

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

Eden Rogers et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 6:19-cv-01567-JD
	)	
United States Department of Health and	)	
Human Services et al.,	)	
	)	
Defendants.	)	

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**DEFENDANTS HENRY MCMASTER’S AND MICHAEL LEACH’S  
MOTION FOR JUDGMENT ON THE PLEADINGS**

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**MOTION FOR JUDGMENT ON THE PLEADINGS**<sup>1</sup>

Defendant Henry McMaster (“Governor McMaster” or “the Governor”), in his official capacity as Governor of the State of South Carolina, and Defendant Michael Leach (“Director Leach”), in his official capacity as the Director of the South Carolina Department of Social Services (“SCDSS”) (collectively the “State Defendants”), move for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) because recent, controlling precedent from the United State Supreme Court forecloses the relief Plaintiffs seek; demonstrates that the State Defendants’ actions challenged in this suit were constitutionally permissible and required; and indicates there is no basis upon which Plaintiffs can prevail on their remaining claims. Accordingly, this Court should enter judgment on the pleadings and dismiss this suit with prejudice.

**INTRODUCTION**

For hundreds of years, in South Carolina and across the nation, state and federal governments have partnered and contracted with faith-based providers of social services whose work is compelled by, and is itself an exercise of, their religious faith. And for hundreds of years, these partnerships have been widely and rightly acknowledged to be constitutionally permissible.

In 2017, however, a federal regulation threatened to prevent faith-based organizations from continuing their long-standing efforts to help children in need. Governor McMaster responded by requesting a waiver from the federal agency responsible for the regulation and by issuing an Executive Order directing South Carolina’s state government agencies to refrain from discriminating against or penalizing such organizations—for example, by denying them licensure or by refusing to contract with them—on the basis of their religious beliefs. Accordingly, SCDSS

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<sup>1</sup> Pursuant to Local Civil Rule 7.04 D.S.C., a full explanation of the motion is provided herein, and, accordingly, a separate supporting memorandum would serve no useful purpose.

continued to license and contract with at least one faith-based foster care provider that, as a matter of religious conviction, partners only with prospective foster parents who share its religious beliefs.

Plaintiffs claim that the State Defendants' actions violated the Constitution, and they ask this Court to declare that the State Defendants' accommodation of religious foster-care providers constituted the establishment of religion and deprived Plaintiffs of equal protection. Plaintiffs further ask this Court to issue a permanent injunction (i) ordering the Governor and Director Leach to cease licensing and contracting with private providers that partner only with co-religionists and (ii) directing the Governor and Director Leach to require all state-licensed and state-contracted providers to work with prospective foster parents whose beliefs and conduct are contrary to the provider's sincerely held religious beliefs.

Plaintiffs' claims lacked merit from the start, and any veneer of plausibility they may have once had was stripped away by the Supreme Court's recent, unanimous judgment in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), in which the Court held that the government *must*, whenever possible, accommodate the religious and associational rights of faith-based foster-care providers who, as a matter of their religious beliefs, limit the group of foster parents and prospective foster parents with whom they partner. The parallels between *Fulton* and this suit are striking. In *Fulton* (as here), a private, faith-based, government-licensed, government-contracted, and government-funded provider of foster-care services could not, as a matter of religious conviction, partner with prospective foster parents whose beliefs or behaviors were inconsistent with the provider's religious beliefs. Accordingly, in *Fulton* (as here), the provider could not in good conscience comply with the government's non-discrimination requirements. In *Fulton* (as here), the government could have accommodated the faith-based provider and continued to license and contract with it. But in *Fulton*, the local government responded not by accommodating the

provider, but, rather, by doing the very thing that Plaintiffs in *this* suit ask the Court to do, namely revoking the provider’s license, refusing to contract with it, denying it funding, and mandating that it must abandon either its beliefs or its foster-care ministry. The Supreme Court unanimously concluded that this response—the same one Plaintiffs ask this Court to impose in South Carolina—was unconstitutional. *See Fulton*, 141 S. Ct. 1868 (2021).

The holding in *Fulton* requires the dismissal of this suit for at least two reasons. First, *Fulton* makes clear that the State Defendants’ accommodation of faith-based providers is not only constitutionally permissible but constitutionally required. *See id.* at 1881 (holding that when “the government *can* achieve its interests in a manner that does not burden religion, it *must* do so” (emphasis added)). Such actions cannot, therefore, form the basis for any claim of constitutional violation. Second, *Fulton* makes clear that—as the State Defendants have maintained from the start—neither they nor this Court may provide the relief Plaintiffs have requested because that relief is itself unconstitutional. *See id.* at 1882 (“The refusal of Philadelphia to contract with CSS for the provision of foster-care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment.”); *see also id.* (noting the Court’s “conclusion that the actions of the City violate the Free Exercise Clause”).

That *Fulton* requires dismissal here should be no surprise to Plaintiffs: In an *amicus* brief they filed in *Fulton*, they argued to the Supreme Court that a ruling for the faith-based foster-care provider in *that* case would be dispositive of *this* case. *See* Brief of Prospective Foster Parents as *Amici Curiae* in Supp. of Resps. at 2–4, 12–15, 29, 31, available at <https://tinyurl.com/FultonAmicusRogersWelch>. A separate *amicus* brief authored by Plaintiffs’ counsel and filed in *Fulton* makes the same point, specifically discussing the facts of this litigation and arguing that if the Court ruled in favor of the faith-based provider in *Fulton*, it “would enable

any government service provider that so wishes to exclude any individual that does not share its religious beliefs.” See Brief of Members of Congress as *Amici Curiae* in Supp. of Resps. at 16–17 available at <https://tinyurl.com/FultonMembersAmicusRespondents> (emphasis added); see also n.12, *infra*, and accompanying text. They were (at least on this point) correct.

*Fulton* compels the dismissal of the Establishment Clause and Equal Protection claims asserted against the State Defendants. Furthermore, the Equal Protection claim, which was previously dismissed in part, should be dismissed for the additional reasons that the State Defendants’ actions were rationally related to legitimate government purposes and, therefore, cannot be an unconstitutional deprivation of Equal Protection. Because the Complaint fails to state any claim on which relief can be granted, and because Plaintiffs have requested relief the Court cannot grant, Plaintiffs’ claims against Governor McMaster and Director Leach should be dismissed with prejudice.

## RELEVANT BACKGROUND<sup>2</sup>

### I. Foster care in South Carolina.

SCDSS operates South Carolina’s foster-care system and oversees the training, licensing, and supervision of foster homes and residential foster facilities in the State. SCDSS has a longstanding practice of contracting with private entities—known in the field as Child Placing Agencies (“CPAs”)—that recruit, train, and supervise foster homes and assist in the placement of

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<sup>2</sup> The facts set out herein are the same facts alleged by Plaintiffs. They are drawn from the allegations of the Complaint and the documents, statutes, and regulations relied on and incorporated by reference therein. See *Phillips v. LCI Int’l, Inc.*, 190 F.3d 609, 618 (4th Cir. 1999) (noting a court may consider documents that are “integral to and explicitly relied on in the complaint” without converting a motion under Rule 12 into one for summary judgment). The State Defendants do not concede the truth of the Complaint’s allegations, but the Court’s resolution of this Motion does not require a determination of the veracity of the facts alleged therein nor does it require consideration of any facts outside of the Complaint and the materials incorporated therein.

children into those homes. *See* S.C. Code of Regulations R. 114-4910 to -4980; *see also* Compl. ¶¶ 24, 26. SCDSS issues CPAs a standard one-year license or a temporary license that allows a CPA to continue to operate while working to correct any noncompliance with regulation, and SCDSS may deny or revoke licenses for violations of the licensing statute or regulations. *See* S.C. Code of Regulations R. 114-4930(E), (F), (G)(1)(b), (d); *see also* Compl. ¶¶ 27–29.

Licensed CPAs perform many valuable services: They monitor foster homes, recommend revocations of foster home licenses, assist SCDSS in its selection of foster homes for child placement, and develop and supervise the implementation of case plans for children placed in foster homes. *See* S.C. Code of Regulations R. 114-4980(A)–(D). A prospective foster parent’s application to be licensed as a foster parent, however, is directed to SCDSS; the decision of whether to grant a license to the applicant is the sole prerogative of SCDSS. *See id.* 114-4980(A)(2)(d) and (A)(3)(b).

Some CPAs with which SCDSS contracts are private religious entities that serve children of every race, color, national origin, creed, disability, sex, age, political belief, sexual orientation, and gender identity. While faith-based CPAs serve children of every background and situation, some of these faith-based CPAs believe they should only hire employees and recruit, train, and supervise foster homes that share their religious mission and beliefs.

One such CPA is Miracle Hill Ministries (“Miracle Hill”). Miracle Hill is a faith-based organization that serves the homeless, hungry, and needy in upstate South Carolina. *See generally* Compl. ¶¶ 41–43. Besides serving the homeless in nine shelters and providing recovery centers for those seeking to overcome addictions, Miracle Hill helps hundreds of foster children by supporting over 200 families licensed as foster homes by SCDSS. *See id.* ¶ 43. For 80 years, Miracle Hill has gladly served anyone in need, regardless of race, color, ethnicity, national origin,

age, sex, disability, religion, sexual orientation, or identity. *See id.* ¶ 41. As explained in the following section, however, Miracle Hill’s ability to serve children in foster care nearly changed in 2018 due to an amended federal regulation promulgated in the waning days of President Obama’s administration that imposed onerous burdens on faith-based CPAs and the states that license and contract with them.

## **II. Relevant regulatory events and the Defendants’ responses thereto.**

South Carolina, like every other State, receives reimbursements for certain foster-care expenditures from the U.S. Department of Health and Human Services (“HHS”) as authorized by Title IV-E of the Social Security Act. Title IV-E prohibits states from using funds in a discriminatory fashion “on the basis of the race, color, or national origin.” 42 U.S.C § 671(a)(18); *see also* Compl. ¶ 31. In January 2017, however, HHS amended regulations implementing Title IV-E of the Social Security Act by adding “religion” and “sexual orientation” as unlawful bases for discrimination. 45 C.F.R. § 75.300(c) (2017); *see also* Compl. ¶¶ 38–40. This new regulation purported to apply both to SCDSS (as a recipient of Title IV-E funds) and to CPAs (as sub-recipients of Title IV-E funds). *See* 45 C.F.R. §§ 75.101(b)(1), 1355.30(i); *see also* Compl. ¶ 34.

When it came time for Miracle Hill’s annual renewal of its CPA license in 2018, SCDSS determined it would issue Miracle Hill only a temporary license in light of Miracle Hill’s practice of recruiting and partnering only with foster parents who share Miracle Hill’s religious beliefs. *See* Compl. ¶¶ 54–57. In response, on February 27, 2018, Governor McMaster wrote to HHS seeking a “deviation” or waiver from the new regulation. *See* Compl. ¶ 62 & n.23 (containing URL link to a copy of the letter);<sup>3</sup> *see also* Letter from Governor McMaster to Steven Wagner, HHS Acting

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<sup>3</sup> *See also* Compl. ¶ 3 (describing the letter as “a critical, essential step”); *id.* ¶¶ 62, 95, 100–10, 129–33.

Assistant Secretary (Feb. 27, 2018) (attached as **Exhibit A**). His request was motivated partly by the fact that the new regulation would require HHS to recoup funds from SCDSS if HHS determined SCDSS's contracts with faith-based CPAs violated the new regulations. *See* Ex. A.

Governor McMaster's letter further explained that "faith-based CPAs are essential as our State needs more CPAs to recruit more families" for foster care, and that religious providers have been serving in that role "for years." Ex. A at 1. The new regulations adopted by HHS, the Governor noted, "effectively require CPAs to abandon their religious beliefs or forgo the available public licensure and funding," which violates the CPAs' constitutional rights, as well as the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb to 2000bb-4. *See* Ex. A at 2; *see also* S.C. Code Ann. §§ 1-32-10 to -60 (South Carolina Religious Freedom Act of 1999). Governor McMaster also directed HHS's attention to *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), issued after HHS amended its regulations, and which "made clear that faith-based entities may contract with the government without having to abandon their sincere[] religious beliefs." *Id.* A waiver, Governor McMaster explained, would protect the rights of faith-based CPAs and, more importantly, would maximize the number of available foster homes, as faith-based CPAs are some of the largest providers of foster families. *See id.* ("South Carolina needs to continue growing our CPAs, not prevent them from serving our State's children.").

Shortly after seeking a waiver from HHS, Governor McMaster issued Executive Order No. 2018-12. *See* Compl. ¶ 64 & n.24 (containing URL link to a copy of the Order); *see also* Exec. Order No. 2018-12 (Mar. 13, 2018), at 1 (attached as **Exhibit B**). The Order affirmed the well-founded principle that "faith-based organizations may retain their religious character and participate in government programs," a right protected by the First Amendment to the U.S.

Constitution, by the analogous provision of the South Carolina Constitution, and by the South Carolina Religious Freedom Act of 1999, S.C. Code Ann. §§ 1-32-10 to -60. *See* Ex. B. at 1.

The Order also acknowledges the historical fact that “the licensing and participation of faith-based organizations in South Carolina’s foster-care system is a long-standing constitutionally permissible practice” and that faith-based CPAs “fulfill[] a crucial need for the State and provid[e] a critical service to the children of South Carolina.” *Id.* at 2. Mindful that “DSS licenses many CPAs and provides a variety of CPA options from which foster parents may choose,” the Order recognizes that “faith-based CPAs should not be asked to compromise sincerely held religious beliefs in recruiting, training, and retaining foster parents” and should be able to freely “associate [with] foster parents and homes who share the same faith.” *Id.* In short, “religious observers and organizations should not be required to sacrifice the tenets of their faith to serve the children of South Carolina,” especially when doing so would only decrease the availability of desperately needed foster homes. *Id.* Accordingly, the Order directs SCDSS to “not deny licensure to faith-based CPAs solely on account of their religious identity or sincerely held religious beliefs” and to “review and revise its policies and manuals” to “ensure that SCDSS does not directly or indirectly penalize religious identity or activity” in issuing licenses. *Id.* at 3.

On January 23, 2019, HHS responded to Governor McMaster’s request for a waiver from 45 C.F.R. § 75.300(c). *See* Compl. ¶¶ 68–69 & n.26 (containing URL link to a copy of the letter); *see also* Letter from Steven Wagner, Principal Deputy Assistant Sec’y, U.S. Dep’t of Health & Human Servs., to Governor Henry McMaster (Jan. 23, 2019) (attached as **Exhibit C**).<sup>4</sup> The response noted Governor McMaster’s concerns about the decrease in available foster homes that would result if HHS enforced the new regulation against faith-based CPAs as well as his concerns

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<sup>4</sup> *See also* Compl. ¶¶ 3, 5–7, 68–72, 96, 115–20, 143–49.

that enforcement would unlawfully force faith-based CPAs to either abandon their religious beliefs or forgo licensure. *See id.* at 1–2. HHS understood that faith-based CPAs, such as Miracle Hill, faced imminent revocation of their licenses unless they agreed to abandon their religious beliefs, which, as HHS recognized, CPAs such as Miracle Hill plainly would refuse to do. *See id.* at 2. After reviewing this information, HHS determined that requiring subgrantees who use religious criteria in partnering with prospective foster care parents “to comply with the religious non-discrimination provision of 45 C.F.R. § 75.300(c) would cause a burden to religious beliefs that is unacceptable under RFRA.” *Id.* at 3. Accordingly, HHS granted the waiver Governor McMaster requested. *See id.* at 4.

### **III. Plaintiffs’ factual allegations and legal claims.**

Plaintiffs allege South Carolina needs additional foster homes to serve the children in its foster-care system, and that Miracle Hill, one of the larger CPAs in the state, performs foster-home recruitment and other foster-care services, including providing training and support for foster parents. *See id.* ¶¶ 4, 6, 20–23, 43–44, 46, 84, 86. Miracle Hill gladly serves any adult or child in need, regardless of his or her race, color, ethnicity, national origin, age, sex, disability, religion, lack of religion, orientation, or identity, and Miracle Hill gladly works with volunteers without regard to such factors. *See id.* ¶¶ 41–42, 94 & n.30 (containing URL link to Miracle Hill FAQ document describing its policy).<sup>5</sup> As part of its religious faith and practice, however, Miracle Hill believes that those it places in positions of spiritual responsibility—including foster parents—must share its religious beliefs, mission, and motivation. *See id.* ¶¶ 47–51, 81. Miracle Hill makes no secret of its strongly and sincerely held religious beliefs, including its conviction that those whom it

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<sup>5</sup> Plaintiffs’ Complaint contains copious references to Miracle Hill’s website. *See* Compl. ¶¶ 41–42, 44, 47–50, 94.

places in positions of spiritual responsibility or influence should share those beliefs. It has acknowledged these beliefs on its website; it has explained them in its application forms and foster-care manual; its officers and employees politely and respectfully discuss them with prospective foster parents; and its leaders emphasize them in staff training. *See id.* ¶¶ 48–51, 54, 81–82.

Plaintiffs admit they do not share Miracle Hill’s religious beliefs. *See id.* ¶¶ 5, 8. After Plaintiffs contacted Miracle Hill regarding an interest in fostering, Miracle Hill requested that they complete an online inquiry form. *See id.* ¶¶ 78–79. As it has done consistently in similar circumstances, *see id.* ¶¶ 2, 45, 51, when Miracle Hill learned Plaintiffs did not share its deeply-held religious beliefs and did not attend a Christian church, Miracle Hill politely informed Plaintiffs they should seek licensure through another CPA or through SCDSS, and provided Plaintiffs with a list of nine other CPAs in the area. *See id.* ¶¶ 81–82. Miracle Hill explained it “feels a religious obligation to partner with foster parents who share [Miracle Hill’s] beliefs and who are active in a Christian church” as well as its religious belief that “those who hold positions of spiritual responsibility or influence—including foster parents”—should “share [Miracle Hill’s] Christian mission, motivation, and beliefs.” *Id.* ¶ 81.

Although Plaintiffs were aware of other opportunities to foster through other CPAs in their area or with DSS directly, *see id.* ¶¶ 4, 24–25, 45, 82, 90, they admit they have made no attempt to do so, *see id.* ¶¶ 8, 77, 90. Instead, Plaintiffs filed a 40-page Complaint in federal court with the backing of three advocacy groups and two law firms and supported by a team of ten lawyers from across the country. And although the factual allegations of the Complaint concede that Miracle Hill referred Plaintiffs to other CPAs because Plaintiffs are not members of a Christian church and do not share Miracle Hill’s religious beliefs, the Complaint is nevertheless replete with speculation

that Miracle Hill *really* referred them to other providers due to their sexual orientation. *See, e.g., id.* ¶¶ 1–2, 7, 45, 52, 83, 107, 130.

Plaintiffs’ Complaint asserts two claims against the State Defendants, alleging the actions the State Defendants took to maximize foster-care opportunities and to protect the Free Exercise and associational rights of South Carolina’s faith-based CPAs prevented Plaintiffs from obtaining licensure through the only CPA they deigned to approach and, thereby, violated the Establishment Clause and the Equal Protection Clause. *See id.* ¶¶ 97–113, 127–40. Specifically, Plaintiffs claim that by requesting and granting exceptions to the non-discrimination requirements in state and federal regulations and in SCDSS policies, the State Defendants have privileged, preferred, advanced, and endorsed certain religious beliefs and have coerced prospective foster parents to support Miracle Hill’s religious beliefs in violation of the Establishment Clause. *Id.* ¶¶ 97–113. They likewise claim that requesting and granting these exceptions subjected Plaintiffs to different and unfavorable treatment on the basis of their religion, sexual orientation, or marital status, and, therefore, violated the Equal Protection Clause. *Id.* ¶¶ 127–40.

#### **IV. Procedural Posture.**

Plaintiffs filed this action against the State Defendants and various Federal Defendants on May 30, 2019. In response to Governor McMaster’s Motion to Dismiss (ECF No. 57), this Court dismissed Plaintiffs’ Equal Protection claim based on religious discrimination; noted that the Equal Protection claim based on sexual orientation or same-sex marriage would likewise be dismissed if and when the same arguments were leveled against it; and allowed the Establishment Clause claim to proceed (ECF No. 81). The Defendants subsequently filed Answers, and the parties began discovery. Discovery is not yet complete. Presently, there are several pending discovery motions

relating to the Plaintiffs' attempts to depose the Governor and employees of the Office of the Governor and to compel the production of more expansive privilege logs.

The Supreme Court's opinion in *Fulton v. City of Philadelphia*, issued on June 17, 2021, clarified the dispositive issues in this case such that it is unnecessary to conduct further discovery and wait for summary judgment because Governor McMaster and Director Leach are entitled to judgment on the pleadings as a matter of law. Accordingly, concurrently with this Motion for Judgment on the Pleadings, the State Defendants have filed a Motion to Stay Discovery and to Hold the Pending Discovery Motions in Abeyance.

#### LEGAL STANDARD

"The standard of review for Rule 12(c) motions is the same as that under Rule 12(b)(6)." *Drager v. PLIVA USA, Inc.*, 741 F.3d 470, 474 (4th Cir. 2014). Thus, a Rule 12(c) motion should be granted when, "after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Id.*

A Rule 12(c) motion is properly filed and granted during the pendency of discovery when a change in controlling precedent makes the relief sought in the suit unobtainable or when a plaintiff is incapable of prevailing on the constitutional claims she has asserted. *See Drager*, 741 F.3d at 474–76; *Pulte Home Corp. v. Montgomery Cnty., Md.*, 909 F.3d 685, 691, 695–96 (4th Cir. 2018).

A party may move for judgment on the pleadings "[a]fter the pleadings are closed—but early enough not to delay trial." Fed. R. Civ. P. 12(c), (h)(2)(B). "The mere fact that discovery has commenced is not enough to invalidate [a motion for judgment on the pleadings]," especially where "there is a case dispositive issue for which discovery is unnecessary to resolve." *Pulte Home Corp. v. Montgomery Cnty., Md.*, 271 F. Supp. 3d 762, 768 n.3 (D. Md. 2017). In fact, "if it seems

clear that the motion may effectively dispose of the case on the pleadings, the district court should permit it regardless of any possible delay consideration of the motion may cause.” Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1367 (3d ed. 2004).

#### ARGUMENT

**I. Plaintiffs’ Complaint fails to state claims upon which relief can be granted because, as *Fulton* shows, the accommodations sought and granted by the State Defendants were constitutionally permissible and required.**

The parallels between *Fulton* and this suit are striking, and the holding of *Fulton*, as explained below, is dispositive here. In *Fulton*, Catholic Social Services (“CSS”), a faith-based entity, had been contracting with the City of Philadelphia for decades to provide foster-care services. *See Fulton*, 141 S. Ct. at 1874. CSS’s ministry was a continuation of “over two centuries” of the Catholic Church’s service to the needy children of Philadelphia. *Id.* at 1874–75.

In Philadelphia, the City’s Department of Human Services, which has custody of all children in foster care, “enters standard annual contracts with private foster agencies to place some of those children with foster families.” *Id.* at 1875. These state-licensed, government-contracted private entities evaluate prospective foster families and conduct a home study before determining whether to approve, disapprove, or provisionally approve of their potential service as a foster family. *Id.* “The agency continues to support the family throughout the placement.” *Id.* Whenever the City needs to place a foster child, it sends a request to entities such as CSS, which, in turn, report whether any of their families are available. *Id.* The City then determines the most suitable placement for the child. *Id.*

Under its contract with the City, CSS received millions of dollars in government funding for foster-care services and, had it continued to contract with the City, would have received millions more. *See Fulton v. City of Philadelphia*, 922 F.3d 140, 150 (3d Cir. 2019) (noting record

evidence indicating CSS provided “government-funded” services); *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661, 668, 671–72, 679 (E.D. Pa. 2018) (noting CSS’s receipt of government funds under the contract with the City); *see also* Brief for Petitioners at 22, 33, and 51 (discussing government funding available to CSS under the contract);<sup>6</sup> Brief for City Respondents at 2, 3, 7–8, 15, 24, 28, and 42 (same);<sup>7</sup> Reply Brief for Petitioners at 16 (same).<sup>8</sup>

Things changed in 2018, when the City learned that CSS’s religious beliefs would not allow it to comply with the City’s non-discrimination requirement imposed on all contracted foster care agencies to forbid them from discriminating against any person on the basis of, among other things, sexual orientation or religion. *See Fulton*, 141 S. Ct. at 1875, 1878. Because CSS views “the certification of prospective foster families to be an endorsement of their relationships, it will not certify unmarried couples—regardless of their sexual orientation—or same-sex married couples.” *Id.* at 1875. If CSS were to receive an inquiry or application from a same-sex couple, “CSS would direct the couple to one of the more than 20 other agencies in the City.” *Id.*

Upon learning of CSS’s religious belief and practice, the City launched an investigation. At its conclusion, the City “informed CSS that it would no longer refer children to the agency,” and “stated that it would not enter a full foster care contract with CSS in the future unless the agency agreed to certify same-sex couples.” *Id.* at 1875–76. CSS responded by suing the City, alleging, among other things, that the City’s refusal to contract with CSS violated CSS’s rights under the First Amendment’s Free Exercise Clause. *Id.* The District Court disagreed, holding that the City’s exclusion of CSS was permissible. *Fulton*, 320 F. Supp. 3d 661. The Third Circuit

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<sup>6</sup> Available at <https://tinyurl.com/FultonPetitionersBrief>.

<sup>7</sup> Available at <https://tinyurl.com/FultonCityBrief>.

<sup>8</sup> Available at <https://tinyurl.com/FultonPetitionersReplyBrief>.

affirmed. *Fulton*, 922 F.3d at 153. The Supreme Court, however, unanimously reversed. Its reasoning and ruling and the effect of both on this suit are explained more fully below.

**A. *Fulton* mandates that if the government *can* accommodate religious foster-care providers by exempting them from non-discrimination requirements while licensing, funding, and contracting with them, “it *must* do so.”**

The *Fulton* Court’s legal analysis began with the unremarkable recognition that the government burden’s a faith-based CPA’s religious exercise by putting it to the choice either of curtailing its mission or partnering with prospective foster parents whose beliefs or behaviors are inconsistent with its beliefs. *Fulton*, 141 S. Ct. at 1876–77. In *Fulton*, the governmental restrictions at issue were two non-discrimination requirements contained in the contract with the City. *See id.* at 1878–79. One forbade foster services providers from declining to work with prospective foster parents based on their sexual orientation unless the Commissioner or her designee granted an exception. *See id.* at 1878. The other, “a separate provision in the contract[,] independently prohibits discrimination in the certification of foster parents . . . on the basis of sexual orientation, and it does not on its face allow for exceptions.” *Id.* at 1879; *see also* Supp. App. to Brief for City Respondents at 31 (containing contract section 15.1 in its entirety, which prohibited CPAs from “discrimination against any individual on the basis of . . . sexual orientation, gender, identity, [or] religion”).<sup>9</sup>

The Court held that because one of the non-discrimination requirements could be waived by the Commissioner, neither of them was generally applicable, so they would both be reviewed “under the strictest scrutiny.” *Id.* at 1881; *see also id.* at 1877 (noting in pertinent part that a “law is not generally applicable if it . . . provid[es] a mechanism for individualized exemptions”) citations and internal quotation marks omitted)); *id.* at 1879 (holding that as long as one of the City’s non-discrimination requirements for foster services providers permitted exceptions, the

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<sup>9</sup> Available at <https://tinyurl.com/FultonSupplementalAppendix>.

other such requirement—which lacked an exception mechanisms—was likewise susceptible to exceptions and thus would also be reviewed under strict scrutiny); *id.* at 1880–81 (noting that recruiting and screening prospective foster parents necessarily “involves a customized and selective assessment” and inherently requires a subjective, “uniquely selective” process).

Under this demanding legal standard, the government “*must*,” whenever possible, accommodate the religious beliefs of faith-based CPAs, including by exempting them from non-discrimination requirements:

A government policy can survive strict scrutiny only if it advances “interests of the highest order” and is narrowly tailored to achieve those interests. [] Put another way, so long as the government can achieve its interests in a manner that does not burden religion, *it must do so*.

*Id.* at 1881 (emphasis added) (citation omitted); *see also id.* at 1878 (noting that when the possibility of an exception exists, “the City ‘may not refuse to extend that [exemption] system to cases of “religious hardship” without compelling reason”” (alteration in original) (citation omitted)).

Applying this rigorous standard in the context of non-discrimination requirements related to foster-care service providers, the *Fulton* Court concluded that none of the governmental interests that Philadelphia asserted in support of its non-discrimination requirement—including maximizing the number of foster homes and ensuring equal treatment of prospective foster homes—were sufficient to justify denying CSS an exception for its religious beliefs and practices. *See id.* at 1881–82. Indeed, the *Fulton* majority (authored by Chief Justice Roberts and joined by Justices Breyer, Sotomayor, Kagan, Kavanaugh, and Barrett) specifically noted that the accommodation of faith-based CPAs “seems likely to *increase*, not reduce, the number of available foster parents.” *Id.* at 1882 (emphasis added).<sup>10</sup>

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<sup>10</sup> Plaintiffs have asserted the contrary, facially implausible view. *See* Compl. ¶¶ 34, 88–92 (alleging the continued operation of Miracle Hill, which they admit is the largest private CPA in the state, somehow shrinks the pool of available foster homes).

Accordingly, the Court unanimously held that the City’s refusal to contract with CSS for the provision of foster-care services unless CSS agreed to comply with government requirements contrary to its religious beliefs violated CSS’s Free Exercise rights and was, therefore, unconstitutional. *Id.* (“CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else. The refusal of Philadelphia to contract with CSS for the provision of foster-care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment.”).

**B. The non-discrimination requirements at issue in this suit, like those in *Fulton*, are reviewed under strict scrutiny, and, just as in *Fulton*, the government can and, therefore, must, accommodate religious foster-care providers.**

*Fulton* established the analytical framework to determine whether and when private faith-based providers of foster-care services may be compelled to hew to government mandates that conflict with their religious identity and beliefs. And *Fulton* demonstrates what the outcome of that analysis must be in a situation that is functionally identical to the one presented in this lawsuit. The multiple parallels between *Fulton* and this suit are striking,<sup>11</sup> and *Fulton*’s holding compels the dismissal of Plaintiffs’ remaining claims.<sup>12</sup>

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<sup>11</sup> A notable difference, of course, is that in this suit the governmental parties acted to *uphold* the Constitution in the manner required by *Fulton*, whereas in *Fulton* the governmental parties violated the Constitution by penalizing, rather than accommodating, a faith-based CPA.

<sup>12</sup> Notably, Plaintiffs filed an *amicus* brief in *Fulton* recognizing that a ruling in CSS’s favor would likewise uphold the right of similarly situated government-contracted CPAs, including Miracle Hill, to decline to work with Plaintiffs because they do not share the CPAs’ religious beliefs. *See* Brief of Prospective Foster Parents as *Amici Curiae* in Supp. of Resps. at 2–4, 12–15, 29, 31, available at <https://tinyurl.com/FultonAmicusRogersWelch>.

Likewise, Plaintiffs’ counsel argued in a separate *amicus* brief they authored in *Fulton* that a ruling in favor of CSS would be dispositive of this suit. *See* Brief of Members of Congress as *Amici Curiae* in Supp. of Resps. at 16–17 (“In South Carolina, for instance, the state requested and received a waiver from federal antidiscrimination regulations for the state’s largest, government-funded agency . . . . Accepting [CSS’s] argument in this case would enable any government service

Plaintiffs in this suit will, one presumes, strain to find some minor difference between this suit and *Fulton*—perhaps noting that the non-discrimination requirement in *Fulton* was contractual rather than regulatory—to argue that *Fulton* is distinguishable and thus does not compel the dismissal of Plaintiffs’ action. Such variances, however, are distinctions that make no difference and, more importantly, miss the critical holdings in *Fulton*, namely (1) that when strict scrutiny applies—whether compelled by statute or by the presence of an exemption mechanism—the government *must* accommodate religion if it can do so while still advancing its compelling interest, and (2) that in the foster care context, the government’s interest in increasing the number of foster homes and in treating prospective foster parents equally can and, therefore, *must* be achieved while accommodating religious CPAs. *See Fulton*, 141 S. Ct. at 1878–79, 1881–82.

Plaintiffs’ claims against the State Defendants arise solely and completely from actions taken by the State Defendants to seek and grant exceptions to non-discrimination requirements that, like those in *Fulton*, are susceptible to exceptions. Specifically, Plaintiffs allege the State Defendants violated the Establishment and Equal Protection clauses by granting and seeking accommodations from non-discrimination requirements found in 45 C.F.R. § 87.3; 45 C.F.R. § 75.300; and SCDSS Human Services Policy & Procedure Manual § 710. *See* Compl. ¶¶ 30, 34–35, 38–40, 55, 62, 68. Because each of the three the non-discrimination requirements raised in Plaintiffs’ Complaint is susceptible to exceptions, they must be strictly scrutinized, and accommodations must, if possible, be made. *See Fulton*, 141 S. Ct. at 1876–77 (noting strict scrutiny of a law is required if the law provides a mechanism for exemptions to its requirements).

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provider that so wishes to exclude any individual that does not share its religious beliefs.”), available at <https://tinyurl.com/FultonMembersAmicusRespondents>.

*First*, the federal requirement from which Governor McMaster requested an exemption—45 C.F.R. § 75.300(c)—is subject to an exception mechanism found in 45 C.F.R. § 75.102. That was the mechanism used by HHS to grant the waiver requested by Governor McMaster.

*Second*, 45 C.F.R. § 87.3 is inapplicable here and, in any event, contains an exception mechanism. The regulation is inapplicable because one subsection that Plaintiffs’ Complaint relies upon states only that a subgrantee may not “discriminate against a program *beneficiary* or prospective program *beneficiary* on the basis of religion.” 45 C.F.R. § 87.3(d) (emphasis added). Part 87 of the CFR does not define “beneficiary,” but courts interpreting federal statutes pertaining to foster care and funding have concluded “foster *children* are the clearly intended beneficiaries.” *Kenny A. v. Perdue*, 218 F.R.D. 277, 292 (N.D. Ga. 2003) (emphasis added); *see also Am. Civil Liberties Union of N. Cal. v. Azar*, C/A No. 16-cv-03539-LB, 2018 WL 4945321, at \*22 n.107 (N.D. Cal. Oct. 11, 2018) (granting judgment in Secretary Azar’s favor on a claim alleging that the federal government violated the Establishment Clause by funding a faith-based organization that supposedly proselytized minors in government custody, and noting that evidence indicated the intended “beneficiaries” of the funds were the *children* cared for by the provider).<sup>13</sup>

Additionally, 45 C.F.R. § 87.3 recognizes that exemptions can—and in some instances *must*—be made. Specifically, it states that HHS “shall provide” accommodations to faith-based organizations to the extent “consistent with Federal Law . . . and the Religion Clauses of the First Amendment.” 45 C.F.R. § 87.3(a). It further states that HHS may not penalize a religious

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<sup>13</sup> Plaintiffs’ additional reliance on subsection 45 C.F.R. § 87.3(b)—which prohibits recipients of direct federal financial assistance from using those funds for explicitly religious activities—is facially deficient as it is contradicted by the Complaint and the documents it incorporates and relies upon. *See* Compl. ¶ 36. The Complaint concedes the State Defendants never sought or granted CPAs any exception to that requirement. In contrast, State Defendants specifically required “that public funds are *not* used to directly subsidize or support religious worship activities.” *See* Ex. A (Executive Order No. 2018-12), at 1 (emphasis added).

organization “[b]ecause of conduct that must or could be granted an appropriate accommodation in a manner consistent with the Religious Freedom Restoration Act [] or the Religion Clauses of the First Amendment.” *Id.*

*Third*, SCDSS Policy § 710 likewise contains a non-discrimination requirement that is not expressly applicable to CPAs and, in any event, is subject to discretionary exemptions:

The unnecessary consideration of race, color, national origin, religion, state of residence, age, disability, political belief, sex, or sexual orientation when making decisions regarding a child’s placement can result in unfair outcomes for prospective families and substantial delays in permanency for foster children. *The agency* is committed to the exercise of nondiscriminatory practice, and shall provide equal opportunities to all families and children, without regard to their . . . religion . . . or sexual orientation. . . .

\* \* \*

[N]o individual shall be denied the opportunity to become a foster or adoptive parent on the basis of . . . religion . . . or sexual orientation. . . . Licensing decisions will not be made on the above basis *except in rare cases* in which such consideration is in the best interests of the child. . . .

SCDSS Human Servs. Policy & Proc. Manual § 710 (emphasis added);<sup>14</sup> *see also id.* § 700 (“At all points in the agency’s partnership with foster families, staff personnel shall treat families and children with respect and fairness. As part of this mission, staff personnel shall avoid any and all forms of discrimination, with consideration of a child or family’s race, color, national origin, religion, state of residence, age, disability, political belief, sex, or sexual orientation only occurring when, after a thorough and individualized assessment, such consideration is the only manner of

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<sup>14</sup> State Defendants note that Plaintiffs were never “denied the opportunity” to become foster parents (to use the words of section 710), much less by “the agency.” SCDSS was and still is willing gladly to receive their application for licensure as foster parents if they ever take action to achieve their stated goal of serving as foster parents.

serving a child’s best interests (see Section 710).”). Because these requirements are susceptible to exemptions, strict scrutiny is required. *See Fulton*, 141 S. Ct. at 1877, 1881.<sup>15</sup>

Under a strict scrutiny analysis, the State Defendants’ actions challenged in this suit were constitutionally permissible and required. Plaintiffs’ Establishment Clause and Equal Protection claims stem from the State Defendants seeking and granting accommodations or exemptions to the non-discrimination requirements discussed above. And, under *Fulton* (as well as RFRA and the RFA), the question of how these regulations should or should not apply to faith-based CPAs is analyzed under strict scrutiny. The law is clear that when, as here, the government can accommodate the religious beliefs of faith-based CPAs while still achieving the governmental purpose behind the regulation, the government must accommodate the faith-based CPAs. *See Fulton*, 141 S. Ct. at 1881. The law is likewise clear that the government’s interest in maximizing the number of available foster homes and in treating all prospective foster parents equally can be achieved while simultaneously accommodating faith-based CPAs who, as a matter of religious belief, can partner only with certain foster parents. *Id.* at 1881–82. Accordingly, the State Defendants’ actions challenged in this suit were not only constitutionally permissible; they were, according to *Fulton*,

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<sup>15</sup> In addition to the fact that these three non-discrimination requirements contain exception mechanisms that invoke strict scrutiny, that exacting standard is already *independently* required here by statutes, namely the Religious Freedom Restoration Act (“RFRA”) and the South Carolina Religious Freedom Act (“RFA”). *See* 42 U.S.C. § 2000bb-1 (“Government may substantially burden a person’s religious exercise only if it demonstrates that the application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”); S.C. Code Ann. § 1-32-40 (“The State may not substantially burden a person’s exercise of religion, even if the burden results from a rule of general applicability, unless the State demonstrates that application of the burden to the person is: (1) in furtherance of a compelling state interest; and (2) the least restrictive means of furthering that compelling state interest.”). Accordingly, even if there were any meaningful differences between the requirements and available exceptions in *Fulton* and in this suit, the governmental requirements and responses in this suit must still be evaluated under a strict scrutiny standard.

constitutionally required. Those actions cannot, therefore, have violated the Constitution, and Plaintiffs’ allegations and claims thus do not and cannot state claims on which relief can be granted. Plaintiffs’ request for this Court to command what the Supreme Court recently and unequivocally prohibited in *Fulton* fails as a matter of law and logic.

**C. Plaintiffs’ other allegations fail to assert any claims on which relief can be granted.**

As explained above, Plaintiffs’ allegations and claims relating to the State Defendants’ actions to accommodate faith-based CPAs whose beliefs compel them to partner only with those who share their deeply held religious beliefs fail to state claims on which relief can be granted. Plaintiffs also pepper their Complaint with allegations that the State Defendants’ actions supposedly coerce prospective foster parents to support the specific religious beliefs of Miracle Hill. *See, e.g.* Compl. ¶¶ 107, 120. The *Fulton* Court disposed of that line of argument in short order, ruling that a CPA “does not seek to impose [its] beliefs on anyone else” merely by screening prospective foster parents on the basis of its religious beliefs. *Fulton*, 141 S. Ct. at 1882. If a faith-based CPA’s screening policy is not coercive, even less so can the government’s accommodation of such a policy be considered coercive, particularly given the availability of other CPAs and licensing directly through SCDSS.

Plaintiffs’ allegations regarding the supposed proselytization of children in foster care, *see, e.g.*, Compl. ¶¶ 94, 108, 121, fare no better, for Plaintiffs lack standing to assert such speculative claims, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (holding that plaintiffs seeking to establish standing to assert a claim must first show that they are “among the injured” group (citing *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972))); *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (“[A] plaintiff generally must assert [her] own legal rights and interests, and cannot rest [her] claim to relief on the legal rights or interests of third parties.”); *Am. Civil Liberties Union of Northern*

*California v. Azar*, C/A No. 16-cv-03539-LB, 2018 WL 4945321, at \*31 (N.D. Cal. Oct. 11, 2018) (“[T]he ACLU lacks standing to advance a claim based on the harms imposed on unaccompanied minors.”).

Plaintiffs concede—as they must—that they lack standing to assert claims for supposed harms to third parties such as children in foster care. *See* Pls.’ Mem. in Opp. to the Mot. to Dismiss (ECF No. 61) at 10 n.5 (“Plaintiffs do not . . . rely on . . . the assertion of claims on behalf of proselytized children in the foster care system for Article III standing.”). And this Court already ruled that Plaintiffs have standing to assert only those claims relating to alleged injuries that they suffered personally. *See* ECF No. 81 at 20–21 (concluding Plaintiffs had standing based only on the alleged injury they suffered when “they were *personally* turned away by Miracle Hill” and encountered alleged “barriers to *Plaintiffs’* participation in the state foster care program” (emphasis added)); *id.* at 19 (noting that Plaintiffs’ briefing had “clarified” that the only injuries on which their claims could rest were those they suffered themselves); *see also Maddonna v. U.S. Dept. of Health & Human Servs. et al.*, Civil Action No. 6:19-cv-03551-JD, D.S.C., Order (ECF No. 43) at 17 n.6 (ruling in a companion case to this one that although “Plaintiff attempts to raise claims for alleged injuries of others, including foster children, their biological parents, and LGBTQ youth, Plaintiff recognizes that she does not have standing to sue for such alleged harms and clarifies that she does not premise her standing on those alleged harms to others.” (internal citations omitted)).

Further, Plaintiffs’ allegations that the State Defendants authorized, permitted, or encouraged private CPAs to proselytize children in foster care are contradicted by the very documents referred to and incorporated into Plaintiffs’ Complaint. The documents that supposedly constitute the constitutional violations (e.g., the Executive Order and the waiver request letter) are entirely devoid of any such authorization, permission, encouragement, or request. Indeed, Governor

McMaster's Executive Order specifically notes that CPAs *cannot* engage in religious activities of that nature using government funds. *See* Ex. A (Executive Order No. 2018-12), at 1. Accordingly, any allegations that the State Defendants supported the proselytization of foster children are both baseless and inadequately pled, and cannot support any claim in this suit.

**D. The relief requested in Plaintiffs' Complaint is itself unconstitutional.**

The infirmities of Plaintiffs' lawsuit are further underscored by the fact that the relief they seek is itself unconstitutional and cannot be awarded by the Court. Plaintiffs ask this Court to declare "that the State Defendants, by authorizing a state-contracted, government-funded CPA to use religious criteria to exclude prospective foster families who are not evangelical Protestant Christians and heterosexual, violate the Establishment Clause of the First Amendment to the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." Compl., Prayer for Relief "A." But *Fulton* makes abundantly clear that this Court cannot make such a declaration. Indeed, *Fulton* held precisely the *opposite*, namely that the Constitution *requires* the government to allow state-contracted, government-funded, faith-based CPAs to use religious criteria to select the prospective foster families with whom it will work. This Court cannot award the relief sought by Plaintiffs, for such relief is forbidden by the First Amendment. *See Fulton*, 141 S. Ct. at 1882.

Plaintiffs also ask this Court to enter "a permanent injunction ordering the State Defendants to cease contracting with, licensing, and funding any CPA that discriminates against prospective foster parents based on their religion, sex, sexual orientation, or exercise of the fundamental right to marry a person of the same sex." Compl., Prayer for Relief "C." One can hardly imagine a request more squarely foreclosed by *Fulton*. The injunction Plaintiffs seek would impose the exact state of

affairs that all nine Justices concluded was unconstitutional. This Court cannot award the relief sought by Plaintiffs.

Plaintiffs finally ask this Court to enter “a permanent injunction directing the State Defendants to ensure that all prospective foster parents, regardless of religion, sex, sexual orientation, or exercise of the fundamental right to marry a person of the same sex are treated equally by state-contracted, government-funded CPAs.” Compl., Prayer for Relief “E.” Yet again, *Fulton* makes clear that this Court cannot enter such an injunction, which would impose precisely the scenario the *Fulton* Court unanimously held to be unconstitutional. *See Fulton*, 141 S. Ct. at 1882.

Because every type of relief that Plaintiffs request against the State Defendants is forbidden by *Fulton*, there is no scenario in which this Court could enter the judgment Plaintiffs seek. This Court should enter judgment on the pleadings and dismiss the suit with prejudice.

**II. Plaintiffs’ Equal Protection claim based on alleged sexual-orientation discrimination fails for the additional reason that the State Defendants’ actions were rationally related to a legitimate government interest.**

In a prior order, this Court dismissed Plaintiffs’ Equal Protection claim based on religious discrimination because rational basis review applied, and because Governor McMaster had “proffered numerous legitimate government interests rationally related to their actions.” ECF No. 81, at 44. In regard to Plaintiffs’ Equal Protection claim based on sexual orientation discrimination, this Court recognized that neither “the Fourth Circuit nor the Supreme Court has expressly recognized sexual orientation as a classification subject to heightened or strict scrutiny,” and, therefore, that claim is also subject to rational basis review. *Id.* at 45–46.<sup>16</sup> The Court declined to

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<sup>16</sup> Under this standard, government actions are presumed valid if they are rationally related to a legitimate government purpose. *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 211 (4th Cir. 2002). “The actual motivation for the [local government’s] actions [is] irrelevant.” *Pulte Homes Corp. v. Montgomery Cty.*, 909 F.3d 685, 693 (4th Cir. 2018) (alterations in original) (citations omitted). “[A] government entity ‘need not actually articulate at any time the purpose or

dismiss the claim at that time, however, “since neither the State nor Federal Defendants presented any arguments as to how their actions rationally related to a legitimate State purpose.” *Id.* at 46. The Court indicated, however, that dismissal of the remnant of the Equal Protection claim would be forthcoming if and when the State Defendants presented arguments explaining the legitimate governmental purpose for their actions. *Id.*

Governor McMaster and Director Leach previously enumerated legitimate governmental purposes supporting their actions, *see* ECF No. 57 at 26–27, which are the same actions giving rise to Plaintiffs’ Equal Protection claim based on sexual orientation. Accordingly, the State Defendants ask the Court to dismiss the Equal Protection claim based on sexual orientation discrimination for the same reason the Court dismissed the Equal Protection claim based on religion. Even assuming Plaintiffs had experienced any disparate treatment on the basis of their sexual orientation or same-sex marriage (which the facts alleged in the Complaint do not demonstrate), and even assuming the State Defendants had authorized, permitted, or allowed third parties to engage in such disparate treatment on those bases (which they did not), the State Defendants’ actions were rationally related to legitimate government purposes. Although there are numerous legitimate government purposes underlying their challenged actions,<sup>17</sup> for brevity’s sake, the State Defendants assert only two here, both of which courts (including this one) have held are legitimate government interests.

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rationale supporting its classification,’ and it is not required to produce evidence showing the rationality of its classification.” *Id.* (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). Rather, the actions “must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for” the actions. *Id.* (citation and internal quotation marks omitted).

<sup>17</sup> These other purposes are enumerated and described in Governor McMaster’s Motion to Dismiss (ECF No. 57) at 26–27, and are incorporated by reference herein.

First, the Governor’s Executive Order and waiver request and SCDSS’s issuance of a CPA license to Miracle Hill had the purpose of increasing community support and options for foster child placement by maximizing the number and diversity of CPAs.<sup>18</sup> *Lipscomb ex rel. DeFehr v. Simmons*, 962 F.2d 1374, 1380 (9th Cir. 1992) (en banc) (a state has a “legitimate purpose of maximizing the level of benefits available to all the children in the foster care program”); *see also* ECF No. 81 at 44.

Second, the purpose of the State Defendants’ actions challenged in this suit was to avoid forcing CPAs to renounce their religious beliefs to participate in a generally available state program, which would have violated their free-exercise rights. *See Fulton*, 141 S. Ct. at 1882; *Trinity Lutheran*, 137 S. Ct. at 2022 (“To condition the availability of benefits upon a recipient’s willingness to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties.” (cleaned up) (citations omitted); *see also Massachusetts v. U.S. Dep’t of Health & Human Servs.*, No. 17-11930-NMG, 2021 WL 185243 at \*10 (D. Mass. Jan. 15, 2021) (“The Supreme Court has indicated . . . that the accommodation of sincerely held religious and moral beliefs is an important government interest.” (citing *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987))).

Both of the State Defendants’ proffered purposes for their challenged actions have been recognized as legitimate government interests. Because under rational basis review the government need only set forth “any reasonably conceivable state of facts that could provide a rational basis for” the actions to survive an Equal Protection claim, *Pulte*, 909 F.3d at 693, the Plaintiffs’ Equal Protection claims against Governor McMaster and Director Leach should be dismissed.

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<sup>18</sup> This Court already recognized this was a legitimate government purpose for the challenged actions in a prior Order. *See* ECF No. 81 at 44.

## CONCLUSION

The Supreme Court's unanimous judgment in *Fulton* makes clear that the State Defendants' actions challenged in this suit were constitutionally permissible and constitutionally required; that the relief sought against Governor McMaster and Director Leach in this suit is contrary to and foreclosed by the ruling in *Fulton*; and that the purported disparate treatment and alleged denial of Equal Protection on the basis of sexual orientation, even if plausibly pled, were supported by legitimate government purposes. For these reasons, Plaintiffs have failed to state any claim upon which relief can be granted, and the relief they have requested cannot be awarded by this Court as a matter of law. Accordingly, Governor McMaster and Director Leach, in their official capacities, respectfully request the Court enter judgment on the pleadings and dismiss Plaintiffs' claims against them with prejudice.

Respectfully submitted

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July 15, 2021  
Greenville, South Carolina

*Rogers et al. v. U.S. Dept. of Health and Human Servs., et al.*  
Civil Action No. 6:19-cv-1567-JD

# Exhibit A

**to Governor Henry McMaster's and Director Michael Leach's  
Motion for Judgment on the Pleadings**

Letter from Governor McMaster to Steven Wagner,  
HHS Acting Assistant Secretary (Feb. 27, 2018)



HENRY McMASTER  
GOVERNOR

February 27, 2018

The Honorable Steven Wagner  
Acting Assistant Secretary  
Administration for Children and Families  
U.S. Department of Health and Human Services  
330 C Street, SW  
Washington, D.C. 20201

Dear Acting Assistant Secretary Wagner:

South Carolina has more than 4,000 children in foster care, and we are thankful for all the wonderful Child Placing Agencies (“CPAs”) that assist in recruiting foster families to serve these children. Today I write specifically on behalf of South Carolina’s faith-based organizations that are called to serve and fill the crucial role of CPAs.

Title IV-E of the Social Security Act authorizes the Department of Health and Human Services (“Department”) to provide states with funding to assist in caring for children placed in foster family homes. In South Carolina, the Department directs these funds to our Department of Social Services (“DSS”). In turn, DSS contracts with both secular and faith-based CPAs to fulfill grant services. Our faith-based CPAs are essential as our State needs more CPAs to recruit more families. Faith-based organizations have contracted with various government entities for years to serve vulnerable populations, such as contracting with faith-based hospitals provide Medicaid and Medicare funding.

All CPAs follow the requirements of Title IV-E, which mandates that CPAs may not deny a person the right to become an adoptive or foster parent on the basis of “race, color, or national origin.” 42 U.S.C. § 671(a)(18). Effective January 11, 2017, the Department attempted to expand the law, adding two new subsections to an existing federal regulation. See 45 C.F.R. § 75.300(c), (d). However, Title IV-E already contains a statutory non-discrimination requirement. The Department cannot lawfully expand such statutory provisions through regulations, as a regulation must *implement* the statutory scheme, not *alter* or *amend* it.

The Honorable Steven Wagner

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Moreover, the new regulatory subsections effectively require CPAs to abandon their religious beliefs or forgo the available public licensure and funding, which violates the constitutional rights of faith-based organizations. A regulation used to limit the free exercise of faith-based providers violates the Religious Freedom Restoration Act (“RFRA”). The purpose of RFRA is to ensure that the government cannot substantially burden the free exercise of religion, such as by pressuring an entity to abandon its religious convictions in order to comply with governmental regulations.

The Supreme Court has made clear that that faith-based entities may contract with the government without having to abandon their sincerely religious beliefs. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Supreme Court held that the state policy of denying a “qualified religious entity a public benefit solely because of its religious character . . . goes too far” and violates the Establishment Clause. Upholding the new regulations would have the same effect, forcing a religious organization to choose between the tenets of its faith or applying for a CPA license to serve the children of South Carolina.

South Carolina needs to continue growing our CPAs, not to prevent them from serving our State’s children. In fact, one faith-based CPA, Miracle Hill, is our State’s largest provider of foster families for Level I foster children, recruiting 15% of the State’s foster families. Therefore, on behalf of South Carolina and faith-based organizations like Miracle Hill, I ask that the Department provide a deviation or waiver from its current policy to recoup grant funds from DSS if the Department determines the new regulations are violated by any DSS CPA contracts due to religiously held beliefs. Faith-based CPAs should be allowed to hold their sincerely held religious beliefs and be licensed to recruit foster parents for our foster children.

I look forward to hearing from you on this very important issue.

Yours very truly,



Henry McMaster

*Rogers et al. v. U.S. Dept. of Health and Human Servs., et al.*  
Civil Action No. 6:19-cv-1567-JD

# Exhibit B

**to Governor Henry McMaster's and Director Michael Leach's  
Motion for Judgment on the Pleadings**

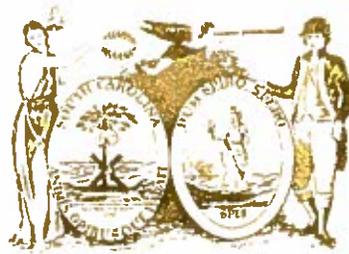
Executive Order No. 2018-12 (Mar. 13, 2018)

State of South Carolina  
Executive Department

FILED

MAR 13 2018

Mark Hammond  
SECRETARY OF STATE



Office of the Governor

EXECUTIVE ORDER NO. 2018-12

**WHEREAS**, government at any level should not and shall not penalize religious activity by denying any person or organization an equal share of the rights, benefits, and privileges enjoyed by other individuals or organizations solely on account of one's religious identity and sincerely held beliefs; and

**WHEREAS**, faith-based organizations may retain their religious character and participate in government programs, provided that public funds are not used to directly subsidize or support religious worship activities; and

**WHEREAS**, the foregoing rights are guaranteed by, *inter alia*, the First Amendment to the United States Constitution and article I, section 2 of the South Carolina Constitution, both of which provide that there shall be no laws prohibiting the free exercise of religion, abridging the freedom of speech, or inhibiting the corresponding right to associate with others; and

**WHEREAS**, the rights of faith-based organizations to exercise religious beliefs while participating in government are also protected by the South Carolina Religious Freedom Act of 1999 ("RFA"), codified in sections 1-32-10 through -60 of the South Carolina Code of Laws, which provides, in relevant part, that "[t]he State may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability," unless the burden furthers a compelling state interest and is applied in the least restrictive means of furthering that interest; and

**WHEREAS**, pursuant to article IV, section 15 of the South Carolina Constitution, the Governor "shall take care that the laws be faithfully executed," which includes ensuring the free exercise of religion as guaranteed by the South Carolina Constitution and upholding religious liberty under the RFA; and

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**WHEREAS**, the licensing and participation of faith-based organizations in South Carolina's foster-care system is a long-standing and constitutionally permissible practice; and

**WHEREAS**, the South Carolina Department of Social Services ("DSS"), which is part of the Governor's Cabinet, oversees the State's foster-care program and, as such, licenses Child Placing Agencies ("CPAs"); and

**WHEREAS**, pursuant to section 114-550 of the South Carolina Code of Regulations, CPAs are defined, in pertinent part, as "any person or entity who holds legal or physical custody of a child for the purpose of placement for foster care or adoption or a private placement and . . . retain[s] their own system of foster homes"; and

**WHEREAS**, sections 114-4910 through -4980 of the South Carolina Code of Regulations govern the licensing and administration of CPAs; and

**WHEREAS**, CPAs may be secular or non-secular and are separate private, non-governmental entities that recruit, retain, and support current and prospective foster-care families in South Carolina, thereby fulfilling a crucial need for the State and providing a critical service to the children of South Carolina; and

**WHEREAS**, DSS licenses many CPAs and provides a variety of CPA options from which foster parents may choose; and

**WHEREAS**, the State has no compelling interest in limiting faith-based organizations' participation as CPAs; and

**WHEREAS**, faith-based CPAs associate foster parents and homes who share the same faith and should not be asked to compromise sincerely held religious beliefs in recruiting, training, and retaining foster parents; and

**WHEREAS**, separate and apart from the association of foster parents by CPAs, under federal and state law, CPAs must assist *any children in foster care* without regard to their religious beliefs; and

**WHEREAS**, to the extent DSS receives funding from the United States Department of Health and Human Services ("DHHS") or otherwise participates in the Federal Foster Care Program, the undersigned has requested that DHHS not exclude faith-based CPAs and grant DSS a formal deviation from DHHS policy in recognition of the foregoing rights and considerations and in accordance with the Religious Freedom Restoration Act of 1993 ("RFRA"), codified as amended at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4; and

**WHEREAS**, religious observers and organizations should not be required to sacrifice the tenets of their faith to serve the children of South Carolina, particularly where, as here, doing so would not serve or further any identifiable or compelling state interest.

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Page 3  
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**NOW, THEREFORE**, by virtue of the authority vested in me as Governor of the State of South Carolina and pursuant to the Constitution and Laws of this State and the powers conferred upon me therein, to the fullest extent permitted by state and federal law, I direct that DSS shall not deny licensure to faith-based CPAs solely on account of their religious identity or sincerely held religious beliefs. Further, I hereby direct DSS to review and revise its policies and manuals in accordance with this Order and ensure that DSS does not directly or indirectly penalize religious identity or activity in applying sections 114-550 or 114-4910 through -4980 of the South Carolina Code of Regulations with regard to Licensure for Foster Care.

In furtherance of the foregoing rights, principles, and considerations, all Cabinet agencies, including all boards and commissions that are part of, comprised within, or under the jurisdiction of a Cabinet agency, are hereby directed to review their policies, procedures, and regulations to ensure that the same do not directly or indirectly penalize religious activity by denying any person or organization an equal share of the rights, benefits, and privileges enjoyed by other individuals or organizations solely on account of religious identity or beliefs. It is further advised that executive agencies not in the undersigned's Cabinet or otherwise subject to the undersigned's direct authority shall likewise act in accordance with this Order and the foregoing directives.

This Order is effective immediately.



GIVEN UNDER MY HAND AND THE GREAT SEAL OF THE STATE OF SOUTH CAROLINA, THIS 13th DAY OF MARCH, 2018.

Handwritten signature of Henry McMaster in black ink.

**HENRY MCMASTER**  
Governor

ATTEST:  
Handwritten signature of Mark Hammond in blue ink.

**MARK HAMMOND**  
Secretary of State

*Rogers et al. v. U.S. Dept. of Health and Human Servs., et al.*  
Civil Action No. 6:19-cv-1567-JD

# Exhibit C

**to Governor Henry McMaster's and Director Michael Leach's  
Motion for Judgment on the Pleadings**

Letter from Steven Wagner, Principal Deputy Assistant Sec'y, U.S. Dep't of  
Health & Human Servs., to Governor Henry McMaster (Jan. 23, 2019)



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.

Governor Henry McMaster  
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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 202.205.7747.

Sincerely,

A handwritten signature in blue ink that reads "Steven Wagner". The signature is stylized with a long horizontal line extending to the right.

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.