

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FATMA MAROUF, ET AL.,)	
)	
Plaintiffs,)	
)	CV No. 18-378
vs.)	Washington, D.C.
)	November 30, 2018
ALEX M. AZAR, II, ET AL.,)	10:00 a.m.
)	
Defendants.)	
)	

TRANSCRIPT OF ORAL ARGUMENT PROCEEDINGS
BEFORE THE HONORABLE AMIT P. MEHTA
UNITED STATES DISTRICT JUDGE

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1 PROCEEDINGS

2 DEPUTY CLERK: All rise. The Honorable Amit P.
3 Mehta presiding. Please be seated and come to order.

4 THE COURT: Good morning. Please be seated,
5 everyone.

6 DEPUTY CLERK: Good morning. We are here for
7 civil matter 18-378, Fatma Marouf, et al., versus Alex Azar,
8 II, et al.

9 Counsel, please approach the lectern and identify
10 yourselves for the record.

11 MS. GLIKSBERG: Jamie Glikberg on behalf of
12 plaintiffs from Lambda Legal.

13 I'm here with co-counsel Hogan Lovells, Ken Choe;
14 and with Lambda Legal, Camilla Taylor.

15 THE COURT: Good morning.
16 Ms. Glikberg, will you be arguing?

17 MS. GLIKSBERG: Yes.

18 THE COURT: Okay. Thank you.

19 MR. RAIMER: I'm David Raimer. I'm here with
20 co-counsel, Leon DeJulius. We represent U.S. Conference of
21 Catholic Bishops.

22 THE COURT: Mr. Raimer, good morning.

23 MR. POWERS: Jim Powers, Your Honor, from the
24 Department of Justice on behalf of the federal defendants.

25 With me at counsel table is Michelle Bennett, also

1 from the Department of Justice on behalf of the federal
2 defendants.

3 THE COURT: All right. Good morning to everyone.

4 All right. So we're here to hear argument on the
5 motion to dismiss, motions to dismiss that are pending.

6 So why don't we begin with the government and
7 we'll go from there.

8 MR. POWERS: Good morning, Your Honor. May it
9 please the Court. Jim Powers on behalf of the
10 United States.

11 This case should be dismissed at the outset
12 because the plaintiffs lack standing to bring it against the
13 government; therefore, the Court lacks jurisdiction to hear
14 it.

15 The plaintiffs have asserted two sets of claims
16 based on different theories of standing.

17 There's a broad Establishment Clause claim
18 asserted on a Taxpayer Standing theory.

19 Then there's a second narrower claim regarding an
20 alleged -- series of claims regarding an alleged denial of
21 opportunity by one of USCCB's subgrantees, Catholic
22 Charities of Fort Worth.

23 COURT REPORTER: You need to slow down.

24 MR. POWERS: Fair enough.

25 Neither ground for standing suffices.

1 Now, I want to begin with the Taxpayer Standing
2 issue, if I may.

3 THE COURT: Can I actually take you in reverse
4 order --

5 MR. POWERS: Sure.

6 THE COURT: -- on the individual standing
7 question?

8 Let me ask the following, which is: Is it the
9 Department of Health and Human Services' policy or position
10 that same-sex couples are ineligible to serve as foster
11 parents under these programs?

12 MR. POWERS: There is no allegation in the
13 complaint of any sort of policy like that.

14 THE COURT: Well, I'm asking whether there is.

15 MR. POWERS: I'm not aware of any such policy.

16 THE COURT: Okay.

17 MR. POWERS: And so I think that --

18 THE COURT: So, just to be clear, the agency's
19 position is that the plaintiffs are eligible -- well, let me
20 put it this way: They're not disqualified by virtue of
21 being a same-sex couple. Is that the agency's position?

22 MR. RAIMER: There is no agency policy that I'm
23 aware of or that's been alleged in the complaint that would
24 disqualify the plaintiffs on that basis.

25 THE COURT: Okay.

1 Well, I guess I'm not asking you to qualify your
2 answer with what's in the complaint or not in the complaint,
3 because --

4 MR. RAIMER: Right.

5 THE COURT: -- it is, in some sense, critical at
6 understanding whether there's standing here.

7 If the agency policy is that same-sex couples may
8 not participate in the program, it seems to me that that
9 provides a different set of -- just different circumstance
10 than if that's not the case.

11 MR. RAIMER: Well, I don't believe that's the
12 agency's policy.

13 And, again, at this stage of the proceedings, the
14 plaintiffs have alleged nothing to indicate that it's the
15 agency's policy either.

16 THE COURT: Okay.

17 And so if that's the case, then I guess the second
18 question I have is: Is, in your view, the agency's view, is
19 Catholic Charities violating any rule, regulation, condition
20 of the grant by -- and I don't mean this term pejoratively,
21 but discriminating against the plaintiffs because they are a
22 same-sex couple?

23 MR. POWERS: I don't think I can get ahead of the
24 facts in the case or speculate about -- or not speculate --

25 THE COURT: Wouldn't that be important?

1 The reason I ask is you, very rightly, cited the
2 *Animal Legal Defense Fund* case, the en banc decision from
3 the Circuit.

4 And it seems to me that this has some parallels to
5 that in the following sense: If what they are asserting is
6 that the agency does not have in place a rule to ensure
7 equal treatment of same-sex couples, it seems to me quite
8 analogous to the situation in that case where the allegation
9 was that the agency had adopted regulations that were
10 inconsistent with the law.

11 Alternatively, the same sort of theory was put
12 forward there, which is that the zoos were conforming with
13 the regulations as have been adopted. And if that was the
14 case, then there was causation and redressability there.

15 And so that's why I asked those two first
16 questions right out of the box, because I'm trying to figure
17 out whether anything they're doing is violative or
18 authorized by the agency's policies and rules and the terms
19 of the grant.

20 MR. POWERS: Well, I think it is different than --
21 entirely than the cases like the *Animal Legal Defense Fund*
22 case, where there was a rule in place that authorized the
23 conduct that was allegedly unlawful.

24 THE COURT: So why does that matter?

25 In other words, here you have, perhaps, not a rule

1 but you have a constitutional principle.

2 And at this stage, because you're -- we're only
3 challenging standing, I have to assume that they will
4 prevail on the merits, right?

5 MR. POWERS: Right.

6 THE COURT: So I have to assume that they will
7 make it out either in an Establishment Clause violation or
8 an Equal Protection Clause violation.

9 So if that's the case, then it sort of begs the
10 question in my mind as to why there needs to be a specific
11 rule.

12 If the agency is facilitating or tacitly
13 authorizing that kind of conduct by a grantee that violates
14 the Constitution, why isn't that enough basis for standing?

15 MR. POWERS: Well, I think -- you know,
16 I don't think there's anything contemplated in the case law,
17 this concept of tacit authorization, as Your Honor put it.

18 I think that the case law, in the context of these
19 government-authorization cases, there's actually a rule or a
20 guidance or something that actually authorizes the conduct
21 that would otherwise be unlawful, as the plaintiffs have
22 shown.

23 THE COURT: So you mean to say -- let's take a
24 different hypothetical.

25 Say one of your grantees' position is that,

1 we believe children should only be placed with Latino
2 families, or at least Latino immigrant children should only
3 be placed with Latino families, and, therefore, any Asian
4 families who come forward and want to be foster parents,
5 we will not place children with them. The agency knows
6 about it.

7 You mean to tell me that that could go on without
8 any redress because foster families or Asian parents who
9 were denied foster placement would lack standing?

10 MR. POWERS: Well, I certainly think that the
11 agency would have full authority to police its grantees, as
12 it always does.

13 THE COURT: Isn't that what they're asking you to
14 do?

15 MR. POWERS: Well, I don't think, though, that
16 that creates a basis for redressability in the Federal
17 Courts.

18 There's a difference between what may or may not
19 be a violation of law that the government can take account
20 of in its own internal operations.

21 THE COURT: Why couldn't I direct the agency to --
22 I sort of have two thoughts; one is sort of a maximalist
23 relief.

24 And it's not clear to me what their relief is, and
25 I need to ask them this. But maximalist relief would be:

1 The agency must run the program in such a way that no
2 grantee discriminates against same-sex couples, right? That
3 could be an order. And the agency would then need to decide
4 how it was going to proceed.

5 But what it meant is -- what it would then mean is
6 that these plaintiffs, who wanted to participate in a
7 program, would be assured that no grantee would deny them
8 placement, right? That could be the maximalist relief.

9 A more minimal relief could be, it seems to me, to
10 direct the agency to ensure that there are alternatives,
11 alternative organizations or alternative means by which
12 these folks can receive a placement that doesn't necessarily
13 impinge upon the honestly held beliefs of Catholic Charities
14 and its subgrantees.

15 So why aren't those two forms of relief the kind
16 of relief that would remedy the harm they've claimed?

17 MR. POWERS: Well, I think, to begin, the
18 maximalist relief that Your Honor proposes, only the
19 Taxpayer Standing theory would, I think, provide a basis for
20 the Court to go down that road.

21 Again, this -- the individual plaintiffs have only
22 asserted claims in regard to a particular episode involving
23 Catholic Charities of Fort Worth, subgrantee of USCCB.

24 That would not provide a basis for those
25 plaintiffs to challenge the manner in which grant monies are

1 being expended across the country by subgrantees and by
2 USCCB.

3 THE COURT: Right.

4 But we know -- okay. Maybe.

5 Because I mean, we do know that Catholic Charities
6 is a substantial subgrantee of the agency. I've looked at
7 the report and it's in the -- over \$2 million, at least in
8 2014, and the number may be bigger now.

9 MR. POWERS: It is certainly substantial.

10 But, you know, I do think that there's a number of
11 locations where USCCB provides services, where these
12 plaintiffs would have no relationship to those subgrantees
13 or to USCCB's activities in those locations.

14 THE COURT: Well, here's the question -- well,
15 all right.

16 Address the second, narrower one.

17 There's a part of me that agrees that the
18 maximalist approach, why take that when there's something
19 more reasonable, which is to direct the agency to say,
20 you know what, you've got -- I've looked at your report, and
21 you have multiple -- I mean, at least maybe 18 or so
22 grantees. They operate in different areas. Some of them
23 operate in Texas. You've got at least two in Houston or
24 three in Houston. Two in Dallas. One in Austin. Why can't
25 their desire to be foster parents be facilitated through

1 those grantees? And why couldn't I direct the agency to
2 facilitate, at least their consideration as foster parents,
3 through those means, or, even alternatively, through the
4 agency itself?

5 MR. POWERS: I understand.

6 So I think that there would be no legal basis.
7 Equity follows the law, and there would be no legal basis to
8 order the government to engage with any particular grantee
9 or to provide services to the beneficiaries of these
10 programs, the unaccompanied youths, in a particular manner.

11 I will note for the Court that the government has
12 identified a potential additional grantee in the Dallas-Fort
13 Worth area to provide long-term foster care services.

14 THE COURT: So if you did that, and this was going
15 to be my leading up to, which is that: If the agency does
16 that, then the question is, why are we here?

17 And it may be that they have a desire to take on
18 the bigger challenge of the way the agency is running the
19 program in its entirety, and that's the Taxpayer Standing
20 issue.

21 But leave that to the side. If the agency does
22 exactly what you've just proposed, which is to find an
23 alternative grantee through which foster placement can be
24 made, doesn't that resolve their claim, at least insofar as
25 the individual standing issue goes?

1 MR. POWERS: I think, you know, certainly, we'd
2 need to look at the facts on the ground.

3 But the nature of this complaint, it seeks an
4 opportunity to be a foster parent to one of these
5 unaccompanied youths, and so it certainly could be the case
6 that that would resolve or moot those claims.

7 THE COURT: So is that something the agency is
8 prepared to do?

9 In other words, could I say, Agency, let me know
10 in two weeks whether you've done that, in which case at
11 least that portion of the complaint would be mooted out,
12 arguably?

13 MR. POWERS: I think there is mutual interest
14 between the government and the potential grantee. You know,
15 we're still in a pre-decisional posture, and so that process
16 needs to play out.

17 It's my understanding that it could finalize in
18 early 2019, but I can't get ahead of the facts.

19 THE COURT: I'm sorry, what could finalize in
20 early 2019?

21 MR. POWERS: An arrangement between the government
22 and this additional --

23 THE COURT: Oh, I see.

24 MR. POWERS: -- grantee.

25 THE COURT: This is a new grantee, you're saying,

1 not an existing grantee.

2 MR. POWERS: Would be -- it's an existing grantee
3 that would be providing additional services in that metro
4 area.

5 THE COURT: I see.

6 MR. POWERS: But there still is a paperwork
7 process and a decision process that needs to occur before
8 that can finalize.

9 And so I can't get ahead of --

10 THE COURT: Understood.

11 MR. POWERS: -- the agency's process.

12 THE COURT: I thought you were suggesting that
13 there's a pre-existing grantee that has those services
14 available.

15 Let me ask you another question, which is: In
16 terms of how the program operates, does this couple, by
17 virtue of their being in Fort Worth or in the Fort Worth
18 area, are they only -- can they only be granted foster
19 placement through a Fort Worth based grantee, or could you
20 turn to a grantee in some other location to assist them with
21 foster placement?

22 MR. POWERS: I think that depends on the scope of
23 that grantee's ability to work with families.

24 So I don't think the -- now, I think that --
25 again, the plaintiffs haven't alleged any alternatives that

1 they've sought out or anything like that. But I think that
2 that is sort of bounded by the operations for that
3 particular grantee, and so I'm not aware of any current
4 other options in the metro area where the plaintiffs reside.

5 And I think, again, though, that -- you know,
6 I think this all points to the fact that this -- the
7 individual plaintiffs' claims are not sort of -- there's not
8 a traceability of redressability nexus there, because those
9 decisions are made by individual grantees; the government
10 doesn't control them.

11 THE COURT: So I guess that I don't understand, to
12 be honest, in the sense that, yes, you're right, you don't
13 control their decision-making, you don't control their
14 religious beliefs; on the other hand, it should come as no
15 surprise that if you are going to award grants to an
16 organization that has the religious beliefs that it does,
17 that it will have certain consequences in terms of
18 eligibility of people who that charity does not believe,
19 based on their religious beliefs, ought not to be raising
20 children as a married couple.

21 So I mean, the government can't just stick its
22 head in the sand on this one, can it? I mean, that's
23 especially, it seems like, what you're saying, which is
24 that, as long as we allow the discrimination to happen at
25 the subgrantee or grantee level, well, then, the government

1 is absolved of any responsibility for doing anything, and
2 that just can't be right.

3 MR. POWERS: I don't know if I would characterize
4 it as sticking one's head in the sand. But I think that the
5 result we've set forth in the papers is bound by the
6 D.C. Circuit's reasoning in *Freedom Republicans*.

7 THE COURT: Well, that's a different case.

8 And isn't that case different precisely because
9 there, the relief could only be afforded by the Republican
10 Party; in other words, it's only the Republican Party that
11 can either afford the relief or not afford the relief and
12 cure the injury.

13 That's not what we have here, right? The agency
14 can take steps to provide what they're asking for, either
15 through other grantees or through the agency itself.

16 Now -- and this is a question I have for them,
17 which is: If you are insisting on relief through Catholic
18 Charities and its subgrantee, then I think you're right,
19 this is a lot closer to -- what's the name of the case --
20 the *Freedom Republicans* case -- because there, you have
21 one -- sort of only one outlet, and either that outlet does
22 what is being asked or not.

23 That's not, at least as I understand, the
24 situation here.

25 MR. POWERS: Well, I think, to begin, we take the

1 complaint as it's pled.

2 The relief that's requested in the
3 prayer-for-relief section asks for the government to be --
4 or the plaintiffs to be able to seek relief through USCCB
5 and its subgrantees. So I think that's one aspect of it.

6 But I think also, the issue is that what can the
7 Court order the government to do, what kind of relief can
8 the Court fashion?

9 And there's no -- these programs, the government
10 has ample discretion as to how to administrator services to
11 these unaccompanied youths, what providers to engage with --

12 THE COURT: But you can't do that in violation of
13 a constitutional principle.

14 I mean, you're always bounded by law.

15 MR. POWERS: That's true, Your Honor.

16 And if the Court were to order the government --
17 if the Court had deemed that some aspect of this was
18 unlawful and ordered the government to seize the conduct, it
19 would leave the plaintiffs, these individual plaintiffs no
20 closer to the relief they're seeking, which is the
21 opportunity that they're pursuing.

22 THE COURT: So let me go back to where I was
23 originally, which is -- and I don't understand this.

24 I mean, just take this out of the context of the
25 same-sex couple; say, again, you had an organization that

1 said it was not going to place children with Asian parents.
2 Why wouldn't an appropriate form of relief be an -- a form
3 of relief be an injunction against the agency to not provide
4 any grant money for this program against an organization
5 that does not commit to providing equal opportunity,
6 irrespective of nationality?

7 MR. POWERS: Well, I think that, again, the agency
8 would certainly have authority to take action in that
9 instance.

10 I'm sure Congress would also take action in that
11 sort of instance, and that's -- the fact that an Article III
12 court wouldn't necessarily have jurisdiction to consider the
13 issue does not --

14 THE COURT: Why don't I -- I don't understand.
15 Why don't I, A, have the jurisdiction -- I have the
16 jurisdiction.

17 Well, let me put it this way: Why don't I have
18 the authority to grant that type of injunction?

19 MR. POWERS: I --

20 THE COURT: Why can't I enjoin the agency from
21 implementing a program in a manner that is unconstitutional?

22 MR. POWERS: So I think that, again, there needs
23 to be a relationship between the particular injury that's
24 asserted.

25 Now, of course, we're dealing in hypotheticals

1 here. This is obviously a terrible scenario that Your Honor
2 is setting forth but...

3 THE COURT: Not any more terrible than the one
4 they've been facing.

5 MR. POWERS: Again, I think that the issue is
6 just: What is the nature of the injury that's asserted,
7 what is the kind of relief that the Court could issue, and
8 how would it redress the injury that is asserted?

9 And if the Court were to order the government to
10 cease funding grants to USCCB or to cease funding grants
11 that flow to CCFW, it wouldn't lead any closer to redressing
12 the plaintiffs' injury.

13 THE COURT: Why?

14 MR. POWERS: Because, again, it's in the
15 government's discretion whether or not to engage with any
16 particular service provider in any particular location.

17 THE COURT: So then what would the government do?

18 MR. POWERS: Well, I mean --

19 THE COURT: You have a mandate from Congress to
20 establish this program, right?

21 MR. POWERS: Right. We --

22 THE COURT: And we're in agreement that you are
23 mandated by Congress to -- that the program is established
24 and the agency has to carry it out. How it carries it out
25 is discretionary.

1 But you mean to tell me, then, that if I had
2 ordered you to only provide grants to organizations that
3 committed to not discriminating against same-sex couples,
4 the agency wouldn't, then, fill the void in some way?

5 MR. POWERS: Well, I think, you know, it's
6 important --

7 THE COURT: I mean, that's not the kind of
8 speculation I need to engage in, is it?

9 MR. POWERS: I think I should begin first by,
10 again, noting that the agency is considering an additional
11 grantee, potentially in this metro area, for foster care
12 under the UAC program.

13 But regardless, this program doesn't operate in
14 every city in America, it doesn't -- in every kind of
15 service that's rendered to unaccompanied youth in every
16 city.

17 And so the decision about where a particular place
18 is -- those services might be rendered is something that the
19 government evaluates in considering how best to help these
20 populations.

21 THE COURT: But, surely given realities, you're
22 going to have service providers in Texas.

23 MR. POWERS: Certainly, there are likely to be
24 service providers in the state of Texas.

25 And, again, the agency is considering an

1 additional grantee in this metro area.

2 THE COURT: Okay.

3 I asked you all -- I have a -- I can only applaud
4 my interns' efforts in finding the *Lyon* case yesterday as we
5 were preparing for this, the case out of the Eastern
6 District of Michigan in which Judge Borman held essentially
7 that the plaintiffs in that case at least have individual
8 standing based on facts that, with the exception there that
9 the defendants were state actors and not the Federal
10 Government -- or federal actors, seems to be on all fours.

11 So tell me how this case is distinguishable from
12 the decision that was reached in *Lyon*, at least as to the
13 individual standing.

14 MR. POWERS: Sure, Your Honor.

15 So I believe that to begin, that case's
16 traceability and redressability analysis was based on a
17 Sixth Circuit case and Sixth Circuit precedent.

18 I do believe the D.C. Circuit precedent imposes a
19 higher burden in cases where the immediate injury was caused
20 by a third party not before the Court.

21 Those cases require a substantial showing that
22 there's a connection and that there's redressability.

23 THE COURT: But that's *Lujan*.

24 I mean, *Lujan* establishes the substantial showing
25 standard. That's not the Sixth Circuit. That's *Lujan*.

1 MR. POWERS: Well, I think that the D.C. Circuit
2 has applied that standard in *Freedom Republicans* and
3 *National Wrestling Coaches Association* and *Renal Physicians*
4 in a way that I think is a higher burden than the one that
5 the Court, in *Dumont*, appears to have applied. So I think
6 that would be the first point.

7 The second point would be that the Court's
8 traceability analysis and, therefore, redressability
9 analysis really turned on the language of the agreements and
10 the Court's inference that there was some kind of
11 governmental encouragement or authorization of the alleged
12 conduct. And here, the plaintiffs have alleged no kind of
13 authorization or encouragement by the government.

14 THE COURT: No. But they have alleged lack of
15 responsiveness, which is the clients, or plaintiffs, called
16 HHS or emailed HHS, there was at least one response by HHS
17 but then radio silence after that.

18 MR. POWERS: And that's exactly what the
19 plaintiffs alleged in the *Freedom Republicans* case; that the
20 FEC was funding the party; that the party was engaging in a
21 delegate allocation method that was allegedly discriminatory
22 towards them; and that the party -- that the FEC was not
23 taking any action to respond to that scenario.

24 But nonetheless, because the -- that underlying
25 action by the party was -- had nothing to do with federal

1 funding, was -- long pre-dated federal funding, there was no
2 traceability shown.

3 And so the fact that the government, arguably, is
4 aware of some belief or something of that nature, I think
5 *Freedom Republicans* shows that that's not enough to show
6 some kind of authorization.

7 THE COURT: Can I just ask one more hypothetical,
8 which is: Could the -- under your view, couldn't HHS only
9 grant monies under this program to Catholic Charities and
10 its subgrantees? And under your theory, they would be
11 immune from suit, essentially. The government could do
12 that, and there would be no plaintiff who would have
13 standing to challenge that decision, at least as you've
14 played it out, right?

15 MR. POWERS: I'm not sure that there would be no
16 plaintiff. Obviously, I can't speak to --

17 THE COURT: Well, who else other than them?
18 They've been denied -- at least according to their
19 allegations, they've been specifically told, we will not
20 place a foster child in your care because you are a same-sex
21 couple.

22 I can't imagine anybody is more, at least
23 factually aggrieved, than these plaintiffs. There's nothing
24 speculative about the reason for which they were denied
25 foster placement.

1 MR. POWERS: I think that the Supreme Court has
2 held repeatedly that the fact that the Court may not be able
3 to envision a particular plaintiff that would have standing
4 is not a reason to find standing in any given case. And
5 so --

6 THE COURT: So the government could essentially
7 create a program that, perhaps while not on its face but in
8 its implementation, discriminates against same-sex couples
9 without any redress for any same-sex couple?

10 MR. POWERS: Again, I think that --

11 THE COURT: And it could only go to Congress to
12 fix that?

13 MR. POWERS: You know, I'm simply asking the Court
14 to apply the binding D.C. Circuit precedent here and the
15 Court -- the Supreme Court's teachings on standing in the
16 *Lujan* case and others, and I think that those cases indicate
17 that in this one before the Court, there is no standing.

18 The fact that we can spit out hypotheticals that
19 could conceivably produce counterintuitive results, the
20 Supreme Court has taught does not provide a basis to find
21 standing in the particular matter pending before this Court.

22 THE COURT: Okay.

23 I stole your thunder about Taxpayer Standing, so
24 go back to that.

25 MR. POWERS: Well, I think on that one, I think

1 the *Dumont* court got it exactly right, which is that the
2 individual plaintiffs, or I should say, all plaintiffs
3 cannot here assert Taxpayer Standing, because that form of
4 relief only applies in a very narrow set of cases that are
5 set forth by the *Flast versus Cohen* case and the *Bowen*
6 *versus Kendrick* case.

7 And there needs to be a close nexus between
8 congressional action under the taxing and spending power and
9 the particular claim that's alleged.

10 THE COURT: So in this case -- I mean, I think
11 *Hein* sort of spoke of it in two terms; one is, there needs
12 to be sort of a congressional mandate and then a
13 congressionally specific appropriation.

14 You have -- I think we've talked about, you've
15 agreed with me that there's a congressional mandate at least
16 in terms of the establishment of the program, right?

17 MR. POWERS: I think there is a mandate for the
18 agency to care for unaccompanied alien children.
19 I don't think that mandate exists in the Refugee Minors
20 program. I think there's just an authorization there.

21 THE COURT: Okay.

22 But your position is that, one, because there's no
23 specific reference to charitable organizations in the
24 congressional act establishing the program. And then, B,
25 there's no specific mention of charitable -- excuse me,

1 religious organizations, I didn't mean charitable, religious
2 organizations in the appropriation -- the appropriations
3 themselves; that that essentially defeats any Taxpayer
4 Standing.

5 MR. POWERS: I think that's the teachings of
6 *In re: Navy Chaplaincy*.

7 In *Hein*, I believe that that does defeat the claim
8 of Taxpayer Standing, because there needs to be that nexus
9 to an actual congressional enactment. That's the logic of
10 *Flast* and as well as the results of *Flast* in *Bowen versus*
11 *Kendrick*.

12 And I think *In re: Navy Chaplaincy* binds the Court
13 here. In that case, there was an allegation that the Navy
14 was operating its chaplaincy program in a discriminatory
15 fashion, in favor of Catholic chaplains.

16 But there was no statute that authorized the Navy
17 to engage in discrimination in favor of Catholic chaplains.
18 There wasn't even a reference to denomination in the
19 statute. And so as a result, the conduct resulted from
20 executive discretion, and that's exactly what's at issue
21 here.

22 And so I believe that as *Dumont* held, the binding
23 precedent forecloses the Taxpayer Standing assertion.

24 And that would -- I think the Court, first of all,
25 would dismiss LGBT Bar Association on that basis; and,

1 second, it would substantially narrow the case as to the
2 individual plaintiffs' claims.

3 THE COURT: Right. They couldn't seek -- well,
4 it would be harder for them to then seek the maximalist
5 relief I was suggesting, which is that essentially, you
6 can't spend taxpayer dollars -- or provide taxpayer dollars
7 to any organization that -- unless an organization commits
8 to not discriminating against same-sex couples.

9 MR. POWERS: Right. There would be no theory of
10 injury that would permit that relief to extend that far.

11 THE COURT: Right.

12 MR. POWERS: And on the nominal damages piece, I'm
13 happy to just stand on the written submission.

14 THE COURT: Okay.

15 MR. POWERS: Otherwise, if I may briefly respond
16 to the plaintiffs at the end.

17 THE COURT: Sure. Of course.

18 MR. POWERS: Thank you, Your Honor.

19 THE COURT: All right. Thank you, Counsel.

20 MR. RAIMER: May it please the Court, David Raimer
21 for Defendant U.S. Conference of Catholic Bishops.

22 I just thought after that back and forth, it might
23 be helpful to take a quick step back and remember how we got
24 here.

25 Congress created a program to fund care for

1 unaccompanied minor children. Plaintiffs have no objection
2 whatsoever to the creation of that program.

3 After Congress created the program, the government
4 defendants decided to set up a grant program, and they
5 decided to award some of those grants to my client, the U.S.
6 Conference of Catholic Bishops, because, as it turns out,
7 the Conference happens to be one of the premier providers of
8 refugee services in the country. And, again, plaintiffs
9 have no objection to federal funds flowing to religious
10 organizations as a general matter.

11 At that point, the Conference decided to issue a
12 subgrant to Catholic Charities at Fort Worth, and it was
13 that entity that is alleged to have caused the injury of
14 which plaintiffs complain, denying their foster care
15 application.

16 So for plaintiffs to have standing here, it has to
17 be fair to say that the government was the cause not only of
18 its own conduct and not only the conduct of its grantee but
19 also the conduct of its grantee's grantee.

20 THE COURT: So does Catholic Charities provide
21 grants to any organization that would provide foster
22 placement for same-sex couples?

23 MR. RAIMER: Are you speaking of the Conference or
24 Catholic Charities? Excuse me. Sorry.

25 THE COURT: You're going to have to forgive me.

1 I mean, whoever the grant recipient is, and I'll
2 get the word, but the grant recipient.

3 MR. RAIMER: Sure.

4 The grant recipient, I'm not aware of that fact,
5 Your Honor.

6 I know that obviously --

7 THE COURT: I mean, it would surprise me if you
8 would.

9 If what you said in the application is that,
10 we will only -- that our program will operate the program to
11 adhere with our religious beliefs, it would surprise me if
12 you were then providing grants to some subgrantees who
13 weren't sort of sharing in those same specifics.

14 MR. RAIMER: Sure.

15 And so what I'll say is that, beliefs on some
16 questions like this and other questions that involve complex
17 moral and credential judgments. There's a different --
18 there can be different applications of those beliefs,
19 depending on which diocese you are in the country.

20 So I can't speak directly to whether or not
21 there's any grantee, subgrantee of the Conference that would
22 do that. But there is a difference -- there's sometimes a
23 difference of opinion on various aspects of Catholic
24 teaching, depending upon what diocese you're in across the
25 country.

1 THE COURT: Do you know the answer to the question
2 I asked government counsel: Are you aware of any
3 regulation, rule, condition of the grant that would prevent
4 discrimination on the basis of services being provided to a
5 same-sex couple versus a heterosexual couple?

6 MR. RAIMER: I'm not -- I don't believe the
7 plaintiffs have alleged that in any way the government has
8 explicitly authorized that sort of conduct.

9 And I think that's important because --

10 THE COURT: No. I know.

11 But that's a different issue.

12 MR. RAIMER: Sure.

13 THE COURT: And yes, I think we all can agree, at
14 least as alleged, and perhaps even as a matter of fact,
15 there's no express authorization.

16 My question is different, which is that:
17 Do you have reason to believe that discriminating against
18 same-sex couples in any way violates a rule, regulation, or
19 condition that governs the grant?

20 MR. RAIMER: The government's never sought, at
21 least that I'm aware of, to enforce any such prohibition
22 against my client.

23 THE COURT: Well, let me ask: Is there an
24 anti-discrimination provision that's a condition of the
25 grant?

1 MR. RAIMER: I'm not aware that there's anything
2 in the explicit grant itself.

3 I believe -- I mean, in their complaint,
4 plaintiffs cite to a couple HHS regulations that they then
5 don't subsequently rely on either as a basis of their claim
6 or as a basis for standing.

7 And I think there's a good reason for that,
8 because if you're pointing to those regulations and saying,
9 the government is required to enforce those regulations
10 against my client, I think you've got a big problem under
11 *Heckler v. Chaney*, because you're essentially trying to get
12 the government to enforce its regulations.

13 And generally enforcement regulations are non- --
14 excuse me, enforcement decisions are non-reviewable. And,
15 again, plaintiffs haven't based any claim -- any one of
16 their merits claims or any of their standing claims on
17 regulations of that sort at all.

18 And I'd submit, Your Honor, you're asking about
19 the *Glickman* case and interplay between any sort of
20 prohibition. There's certainly a line of cases from the
21 D.C. Circuit that says, if the government is authorizing
22 conduct that would otherwise be illegal, there's standing in
23 those sorts of circumstances. Again, plaintiffs haven't
24 made any sort of allegation of that nature here, that's the
25 first point.

1 The next point is, the whole premise of that line
2 of authority is based on the notion that the government
3 authorization somehow changes the conduct of the regulated
4 party.

5 And I'd submit that in this case, where you have
6 an entity operating on the basis of sincerely held religious
7 beliefs, that the legality or the illegality of a particular
8 mode of conduct just doesn't play into the calculus in the
9 same way.

10 So it can't be assumed that simply because
11 something is presumptively illegal, an organization would
12 decline to take that action if it was in accordance with the
13 sincerely held religious beliefs, particularly when this --

14 THE COURT: So --

15 MR. RAIMER: Sorry.

16 THE COURT: No. Go ahead.

17 MR. RAIMER: Particularly when any such order or
18 regulation would have to be read against the backdrop of the
19 Religious Freedom Restoration Act, which generally would
20 give federal grantees the right to act in accordance with
21 their religious beliefs when providing services under
22 federal grants.

23 THE COURT: I mean, you've taken the same position
24 the government has, which is that there's no causation and
25 there's no redressability.

1 MR. RAIMER: Sure.

2 THE COURT: But at least on the redressability
3 prong, why couldn't I afford relief to these plaintiffs in a
4 way that doesn't affect your client at all and direct HHS to
5 provide an alternative means, whether it's through the
6 agency itself or through some other grantee, of making the
7 foster care services available to this couple?

8 MS. GLIKSBERG: Sure.

9 And, Your Honor, anything is possible, Your Honor,
10 but at this stage of the proceedings, the burden is on
11 plaintiff to show there was "little doubt" as to a
12 likelihood of redress.

13 And plaintiffs haven't set forth, really, any
14 avenue of relief that does what you're proposing here. They
15 haven't given any specifics. They haven't given any
16 indication that something is either practically --

17 THE COURT: Well, I mean, I do know that there are
18 at least a dozen different grantees, some of which,
19 according to the last report, actually, sort of tout their
20 work with LBGT refugees.

21 So, I mean, I hear you, but shouldn't I at least
22 give them some discovery before I determine that there's no
23 possibility that the kind of relief I've just discussed
24 would not be available?

25 MR. RAIMER: I mean, again, there was no

1 allegation of that nature in their complaint. And
2 Supreme Court, the D.C. Circuit have been pretty clear that
3 those sorts of allegations have to be included in their
4 complaint, even on standing grounds, for this sort of
5 relief, because, otherwise, the fact -- and even looking at
6 those other refugee organizations, Your Honor, it's
7 speculative that they would be willing to step forward and
8 provide the services requested.

9 THE COURT: So why couldn't the agency do it?
10 Why couldn't I order the agency, say HHS, we
11 understand you have done most of this work through the
12 grantees, but you have to do it yourself.

13 MR. RAIMER: And on that front, Your Honor, again,
14 it's not clear to me that HHS or ORR is set up to do that
15 sort of work in any way, shape, or form.

16 They've -- the congressional statute at issue here
17 authorizes the government to spend funds to enter into
18 private-public partnerships to provide this stuff. So it's
19 not clear to me, just on the face of that, whether
20 they're --

21 THE COURT: They don't have to.

22 MR. RAIMER: Pardon?

23 THE COURT: They don't have to.

24 MR. RAIMER: They don't have to.

25 THE COURT: I mean, HHS could have decided to run

1 this entire program itself, right?

2 I mean, it doesn't require that the agency enter
3 into these private-public partnerships, does it?

4 MR. RAIMER: That, I'm not positive of.

5 I believe that's probably how they have carried it
6 out.

7 THE COURT: Understood. But they're not required
8 to do that.

9 MR. RAIMER: And that's fair.

10 And in that case, it would depend on the specific
11 nature of the relief or the specific nature of Your Honor's
12 relief as to whether that would afford redressability to the
13 particular plaintiffs in this case.

14 And, again, they haven't given us any sort of
15 specifics as to what redress would look like in those
16 circumstances, and it's, again, their burden to show that
17 there's little doubt of the opportunity for redress.

18 But in the abstract there -- again --

19 THE COURT: So is it your view that the government
20 could not have reasonably foreseen your clients' position
21 with respect to same-sex couples, given what the grant
22 application has alleged to have said?

23 MR. RAIMER: The grant application -- I mean, the
24 grant application didn't specify anything --

25 THE COURT: No. I mean --

1 MR. RAIMER: -- on this issue in particular.

2 THE COURT: No.

3 On the other hand, it said, we will conduct the
4 program. These are my words, not theirs.

5 MR. RAIMER: Sure.

6 THE COURT: We will conduct the program in such a
7 way that is consistent with our religious beliefs.

8 MR. RAIMER: Sure.

9 THE COURT: Catholic Church's religious belief is
10 that marriage is meant to be between a man and a woman.
11 They cite to proportions of the website that say, we --
12 children should be placed in a home with a male and a
13 female.

14 I mean, can't -- government can't stick its head
15 in the sand.

16 MR. RAIMER: No, it can't stick its head in the
17 sand, but the D.C. Circuit and the Supreme Court and -- the
18 D.C. Circuit in *Freedom Republicans* and the Supreme Court in
19 *Simon* said the traceability test looks to whether something
20 can be fairly traceable to any encouragement on the part of
21 the government. And there's nothing in the allegations that
22 indicate that the government in any way, shape, or form
23 encouraged.

24 THE COURT: I guess I just find it mystifying that
25 there's relief afforded only if something can be qualified

1 as encouragement as opposed to turning the other way, when
2 it's known that government funds are being used in a
3 discriminatory manner.

4 I mean, I don't think anyone here would be
5 standing up and saying, making these arguments if the
6 discrimination was based upon race or if the discrimination
7 was based upon age.

8 MR. RAIMER: Sure.

9 THE COURT: I just cannot believe that anybody
10 would come in here and say that the government can turn its
11 head and stick its head in the sand if an organization is
12 saying, you know what, it's our sincere religious belief
13 that we're not going to -- that children shouldn't be placed
14 with African-Americans. I just -- it's astounding to me
15 that anybody would take that position, and I'd be surprised
16 if anybody would.

17 MR. RAIMER: And fair enough, Your Honor.

18 But I think there's a distinction there.

19 Like, for example, if the government were to go
20 out and hire the KKK or something like that to provide
21 adoption services, that's a pretty strong indication that
22 the government is actively encouraging discrimination. You
23 don't hire the KKK unless you want them to discriminate.

24 Whereas in this case, the government hired the
25 U.S. Conference of Catholic Bishops, which is, again, one of

1 the premier providers of refugee services in the country.

2 There's simply no similar inference that the
3 government is attempting to encourage discrimination in this
4 case, where you don't have that sort of party that they
5 ended up hiring. So I'd respectfully say there's a
6 distinction there, so -- on the traceability grounds there.

7 And, again, on the redressability grounds, you
8 were talking about the maximalist or minimalist approach.
9 And, Your Honor, obviously, I think it's important to ask
10 plaintiffs what they're requesting.

11 But on the maximalist side, I'd submit that in
12 their briefing, they appear to have essentially abandoned a
13 request for that maximalist form of relief.

14 THE COURT: Or at least said that they're not
15 necessarily seeking it.

16 MR. RAIMER: Not necessarily seeking and then
17 I think they added, not our objective.

18 Because, again, on those certain bases, they
19 appear to concede that if they were to do that, the
20 likely -- they would not only not redress their particular
21 injury but it would also have a negative impact on
22 potentially thousands of refugee children.

23 THE COURT: Right.

24 MR. RAIMER: And there's, again, no guarantee that
25 there is any agency -- it's purely speculative to suggest

1 that there's any agency that would be willing to step
2 forward and fill in the gap for any religious organization
3 that felt compelled to leave the program, because
4 it would be violating their sincerely held religious
5 beliefs.

6 And, again, the only request for relief that they
7 actually propose, they offered no specifics as to what that
8 form of relief looks like.

9 And at least, as far as the Conference is
10 concerned, the specifics, the devil is in the details on all
11 those sort of things, because on anything involving whether
12 or not the Conference could be asked to act in violation of
13 its sincerely held religious beliefs, all of that turns very
14 much on the specifics of any proposal.

15 They haven't provided those specifics; and in that
16 case, they just haven't met their burden to show there's
17 little doubt as to the possibility of -- as to the
18 possibility of redress.

19 THE COURT: Would you agree with me that if there
20 was a way to fashion relief that didn't require your client
21 to make a decision, that this would be a different case than
22 the *Freedom Republicans* case?

23 MR. RAIMER: I think it would be a different case
24 than the *Freedom Republicans* -- I think that's fair.

25 Again, it would very much depend on the specifics

1 of the relief requested.

2 THE COURT: Right.

3 MR. RAIMER: And at this point, we just don't have
4 any indication of what those specifics were.

5 THE COURT: I also don't think they need to, at
6 this juncture, spell out the relief with such specificity
7 that -- I mean, there is some -- we have to sort of take a
8 step back and be practical about this.

9 I mean, they don't have every sense of what is
10 available and what isn't; they're limited in that sense.

11 And so it can't be that their complaint says,
12 well, as a form of relief, we want you to have us go to
13 X particular grantee and have that grantee consider us for
14 placement.

15 I mean, that can't be what they have to do.
16 That's not their burden; it's not that heavy.

17 MR. RAIMER: Yeah.

18 But there is some limit to Your Honor's predictive
19 power.

20 I mean, even in *Freedom Republicans*, in *Simon*,
21 there were potentially millions of dollars at stake in both
22 of those cases that the defendants in those cases would be
23 losing.

24 And the courts, in those circumstances, were
25 unwilling to predict that on potential penalty of losing

1 millions of dollars, those entities still wouldn't act.

2 So there's very much -- there is some burden
3 placed on them to show. Again, it's a relatively high
4 burden when they don't have the --

5 THE COURT: If I -- that may be speculation as to
6 your client, but I don't need to speculate as to what the
7 government would do.

8 In other words, I should -- shouldn't I presume
9 that the government will carry out its mandate from Congress
10 and spend the funds to provide the assistance that they're
11 supposed to provide to unaccompanied minors?

12 MR. RAIMER: It has to provide the services to
13 unaccompanied minors. But it's an open question as to whether
14 those services would be provided in the Dallas-Fort Worth
15 area.

16 As the government pointed out, they're under no
17 obligation to provide services in any particular region of
18 the country. I believe there's something like 20 cities
19 across the country right now that have participants in the
20 URM program at least, which I believe is the program.

21 THE COURT: Right.

22 But there's a lot of them in Texas.

23 MR. RAIMER: I think that's the UAC program.

24 THE COURT: I guess I'm just looking at the list
25 of preferred community program grantees that ORR listed in

1 its 2014 annual report.

2 MR. RAIMER: That's fair.

3 But -- so, again, it's a different question. And
4 the question gets -- the question, for my client at least,
5 turns very much on how much they are or are not involved in
6 any relief Your Honor might order.

7 But that's -- and, again, in this case, there's
8 just no -- plaintiffs haven't met their burden to show that
9 there's little doubt as to a possibility of redress.

10 On the *Lyon* case, to the extent Your Honor's
11 interested in that, another couple distinguishing points.

12 In that case on redressability, plaintiffs there
13 appear to have pled the possibility -- they appeared, again,
14 to plead that there were more -- there would be more
15 alternatives for them. They suggested that there were other
16 providers available. Again, there are no similar providers
17 available that they've alleged in this case.

18 The redressability argument was, again, also based
19 on the premise that the relief requested was cutting off
20 funding, and then whether or not that would have the desired
21 effect. And in this case, again, it's not clear that
22 plaintiffs are requesting that sort of relief.

23 On the traceability question, there, I think
24 another distinction is the fact that you're dealing directly
25 with the grantees in that case, a contract between the state

1 and the adoption providers, where, in this case, you've got
2 another link in the chain of causation, where you've got not
3 just the grantee but the grantee of a grantee.

4 And, again, *Freedom Republicans* says what you need
5 to do is, you need to look to see whether there's some sort
6 of sufficient causal nexus when you're looking about the
7 government's alleged failure to prevent harms caused by
8 other people, and I'd submit that two steps removed simply
9 is too far for a proper traceability analysis. And I think
10 the Court's traceability analysis, in *Freedom Republicans*,
11 is also relevant there.

12 They looked to see, again, whether the conduct was
13 fairly traceable to any government conduct.

14 Again, you had the delegate selection method at
15 issue there. And the Court kind of did a historical
16 analysis. They were like, look, the delegate selection
17 model, that started back in 1912, around 1912, I believe.

18 Federal funding for conventions didn't come into
19 play until the 1970s. So they decided to take a leap of
20 logic to suggest that in any way, shape, or form the Federal
21 Government caused the Republican Party to adopt this
22 particular position.

23 And I think we take a similar leap of logic here
24 to suggest that the Federal Government in any way, shape, or
25 form caused Catholic Charities to adopt its position on

1 marriage.

2 Obviously, the Catholic Church's position on
3 marriage far pre-dates the advent of federal funding for
4 these sorts of programs.

5 THE COURT: Right. Of course.

6 On the other hand, the potential harm only arises
7 because you have the money from the Federal Government.

8 In other words, we're not asking you to change --
9 this only becomes an issue because of Catholic Charities'
10 receipt of a government grant.

11 It's different in the *Freedom Republicans* case
12 because -- it wasn't because they were receiving money that
13 they adopted this particular system.

14 Here, we have a situation which you are carrying
15 out a function precisely because you've received a
16 government grant.

17 MR. RAIMER: And I'd submit that that -- on the
18 basis of their claims here, I would submit that that
19 connection is simply too tenuous, because, again, they don't
20 challenge the fact that Catholic Charities is receiving
21 federal funds. They challenge the specific injury of the
22 denial of their foster care application.

23 And *Freedom Republicans* says you have to look at
24 the nexus between the injury and the government conduct.
25 And, again, there's no allegations in the complaint that the

1 government encouraged the specific conduct at issue here.

2 THE COURT: So can the government -- I go back to
3 this.

4 What is particularly unusual about this case is
5 that they called, they made inquiry, and they said, this has
6 happened to us, do something, help us.

7 MR. RAIMER: And I --

8 THE COURT: That's not good enough?

9 MR. RAIMER: And I'd submit that was the same --

10 THE COURT: It's not 'rah, 'rah, go ahead and do
11 it, but it certainly would seem to me to be a tacit, not,
12 perhaps, an encouragement but tacit authorization if the
13 government turns a blind eye to it.

14 MR. RAIMER: And I'd submit that was the same
15 situation that was the case in *Freedom Republicans*. The
16 same allegations were there. The government didn't take
17 steps to prevent discrimination, and they didn't cut off
18 funding when they found out discrimination was happening.
19 And the D.C. Circuit said that's not a sufficient nexus, and
20 I think that's the same case here.

21 Your Honor, I'm happy to talk about the Taxpayer
22 Standing issue as well or any other issues.

23 THE COURT: I don't have any questions about the
24 Taxpayer Standing.

25 MR. RAIMER: All right. Thank you.

1 THE COURT: Thank you, Counsel.

2 Ms. Glickman, right?

3 MS. GLIKSBERG: Glicksberg.

4 THE COURT: Glicksberg, I'm sorry.

5 MS. GLIKSBERG: Thank you, Your Honor.

6 Would you like me to just get started addressing
7 some of the issues that they raised?

8 THE COURT: Please.

9 MS. GLIKSBERG: Okay.

10 So I'd like to start --

11 THE COURT: Maybe you should start here: Tell me
12 what you are asking for in terms of relief.

13 MS. GLIKSBERG: What we're asking for is simply
14 that grantee -- that any individual be able to walk into a
15 facility and not be able to be discriminated against; that
16 the program be run in a manner that's seamless, that's
17 non-stigmatizing and doesn't demean --

18 THE COURT: Any individual or your clients?

19 MS. GLIKSBERG: It's any --

20 THE COURT: Because if it's any individual, then
21 you need to have Taxpayer Standing, or get me to provide the
22 sort of maximalist relief that I was describing earlier.

23 MS. GLIKSBERG: So we both have individual
24 standing here and Taxpayer Standing.

25 THE COURT: Right.

1 MS. GLIKSBERG: So we're asking both that our
2 clients be able to enter into any facility and not be
3 discriminated against, not stigmatized, and not have any
4 obstacles in front of them that any other individual
5 wouldn't have.

6 THE COURT: So let me be clear.

7 Are you, for example -- would you be -- because
8 there's a portion of your brief that I thought suggested a
9 softening of what you've just said.

10 I mean, you've just said that your clients, or
11 anybody, should be able to walk into any grantee's office
12 and not be discriminated against based upon being a same-sex
13 couple. That's the relief you want me to grant.

14 MS. GLIKSBERG: So, Your Honor, that's currently
15 the way that the system is set up.

16 The way that it's set up right now in Texas is
17 that USCCB is the only grantee that is accepting these
18 applications, that is processing these applications.
19 They're doing the whole screening process and everything.

20 So the way the program is set up right now, the
21 only place for our clients to go was for them to be able to
22 foster a refugee child or unaccompanied child.

23 THE COURT: There are no -- do you know whether
24 there are other grantees in the area or in the state that
25 serve a similar role?

1 MS. GLIKSBERG: Not for this specific program.

2 So the URM program is only administered by two
3 organizations, both religious organizations, one being
4 USCCB. And our clients wanted to be considered for both of
5 those programs.

6 So the current way that the system is working,
7 that the government has set it up, is such that our clients
8 had to walk into the door of URM.

9 THE COURT: What's the other religious
10 organization?

11 MS. GLIKSBERG: The Lutheran --

12 THE COURT: Lutheran Immigration and Refugee
13 Service?

14 MS. GLIKSBERG: Correct.

15 Correct, Your Honor.

16 THE COURT: And do you know whether they place
17 unaccompanied minors in the homes of same-sex couples?

18 MS. GLIKSBERG: I do not know; but to my
19 knowledge, they don't have any facilities in Texas. It's
20 only USCCB who's administering the program right now in
21 Texas.

22 THE COURT: Okay.

23 MS. GLIKSBERG: So the way that this system is
24 currently set up, they would have to walk into their doors.

25 There's no other mechanism that the government has

1 set up for this process -- for this foster process to be
2 able to set up in a way that doesn't discriminate, doesn't
3 stigmatize, and treats all applicants as equals.

4 So as long as there were no obstacles put in front
5 of individuals that weren't put in front of other couples,
6 we wouldn't have any objections. But that's not what's
7 happening here.

8 THE COURT: Would you be satisfied if I ordered
9 HHS to do what USCCB is doing, at least with respect to
10 same-sex couples?

11 MS. GLIKSBERG: Accepting applications and
12 seamlessly processing without discrimination?

13 THE COURT: Yes.

14 MS. GLIKSBERG: Yes.

15 THE COURT: Okay.

16 If it was done through the agency, that wouldn't
17 be a problem?

18 MS. GLIKSBERG: Absolutely.

19 THE COURT: Okay.

20 MS. GLIKSBERG: And that's why this issue is
21 redressable, because it's the government's actions that
22 we're asking to be changed. They're the ones who are
23 responsible for the program. They're the ones who
24 administer -- that are in charge of administering the
25 program. And so they're the ones who need to redress the

1 issues. They have full control.

2 And if they change the policies that they have,
3 the current processes in place that are allowing their
4 grantees, including USCCB, to use a religious-based test to
5 discriminate and determine who can and cannot participate in
6 a program --

7 THE COURT: Do you know -- I'll ask you the same
8 question I asked your colleagues, which is: Are you aware
9 of any regulation, rule, or grant condition?

10 And essentially what I'm thinking of is some sort
11 of anti-discrimination rule or regulation or condition that
12 applies in this case.

13 MS. GLIKSBERG: There are anti-discrimination
14 rules and policies, but they're not being applied.

15 The way that the process is currently set up --

16 THE COURT: When you say "they're not being
17 applied," do you mean they're not being enforced by HHS?

18 MS. GLIKSBERG: Correct.

19 HHS is providing these grants.

20 So it's really not that the policies don't exist
21 but that the processes that are in place right now are
22 violating those policies and are violating the Constitution.

23 Because if -- the way it -- what is happening is
24 that the government is knowingly enabling, authorizing, and
25 ratifying this grant agreement that is explicitly telling

1 them that they would be administering the programs in
2 accordance with Catholic doctrine, Catholic identity, the
3 moral convictions and beliefs of the Church.

4 And that, we all know, like Your Honor stated,
5 based on many different facts that we noted in our
6 complaint, means that they would not be providing services
7 to same-sex couples and would be discriminating on that
8 basis.

9 And, in fact, USCCB concedes in its own brief, in
10 its own moving papers, which it states it doesn't, that it
11 would not be subgranting to any entity that would be
12 violating USCCB's religious beliefs and that would be
13 fostering to same-sex couples.

14 So it actually does have control over what CCFW
15 does. In fact, the one with control is the government
16 itself.

17 THE COURT: Let's say, for instance, USCCB,
18 hypothetically, is the only grantee or the only means
19 through which a foster care adoption -- excuse me, foster
20 care placement could happen. Why isn't that, then, squarely
21 sewed within the *Freedom Republicans* case? Because then I
22 do have to speculate that this grantee is going to change
23 its policies in the way that the Circuit said I can't
24 speculate in *Freedom Republicans*.

25 MS. GLIKSBERG: So *Freedom Republicans* is

1 completely different, which Your Honor recognized before,
2 because, first of all, it's the government's own conduct
3 here that we're challenging.

4 We're not challenging CCFW's conduct. We're
5 challenging the government's own conduct. They're fully
6 responsible for this program.

7 The fact that they chose to give those
8 responsibilities to a grantee doesn't mean that they give
9 away that responsibility of administering the program in
10 adherence with the Constitution.

11 And so they're ultimately responsible, and that
12 means that they're ultimately in control of the remedy.
13 It's their program, so they can redress the harm.

14 In *Freedom Republicans*, they were not in control
15 over the remedy, because discrimination could have continued
16 long after the government changed its policy. That's not
17 the case here, which Your Honor recognized before.

18 If the government decides that its grant -- that
19 there cannot be discrimination on the basis of religious
20 beliefs that would prevent equal access to the programs to
21 all individuals and all members of the public, then that is
22 the remedy, it's resolved, there can be no discrimination
23 against our clients. They'd be able to seamlessly apply,
24 not be discriminated against or be demeaned for being turned
25 away and being treated as inferior.

1 THE COURT: So the relief you're seeking
2 contemplates either one of two things, it seems to me;
3 either, A, that the opportunity for placement would be
4 available through either the agency or a grantee that isn't
5 USCCB; or that the government would have to discontinue
6 providing grants to USCCB altogether and figure out some
7 other way to implement the program, right?

8 I mean, it's either one or the other, correct?

9 MS. GLIKSBERG: Correct.

10 We're not asking that the government remove all of
11 its funding to USCCB.

12 THE COURT: That would be the consequence.

13 I mean, if what you've told me is accurate, which
14 is that only USCCB can provide foster care placement in the
15 Dallas-Fort Worth area, absent some change in circumstance
16 or some modification or adjustment by the government, it's
17 all or nothing.

18 MS. GLIKSBERG: So Your Honor was correct when you
19 stated that that is purely speculative at this stage of the
20 litigation, because what we know the remedy is is merely
21 putting a stop to the discriminatory policy.

22 As long as the government stops enabling,
23 authorizing, and ratifying the use of a religious-based test
24 that is discriminating and preventing equal access to
25 government programs, that is the remedy.

1 And the Third Circuit in *Hassan* actually said
2 that. They said, redressability is "easily established."

3 Whereas here, the alleged injury arises from an
4 identifiable discriminatory policy.

5 And then it further explains that, while we may
6 not be able to predict "the exact nature of the possible
7 relief without a full development of the facts" -- so
8 without discovery here -- "an order enjoining the policy
9 would redress the injury."

10 So we don't have to, at this point in the
11 litigation, determine exactly what mechanism would be in
12 place in order to redress the harms. All we have to
13 determine is the fact that we know that ending this
14 discriminatory process would redress the harms.

15 And it would redress all of the -- it would
16 provide relief for all of the injuries that occurred here.
17 There are -- there's not one injury that wouldn't be
18 provided relief if the government simply stopped allowing
19 the use of a discriminatory religious-based test.

20 And just to address a few other issues that were
21 brought up regarding redressability.

22 First of all, the claim was made that somehow, the
23 government cannot -- that although they have the obligation,
24 they recognize, to police the conduct of its grantees and
25 can take corrective action as necessary, that somehow there

1 wouldn't be a remedy here.

2 But that's actually incorrect, because the remedy
3 is the change in the federal policy.

4 So if the corrective action here is all the
5 government has to do is change that policy --

6 THE COURT: Yeah. No. Look --

7 MS. GLIKSBERG: -- and no longer does that issue
8 occur.

9 THE COURT: No. I know.

10 I hear what you're saying, which is that -- again,
11 it's the maximalist relief I was talking about, which is the
12 government either has to -- essentially would be put to the
13 decision; either we continue to operate the program in which
14 we -- in the manner in which we do, which puts Catholic
15 Charities to the test; and if they walk away, then the
16 government has to figure out another way to carry out the
17 program.

18 I mean, that's the end result of what you're
19 talking about.

20 MS. GLIKSBERG: Your Honor, so, again, while we
21 don't have to contemplate the actual mechanism, there are
22 other mechanisms in which USCCB can continue providing
23 services and our clients would be able to walk in and have
24 their application be processed seamlessly without being
25 discriminated against.

1 THE COURT: How could that happen?

2 I mean, wouldn't that be really the essence of
3 speculation? I mean, somehow, we're going to craft relief
4 or craft a mechanism through which they would be able to get
5 comfortable with this notion? That seems to me to be highly
6 unlikely.

7 MS. GLIKSBERG: There are -- there's different --
8 there's a multitude of different possibilities, and the
9 truth is that --

10 THE COURT: Give me one.

11 MS. GLIKSBERG: -- without discovery, we're not in
12 the best position to be able to --

13 THE COURT: Give me one. Give me one scenario in
14 which you can contemplate -- I keep saying Catholic
15 Charities but -- USCCB would continue to operate as it does
16 if it were required to place children with same-sex couples,
17 in violation of their religious beliefs or in a manner
18 inconsistent with their religious beliefs.

19 I mean, I can't think of one.

20 MS. GLIKSBERG: Thinking off the top of my head,
21 I'm happy to provide an example, but it might not be the
22 best situation, because I don't know that federal defendants
23 are in the best position to interpret how the inner workings
24 of their program would best create a solution to this
25 problem.

1 But the government could take over the application
2 process and process -- create a screening process, and then
3 provide applicants with where to -- with options of where to
4 go to be able to foster a child.

5 THE COURT: Right.

6 But that's different than what I just asked you,
7 which is: Can you contemplate a scenario in which USCCB
8 would be required to be that service provider?

9 MS. GLIKSBERG: To be -- no; that they would be
10 required to have to provide.

11 THE COURT: Right.

12 MS. GLIKSBERG: No.

13 But there's other mechanisms to be able to ensure
14 that their religion --

15 THE COURT: Right.

16 But my question is: Can you think of a mechanism
17 through which this particular provider could be compelled to
18 do what you're asking?

19 MS. GLIKSBERG: No, we're not asking to compel.

20 And that's actually another thing that they were
21 saying, is they reference the remedy.

22 The only reason USCCB is mentioned in the remedy
23 is simply because that is the way the program is run right
24 now.

25 So if it were any other program administrator,

1 we'd be happy to say that we could go through them or
2 whoever was going to be administrating the process.

3 The bottom line, though, is that the clients
4 should be able to walk in to whatever the process is and be
5 treated the same as anyone else; not be stigmatized; not be
6 demeaned; and not have any obstacles in front of them that
7 aren't in front of other people.

8 THE COURT: Would your clients say they were
9 stigmatized if they -- let's say hypothetically this
10 resolution here is that the agency itself takes over this
11 process for same-sex couples.

12 Would that be, in your view, stigmatizing, that
13 your clients, instead of being able to go to USCCB, instead,
14 they have to go to HHS?

15 MS. GLIKSBERG: The process would have to be the
16 same for everyone. So everyone would have to go through the
17 same process.

18 And what that would mean is, in your scenario, if
19 HHS is administering that process or that screening process,
20 everyone should have to go through that process and it
21 should be equal for everyone.

22 And then the government can determine from there
23 who then would process the foster -- providing the actual
24 foster child or who that individual, which grantee they
25 would go to.

1 But the bottom line is that, no matter who the
2 individual is, they have a right to walk in and initiate
3 that application process without feeling demeaned or
4 de-stigmatized [sic] and having that injury because they had
5 to go through different hoops or they had different
6 obstacles because of their sexual orientation, the same-sex
7 character of their marriage, or any other issue.

8 THE COURT: I guess what I'm just getting at is
9 let's say -- I don't know what the process is. But whatever
10 process is in place now, I assume that you had to put in an
11 application through the grantee; is that right? Is that how
12 it worked?

13 MS. GLIKSBERG: Correct.

14 THE COURT: So say there was a parallel process
15 through HHS, okay? Exact same process, but one HHS is
16 running, one the grantee is running.

17 Do I hear you correctly that that would not, in
18 your view, create a stigma because your client would have to
19 go to HHS as opposed to go to Catholic Charities?

20 MS. GLIKSBERG: If there's any difference provided
21 to one couple versus a different couple simply because
22 that --

23 THE COURT: No difference other than just which
24 door you've got to walk through. That's all.

25 I mean, exactly the same process, same end result.

1 MS. GLIKSBERG: So you're saying that same-sex
2 couples would have to go through one door and anyone else
3 through another door?

4 THE COURT: Right.

5 MS. GLIKSBERG: To me, that's discrimination and
6 stigmatization and doesn't resolve the problem. That's no
7 different than separate but equal.

8 THE COURT: So then if that's your position, then
9 I really do have no choice, in terms of a remedy, other than
10 to direct the agency to provide grants to no grantee that
11 discriminates against same-sex couples.

12 MS. GLIKSBERG: As long as they would do, for
13 example, as the scenario -- if they were doing the screening
14 process and then they were determining who that couple would
15 go to, that wouldn't discriminate; that's not on the face
16 discriminating against the person --

17 THE COURT: I'm sorry, who did that process?

18 MS. GLIKSBERG: If HHS provided the screening
19 process, for example --

20 THE COURT: Right.

21 MS. GLIKSBERG: -- and any couple could walk in
22 that door, no matter who they are, and have their
23 application processed. HHS can then determine where that
24 couple is sent.

25 But there's no stigmatization or treatment of that

1 individual as inferior merely because of the same-sex
2 character of their marriage; whereas if you're telling
3 people to go through two separate doors, you're telling them
4 that one is inferior to the other, that one doesn't have --
5 isn't treated as equal.

6 THE COURT: I guess I don't understand why it
7 would be inferior if the process and results were the same.

8 In other words, maybe I'm being overly simplistic
9 here, but you are a same-sex couple, you are interested in
10 being a foster parent, you turn to the grantee in your area,
11 if that grantee happens to be a Catholic-affiliated charity,
12 you know, well, I can't go there, I'm going to go directly
13 to HHS. Is that a problem?

14 MS. GLIKSBERG: Your Honor, people should be able
15 to walk in the doors of any facility and not feel
16 stigmatized or demeaned.

17 So whoever is administering the application
18 process needs to be accepting all applicants equally, no
19 matter who they are, what sex, what sexual orientation.

20 THE COURT: So you're still not answering my
21 question, which is: Would that be a problem?

22 In other words, there's just two different
23 recipients of applications; HHS is one recipient; the
24 Catholic grantee is the other. Why is that a problem?

25 MS. GLIKSBERG: That in and of itself creates a

1 stigma. It's saying that your application process is going
2 through --

3 THE COURT: So that gets back to what I was
4 saying, which is that, the only resolution then would be to
5 not allow any federal funds to go to any Catholic-affiliated
6 organization; because every Catholic-affiliated
7 organization, we can agree, will not carry this out and
8 provide placement with same-sex couples.

9 MS. GLIKSBERG: So to clarify for the Court --
10 and, again, this is for a later stage in the litigation,
11 determining the exact and precise remedy.

12 But there's a difference between actually
13 administering the care for the children and providing
14 placement and actually screening the application process.

15 So the government can take over that process or
16 someone else can take over that process.

17 THE COURT: But it can't be the Catholic.

18 MS. GLIKSBERG: But it can't be the Catholic
19 Charities if they're not willing to provide equal treatment
20 to any couple who's walking through their door.

21 THE COURT: Okay.

22 MS. GLIKSBERG: May I address other issues for the
23 Court?

24 THE COURT: Sure.

25 MS. GLIKSBERG: Okay.

1 So going back to individual standing, separate and
2 aside from their status as taxpayers -- and all of our
3 plaintiffs do have Taxpayer Standing.

4 Bryn and Fatma experienced injuries that are a
5 result of the government's own conduct and that are
6 redressable via a change in that conduct and to the
7 processes.

8 There are two specific government actions that
9 make it traceable, that make the injuries traceable to the
10 federal defendants.

11 First, they ratified the discrimination when they
12 awarded USCCB with millions of dollars in grant monies,
13 knowing that USCCB stated explicitly that it would be
14 discriminating on the basis of its Catholic identity, the
15 authentic teachings of the Catholic Church, its religious
16 beliefs and convictions. And it didn't even try to hide
17 what that meant.

18 USCCB even concedes that it put federal defendants
19 on notice that it would be administering the programs as
20 such and that it would not subgrant with any entity that
21 would license same-sex couples.

22 THE COURT: I understand the theory, which is that
23 there's two types of -- there's two federal conducts you're
24 challenging; one is the actual giving of the grant, and the
25 other is the failure to respond when your clients

1 complained.

2 MS. GLIKSBERG: The failure to respond, there's
3 one thing I do want to add about that, which is that, that's
4 a denial anew.

5 So when federal defendants failed to do anything,
6 they were told, this is your program.

7 THE COURT: Right.

8 MS. GLIKSBERG: You're responsible for this
9 program. You're not doing anything to help us. Help
10 remedy. You are supposed to be responsible for this
11 program. And they failed to do anything.

12 THE COURT: It's a de facto denial.

13 MS. GLIKSBERG: Exactly.

14 It's not just a ratification of USCCB's denial,
15 but it's another de facto denial, Your Honor is correct. So
16 that's an important thing to mention about that.

17 As for the injuries, defendants want to focus on
18 the fact that it's just a lost opportunity to be able to
19 foster a child. That is not the only injury, though, that's
20 being alleged here.

21 What's also being alleged is the impermissible
22 government message that's being sent to Bryn and Fatma and
23 to same-sex couples; that they're somehow unworthy of
24 participation in the federal program; that they're somehow
25 less deserving of respect. And that stigmatizes them as

1 inferior.

2 It subjects them to demeaning --

3 THE COURT: Is that injury only with respect to
4 your Taxpayer Standing position or your individual?

5 MS. GLIKSBERG: No. These are all individual
6 injuries that I'm talking about.

7 THE COURT: Okay.

8 MS. GLIKSBERG: So they experience stigma as being
9 inferior, which subjected them to demeaning, unequal
10 treatment.

11 THE COURT: Of course, nobody -- but, of course,
12 nobody has challenged that your clients have been injured.

13 MS. GLIKSBERG: They specifically stated, though,
14 that part of their analysis of why it's not redressable is
15 simply that Bryn and Fatma wouldn't be able to walk into
16 their door and that they would have to go out of business.
17 But that's actually not the only injury here.

18 And so changing the federal policy, although it
19 might change the whole processes of how everything is
20 functioning, it would immediately redress their equal
21 protection and due-process claims from the stigma and
22 demeaning treatment that they had and their Establishment
23 Clause claims; because this was explicit government
24 coercion, an endorsement of religion, when it ratified the
25 use of a religious-based test to determine who could and

1 could not participate in a federal government program.

2 So when it did that, it not only coerced
3 individuals into participating in a religion, but it also
4 impermissibly incentivized them to submit to religious
5 indoctrination. And, yes, that's all at taxpayers' expense,
6 but that is an individual harm that they also experienced.

7 And that coercive endorsement of religion is a
8 cognizable injury under the Establishment Clause, and that's
9 been repeated in many, many cases identifying that as a
10 cognizable injury.

11 And similarly regarding --

12 THE COURT: So let me ask you a question.

13 If there were to be a remedy that enabled your
14 clients to become foster parents, other than the complaint
15 of how the agency is spending its money, is there any other
16 injury that would need to be remedied, or would that
17 essentially moot out that claimed injury?

18 MS. GLIKSBERG: Without a change in the process,
19 their injuries are not remedied, because it's not just about
20 the lost opportunity to be able to foster a child and the
21 lost opportunity to be able to participate in a federal
22 program, but it's also that stigma and that demeaning
23 treatment as unequal.

24 In *Heckler v. Matthews*, the Supreme Court stated
25 that stigma itself is a cognizable injury under the equal

1 protection and due process guarantees, just as I just
2 mentioned that the coercive endorsement of religion is a
3 cognizable injury under the Establishment Clause.

4 So these are two separate injuries that they have
5 experienced, aside from their lost opportunity to be able to
6 foster a child.

7 And those can only be redressed by a change in the
8 government's policy that puts a stop to the use of a
9 religious-based test to determine who can and cannot
10 participate in a federal program and that does not ensure
11 equal access to all member of the public to the federal
12 program.

13 So separate and aside from their status as
14 taxpayers, those are injuries that they have, that they've
15 experienced personally that need to be redressed.

16 THE COURT: Can I just ask -- and maybe I've asked
17 this in many ways, but just ask it very explicitly:

18 Is the relief you are contemplating, would require
19 the government to no longer provide grants for this program,
20 to any organization that would discriminate against same-sex
21 couples?

22 MS. GLIKSBERG: Your Honor --

23 THE COURT: Because you've said in your brief that
24 you -- I mean, you've said in your brief that you're not
25 looking to do that.

1 MS. GLIKSBERG: Correct, we are not looking to
2 take away funding from USCCB.

3 We are happy to create religious accommodations to
4 ensure that they can continue providing their services.

5 We're simply stating that the process needs to be
6 seamless for all couples. There needs to be no obstacles in
7 place that aren't for one couple that aren't for the second
8 couple.

9 So as long as there's a process in place ensuring
10 that people can submit their application equally without any
11 additional tangible or dignitary harms --

12 THE COURT: So if as government counsel said, say
13 there is, tomorrow, another provider in the Fort Worth area
14 that would not discriminate on the basis of your clients
15 being a same-sex couple, would that satisfy you?

16 MS. GLIKSBERG: So long as they could be -- there
17 would be seamless treatment of their applications and they
18 could be treated equally, that would not be a problem.

19 THE COURT: Okay. I just want to make sure I'm
20 clear on that.

21 MS. GLIKSBERG: Would Your Honor like me to
22 address Taxpayer Standing as well?

23 THE COURT: Sure.

24 I'm having a hard time seeing the Taxpayer
25 Standing argument that you're making.

1 I mean, you read these cases and it essentially
2 seems to say that both the program and the specific
3 allocation of funding needs to specifically contemplate, and
4 do so expressly, the granting of monies to a religious
5 organization.

6 And neither the statute that establishes this
7 program nor the appropriations for the program do that. So
8 how are you getting around *Hein*?

9 MS. GLIKSBERG: So *Hein* -- it's interesting you
10 say that.

11 So Alito, in *Hein*, actually specifically talked
12 about *Flast*. And it said, and I quote, "Congress surely
13 understood that much of the aid mandated by the statute
14 would find its way to religious schools."

15 Because in that case in *Flast*, and by that
16 standing, said that it imputed intent upon Congress to be
17 funding religious organizations because of that general
18 knowledge that Congress should have had about the way the
19 school system was run in *Flast*.

20 Because, in *Flast*, there was no explicit statement
21 that it would be going to religious organizations. It was
22 exactly like, here, where there is a grant program and
23 Congress knew that that grant -- that amongst the grantees
24 would be religious organizations.

25 The same thing is here.

1 Here, Congress knew that child welfare programs in
2 this country are run largely by religious organizations.
3 And so, like in *Flast*, that intent is imputed on them to
4 have funded religious organizations.

5 So what they also were on --

6 THE COURT: But isn't it also true that Congress
7 structured it in such a way that it's really the Executive
8 Branch that decides where the money is going to?

9 The Executive Branch says, first, they don't have
10 to do this through grants, but they have elected to do that.
11 And then secondly they've elected to -- they have discretion
12 as to who gets the money.

13 It can't be that just because Congress has
14 awareness that there is some money going to a religious
15 organization, that that satisfies *Flast*, because otherwise
16 that would blow the doors pretty wide open.

17 MS. GLIKSBERG: Well, what it is is that there's a
18 specific statutory scheme and conscientiously allowing for
19 the usage of grant programs, and they knew that those grant
20 programs would be used for religious organizations.

21 And here, there was actually -- not only were they
22 on constructive notice from general understanding of the
23 system, but they actually had actual notice that the
24 grantees at issue were awarding -- that were religious
25 organizations; that these grants were being awarded to

1 religious organizations, including USCCB. And they know
2 that from the annual -- congressionally mandated annual
3 expenditure reports.

4 THE COURT: I don't think there's any doubt that
5 Congress knows where the money is going. I just don't think
6 that's the test.

7 MS. GLIKSBERG: So the *Flast* test is a two-part
8 test. It's first that Congress must have exercised its
9 taxing and spending power to specifically authorize the
10 challenged expenditure.

11 THE COURT: Are you aware of any case in which
12 there's been Taxpayer Standing found in which the
13 congressional action does not explicitly reference the
14 giving of money to a religious organization?

15 Now, *Flast* is, I think, a -- it's sort of an
16 outlier, in that the term "private school" there was
17 essentially synonymous with religious organization.

18 So is there any such case?

19 MS. GLIKSBERG: Well, school -- so it is a
20 directly -- I would say is directly exactly what happened in
21 *Flast*, in the sense that there is general knowledge --

22 THE COURT: But leave *Flast* aside.

23 MS. GLIKSBERG: But leaving *Flast* aside --

24 THE COURT: Any other case.

25 MS. GLIKSBERG: -- in *Bowen v. Kendrick*, there was

1 no requirement that it go to religious organizations. They
2 just knew that religious organizations would be amongst the
3 grantees.

4 THE COURT: No, but religious organizations were
5 expressly mentioned in the statute in *Bowen*.

6 MS. GLIKSBERG: So what I would say is that it's
7 not about the Executive Branch's discretion here. It's
8 about what Congress knew from its expenditure reports and
9 what it should have known. And we know that because of
10 *Bowen*.

11 In *Bowen*, it determined that the fact that we're
12 challenging federal defendants' administration of the funds
13 is not any less a challenge to Congress's taxing and
14 spending power merely because --

15 THE COURT: Why wouldn't that have been given
16 Taxpayer Standing in *Hein*?

17 I mean, surely Congress knew the Executive Branch
18 was using money to establish the White House offices that
19 were being challenged there.

20 MS. GLIKSBERG: Because there -- so there's -- the
21 first part of the test is the problem. And that is what the
22 issue is both in *Dumont*, in *Navy Chaplaincy*, and in *Hein*.

23 The first part of the test is they have to
24 specifically challenge the -- the taxing expenditure has to
25 have been exercised to specifically authorize the challenged

1 expenditure.

2 Here we have a specific statute, specific
3 congressional mandate for the URM and UC programs and a
4 specific appropriation of funds and even a statutory scheme
5 that contemplated the usage of grants, which we know was
6 also contemplated to go to religious organizations, all for
7 the accompanied -- unaccompanied youth. So this was a
8 statutory scheme that was very specific and that didn't
9 exist in those cases.

10 In those cases, for example, in *Navy Chaplaincy*,
11 there was a lump-sum payment given straight -- so there was
12 an appropriation that wasn't in any way connected to a
13 specific statute. It was a lump-sum payment, given from
14 Congress to the Executive Branch, to be able to administer
15 money for Navy Reservists.

16 But as Kavanaugh stated and acknowledged actually
17 in *Navy Chaplaincy*, was that there was no mention of
18 retirement benefits, let alone any mention of Navy Chaplains
19 or retirement program for Navy Chaplains.

20 So it's the fact that they've lacked the
21 specificity there. There was nothing specifically
22 authorizing the challenged expenditure.

23 Here we have a very specific statutory scheme that
24 was set up to administer this grant program, and that is
25 what has to be met: That Congress exercised its taxing and

1 spending power to specifically authorize the grants at issue
2 here in this case.

3 And Congress actually continues funding this
4 program year after year, knowing that the expenditure
5 reports state that it's going to religious organizations.
6 And then federal defendants distributed the funds in
7 accordance with that statutory scheme. So it's all tied to
8 a statutory scheme, which is not the case in *Navy*
9 *Chaplaincy*.

10 Actually, in *Hein*, the Court said that plaintiff
11 couldn't even point to any statute that they -- that they
12 were appropriating funds to. So there was -- there is no
13 statutory scheme there; there's no connection between the
14 statute and the appropriation.

15 Here, the funds were earmarked, the appropriations
16 were earmarked to be able to implement the programs of that
17 congressional mandate. So it's a very specific intent of
18 Congress that didn't exist in those other cases, that do
19 exist, though, in *Bowen v. Kendrick* and in *Flast*.

20 And like I was saying, the Court, in *Bowen v.*
21 *Kendrick*, said it was not any less a challenge to track
22 congressional taxing and spending power merely because the
23 funds flowed through and were administered by the Executive
24 Branch, and that was what happened here.

25 So all Congress had to have done was create a

1 specific statutory scheme for these programs, which it did.
2 And it had to do that knowing that these grants would be
3 going to religious organizations, which it knew.

4 The fact that the Executive Branch then chose to
5 use it to ratify, authorize, and endorse the usage of a
6 religious-based test to discriminate is not part of the
7 *Flast* test. That is a completely separate inquiry.

8 All we have to establish here is that they knew
9 that there was -- that they established a program for the
10 grants and that they knew that those grants were going to go
11 to religious organizations.

12 And that's what we have here, exactly like in
13 *Flast* and *Bowen v. Kendrick*.

14 THE COURT: Okay. I'll ask you to wrap up,
15 Counsel.

16 MS. GLIKSBERG: I just want to note also that *Hein*
17 did not change the law. *Hein* actually affirmed *Bowen v.*
18 *Kendrick* and *Flast* and decided the case on a completely
19 separate issue, that being lump-sum payments.

20 Congressional budgets handed over to the Executive
21 Branch for its own general, discretionary use, and that's
22 not what the case is here.

23 And all of the cases to the contrary, that's what
24 they're based on: That discretionary use that is not tied
25 to a statutory scheme.

1 In fact, those cases don't even contemplate the
2 uses of a grant program, which is what -- the case in *Flast*,
3 *Bowen v. Kendrick*, and here.

4 And to bring that full circle, because -- *Navy*
5 *Chaplaincy* and *Hein* failed that first step of the test. We
6 pass both steps of that test.

7 Federal defendants apparent --

8 THE COURT: Counsel, I'm just going to -- if
9 there's anything more on Tax -- I've got your argument on
10 Taxpayer Standing. So if there's anything you want to add
11 about --

12 MS. GLIKSBERG: I'm happy to provide concluding
13 remarks if the Court would prefer.

14 THE COURT: That would be --

15 MS. GLIKSBERG: Okay.

16 But it's federal defendants' apparent position,
17 not plaintiffs', that radically threatens the welfare of the
18 children in federal defendants' care and the fundamental
19 limitations on government power set forth in the
20 Constitution.

21 There's an entire universe of possible loving
22 homes being denied to the children in the government's care
23 because they're being denied as possible -- the opportunity
24 to even apply to be foster parents because of a
25 religious-based test that is discriminating against them and

1 that is disabling access to public programs.

2 If plaintiffs cannot vindicate their
3 constitutional rights here, children in federal defendants'
4 care will continue being denied possible placement options
5 that might serve their best interest, all because of federal
6 defendants' own actions that are enabling USCCB to use
7 taxpayer dollars to advance religious doctrine and
8 discriminate on the basis of religion and deny people equal
9 opportunities and equal rights.

10 THE COURT: All right. Thank you, Counsel.

11 MS. GLIKSBERG: Thank you, Your Honor.

12 THE COURT: All right. Any rebuttal?

13 MR. POWERS: Just briefly, Your Honor.

14 THE COURT: Sure.

15 MR. POWERS: Thank you.

16 Just a few quick points.

17 One point is that, you know, the government has no
18 objection if the Court wanted to hold the motion in part as
19 to the individual plaintiffs as this potential supplemental
20 grantee option plays out, you know, we certainly wouldn't
21 have an objection to that.

22 We do think the Taxpayer Standing issue can be
23 decided immediately and that would need to be decided
24 regardless, because greater relief is sought pursuant to
25 that avenue.

1 THE COURT: Right.

2 MR. POWERS: And I just wanted to clarify exactly
3 what's happening.

4 You know, there's two programs here; there's the
5 URM program and the UAC program.

6 The potential supplemental grantee would be for
7 long-term foster care in the UAC program.

8 The agency is not, at present, taking action with
9 regard to the URM program, although it always is evaluating
10 the best manner in which to administer services under these
11 programs.

12 THE COURT: But which of the two programs are you
13 all seeking for?

14 MS. GLIKSBERG: They're looking to be considered
15 for both programs.

16 THE COURT: For both. Okay.

17 MR. POWERS: And at present, in the URM program,
18 it is true that USCCB is the sole designee, the sole grantee
19 in the state of Texas, which I think puts this case more in
20 the *Freedom Republicans* context because it's sort of the
21 all-or-nothing relief that the Court has discussed, and that
22 all-or-nothing relief would not get these individual
23 plaintiffs any closer to the relief they're seeking. But,
24 again, if the Court wants to hold the motion while that
25 process plays out, we wouldn't object to that.

1 And I just wanted to -- more broadly, the ideas
2 about kind of relief the Court could fashion that would sort
3 of superintend the agency's operations or construct new
4 mechanisms for the programs to operate, there's no legal
5 basis for the Court to order the government to engage in any
6 particular manner of delivering services under these
7 programs. Again, the programs are highly discretionary and
8 in the executive's contemplation as to how to deliver these
9 services.

10 THE COURT: Right.

11 But I could have ordered you not to deliver them
12 in a discriminatory manner.

13 MR. POWERS: And if the Court issued that relief,
14 it would not bring the plaintiffs closer to the opportunity
15 they seek.

16 Again, though, this may become moot or may change
17 significantly if the supplemental grantee situation --

18 THE COURT: I guess I don't understand that
19 because if -- you say that because -- I don't understand,
20 because if what ultimately I were to find is that you were
21 spending money in violation of the Establishment Clause, and
22 I've got to assume that at this juncture, I don't understand
23 why that doesn't remedy their injury.

24 MR. POWERS: I mean, I think that the facts are
25 somewhat changing on the ground.

1 THE COURT: But under the current facts, I mean,
2 that would resolve things.

3 I mean, you are not allowed to spend money in
4 violation of the Establishment Clause, which means you need
5 to operate the program through grantees that aren't going to
6 discriminate. That seems pretty straightforward.

7 MR. POWERS: And if the Court issued that relief
8 and the agency then evaluated how best to deliver services
9 to the unaccompanied youth, it wouldn't necessarily mean
10 that the grantees would -- or that the services would be
11 rendered in this location where the individual plaintiffs
12 are.

13 Again, that's a matter of policy discretion at the
14 agency and the Court wouldn't have any legal basis to go the
15 next step and to order the government to engage in that
16 particular metro area.

17 And I think that's where the disconnect --

18 THE COURT: So you would -- I should speculate
19 that you would abandon Dallas-Fort Worth.

20 MR. POWERS: I don't think you should speculate
21 either way. I think that's the problem.

22 THE COURT: Or that you might.

23 I should take that into the equation, that the
24 government might abandon the Dallas-Fort Worth area instead
25 of finding a different grantee.

1 MR. POWERS: I don't think that there's any
2 speculation either way that's required or appropriate.

3 I think the point is that it's a contingency in
4 the future that there would be a next step in the chain
5 beyond the Court's relief, and the Court wouldn't have any
6 basis to determine one way or the other how the next step
7 would play out.

8 THE COURT: And I guess doesn't that sort of run
9 up against *Animal Legal Defense Fund*?

10 The Court there says -- well, in any event,
11 there's a suggestion there that I don't need to -- and it's
12 sort of citing to -- in any event, there's a suggestion here
13 that I don't need to speculate as to whether the government
14 will comply with what it's supposed to do.

15 This is just sort of reviewing *FEC versus Akins*.

16 MR. POWERS: I think in that context, again, that
17 that's sort of a case involving a causation by authorization
18 theory, and I think that's what brings the nexus closer and
19 allows the Court to infer that -- those elements of
20 standing.

21 THE COURT: Okay.

22 MR. POWERS: And I just have one small point on
23 the Taxpayer Standing point, which I don't believe was noted
24 in our briefs.

25 In *Hein*, actually, page 608, footnote 7, the Court

1 actually noted that there was a conference report where
2 Congress -- or the Conference noted that there was a portion
3 that was sort of informally earmarked for one of these
4 faith-based centers. So clearly Congress, in some sense,
5 knew. But that's not enough; there needs to be statutory
6 text.

7 Unless the Court has further questions --

8 THE COURT: No. Thank you, Counsel.

9 MR. POWERS: Thank you, Your Honor.

10 THE COURT: Mr. Raimer.

11 MR. RAIMER: Your Honor, I'm still not exactly
12 sure the sort of relief that plaintiffs are requesting here,
13 but I do think we now know one thing that is certainly off
14 the table.

15 They've indicated that the sort of maximalist
16 relief you are proposing is off the table, their words.
17 They're not looking to take away the funding from USCCB.
18 So I think that removes any element of relief that would
19 involve either yanking funding from USCCB or requiring them
20 to act in violation of their religious beliefs.

21 On the sort of stigmatic injury question, whether
22 that can be redressed one way or another, very briefly on
23 that: The Supreme Court in *Allen v. Wright* said that any
24 sort of stigmatic injury, I believe this is footnote 22, has
25 to be tied to a concrete particular injury.

1 So remedying stigmatic injury in the abstract
2 is -- it's not a viable claim; you have to tie that to some
3 sort of relief that affords them a remedy for the particular
4 injury that they suffered; in this case, a denial of
5 consideration of their foster application. So, again, we're
6 not looking at sweeping programmatic relief here. Any
7 relief would have to be tailored to address that specific
8 relief here.

9 And then more broadly on the traceability
10 question, repeatedly, there was reference to the government
11 policy, government policy, government policy.

12 There's no government policy here, Your Honor.
13 It's a grant fund, and the actions we're talking about are
14 not the actions of the government but the actions of a
15 subgrantee two levels removed from any government conduct.

16 Again, the question is whether it's fairly
17 traceable -- that conduct is fairly traceable to any
18 encouragement on the part of the government.

19 USCCB has been receiving these funds for numerous
20 years, from administrations on both sides of the aisle.

21 I submit it's simply implausible to think that at
22 the same time the Obama administration, for example, was
23 briefing *Obergefell*, they were surreptitiously encouraging
24 USCCB to discriminate against same-sex couples.

25 And then finally on the Taxpayer Standing

1 question, I don't disagree, there may be some tensions
2 between what *Hein* said and what *Flast* says. But
3 I don't think you have to worry about any of that, because
4 the D.C. Circuit's done the work for you in *Navy Chaplaincy*.
5 They said, look, a case does not fit within the narrow *Flast*
6 exception because there's no legislative enactment that
7 expressly authorizes and appropriates funds for the
8 particular harm at issue.

9 And there, they were super specific. They said,
10 look, Congress didn't say favor Catholic Chaplains in the
11 retirement system. You need something that explicit in a
12 statute here to find Taxpayer Standing.

13 If there's nothing else --

14 THE COURT: No. Thank you, Counsel.

15 MR. RAIMER: Thank you, Your Honor.

16 THE COURT: Okay.

17 First, thank you, all, for your arguments, it's
18 been very helpful, and I'm just -- I'm sorry it took so long
19 to get to this point.

20 But, look, I think what I would encourage you all
21 to do is as follows -- I mean, mainly government counsel and
22 plaintiffs' counsel.

23 I agree that the Taxpayer Standing issue is going
24 to have to be resolved one way or another regardless.

25 That said, if there is a solution here that

1 satisfies the plaintiffs and gives them the opportunity to
2 be on equal footing, as they've said, whether that be
3 through a grantee, another grantee, or HHS itself, I think
4 that would resolve a lot of this case.

5 And it seems to me, given some of the competing
6 issues here, it's really in no one's interest to have me get
7 to a point where I have to decide whether the government
8 needs to stop funding these grants through Catholic
9 Charities -- or through USCCB, excuse me. I just don't
10 think we want to go there.

11 So what I'll ask you all to do is to get back to
12 me in a couple weeks and let me know where things stand and
13 whether you've been able to resolve at least the individual
14 standing portion of this.

15 I understand the Taxpayer Standing is something
16 we'll have to deal with regardless. But if there is some
17 mechanism that will satisfy the plaintiffs, along the lines
18 of what plaintiffs' counsel has suggested, whether, again,
19 it be through a different grantee or through HHS itself, it
20 seems to be in everyone's interest to try and reach that
21 agreement, okay?

22 So I don't know what two weeks is from today, but
23 whatever that date is, I'll look for a Status Report from
24 both sides or from all three sides.

25 Thank you, everyone.

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DEPUTY CLERK: All rise.

This Honorable Court is adjourned.

(Proceedings concluded at 11:40 a.m.)

C E R T I F I C A T E

I, William P. Zaremba, RMR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

Date: August 3, 2020 /S/ William P. Zaremba

William P. Zaremba, RMR, CRR

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