

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

)	CA: 6:19-cv-03551-TMC
)	
Aimee Maddonna,)	
)	
<i>Plaintiff,</i>)	
)	
)	RULE 26(f) PROPOSED DISCOVERY PLAN
v.)	
)	
)	
)	
United States Department of Health and)	
Human Services, et al.,)	
<i>Defendants.</i>)	

I. RULE 26(F) CONFERENCE

Pursuant to Fed. R. Civ. P. 26(f) and this Court’s Conference and Scheduling Order (ECF No. 48), counsel for all parties participated in a teleconference on September 14, 2020. The following persons attended:

On behalf of Plaintiff: Kenneth D. Upton, Jr.

On behalf of Federal Defendants: Christie Newman and James R. Powers.

On behalf of Defendant Henry McMaster: Miles Coleman and Jay Thompson.

On behalf of Defendant Leach: Kenneth P. Woodington.

The parties agreed to a Consent Amended Scheduling Order, submitted to the Court separately.

The parties additionally submit the following information pursuant to Fed. R. Civ. P. 26(f), Local Civ. R. 26.03, and this Court’s Order (ECF No. 48).

II. RULE 26(F) DISCOVERY PLAN

A. What changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including when initial disclosures were made or will be made.

The parties have agreed and stipulated that the information provided for inclusion in this Joint 26(f) Discovery Plan pursuant to Local Civil Rule 26.03 will satisfy the parties' initial disclosure obligations under Rule 26(a)(1), and that any further disclosure requirements under Rule 26(a)(1) are waived by and for all parties.

B. The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues.

Plaintiff: Plaintiff anticipates conducting discovery relevant to the claims she asserts and the defenses asserted by Defendants in this action, including discovery relevant to:

- the State's funding, licensing, and assignment of children to foster-care agencies, including Miracle Hill Ministries;
- Miracle Hill's policies, practices, and procedures regarding children in its care and their placement with prospective foster parents in the State's foster-care program;
- the State's enforcement of or exemptions granted from antidiscrimination requirements applicable to the foster-care agencies it funds and licenses, including Miracle Hill Ministries;
- Governor McMaster's request for a waiver from § 75.300(c) and issuance of South Carolina Executive Order No. 2018-12;
- Federal Defendants' funding of South Carolina's foster-care program under Title IV-E of the Social Security Act;
- Federal Defendants' enforcement of or exemptions granted from 45 C.F.R. § 75.300(c) and all other applicable antidiscrimination requirements as to South Carolina and other recipients of Title IV-E funding for foster-care programs, and the notice of nonenforcement of § 75.300(c);
- Plaintiff's interactions with Miracle Hill Ministries; and
- the harms that Plaintiff has suffered, as well as the harms to other prospective foster parents and to children in foster care, as a result of Defendants' actions.

Federal Defendants: Federal Defendants may conduct discovery regarding Plaintiff's standing to sue or such other matters relevant to the parties' claims or defenses that may arise during this litigation. As for discovery against them, Federal Defendants believe that such discovery should be limited to production of the administrative record for any final federal agency action challenged in this litigation. This outcome is consistent with the Administrative Procedure Act and judicial authorities interpreting it.

State Defendants: State Defendants anticipate conducting discovery relating to the facts and circumstances surrounding Plaintiff's alleged injury; whether and on what basis a private, non-profit child placing agency referred Plaintiff to other nearby private agencies or to SCDSS in her efforts to work with foster children or to be licensed as a foster parent; whether State Defendants' challenged, alleged actions have hindered qualified prospective foster parents of any religion from working with foster children or from seeking licensure as foster parents; whether State Defendants' challenged, alleged actions have increased, decreased, or had no effect on the pool of available foster homes; the absence of any discriminatory intent or effect of State Defendants' challenged actions; the secular purpose, neutral effect, and non-entanglement resulting from State Defendants' challenged actions; and the rational bases and legitimate state interests relating to and supporting State Defendants' challenged actions.

All Parties: Discovery generally need not be conducted in phases or otherwise limited to particular issues, except that, as described below, Plaintiff will await receipt of the administrative record in this case before Plaintiff determines whether further discovery outside the administrative record against Federal Defendants is warranted. Additionally, Plaintiff has committed to exploring the use of stipulations to narrow the scope of needed discovery.

As set out in the proposed Consent Amended Scheduling Order, the parties have agreed to a discovery deadline of April 9, 2021.

C. Any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced.

None at this time.

D. Any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502.

The parties anticipate that they may request that the Court enter the District of South Carolina form Confidentiality Order in this case, or a modified form thereof, as well as a Fed. R. Evid. 502 Order.

E. What changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed.

Plaintiff: Plaintiff seeks no change to the limitations on discovery imposed by the Federal Rules of Civil Procedure or the Local Rules. Plaintiff acknowledges that in a related case, *Rogers v. U.S. Department of Health and Human Services*, No. 6:19-cv-01567-TMC, Federal Defendants have moved for a protective order to limit discovery to production of the administrative record. Federal Defendants have agreed to produce the administrative record in this case. Until Plaintiff has had an opportunity to review the contents of the administrative record, Plaintiff takes no position on whether additional discovery will be necessary, and hence resolution of any dispute regarding the scope of allowable discovery as to Federal Defendants is premature at this time.

Federal Defendants: Discovery as to the Federal Defendants is inappropriate in this case because review of all of Plaintiffs' claims, whether arising under the Constitution or the Administrative Procedure Act ("APA"), should be governed by the judicial review provisions of

the APA. In light of Plaintiff's position above that she may not seek discovery against them, however, Federal Defendants agree that the Court need not consider this issue at present.

State Defendants: State Defendants seek no amendment to the limitations on discovery set forth by the Federal Rules of Civil Procedure or the Local Rules. The parties have not yet identified whose depositions they may seek to take in this action, but, to the extent Plaintiffs intend to depose Governor McMaster or SCDSS Director Leach, State Defendants do not at this time consent to such depositions and may at the appropriate time move for appropriate protective orders on the basis of the established legal doctrine protecting high-ranking government officials from being called to testify regarding their official actions except, perhaps, in "extraordinary circumstances." *See generally Franklin Sav. Ass'n v. Ryan*, 922 F.2d 209 (4th Cir. 1991); *United States v. Morgan*, 313 U.S. 409 (1941).

F. Any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

None at this time.

III. INFORMATION REQUIRED BY LOCAL RULE 26.03

A. A short statement of the facts of the case.

Plaintiff: Plaintiff Aimee Maddonna and her family want to become volunteer mentors to children in the care and custody of the State of South Carolina, with the hope of ultimately providing a loving home to a child in need. But when she reached out to Miracle Hill Ministries, the largest and best-known child-placement agency in the Greenville area—an agency licensed by the State and funded with federal and state dollars to administer foster-care services on the State's behalf—she was rejected because her family is Catholic. Miracle Hill refuses to allow prospective foster parents to participate in the governmental program it operates if they do not share the agency's own religious beliefs.

The State licenses Miracle Hill to provide governmental foster-care services on its behalf; and both the State and Federal Defendants fund the agency with federal and state dollars, thereby impermissibly sponsoring and underwriting the agency's religious discrimination. Compounding these violations, the State and Federal Defendants have also authorized all child-placement agencies that contract with the State to refuse to recruit, work with, train, or place children with prospective foster parents who do not share the child-placement agencies' religious beliefs. The federal and state governments have done so by enacting sweeping exemptions from antidiscrimination laws and regulations and by refusing to enforce constitutional, statutory, and regulatory antidiscrimination requirements for the provision of government-funded services. The State and Federal Defendants have continued to fund, license, and authorize agencies' religious discrimination with full knowledge of the agencies' discriminatory practices.

Defendants' actions come at great cost to prospective foster parents like Aimee Maddonna—who are deprived of the opportunity to provide loving homes to children in need and who are subjected to the sting of discrimination based on their religious beliefs—and to the children in foster care in South Carolina—who are denied access to loving homes.

The State's actions violate the First and Fourteenth Amendments to the U.S. Constitution. And the Federal Defendants' actions violate the First and Fifth Amendments to the U.S. Constitution and the Administrative Procedures Act.¹

Federal Defendants: HHS awards 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.

¹ The Court dismissed certain of Plaintiff's equal-protection claims in its August 10, 2020 interlocutory Order (ECF No. 43).

These grants may encompass reimbursement to states for administrative expenses necessary for the provision of child placement services and the proper and efficient administration of the Title IV-E foster care program. *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.

HHS has promulgated a regulation, rooted in an HHS “public policy requirement,” 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). 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. South Carolina sought the exception in connection with its use of federal funds to reimburse faith-based organizations, including Miracle Hill Ministries, that provide services under the State’s Title IV-E Foster Care Program (“the SC Foster Care Program”). HHS granted South Carolina’s requested exception after determining 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”), and 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.”

HHS has since issued a Notification of Nonenforcement of Health and Human Services Grants Regulation, 84 Fed. Reg. 63809 (Nov. 19, 2019) (the “Notice”), that among other things, provides that HHS will not enforce section § 75.300(c) in any circumstances until its provisions have been repromulgated to address concerns about compliance with the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* On the day the Notice was published, HHS also

issued a notice of proposed rulemaking (“NPRM”) to amend § 75.300(c), among other provisions. *See* 84 Fed. Reg. 63,831 (Nov. 19, 2019). This NPRM has not yet resulted in a final rule.

State Defendants: State Defendants contest and do not agree with Plaintiffs’ argumentative and inflammatory characterization of the facts alleged by Plaintiffs above. State Defendants’ statement of facts is as follows.

The South Carolina Department of Social Services (“SCDSS”) oversees the training, licensing, and supervision of foster homes and residential foster facilities in the state. Consistent with longstanding historical practice, SCDSS contracts with private Child Placing Agencies (“CPAs”) to assist in training and supervising foster homes and assisting in the placement of children into those homes. SCDSS reimburses CPAs for certain of their services. One such CPA is Miracle Hill Ministries (“Miracle Hill”), a faith-based organization that, among other social services, provides encouragement and support to over 200 families licensed as foster homes by SCDSS.

In 2017, SCDSS learned of newly-effective amendments to federal regulations that purported to prohibit State agencies from distributing certain funds to private CPAs who choose to partner only with co-religionists. In 2018, Miracle Hill was due for its annual CPA license review and renewal. In light of the uncertainties relating to the amended federal regulation, SCDSS issued Miracle Hill a temporary license. Recognizing that the amended regulation appeared to be unconstitutional and a transgression of federal law, that faith-based CPAs do not (and cannot) prevent any qualified person from seeking and obtaining licensure as a foster parent, and that faith-based CPAs add to the available pool of foster homes, Governor McMaster subsequently wrote to federal officials seeking a deviation or waiver from the new regulation. Governor McMaster later issued an Executive Order directing SCDSS not to “deny licensure to faith-based CPAs solely on

account of their religious identity or sincerely held religious beliefs” and to “ensure that DSS does not directly or indirectly penalize religious identity or activity.” In early 2019, the U.S. Department of Health and Human Services responded to Governor McMaster’s request, granting the deviation requested by the Governor. SCDSS subsequently granted Miracle Hill a regular one-year license.

Almost immediately after these things occurred, apparently in a pretextual attempt to set up a legal challenge, Plaintiff inquired of Miracle Hill, with which she had corresponded several years earlier, to inquire whether Miracle Hill still maintained its policy of working only with Protestant foster parents and mentors, or whether she—a Roman Catholic—could also work with Miracle Hill in such ways. Without waiting for a response from Miracle Hill, Plaintiff promptly filed a federal lawsuit, alleging Governor McMaster and Mr. Leach’s predecessor at SCDSS had, through their actions described above, established a State religion and had deprived Plaintiff of equal protection. Upon information and belief, Miracle Hill subsequently responded to her inquiry, described its then-existing policy of working only with Protestant foster parents and mentors, and referred her to other nearby entities or providers or to SCDSS directly, any of which would meet Plaintiff’s needs and desires to an equal or greater degree as Miracle Hill.

While Plaintiff’s suit was pending, Miracle Hill amended its policy and began working with Roman Catholic foster parents and mentors willing to affirm Miracle Hill’s statement of Christian doctrinal beliefs. Miracle Hill announced this change publicly, and Ms. Maddonna was further made aware of it by court filings in her lawsuit.

The Court dismissed Ms. Maddonna’s suit, noting she had not alleged any injury occurring after and caused by Governor McMaster’s and Director Leach’s challenged actions. Despite knowing that Miracle Hill now welcomed Roman Catholic foster parents and mentors, Ms.

Maddonna chose not to apply to or inquire of Miracle Hill, but, rather, simply to file a new federal lawsuit raising the same legal claims as before.

B. The names of fact witnesses likely to be called by the party and a brief summary of their expected testimony.

Plaintiff: Plaintiff can identify the following individuals at this time who are likely to have discoverable information that Plaintiff may use to support her claims in this action:

Name	Title	Subject Matter
Aimee Maddonna	Plaintiff	Facts related to the allegations in the Complaint; her correspondence and interactions with Miracle Hill Ministries; her attempts to volunteer and foster through Miracle Hill Ministries; and the harms caused by Defendants' actions.
Alex Azar* (and/or a similarly knowledgeable representative)	Secretary, U.S. Department of Health and Human Services	Facts related to the allegations in the Complaint; HHS's funding of South Carolina's foster-care program under Title IV-E of the Social Security Act; the grant of a waiver from the federal antidiscrimination requirement of 45 C.F.R. § 75.300(c); the notice of nonenforcement of § 75.300(c); enforcement of or exemptions granted from any other antidiscrimination requirement as to South Carolina or other recipients of Title IV-E funding for foster-care programs.
Lynn Johnson* (and/or a similarly knowledgeable representative)	Assistant Secretary, HHS Administration for Children and Families	Facts related to the allegations in the Complaint; HHS's funding of South Carolina's foster-care program under Title IV-E of the Social Security Act; the grant of a waiver from the federal antidiscrimination requirement of 45 C.F.R. § 75.300(c); the notice of nonenforcement of § 75.300(c); enforcement of or exemptions granted from any other antidiscrimination requirement as to South Carolina or other recipients of Title IV-E funding for foster-care programs.
* <i>Depositions or trial testimony of Federal Defendants contingent on review of Admin. Record.</i>		

Name	Title	Subject Matter
Henry McMaster (and/or a similarly knowledgeable representative)	Governor of South Carolina	Facts related to the allegations in the Complaint; the State's funding and licensing of foster-care agencies, including Miracle Hill; the State's assignment of children to foster-care agencies, including Miracle Hill; enforcement of or exemptions granted from antidiscrimination requirements applicable to foster-care agencies; South Carolina Executive Order No. 2018-12; Governor McMaster's request for a waiver from § 75.300(c).
Michael Leach (and/or a similarly knowledgeable representative)	Director, South Carolina Department of Social Services	Facts related to the allegations in the Complaint; the State's funding and licensing of foster-care agencies, including Miracle Hill; the State's assignment of children to foster-care agencies, including Miracle Hill; enforcement of or exemptions granted from antidiscrimination requirements applicable to foster-care agencies; South Carolina Executive Order No. 2018-12; Governor McMaster's request for a waiver from § 75.300(c).
Ryan Duerk (and/or a similarly knowledgeable representative)	President/CEO, Miracle Hill Ministries	Facts related to the allegations in the Complaint; Miracle Hill's policies, procedures, practices, and communications regarding the eligibility and selection of volunteers and foster parents; the assignment of children from the State, the care and supervision of those children by Miracle Hill, and the children's placement with foster families; Miracle Hill's license from, contract with, and funding by the State; and Miracle Hill's compliance with and waiver from applicable laws, regulations, and other legal requirements concerning the governmental foster-care activities it provides.

Name	Title	Subject Matter
Reid Lehman	Former President/CEO, Miracle Hill Ministries	Facts related to the allegations in the Complaint; Miracle Hill's policies, procedures, practices, and communications regarding the eligibility and selection of volunteers and foster parents; the assignment of children from the State, the care and supervision of those children by Miracle Hill, and the children's placement with foster families; Miracle Hill's license from, contract with, and funding by the State; and Miracle Hill's compliance with and waiver from applicable laws, regulations, and other legal requirements concerning the governmental foster-care activities it provides.
Janis Rogers	Former Mentor Coordinator, Miracle Hill Ministries	Facts related to the allegations in the Complaint; her employment with Miracle Hill Ministries; Miracle Hill's policies, procedures, and practices regarding the eligibility and selection of volunteers and foster parents; her correspondence with Plaintiff in 2014.
Frankie Whitfield Powell	Former Vice President of Development, Miracle Hill Ministries	Facts related to the allegations in the Complaint; her employment with Miracle Hill Ministries; Miracle Hill's policies, procedures, and practices regarding the eligibility and selection of volunteers and foster parents; her correspondence with Plaintiff in 2014.
Beth Sevilla	Parent Support Specialist and Foster Care Mentor Coordinator, Miracle Hill Ministries	Facts related to the allegations in the Complaint; her employment with Miracle Hill Ministries; Miracle Hill's policies, procedures, and practices regarding the eligibility and selection of volunteers and foster parents; her correspondence with Plaintiff in 2019.

In addition, Plaintiff anticipates that other, unknown individuals may have discoverable information that Plaintiff may use to support her claims. Plaintiff also incorporates by reference any other individuals disclosed by other parties in this matter.

Federal Defendants: Federal Defendants' position is that this case should be resolved as to them at summary judgment on review of the administrative record of any final federal agency action challenged. That outcome is consistent with the Administrative Procedure Act and judicial

authorities interpreting it. *See Audubon Naturalist Soc’y of the Cent. Atl. States v. U.S. Dep’t of Transp.*, 524 F. Supp. 2d 642, 660 (D. Md. 2007).

Insofar as this case proceeds to a trial involving Federal Defendants, Federal Defendants anticipate calling an agency employee with authority to testify regarding the authenticity and completeness of the administrative record regarding any final agency action under challenge. Federal Defendants reserve the right to call any of the witnesses identified or listed in forthcoming Witness Disclosures as well as any rebuttal, impeachment or rehabilitation witnesses based upon the issues and witnesses identified in the parties’ Witness Disclosures and during discovery.

State Defendants: State Defendants note as an initial matter that Plaintiff’s description of the relevant knowledge of the individuals listed above is in some instances too narrow and in others too broad. As to the former, for example, State Defendants believe that Ms. Maddonna also possesses relevant knowledge regarding her efforts (or the absence thereof) to seek to volunteer with foster children or to seek licensure as a foster parent through SCDSS or private CPAs willing to partner with her, as well as other information relevant to Plaintiff’s alleged injury, standing, and motivation to bring this suit. As to Plaintiff’s characterizations of the knowledge of the other listed individuals, State Defendants assert that certain of the topics listed by Plaintiff are not relevant to this proceeding, and they reserve the right to dispute or challenge the relevance of inquiries into such topics at the appropriate time.

State Defendants can identify the following individuals at this time who are likely to have discoverable information that he may use to support his claims and defenses in this action:

Name	Title	Subject Matter
Aimee Maddonna	Plaintiff	Aimee Maddonna is the Plaintiff in this suit and is likely to testify concerning: the factual allegations of the Complaint: her efforts or lack thereof to seek to mentor foster children or to seek licensure as a foster parent; her efforts (or lack thereof) to seek to work

Name	Title	Subject Matter
		with Miracle Hill or even to inquire regarding the possibility of working with Miracle Hill following that entity's policy change to welcome Roman Catholic foster volunteers and parents; and other matters relating to the claims and allegations of the Complaint
Currently unidentified representative(s) of the U.S. Department of Health and Human Services ("HHS") and its subdivisions and officers	Defendant	One or more Representatives (whose names are not currently known to Defendants McMaster and Leach) from Defendants HHS, its subdivisions, and its officers, may, depending on the Court's resolution of the pending motion for a protective order filed by Defendant HHS, testify regarding the Complaint's factual allegations relating to actions or decisions made by HHS, its subdivisions, or its officers.
Reid Lehman	Former CEO of Miracle Hill Ministries, Inc.	Reid Lehman was the Chief Executive Officer of Miracle Hill during the time period of the some of the events alleged in the Complaint, and, on information and belief, would likely be knowledgeable of Plaintiffs' alleged interactions with Miracle Hill and Miracle Hill's responses thereto. Mr. Lehman can be reached in the care of Miracle Hill.
Jacqueline S. Lowe	SCDSS employee	Jacqueline Lowe is an employee of SCDSS knowledgeable of SCDSS' licensing of and relationship to CPAs. She is likely to testify regarding the allegations of the Complaint relating to SCDSS' relationship with CPAs and with Miracle Hill. Ms. Lowe can be reached in the care of counsel for Defendant Leach, who, in his official capacity, is the director of Ms. Lowe's employer.
Lauren Stadt	SCDSS employee	Lauren Staudt is an employee of SCDSS who is likely knowledgeable of SCDSS' licensing of and relationship to CPAs. She is likely to testify regarding the allegations of the Complaint relating to SCDSS' relationship with CPAs and with Miracle Hill. Ms. Staudt can be reached in the care of counsel for Defendant Leach, who, in his official capacity, is the Director of SCDSS.
Laura Claspill	SCDSS employee	Laura Claspill is an employee of SCDSS who is likely knowledgeable of SCDSS' business relationship to CPAs. Ms. Claspill can be reached in the care of

Name	Title	Subject Matter
		counsel for Defendant Leach, who, in his official capacity, is the Director of SCDSS.
Representative of Governor McMaster	Defendant	a representative individual employed in the office of Governor McMaster knowledgeable of the Governor's actions alleged in the Complaint. Such individual may be reached in the care of counsel for Defendant McMaster.
Witnesses identified by Plaintiff or other parties		Plaintiff or other parties may identify possible witnesses in their discovery responses or disclosures who may have pertinent information regarding the allegations made in the Complaint and Defendants McMaster's and Leach's defenses to such claims.

Discovery is in its infancy in this matter and State Defendants' investigation of the matter is ongoing. Accordingly, they reserve the right to supplement the foregoing responses with the names of any additional witnesses with discoverable information that may be used to support Defendants McMaster's and Leach's defenses as such individuals become known to them. State Defendants may also rely on any witnesses identified by any other party to this action.

C. The names and subject matter of expert witnesses (if no witnesses have been identified, the subject matter and field of expertise should be given as to experts likely to be offered).

None of the parties at this time have retained any expert witness to testify at trial in this matter. All parties retain the right to do so, consistent with the deadline for identifying experts set out in the parties' proposed Consent Amended Scheduling Order.

D. A summary of the claims or defenses with statutory and/or case citations supporting the same.

Plaintiff:

Count I (Establishment Clause, First Amendment to the U.S. Constitution) (All Defendants): Defendants have violated and continue to violate the Establishment Clause by

(1) knowingly and actively facilitating Miracle Hill's religious discrimination by funding, licensing, and clearing the statutory and regulatory hurdles that would otherwise prohibit such discrimination, thereby acting with a religious purpose and effect (*see, e.g., Lemon v. Kurtzman*, 403 U.S. 602 (1971)); (2) delegating the State's child-placement authority to religious institutions that employ religious criteria in the exercise of that authority (*see, e.g., Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982)); (3) funding, licensing, and authorizing child-placement agencies to administer foster-care services on a religiously discriminatory basis and to advance religious objectives (*see, e.g., Bowen v. Kendrick*, 487 U.S. 589 (1988)); (4) authorizing the use of publicly funded governmental foster-care programs for religious coercion and proselytization (*see, e.g., Lee v. Weisman*, 505 U.S. 577 (1992)); (5) granting foster-care agencies exemptions from antidiscrimination requirements when those exemptions burden third parties (i.e., prospective foster parents and children in foster care) and do not lift substantial government-imposed burdens on the agencies' religious exercise (*see, e.g., Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985)); and (6) affording a denominational preference to Miracle Hill's faith over all other faiths (*see, e.g., Larson v. Valente*, 456 U.S. 228 (1982)).

Count II (Equal Protection Clause, Fifth Amendment to U.S. Constitution) (Federal Defendants): Federal Defendants have violated and continue to violate the Equal Protection Clause by denying prospective foster parents, including Plaintiff, participation in publicly funded governmental programs on the same terms as everyone else because of their religious beliefs and identities (*see, e.g., Giarratano v. Johnson*, 521 F.3d 298 (4th Cir. 1985)); and by funding and authorizing child-placement agencies to administer foster-care services on a religiously discriminatory basis (*see, e.g., Norwood v. Harrison*, 413 U.S. 455 (1973)).

Count III (Equal Protection Clause, Fourteenth Amendment to U.S. Constitution) (State):

The State has violated and continues to violate the Equal Protection Clause by denying prospective foster parents, including Plaintiff, participation in publicly funded governmental programs on the same terms as everyone else because of their religious beliefs and identities (*see, e.g., Giarratano*, 521 F.3d 298); and by funding, licensing, and authorizing child-placement agencies to administer foster-care services on a religiously discriminatory basis (*see, e.g., Norwood*, 413 U.S. 455).

Count IV (Contrary to Constitutional Rights, Administrative Procedure Act) (Federal Defendants): Federal Defendants' disbursements of funds to the State's foster-care program, grant of an exemption to the State from the antidiscrimination requirements of 45 C.F.R. § 75.300(c), and issuance of a notice of nonenforcement of § 75.300(c) are contrary to constitutional rights under 5 U.S.C. § 706(2)(B) because they violate the Establishment and Equal Protection Clauses, for the reasons explained above.

Count V (Arbitrary, Capricious, Abuse of Discretion, and Not in Accordance with Law) (Federal Defendants): Federal Defendants' disbursement of funds to the State's foster-care program is arbitrary, capricious, an abuse of discretion, and not in accordance with law under 5 U.S.C. § 706(2)(A) because the funds have been and are awarded without requiring grantees and sub-grantees to comply with the constitutional requirement that the funds not be used in a religiously discriminatory manner, as explained above, and without considering the harms to prospective foster parents and families and the best interests of children in foster care (*see, e.g., Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29 (1983)). And Federal Defendants' grant of an exemption to the State from the antidiscrimination requirements of § 75.300(c) is arbitrary, capricious, an abuse of discretion, and not in accordance with law under § 706(2)(A) because they failed to follow the procedure required under 45 C.F.R. § 75.102(b) by

granting a class-wide exemption, they failed to consider the relevant harms to prospective foster parents and families and the best interests of children in foster care, and HHS's stated reasons do not justify granting the exemption (*see, e.g., State Farm*, 463 U.S. 29).

Federal Defendants: Plaintiff's claims against Federal Defendants concerning the January 2019 conditional exception from enforcement of a portion of section 75.300(c) issued to South Carolina have become moot. That is because in a separate agency action issued November 2019, HHS has since provided that it will not enforce section § 75.300(c) in any circumstances until that regulation's provisions have been repromulgated to address concerns about compliance with the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* Any relief that this Court may issue regarding the January 2019 conditional exception to South Carolina, therefore, would have no impact on whether Federal Defendants will enforce section 75.300(c) as to South Carolina.

Plaintiff's claims as to the January 2019 conditional exception, as well as the November 2019 notice of nonenforcement, also lack merit.

First, the conditional exception does not violate the Establishment Clause because it is a neutral accommodation of religious freedom motivated by secular concerns. Moreover, it does not excessively entangle the Government with religion and does not have the primary effect of advancing or inhibiting religion. *See, e.g., Wood v. Arnold*, 915 F.3d 308, 314 (4th Cir. 2019); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). Instead, Federal Defendants' actions are consistent with the "ideals of respect and tolerance embodied in the First Amendment." *See Am. Legion v. American Humanist Association*, 139 S. Ct. 2067 (2019). The November 2019 notice of nonenforcement is even further afield from Establishment Clause concerns, given that it does not relate specifically to religion or faith-based grantees at all.

Second, Federal Defendants have not themselves denied equal treatment to Plaintiff, nor can Plaintiff show any basis to attribute to the Government any denial of equal treatment by another person or entity. *See Blum v. Yaretsky*, 457 U.S. 991 (1982); *Allen v. Wright*, 468 U.S. 737, 755–56 (1984), *abrogated on other grounds by Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

Finally, Federal Defendants note that they respectfully disagree with the Court’s finding that Plaintiff has standing to bring her claims against the Federal Defendants and preserve that position for purposes of any appeal. Federal Defendants make the same reservation of rights as to the Court’s holding that the conditional exception and notice of nonenforcement are judicially reviewable under the APA.

State Defendants: Plaintiff lacks standing to assert her claims. Plaintiff has not suffered an injury-in fact, and, in any event, her alleged injury resulted from either her own actions or inactions or from the independent, intervening actions of a private third party that is not a named defendant in the litigation, and thus is not traceable to or caused by State Defendants and is not redressable by this Court. Nor can Plaintiff assert claims arising from alleged injuries allegedly suffered by others. *See, e.g., In re Trump*, 928 F.3d 360, 375–76 (4th Cir. 2019); *Taubman Realty Grp. Ltd. P’ship v. Mineta*, 320 F.3d 475, 480 (4th Cir. 2003).

Plaintiff cannot establish an Equal Protection violation. Contrary to Plaintiff’s summary of her claims in the preceding paragraphs, she cannot establish a claim for denial of Equal Protection on the basis of religion because this Court has already dismissed that claim. *See Order* (ECF No. 43) at 43.

Plaintiffs cannot establish an Establishment Clause violation. A State’s licensure of, accommodation of, and contracting with faith-based providers is permissible under the

Establishment Clause. Such partnerships are historically permissible, have been upheld by the courts, and are supported by a legitimate secular purpose that neither advances religion nor excessively entangles the state with it. Further, such accommodations are permitted—and, in some cases, required—by state and federal law and Supreme Court precedent. *See, e.g., Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Hosana-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012); *Bowen v. Kendrick*, 487 U.S. 589 (1988); 42 U.S.C. § 2000bb to 2000bb-4.

E. Absent special instructions from the assigned judge, proposed dates for the following deadlines listed in Local Civ. Rule 16.02 (D.S.C.):

1. Exchange of Fed. R. Civ. P. 26(a)(2) expert disclosures.

As set out in the proposed Consent Amended Scheduling Order, the parties propose that Plaintiff make her expert disclosures no later than February 8, 2021, and that Defendants make their expert disclosures no later than March 9, 2021.

2. Completion of discovery.

As set out in the proposed Consent Amended Scheduling Order, the parties propose that discovery be completed no later than April 9, 2021.

F. Any special circumstances that would affect the time frames applied in preparing the scheduling order. See generally Local Civ. Rule 16.02(C) (D.S.C.) (Content of Scheduling Order).

The parties note that the ongoing Covid-19 pandemic has presented and may continue to present circumstances that require conducting discovery and trial preparation remotely. The parties will notify the Court if they believe that this special circumstance requires adjustment of any deadline or procedure.

G. Any additional information requested in the Pre-Scheduling Order (Local Civ. Rule 16.01 (D.S.C.)) or otherwise requested by the assigned judge.

None at this time.

IV. ADDITIONAL INFORMATION

A. Consent to Magistrate Judge

The parties do not consent to the trying of this matter before a Magistrate Judge.

B. Mediation and Settlement

Counsel have discussed the advisability and timing of mediation. The parties do not intend to seek relief from the Court's Mediation Order (ECF No. 49) at this time, beyond that already granted by the Court (ECF No. 53). The parties are unable to determine the prospects for settlement at this time.

C. Electronic Service

The parties consent to electronic service on counsel of record of any document for which the Federal Rules of Civil Procedure require service.

CAPITOL COUNSEL, LLC

s/ Aaron J. Kozloski

AARON J. KOZLOSKI
(D.S.C. Bar No. 9510)
P.O. Box 1996
Lexington, SC 29071-1996
Tel: (803) 465-1400
Fax: (888) 513-6021
Email: aaron@capitolcounsel.us

AMERICANS UNITED FOR
SEPARATION OF CHURCH AND STATE

RICHARD B. KATSKEE*
KENNETH D. UPTON, JR.*
SARAH R. GOETZ*
1310 L Street NW, Suite 200
Washington, DC 20005
Tel: (202) 466-3234
Fax: (202) 466-3353
E-Mail: katskee@au.org
upton@au.org
goetz@au.org

*Admitted *pro hac vice*

Counsel for Plaintiff

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

PETER M. MCCOY
United States Attorney
/s/ Christie V. Newman
CHRISTIE V. NEWMAN (#5473)
Assistant United States Attorney
1441 Main Street, Suite 500
Columbia, SC 29201
Telephone: (803) 929-3021
Email: Christie.Newman@usdoj.gov

MICHELLE BENNETT
Assistant Branch Director

CHRISTOPHER A. BATES
Senior Counsel to the Assistant Attorney
General

JAMES R. POWERS
(TX Bar No. 24092989)*
Trial Attorney
Federal Programs Branch
U.S. DEPARTMENT OF JUSTICE, CIVIL
DIVISION

1100 L Street, NW
Washington, DC 20005
Telephone: (202) 353-0543
Email: james.r.powers@usdoj.gov
*Admitted *pro hac vice*

Counsel for Federal Defendants

NELSON MULLINS RILEY &
SCARBOROUGH LLP

s/ Miles E. Coleman

MILES E. COLEMAN

Federal Bar No. 11594

E-Mail:

miles.coleman@nelsonmullins.com

2 W. Washington St. / 4th Floor

Greenville, SC 29201

(864) 373-2352

JAY T. THOMPSON

Federal Bar No. 09846

E-Mail:

jay.thompson@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

OFFICE OF THE ATTORNEY GENERAL

ROBERT D. COOK

South Carolina Solicitor General

Federal Bar No. 285

E-Mail: bcook@scag.gov

Post Office Box 11549

Columbia, SC 29211

(803) 734-3970

Counsel for Governor Henry McMaster

DAVIDSON, WREN & DEMASTERS, P.A.

s/Kenneth P. Woodington

WILLIAM H. DAVIDSON, II, #425

KENNETH P. WOODINGTON, #4741

1611 Devonshire Drive, 2nd Floor

Post Office Box 8568

Columbia, South Carolina 29202-8568

E-Mail:

wdavidson@dml-law.com

kwoodington@dml-law.com

T: 803-806-8222

F: 803-806-8855

*Counsel for Defendant Michael Leach, in
his official capacity as State Director of the
South Carolina Department of Social
Services*

Date: September 28, 2020

Location: Greenville, SC