuing to place all children in need of foster care. You make the case that, if the SC Foster Care Program is not provided an exception from § 75.300(c) in this regard, certain faith-based organizations operating under your grant would have to abandon their religious beliefs or forego licensure and funding. You contend this would cause hardship to faith-based organizations and to the SC Foster Care Program. Your letter seeking the exception argued that certain requirements in § 75.300(c) and (d) exceed any nondiscrimination requirements or authority imposed by statute, and that § 75.300(c) and (d) limit the free exercise of religion of faith-based organizations in violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.* (“RFRA”). In follow-up telephone conversations with your chief legal counsel, the request for an exception was narrowed to the religious nondiscrimination provision in § 75.300(c).

On December 18, 2018, Miracle Hill wrote to HHS stating that, in prohibiting Miracle Hill’s use of religious criteria in selecting prospective foster parents under the SC Foster Care Program, HHS’s regulations substantially burden Miracle Hill’s free exercise of religion (including under RFRA), and are also *ultra vires* because they exceed the scope of the relevant statutes. Miracle Hill notes that the South Carolina Department of Social Services, pursuant to the requirements imposed on it through its grants from HHS, declined to renew Miracle Hill’s license to provide foster services and “instead granted [Miracle Hill] a provisional license that would be revoked if [Miracle Hill] continued [its] ministry consistent with [its] religious beliefs.” It is HHS’s understanding that this provisional license will be revoked in January 2019 unless Miracle Hill agrees to partner with foster parents in accordance with § 75.300(c), which Miracle Hill cannot do, because Miracle Hill “believe[s] those who hold certain positions of spiritual influence and leadership—including foster parents—should share [Miracle Hill’s] religious mission and beliefs.”

The HHS Office for Civil Rights (“OCR”) is the HHS component with delegated authority to ensure compliance with RFRA by the Department, its programs, and the recipients of HHS

federal financial assistance. OCR has reviewed Miracle Hill's letter as part of an ongoing investigation and has determined that subjecting Miracle Hill to the religious nondiscrimination requirement in § 75.300(c) (by requiring South Carolina to require Miracle Hill to comply with § 75.300(c) as a condition of receiving funding) would be inconsistent with RFRA.

OCR specifically found that Miracle Hill's sincere religious exercise would be substantially burdened by application of the religious nondiscrimination requirement of § 75.300(c), and that subjecting Miracle Hill to that requirement, by denying South Carolina's exception request, is not the least restrictive means of advancing a compelling government interest on the part of HHS. Relevant to this determination is the fact that the religious nondiscrimination provision in § 75.300(c) exceeds the scope of the nondiscrimination provisions found in the federal statutes applicable to the SC Foster Care Program, and provides no exceptions for religious organizations as are found in other statutes prohibiting religious discrimination. *See, e.g.*, 42 U.S.C. § 2000e-1(a) (Title VII); 42 U.S.C. § 3607(a) (Fair Housing Act). In addition, the interest of allowing potential foster parents into the SC Foster Care Program appears capable of being served by other providers in the program, since at least nine other foster care providers in Miracle Hill's area appear available to assist potential foster parents in the event Miracle Hill is unable to partner with certain potential foster parents because of Miracle Hill's religious beliefs. Of additional relevance is the fact that the OMB Uniform Administrative Requirements, located at 2 CFR § 200.300, do not contain provisions analogous to the broad religious nondiscrimination provision in 45 CFR § 75.300(c). As the Supreme Court recognized in *Holt v. Hobbs*, 135 S. Ct. 853, 866 (2015), consideration of analogous programs operated by other governmental entities is relevant in determining whether the government has a compelling interest "of the highest order" in requiring such a burden on religious exercise. Finally, 45 CFR Part 75 provides a mechanism for granting an exception from requirements of that part, including § 75.300(c): namely, as applicable here, case-by-case exceptions available under 45 CFR § 75.102(b). The Supreme Court has emphasized that, where exceptions are available, the government has a difficult burden to meet before refusing an exception under RFRA. *See, e.g., Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006). Accordingly, OCR concluded that Miracle Hill (and any other similarly situated religious organization in the SC Foster Care Program) is entitled under RFRA to an exception from the religious nondiscrimination requirements of 45 CFR § 75.300.

Section 75.102(b) of 45 CFR states that "[e]xceptions on a case-by-case basis for individual non-Federal entities may be authorized by the HHS awarding agency or cognizant agency for indirect costs, except where otherwise required by law or where OMB or other approval is expressly required by this part." This provision permits the HHS awarding agency (or the "cognizant agency for indirect costs") to grant exceptions on a case-by-case basis.

After reviewing all of the information you have provided, we have determined that requiring your subgrantee Miracle Hill to comply with the religious non-discrimination provision of 45 CFR § 75.300(c) would cause a burden to religious beliefs that is unacceptable under RFRA. While this determination is sufficient to require the granting of your request for an exception from such provision of the regulation, we also note that the application of the regulatory requirement would also cause a significant programmatic burden for the SC Foster Care Program by impeding the placement of children into foster care.

For these reasons, under 45 CFR § 75.102(b), HHS is hereby conditionally granting the requested exception from the religious non-discrimination requirement of 45 CFR § 75.300(c). The exception applies with respect to Miracle Hill or any other subgrantee in the SC Foster Care Program that uses similar religious criteria in selecting among prospective foster care parents. The exception applies on the condition that Miracle Hill, or any other subgrantee making use of this exception, be required to refer potential foster parents that do not adhere to the subgrantee's religious beliefs to other subgrantees in the SC Foster Care Program, or to refer them to the SC Foster Care Program staff themselves, if the SC Foster Care Program staff is equipped to refer those persons to other willing subgrantees. This condition is added on the understanding that Miracle Hill, and any other subgrantee making use of this exception, does not object on religious grounds to making such referrals and, therefore, the condition does not implicate additional RFRA concerns.

Please note that this exception does not relieve the SC Foster Care Program of its obligation to comply with any other requirements of 45 CFR Part 75.300(c), of other paragraphs of 45 CFR Part 75.300, of 42 U.S.C. § 671(a)(18), or of any provisions of civil rights statutes, including Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, and section 504 of the Rehabilitation Act of 1973 that may apply.<sup>1</sup>

If you require any additional information, please contact me at 202.401.1822.

Sincerely,



Steven Wagner  
Principal Deputy Assistant Secretary  
Administration for Children and Families

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<sup>1</sup> 42 U.S.C. § 2000d *et seq.*, 20 U.S.C. § 1681 *et seq.*, 42 U.S.C. § 6101 *et seq.*, and 29 U.S.C. § 794, respectively.

# **Exhibit B**

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

|   |   |                                   |
|---|---|-----------------------------------|
| Aimee Maddonna,                                   | ) | Civil Action No.: 6:19-cv-448-TMC |
| Plaintiff,  | ) |                                   |
|   | ) |                                   |
| v.  | ) |                                   |
|   | ) |                                   |
| United States Department of Health and            | ) |                                   |
| Human Services; Alex Azar, <i>in his official</i> | ) |                                   |
| <i>Capacity as Secretary of the United States</i> | ) |                                   |
| <i>Department of Health and Human</i>             | ) |                                   |
| <i>Services; Administration for Children and</i>  | ) |                                   |
| <i>Families, Department of Health and</i>         | ) |                                   |
| <i>Human Services; Steven Wagner, in his</i>      | ) |                                   |
| <i>official Capacity as Principal Deputy</i>      | ) | <b>ORDER</b>                      |
| <i>Assistant Secretary for the Administration</i> | ) |                                   |
| <i>for Children and Families; Henry</i>           | ) |                                   |
| <i>McMaster, in his official capacity as</i>      | ) |                                   |
| <i>Governor of the State of South Carolina;</i>   | ) |                                   |
| <i>and Michael Leach, in his official</i>         | ) |                                   |
| <i>capacity as Acting State Director of the</i>   | ) |                                   |
| <i>South Carolina Department of Social</i>        | ) |                                   |
| <i>Services,</i>                                  | ) |                                   |
|   | ) |                                   |
| Defendants.                                       | ) |                                   |
| _____   | ) |                                   |

Plaintiff Aimee Maddonna filed this suit alleging various constitutional violations based on her inability to volunteer with foster children and serve as a foster parent through a non-governmental child-placement agency, Miracle Hill Ministries (“Miracle Hill”), because of her Catholic faith.<sup>1</sup> (ECF No. 1). Plaintiff contends that Miracle Hill receives government funding and, therefore, should not be able to discriminate and deny her the ability to volunteer or foster with its programs based on her religious beliefs. *Id.* Pertinent to this action, Plaintiff alleges that

<sup>1</sup> The court notes that Miracle Hill is not a party to this action.

Defendant Henry McMaster (“McMaster”) and Defendant Michael Leach (“Leach”)<sup>2</sup> (collectively the “State Defendants”) enabled, sanctioned, and failed to implement adequate safeguards against such discrimination by seeking a waiver from the Department of Health and Human Services (“HHS”) to permit South Carolina’s faith-based child-placement agencies (“CPAs”) to discriminate in violation of 45 C.F.R. §§ 75.300(c) and (d), while still receiving government funding and by McMaster issuing Executive Order No. 2018-12, directing the South Carolina Department of Social Services (“DSS”) to permit faith-based CPAs to associate “only with ‘foster parents and homes who share the same faith’ as the subgrantee ‘in recruiting, training, and retaining foster parents’” and to not deny licensure to faith-based CPAs on such basis. *Id.* at 18–19. Plaintiff further contends that Defendants HHS, Alex Azar (“Azar”), the Administration for Children and Families, and Steven Wagner (“Wagner”) (collectively the “Federal Defendants”) have enabled, sanctioned, and failed to provide adequate safeguards against such discrimination by granting the South Carolina Foster Care Program an exemption from the religious anti-discrimination component of 45 C.F.R. § 75.300(c). *Id.* at 19.

This matter is before the court on various motions to dismiss. (ECF Nos. 12, 18, 29). The State Defendants filed separate motions to dismiss.<sup>3</sup> (ECF Nos. 12, 18). Plaintiff filed a joint response in opposition to both motions, (ECF No. 20), and the State Defendants filed separate replies<sup>4</sup> (ECF

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<sup>2</sup> When the complaint was filed, Joan Meacham was serving as Acting State Director of the South Carolina Department of Social Services. On August 22, 2019, the parties consented to substituting Defendant Michael Leach for Joan Meacham, as he had succeeded Ms. Meacham as Acting State Director of the South Carolina Department of Social Services on April 18, 2019. (ECF No. 58). Pursuant to Fed. R. Civ. P. 25(d), the court granted the motion. (ECF No. 61).

<sup>3</sup> Leach indicates that he should be dismissed from the case for the same reasons as stated in McMaster’s motion and that he “incorporates by reference” McMaster’s motion to dismiss (ECF No. 12) and its attachment (ECF No. 12-1). (ECF No. 18).

<sup>4</sup> In Leach’s reply, he relies upon McMaster’s reply and incorporates it by reference. (ECF No. 34).

Nos. 33, 34). The Federal Defendants filed a joint motion to dismiss. (ECF No. 29). Plaintiff filed a response (ECF No. 39), and the Federal Defendants replied (ECF No. 42). These motions to dismiss are now ripe for review.

### I. BACKGROUND AND PROCEDURAL HISTORY<sup>5</sup>

South Carolina has faced an increasing need for foster homes over the past five years, and South Carolina has been unable to meet the demand, leaving over a thousand children without home placement. *See, e.g.*, (ECF Nos. 1 at 20–21; 12-1 at 7; 29-1 at 7). In an attempt to meet these growing needs, DSS contracts with private CPAs, who receive licenses from the state “to facilitate the placement of foster children with foster parents and families by providing counseling, referrals, searches, and other services.” (ECF No. 1 at 11). Pursuant to Title IV-E of the Social Security Act, South Carolina receives reimbursement from HHS for a portion of the state’s foster care expenditures, which the state then uses to partially reimburse the CPAs for their services. (ECF No. 1 at 12); *see also* S.C. Code Ann. § 63-9-30(5); S.C. Code Regs. § 114-4910.

DSS typically issues one-year licenses to CPAs that meet all regulatory and DSS requirements. (ECF No. 1 at 11) (citing S.C. Code Ann. § 114-4930(E)). DSS then monitors those CPAs to ensure that they continue to comply with federal and state law requirements. *Id.* (citing S.C. Code Ann. § 114-4920(E)). If a CPA is temporarily unable to comply with a state foster-care regulation, DSS may grant the agency a temporary license “if the agency provides a written plan to the Department to correct its areas of noncompliance within a probationary period.” *Id.* (citing S.C. Code Ann. § 114-4930(F)).

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<sup>5</sup> These facts are taken from Plaintiff’s Complaint, as the court must accept Plaintiff’s factual allegations as true for purposes of motions to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). The court, however, is “not bound to accept as true a legal conclusion couched as a faction allegation,” *Papasan v. Allain*, 478 U.S. 265, 286 (1986), nor must the court “accept as true unwarranted inferences, unreasonable conclusions, or arguments,” *E. Shore Mkts. Inc. v. J.D. Assocs., LLP*, 213 F.3d 175, 180 (4th Cir. 2000).

In December 2015, HHS began requiring, as a part of its contracts with the state foster care systems, “that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as . . . religion . . . .” (ECF No. 1 at 13). HHS also required contractors to “agree to comply with this policy in supporting the program” and required contractors to include the anti-discrimination clause in any subcontract. *Id.* In July 2016, HHS proposed changes to 45 C.F.R. § 75.300 to codify that anti-discrimination provision, and the changes became effective on January 11, 2017. *Id.* at 13. Pursuant to 45 C.F.R. § 75.101(b)(1), the anti-discrimination provisions of 45 C.F.R. § 75.300 apply to South Carolina’s CPAs just as they apply to DSS. *Id.*

Miracle Hill is one of the CPAs<sup>6</sup> in Greenville, South Carolina, and it serves the counties of Abbeville, Anderson, Cherokee, Greenville, Greenwood, Laurens, Newberry, Oconee, Pickens, and Spartanburg. *Id.* at 7. Miracle Hill is a faith-based ministry, and it is the largest CPA in both the state and the upstate South Carolina region. *Id.* at 21. As a CPA, Miracle Hill is charged with conducting a variety of services on behalf of the state, including, but not limited to (1) conducting initial and relicensing foster-home investigations; (2) making recommendations to DSS regarding foster-home licensing; (3) monitoring homes for compliance with DSS regulations; (4) investigating complaints of regulatory violations; (5) developing written case plans for all children assigned to them; and (6) determining which foster home is appropriate for a child’s placement based on the agency’s assessments of foster families’ and children’s needs and strengths. *Id.* at 12.

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<sup>6</sup> Plaintiff contends that Miracle Hill is one of only three non-governmental CPAs in Greenville County, South Carolina. (ECF No. 1 at 8). However, McMaster points out in his motion that there are at least nine other non-governmental CPAs serving Greenville County. (ECF No. 12-1 at 9). Nonetheless, McMaster acknowledges that the court must accept Plaintiff’s factual statement as true for this motion to dismiss. *Id.*

In reviewing Miracle Hill’s 2018 application to renew its license as a CPA, DSS discovered that Miracle Hill’s website mentioned “the recruitment of Christian foster parents and families” and that foster-care applicants were asked to provide information regarding their families’ religious beliefs. *Id.* at 14. DSS further determined that Miracle Hill “directs its staff to inquire about families’ particular religious beliefs and practices before accepting them to volunteer or to foster a child.” *Id.* DSS followed up with Miracle Hill to determine what the purpose was of such inquiries and confirmed that Miracle Hill uses the religious information “to refuse to provide services as a licensed child-placement agency to families who are not practicing evangelical Christians.” *Id.* at 14–15.

Accordingly, DSS determined that Miracle Hill’s practices constituted discrimination on the basis of religion, in violation of several state and federal policies and regulations, and, therefore, on January 26, 2018, DSS issued Miracle Hill only a temporary CPA license under S.C. Code Reg. § 114-4930(F). *Id.* at 17. DSS notified Miracle Hill that it had thirty days to address DSS’s concerns and issue a written plan of compliance. *Id.* To Plaintiff’s knowledge, Miracle Hill has not issued a written plan of compliance to date. *Id.*

On February 27, 2018, McMaster, in his capacity as Governor of South Carolina, wrote a letter to Defendant Wagner, the then-Acting Secretary for the Administration of Children and Families within HHS, requesting that HHS provide South Carolina with a “waiver for faith-based entities from the HHS requirement that federal funds be withheld or returned in case of violations of federal law by state foster-care” CPAs. *Id.* at 17. Pertinent to this action, McMaster specifically identified 45 C.F.R. § 75.300(c) and (d) and suggested that he believed these regulations “effectively required faith-based foster-care child placement agencies to abandon their religious beliefs or forgo the available public licensure and funding.” *Id.* at 18. After sending the letter

requesting the waiver, on March 13, 2018, McMaster issued Executive Order No. 2018-12, directing DSS to permit faith-based foster-care child-placement subgrantees to associate only with “foster parents and homes who share the same faith . . . in recruiting, training, and retaining foster parents,” and ordering DSS not to deny licensure of faith-based programs based on these actions. *Id.* The Executive Order further dictated that DSS not “directly or indirectly penalize religious identity or activity in applying the state’s requirements for licensure for foster care.” *Id.*

On June 29, 2018, the South Carolina legislature ratified a budget proviso directing DSS to use funds appropriated by the legislature to “make and promulgate rules and regulations to protect faith-based foster-care child-placement agencies from adverse actions if those agencies ‘decline any service that conflicts with, or provide any services under circumstances that conflict with, a sincerely-held religious belief or moral conviction of the’ agency.” *Id.* 19 (citing 2018 S.C. Acts 3651, § 38.30).

On January 23, 2019, HHS granted the South Carolina Foster Care Program an exemption from the antidiscrimination requirement of 45 C.F.R. § 75.300(c). *Id.* at 20. In granting the exemption, Defendant Wagner stated that the South Carolina Foster Care Program subgrantees, like Miracle Hill, could use “religious criteria in selecting among prospective foster parents.” *Id.*

As it pertains to this case, Plaintiff and her husband and three children desired to volunteer with foster children through Miracle Hill Ministries, in hopes that the family may eventually be “willing and prepared to provide a foster home to a needy child who was an appropriate fit with the family.” *Id.* at 7. At some unspecified point in time, Plaintiff reached out to Miracle Hill to inquire about volunteer opportunities and “provided answers about her experience with the foster-care system and her family’s ability to volunteer.” *Id.* at 9. However, according to Plaintiff, when the representative from Miracle Hill learned that Plaintiff and her family were of the Catholic faith,

she was told that “only Christians who attended the right type of Protestant church were permitted to volunteer with and work with the children” in Miracle Hill’s care. *Id.* Plaintiff states that because of her experience with Miracle Hill, she “has been afraid to reach out to the other nongovernmental foster-care child-placement agencies.” *Id.* at 10. Plaintiff apparently reached out to Miracle Hill again in February 2019, asking “that her family be accepted as volunteers.” (ECF No. 1 at 11). However, Plaintiff’s complaint is silent as to the outcome of such inquiry.<sup>7</sup> Furthermore, Plaintiff does not allege that she sought opportunities to volunteer or foster children through any other agency.

Plaintiff alleges that her inability to become a volunteer or foster parent through Miracle Hill was directly caused by the actions of the State Defendants and Federal Defendants because they have affirmatively enabled the discrimination against the Maddonnas by licensing and funding Miracle Hill. *Id.* at 10. Additionally, Plaintiff contends that Defendants have failed to consider the best interests of the children and have “den[ie]d these children access to safe and loving homes,” *id.* at 19, thereby “worsening South Carolina’s foster-care crisis,” *id.* at 23.

In her Complaint, Plaintiff asserts the following causes of action: (1) that the Federal Defendants’ granting of the exemption was arbitrary, capricious, an abuse of discretion, and contrary to the law under 5 U.S.C. § 706(2)(A); (2) that the Federal Defendants’ granting the exemption violated the Establishment Clause of the First Amendment and the equal protection guarantee and substantive due process protections of the Fifth Amendment of the Constitution, and, therefore, is contrary to constitutional rights, powers, privileges and immunities, in violation of 5 U.S.C. § 706(2)(B); (3) that all Defendants have violated the Establishment Clause of the First Amendment; (4) that the Federal Defendants violated the Due Process Clause of the Fifth

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<sup>7</sup> In fact, Plaintiff’s complaint was filed within a week of her reaching out to Miracle Hill regarding any potential volunteer opportunities.

Amendment; (5) that the Federal Defendants have violated the Substantive Due Process Clause of the Fifth Amendment; (6) that the State Defendants violated the Equal Protection clause of the Fourteenth Amendment; and (7) that the State Defendants have violated the Substantive Due Process Clause of the Fourteenth Amendment. *Id.* at 23–32.

As to these claims, Plaintiff seeks for this court to (1) declare the exemption from 45 C.F.R. § 75.300(c) to be in violation of the First and Fifth Amendments of the Constitution and the Administrative Procedures Act; (2) declare the South Carolina Executive Order No. 2019-12 to be in violation of the First and Fourteenth Amendments of the U.S. Constitution; (3) declare that the Federal Defendants have violated and continue to violate the First and Fifth Amendments of the Constitution by providing federal tax dollars to faith-based CPAs that use religious criteria in placement; (4) declare that the State Defendants have violated and continue to violate the First and Fourteenth Amendments to the Constitution by providing taxpayer funds to faith-based CPAs that use discriminatory criteria in performance of government services; (5) enter a permanent injunction prohibiting all Defendants from implementing the exemption to 45 C.F.R. § 75.300(c); (6) enter a permanent injunction prohibiting State Defendants from implementing or relying on South Carolina Executive Order 2018-12; (7) enjoin all Defendants from expending tax dollars on faith-based CPAs that use discriminatory religious criteria to perform contracted-for government services; and (8) award such further and additional relief as the court deems just and proper. *Id.* at 32–34.

The State Defendants have filed motions to dismiss, arguing that Plaintiff lacks standing to assert her claims and that she has failed to allege sufficient facts to constitute cognizable causes of action. (ECF Nos. 12, 18). Specifically, as to standing, the State Defendants assert that Plaintiff has not alleged a cognizable injury; that any injury she suffered is a result of the conduct of Miracle

Hill and/or Plaintiff and is, therefore, not fairly traceable to State Defendants; and that Plaintiff's alleged injuries would not be redressed by the relief she seeks. (ECF No. 12 at 9–15). Furthermore, State Defendants allege that to the extent Plaintiff asserts taxpayer standing as to her Establishment Clause claim, such argument fails because the Executive Order was a “discretionary action of [an] executive official[,]” and, therefore, not a legislative appropriation that can be challenged via taxpayer standing. *Id.* at 16–19. As to the merits of Plaintiffs' claims, State Defendants argue that such claims should be dismissed because Plaintiff has “failed plausibly to allege interference with a fundamental right” in the face of “numerous legitimate government purposes” for State Defendants' actions, *id.* at 21–23; that State Defendants' actions did not discriminate among religions, *id.* at 25; that these sorts of actions have been “historically permissible,” *id.* at 27–29; and that the government's “accommodation of faith-based child welfare providers is not only permitted by the First Amendment, it is required by decades of Supreme Court precedent, state and federal law, and the First Amendment itself,” *id.* at 34. Plaintiff responded to these motions to dismiss (ECF No. 39), and State Defendants filed replies (ECF No. 42, 43).

Federal Defendants filed a separate motion to dismiss, also asserting that Plaintiff lacks standing to bring her claims against Federal Defendants because Plaintiff cannot show that her alleged injuries are traceable to them or that the relief she seeks will redress her alleged injuries. (ECF No. 29-1 at 15–21). Federal Defendants also assert that Plaintiff lacks taxpayer standing because “she has not identified any act of Congress that appropriates funds specifically for faith-based organizations under the Title IV-E program,” and no act of Congress “expressly contemplates, let alone requires, the involvement of faith-based organizations in the program.” *Id.* at 21–23. Additionally, Federal Defendants contend that the court lacks jurisdiction to hear Plaintiff's APA claims because HHS's exemption is “the type of non-enforcement decision that is

‘presumed immune’ from judicial review under the APA.” *Id.* at 25 (citing *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985)). Finally, Federal Defendants assert that Plaintiff has failed to raise cognizable constitutional claims because Plaintiff has failed to establish a state action for which Federal Defendants can be held responsible; the exemption was driven by a secular purpose with the primary effect of neither advancing nor inhibiting religion and did not excessively entangle church and state; the exemption was not fatally arbitrary; and the exemption is rationally related to legitimate government interests. *Id.* at 28–39. Plaintiff responded to the motion (ECF No. 39), and Federal Defendants replied (ECF No. 42).

On July 17, 2019, Defendant McMaster filed a supplement to his motion to dismiss, stating that it had come to his attention that Miracle Hill had changed its policies and now allows persons of the Catholic faith to serve as both foster parents and employees. (ECF No. 46). On August 6, 2019, the court ordered all parties to file a brief specifying how this development affected the case, if at all. (ECF No. 50). All parties filed responsive briefs indicating that they did not believe the new policy affected the case as it stood. (ECF Nos. 51, 52, 53, 54). The motions to dismiss are now ripe for review.

## II. LEGAL STANDARD

Article III of the Constitution restricts federal courts’ jurisdiction to the adjudication of cases and controversies. *Raines v. Byrd*, 521 U.S. 811, 818 (1997). One element of the case-or-controversy requirement is that the Plaintiff must have standing to sue, or, in other words, that Plaintiff is the proper party to bring suit. *See id.* The standing doctrine upholds this restriction by “ensur[ing] that a plaintiff has a personal stake in the outcome of a dispute, and that judicial resolution of the dispute is appropriate.” *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 287, 396 (4th Cir. 2011) (“*Gaston II*”). Thus, “[t]o meet the constitutional

requirement for standing, a plaintiff must prove that: 1) he or she suffered an ‘injury in fact’ that is concrete and particularized, and is actual or imminent; 2) the injury is fairly traceable to the challenged action of the defendant; and 3) the injury likely will be redressed by a favorable decision.” *Id.* Such alleged injury must be particularized to that Plaintiff, and courts have consistently held that “a plaintiff raising only a generally available grievance about government - claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws and seeking relief that no more directly and tangibly benefits him than it does the public at large - does not have an Article III case or controversy.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992). Additionally, to be “fairly traceable” to the defendant, there must be a “causal connection between the injury and the conduct complained of” and the injury must not be the result of “the independent action of some third party not before the court.” *Id.* at 561. Furthermore, the Plaintiff must show more than mere conjecture or speculation as to the redressability of her alleged injury should she prevail on the merits of her case.

The party invoking federal jurisdiction bears the burden of establishing the three elements of standing. *Id.* Because standing is not a pleading requirement but rather an “indispensable part of the plaintiff’s case” that speaks directly to whether the claims establish a “case or controversy” within the parameter of federal court jurisdiction, “each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof” at that stage in the litigation. *Id.* Accordingly, here, the court considers Plaintiff’s burden regarding standing with the same scrutiny that it would within the context of a motion to dismiss at the pleading stage.

A motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint or pleading. *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009). “[T]he legal sufficiency of a complaint is measured by whether it meets the standard stated

in Rule 8 [of the Federal Rules of Civil Procedure] . . . and Rule 12(b)(6) (requiring that a complaint state a claim upon which relief can be granted).” *Id.* Rule 8(a)(2) requires that a pleading must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). This pleading standard requires that a complaint must contain “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

In *Ashcroft v. Iqbal*, the United States Supreme Court stated that to survive a 12(b)(6) motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, ‘to state a claim to relief that is plausible on its face.’” 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when [a party] pleads factual content that allows the court to draw the reasonable inference that the [opposing party] is liable for the misconduct alleged.” *Id.* The plausibility standard “asks for more than a sheer possibility that a [party] has acted unlawfully.” *Id.* Rather, “[i]t requires [a party] to articulate facts, when accepted as true, that ‘show’ that [the party] has stated a claim entitling [them] to relief[.]” *Francis*, 588 F.3d at 193 (quoting *Twombly*, 550 U.S. at 557). Such “factual allegations must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555. “Determining whether a complaint states [on its face] a plausible claim for relief [which can survive a motion to dismiss] will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679. However, “where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not ‘show[n]’ - “that the pleader is entitled to relief.” *Id.* (quoting Fed. R. Civ. P. 8(a)(2)).

### III. ANALYSIS

Before the court can address the merits of Plaintiff’s Complaint to see if she has set forth cognizable claims for relief, the court must first determine if Plaintiff has standing to bring this suit. *See Raines*, 521 U.S. at 818 (recognizing that standing is jurisdictional because without standing, there is no “case-or-controversy”); *see also Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976) (“No principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.”). As noted above, Plaintiff bears the burden of proving the following elements with sufficient factual allegations as would survive a motion to dismiss: (1) a particularized injury in fact; (2) traceability of that injury to the defendants; and (3) the likelihood that her injury will be redressed by a favorable decision of this court. *See Lujan*, 504 U.S. at 560–61.

In her Complaint, Plaintiff alleges the following injuries: (1) that she has had to pay federal and state tax dollars that have gone to supporting publicly funded foster-care services that are provided in a discriminatory manner and (2) that she was “denied . . . the opportunity to foster or volunteer with foster children.” (ECF No. 1 at 4). In her response to the Motion to Dismiss, Plaintiff also alleges that she has been injured by being subjected to “the stigma of discrimination” while seeking “service from or participation in” a government program. (ECF No. 20 at 18–19).

As for Plaintiff’s contention that she has been injured because the government has used her federal and state tax dollars to support faith-based CPAs, the court finds that such injury is not particularized to Plaintiff and is, instead, a generalized grievance that Plaintiff does not have standing to assert in federal court. Courts have consistently held that “plaintiff[s] raising only a generally available grievance about government - claiming only harm to h[er] and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more tangibly benefits h[er] than it does the public at large - does not state an Article III case or controversy.”

*Lujan*, 504 U.S. at 573–74. Plaintiff’s alleged injury involving her tax dollars being used to support faith-based CPAs is separate and distinct from her alleged injury of denial of participation in the volunteer and foster-parent programs and is not particularized to Plaintiff but could apply to every other taxpaying citizen in the public at large. Therefore, the court finds Plaintiff’s injury regarding her payment of tax dollars to be insufficient to establish standing.

However, Plaintiff has stated that her emphasis on her tax dollars being used to support Miracle Hill was to show a direct injury, not to support a notion of taxpayer standing. (ECF No. 20 at 23 n.5). However, to the extent Plaintiff has attempted to assert any taxpayer standing, the court finds that Plaintiff has failed to do so. As a general matter, federal taxpayers do not have standing to sue in federal court based on the allocation of their taxes. *See Commonwealth of Ma. v. Mellon*, 262 U.S. 447, 487 (1923). However, in *Flast v. Cohen*, the Supreme Court created a narrow exception to this rule, allowing taxpayers to establish standing to bring an Establishment Clause challenge, stating that the “taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Article I, § 8 of the Constitution.” 392 U.S. 83, 102–03 (1968). This narrow exception applies only “when the taxpayer has established a ‘logical link between his taxpayer status and the type of legislative enactment attacked’ as well as a ‘nexus between that status and the precise nature of the constitutional infringement alleged.’” *Hinrichs v. Speaker of the House of Reps. of the In. Gen. Assembly*, 506 F.3d 584, 598 (7th Cir. 2007) (quoting *Flast*, 392 U.S. at 102–103). Therefore, Plaintiff could only conceivably attempt to assert taxpayer standing as to her claims regarding the Establishment Clause. Even then, Plaintiff has not set forth any challenge to any *legislative* action, but has, rather, challenged discretionary executive actions and appropriations.<sup>8</sup> Furthermore,

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<sup>8</sup> The court takes judicial notice of the fact that HHS is a cabinet-level agency within the Executive Branch of the federal government.

Plaintiff has provided no basis for any nexus between any legislative action and the actions of the Defendants. Accordingly, the court finds Plaintiff has failed to assert any basis for taxpayer standing.

Assuming without deciding that Plaintiff's other alleged injuries - *i.e.* that she was denied the opportunity to volunteer and/or become a foster parent through Miracle Hill and was discriminated against in the process - has been sufficiently alleged at least in terms of the burden of proof required at this stage, the court finds that Plaintiff has failed to establish that such injury was fairly traceable to any Defendant. Plaintiff's Complaint detailed the four-year progression of events within federal and state governments that ultimately lead to McMaster's 2018 Executive Order and HHS's 2019 exemption of which she challenges. *See* (ECF No. 1) (noting that HHS began requiring contracts with states to include non-discriminatory language as early as 2015 and describing the changes in policy both within the state and federal system leading up to the 2019 exemption). However, at no point in Plaintiff's detailed timeline regarding the changing governmental policies did she allege when she reached out to Miracle Hill seeking to become a foster parent. Finding that when Plaintiff contacted Miracle Hill impacts the issue of standing, which goes directly to the court's jurisdiction over the case, the court issued an order on November 6, 2019, instructing Plaintiff to provide the court with the month and year that she contacted Miracle Hill and was told she could not volunteer, as alleged on pages 8 and 9 of her Complaint.<sup>9</sup>

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<sup>9</sup> Notably, Plaintiff bears the burden of establishing the elements of standing, and because her Complaint was so barren of any allegation as to *when* her alleged injuries arose, the court could have dismissed the case for lack of standing without allowing the Plaintiff to clarify the timeline because she had not alleged sufficient facts to link the actions of the defendants to her injury. *See, e.g., Lujan*, 504 U.S. at 561 (stating that the burden of proof for standing is determined by the stage in litigation). However, the court felt that such clarification was in the interest of justice to all parties, given the extensive filings and time expended on this case.

(ECF No. 65). Plaintiff responded that such allegations referred to her contact with Miracle Hill in 2014. (ECF No. 66).

For a Plaintiff to establish that her injuries are traceable to the defendant, she must show that there is a “causal connection between the injury and the conduct complained of.” *Lujan*, 504 U.S. at 560. The injury must be fairly traceable to the “challenged action of the defendant . . . not the result of independent action of some third party not before the court.” *Id.* Here, Plaintiff’s alleged injury is that she was denied the opportunity to volunteer with and become a foster parent through Miracle Hill and that she was discriminated against in the process. (ECF No. 1 at 4). Accordingly, for Plaintiff to satisfy this prong of the standing analysis, she must show that that denial was the result of the conduct of the defendants.

As set forth in her Complaint, HHS did not begin relying on the anti-discrimination language that is now codified in 45 C.F.R. § 75.300(c) until December 2015, which did not become effective as codified until January 2017. (ECF No. 1 at 13). Accordingly, there was no codified anti-discrimination language in 45 C.F.R. § 75.300(c) for McMaster to seek an exemption from until well after Plaintiff had already been denied the ability to volunteer with Miracle Hill. In fact, McMaster did not send his letter to HHS requesting an exemption until February 2018; Executive Order 2018-12 was not issued until March 2018; and HHS did not grant South Carolina an exemption from 45 C.F.R. § 75.300(c) until January 2019. *See id.* at 18–19. Accordingly, at the time Plaintiff was denied the ability to volunteer with or foster through Miracle Hill in 2014, the actions of which she complains had not taken place, and, therefore, cannot conceivably have caused or even contributed to Plaintiff’s alleged harm. Instead, on its own volition, Miracle Hill, a private CPA, denied Plaintiff the ability to volunteer with its agency. Because Miracle Hill is not

a party to this action, such denial is an independent action by a party not before this court, and, therefore, Plaintiff has failed to establish the “fairly traceable” prong of the standing inquiry.<sup>10</sup>

#### IV. CONCLUSION

Accordingly, this case is **DISMISSED** *without prejudice* for lack of jurisdiction based on Plaintiff’s failure to establish standing.<sup>11</sup>

**IT IS SO ORDERED.**<sup>12</sup>

s/Timothy M. Cain  
United States District Judge

November 13, 2019  
Anderson, South Carolina

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<sup>10</sup> The court recognizes that Plaintiff asserts in her Complaint that she again reached out to Miracle Hill on February 9, 2019, asking to volunteer. (ECF No. 1 at 11). However, Plaintiff’s Complaint is void of any allegation that she was denied the ability to volunteer or foster at that time. In fact, Plaintiff never asserts in her Complaint that she ever heard back from Miracle Hill regarding such inquiry. Instead, Plaintiff filed this lawsuit within a week of reaching out to Miracle Hill.

However, in response to the court’s interrogatory regarding the timing of her allegations, Plaintiff also alleged additional facts regarding the February 2019 inquiry that were not included in her Complaint. (ECF No. 66-1 at 2). Plaintiff has not filed a motion to amend her Complaint to include such allegations. Accordingly, at this time, Plaintiff’s Complaint remains void of allegations of sufficient facts to link the actions of the defendants to the injuries set forth *in her Complaint*. Furthermore, the court notes that Plaintiff, the master of her Complaint, is represented by counsel, and, therefore, the court is not required to liberally construe counsel’s filings as motions to amend the Complaint to assert the newly-alleged facts.

<sup>11</sup> Because Plaintiff must establish all three prongs of the standing analysis, the court need not reach the issue of redressability of Plaintiff’s alleged harms. However, the court takes judicial notice that on November 1, 2019, HHS issued a “Notice of Nonenforcement” and a “Notice of Proposed Rulemaking,” which indicated that HHS will not be enforcing the provisions of 45 C.F.R. § 75.300(c) pending repromulgation of the code. *See* <https://www.hhs.gov/about/news/2019/11/01/hhs-issues-proposed-rule-to-align-grants-regulation.html> ; (ECF No. 64).

<sup>12</sup> All motions are, therefore, terminated as moot.