IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FATMA MAROUF and BRYN ESPLIN, *Plaintiffs,* v. XAVIER BECERRA, in his official capacity as Secretary of the United States Department of Health and Human Services, *et al.*, *Defendants.*	Case No. 1:18-cv-378 (APM) Hon. Amit P. Mehta

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

Rules

Other Authorities

INTRODUCTION[1]

Although the essential facts of this case are undisputed, Defendants' motions for summary judgment mischaracterize or misinterpret them, and fail to appropriately apply applicable law. What is not contested or contestable is that Federal Defendants[2] knowingly allowed the federally funded Unaccompanied Refugee Minors ("URM") Program to be administered in accordance with the religious beliefs of Defendant United States Conference of Catholic Bishops ("USCCB")—the grantee that is delegated the authority to operate the URM Program in the Dallas-Fort Worth area on Federal Defendants' behalf. Such administration discriminated against Plaintiffs Fatma Marouf and Bryn Esplin ("Plaintiffs")—a married same-sex couple residing in the Dallas-Fort Worth area by denying them an equal opportunity to foster Program children on account of USCCB's religious beliefs disfavoring married same-sex couples. Federal Defendants continue to so discriminate against Plaintiffs and other similarly situated couples.

Federal Defendants' recent Program modification does nothing to alter these essential facts and, indeed, only exacerbates the constitutional deficiencies of Federal Defendants' Program administration. In direct response to this litigation, Federal Defendants contracted with a new third party, the United States Committee for Refugees and Immigrants ("USCRI"), to pre-screen Program foster parent applicants in the Dallas-Fort Worth area for the purpose of referring them for further processing to either USCCB's subgrantee Catholic Charities of Dallas ("CCD") or alternative Program grantee Lutheran Immigration and Refugee Service's ("LIRS") subgrantee Upbring. Federal Defendants admit that if Plaintiffs were to seek to reapply to be Program foster

[1] Plaintiffs file this combined opposition to both Defendants' motions for summary judgment ("MSJ"). *See* Dkt. 109 (Federal Defendants' MSJ); Dkt. 106 (United States Conference of Catholic Bishops' MSJ).

[2] Plaintiffs collectively refer to the Office of Refugee Resettlement ("ORR"), the Administration for Children and Families ("ACF"), the United States Department of Health and Human Services ("HHS"), and the officials who lead them as "Federal Defendants."

parents following Federal Defendants' Program modification, it is "possible" that Plaintiffs would be referred by USCRI to CCD—in which case they would again be subjected to the very same religion-based discriminatory treatment they experienced in 2017. And even if USCRI consistently refers married same-sex couples solely to Upbring, such Program administration only compounds Federal Defendants' constitutional violations: Federal Defendants themselves, through their agent, now segregate married same-sex couples for unequal treatment—and do so by deliberate reference to a religious standard, for the sole purpose of permitting bias.

For the reasons set forth below and in Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment (Dkt. 107), Federal Defendants' administration of the URM Program continues to violate the fundamental guarantees of equal protection and due process and the constitutional prohibition against governmental religious discrimination, to the detriment both of married same-sex couples who wish to be Program foster parents and of Program children whose best interests would be served by placement with such couples. Hence, Defendants' assertion of mootness and arguments that they are entitled to judgment on the merits fail, and their motions should be denied.

FACTUAL BACKGROUND

A. The Undisputed Facts Demonstrate That Federal Defendants Administer the URM Program by Reference to USCCB's Religious Beliefs in a Manner That Discriminates Against Married Same-Sex Couples.

As explained in Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Motion") and accompanying Memorandum of Law and Statement of Undisputed Material Facts ("PMF") (Dkt. 107), which Plaintiffs incorporate by reference,[3] Federal Defendants administer the URM Program, a federally funded child welfare program that provides care for thousands of

[3] Plaintiffs refer to the evidence already in the summary judgment record by virtue of Plaintiffs' Motion, rather than reattaching that evidence to this opposition.

unaccompanied refugee children, including through placement in foster homes. *See* PMF ¶¶ 1-3.[4] Federal Defendants have delegated administration of the Program to their grantee USCCB, including such functions as recruitment and screening of prospective foster parents, training of foster parents, and placement of Program children with foster parents. *Id.* ¶¶ 5-6, 10. And USCCB, through its subgrantees, administers the Program on Federal Defendants' behalf, including by processing foster parent applications. *Id.* ¶ 8.

USCCB is a religious organization that holds the belief that "marriage is between one man and one woman." *Id.* ¶ 16. As a result, USCCB openly rejects couples as potential foster parents unless they are a married couple comprising one man and one woman. *See id.* ¶¶ 16-18. USCCB's agreements with its subgrantees require that the subgrantees administer grants in a manner consistent with USSCB's religious beliefs, including by not processing foster parent applications of, or placing foster children with, same-sex couples. *Id.* ¶¶ 15-20; *see also* USCCB's Statement of Undisputed Material Facts ("USCCBMF") ¶ 39 (Dkt. 106-2). Federal Defendants awarded USCCB its fiscal year ("FY") 2017 URM Program grant knowing that USCCB would administer the grant in accordance with its religious beliefs, including USCCB's religious objection to parenting by same-sex couples. PMF ¶¶ 10, 15-24.

In February 2017, Plaintiffs spoke with Dana Springer of USCCB's then-subgrantee Catholic Charities of Fort Worth ("CCFW") about fostering a Program child.[5] PMF ¶ 27; Fed.

[4] Pursuant to Local Civil Rule 7(h)(1) and the Court's summary judgment procedure order (Dkt. 87), Plaintiffs' Statement of Material Undisputed Facts was filed as an attachment to Plaintiffs' Motion. *See* Dkt. 107. Citations to Plaintiffs' Statement of Material Undisputed Facts are formatted as follows: (PMF ¶ _.). Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion was also filed as an attachment to Plaintiff's Motion ("PMSJ"). *See* Dkt. 107.

[5] Plaintiffs also spoke with Springer about foster parenting under the Unaccompanied Alien Children ("UAC") Program. PMF ¶¶ 26-27. USCCB is no longer a participant in the UAC Program in the Dallas-Fort Worth area. FDMF ¶¶ 73-75.

Defs.' Statement of Undisputed Material Facts ("FDMF") ¶ 39 (Dkt. 110-3). Springer informed Plaintiffs that CCFW would not accept their foster parent application because they do not "mirror the holy family." PMF ¶ 28; FDMF ¶ 41; USCCBMF ¶¶ 39-40. Marouf notified Federal Defendants of CCFW's refusal to accept Plaintiffs' application for that reason. PMF ¶ 29; *see also* Decl. of Fatma Marouf ("Marouf Decl.") ¶ 14 (Dkt. 108-3); Decl. of Bryn Esplin ("Esplin Decl.") ¶ 6 (Dkt. 108-2); FDMF ¶ 41; USCCBMF ¶ 41.

The discrimination Plaintiffs suffered directly resulted from: (1) Federal Defendants' failure to establish and maintain meaningful safeguards against USCCB's use, in the course of its administration of the URM Program, of a religious litmus test condemning married same-sex couples, despite express notice that USCCB would use such a test; and (2) Federal Defendants' failure, despite express notice, to redress USCCB subgrantee CCFW's use of that test against Plaintiffs when they sought to apply to be Program foster parents.

First, when Federal Defendants awarded the Program grant to USCCB, they did not prohibit or otherwise restrict USCCB from categorically turning away prospective foster parents who are married same-sex couples based on USCCB's religious beliefs. *See* PMF ¶¶ 6, 21-23. Nor did Federal Defendants implement any other safeguard to prevent USCCB from administering the grant in an impermissibly discriminatory manner. *Id.* ¶¶ 23-24.

The absence of safeguards has resulted in systematic discrimination against same-sex couples, including Plaintiffs. *See id.* ¶¶ 41-76 (identifying multiple instances of such discrimination). Moreover, Federal Defendants' ratification of USCCB's use of a religious litmus test has also resulted in discrimination against other classes on religious grounds. *See*, *e.g.*, Decl. of Catelyn Devlin ("Devlin Decl.") ¶¶ 10-12, 14-15 (Dkt. 108-5); *see also, e.g.*, PMF ¶¶ 169-79 (CCFW also discriminated against single individuals and non-Christian individuals who inquired

with CCFW about becoming Program foster parents). Such discrimination confirms that Federal Defendants have not established and maintained meaningful safeguards against USCCB's religious discrimination in the administration of the URM Program on Federal Defendants' behalf.

Second, after Marouf notified Federal Defendants of CCFW's refusal to accept Plaintiffs' application because they do not "mirror the holy family," Federal Defendants did nothing to meaningfully redress that religion-based discriminatory treatment of married same-sex couples under the URM Program. *See id.* ¶¶ 29-31. On the contrary, Federal Defendants continue to refer same-sex couples to USCCB or its subgrantees, despite knowing that they will be turned away on account of USCCB's religion-based rules for operating the Program. *See id.* ¶¶ 41-52.

B. The New Consortium Does Not Remedy the Constitutional Deficiencies of Federal Defendants' Program Administration—It Exacerbates Them.

In direct response to this litigation, Federal Defendants contracted with USCRI to conduct intake of Program foster parent applications in the Dallas-Fort Worth area. *Id.* ¶ 84; *see also* FDMF ¶¶ 89-91. USCRI solicits demographic information about the applicants—including whether they are a married same-sex couple—and then refers them for further processing to either CCD or Upbring. PMF ¶¶ 84-86. Upbring does not object to licensing same-sex couples as foster parents. *Id.* ¶ 83; FDMF ¶¶ 86-87. Federal Defendants refer to this arrangement as a "Consortium." FDMF ¶ 90.

Defendants are simply wrong in contending that the Consortium remedies the constitutional deficiencies of Federal Defendants' Program administration. For, while Federal Defendants assert that "[redacted]" Fed. Defs.' Statement of P. & A. in Supp. of Mot. for Summ. J. ("FDs' Mem.") at 9 (Dkt. 110-2), their own memorandum concedes that it is, at best, only "[redacted]" that Plaintiffs would not

suffer the very same discrimination again if they reapply to be Program foster parents through the Consortium. *Id.* at 14. And this concession is borne out by the summary judgment record: In sworn deposition testimony, Federal Defendants admitted that, notwithstanding the Consortium, it remains "possible" that the very same discrimination Plaintiffs suffered would happen again if they reapply to be Program foster parents. PMF ¶ 107. That Federal Defendants cannot assure otherwise is not surprising, because, as they admit, Consortium participants deliberately do not document the referral criteria that USCRI uses in processing applicants. *Id.* ¶¶ 87-89. And Federal Defendants have intentionally remained ignorant of USCRI's decision-making standards, conducting no governmental oversight and taking no steps to ensure appropriate safeguards. *See id.* ¶ 93. Thus, by their own design, Federal Defendants have placed themselves in a position where they cannot provide any assurance that prospective Program foster parents, who are married same-sex couples, will not be referred by USCRI to CCD (and then turned away by CCD on account of religious objections). *See id.* ¶ 107. Indeed, the Consortium's organizing documents contain a prospective, broad waiver providing for religious exceptions that have not even been sought by any Consortium member. *Id.* ¶ 108. That waiver does not adequately identify any substantial religious burden on a Consortium member, does not outline the scope of any purported religious accommodation, and does not take into account either the subversion of the Program's purpose or the burdens imposed on prospective foster parents and Program children. *See id*. Yet Federal Defendants themselves have described those sorts of waivers as overbroad and improper. *See* Ltr. to S.C. Gov. Henry McMaster from ACF (Nov. 18, 2021), *available at* https://www.acf.hhs.gov/sites/default/files/documents/withdrawal-of-exception-from-part-75.300-south-carolina-11-18-2021.pdf.

Even if USCRI referred all married same-sex couples to Upbring to avoid having the couples be turned away by CCD on account of religious objections, the Consortium does not remedy the constitutional deficiencies here. Rather, the Consortium compounds those deficiencies: Federal Defendants themselves, through their agent, now segregate married same-sex couples from other applicants to enable unequal treatment of these couples in accordance with religious standards. In other words, through their agent, Federal Defendants (1) are now themselves discriminating against married same-sex couples (in addition to enabling and ratifying discrimination by USCCB in USCCB's administration of the URM Program on Federal Defendants' behalf), and (2) have now adopted USCCB's religious beliefs as a determinant of governmental decision-making. *See* PMF ¶¶ 91-92.

This direct religion-based governmental discrimination materially disadvantages married same-sex couples, who not only have fewer options for participating in the Program—one agency as opposed to the two for different-sex couples—but are also relegated to what is, at least to date, the far more limited option. As a new subgrantee, Upbring lacks the capacity to screen, train, and license applicants and support child placements on anywhere near the scale that CCD does, so Upbring does not and cannot provide Program services equal to CCD's. *See id.* ¶ 102. Indeed, whereas CCD currently has approximately 50 Program children in its care, *id.* ¶ 105; FDMF ¶ 81, Upbring to date has *no* Program children in its care and is still attempting to hire the staff it needs to license foster families and arrange placements. PMF ¶ 102. Hence, Upbring currently has only a single licensed foster family in its network. *Id.* ¶ 103.

Moreover, the Consortium does not remedy—and indeed exacerbates—the "stigma, rejection, and humiliation" that Plaintiffs experienced. Marouf Decl. ¶ 20. When Plaintiffs were turned away by CCFW in February 2017, Esplin "was devastated." Esplin Decl. ¶ 5. She testified

that "[i]t was really painful to be rejected" as a result of the "discrimination" that Federal Defendants enabled. PMF ¶¶ 32-35, 37, 39-40. The Consortium's continuation of the discriminatory treatment of same-sex couples has only compounded the trauma and dignitary harm Plaintiffs suffered. As Marouf states:

> To us, it sounds like a thinly veiled attempt by the federal government to fashion a 'separate but equal' scheme, where same-sex couples are shunted through one door, while heterosexual couples are invited to apply through another. Even if a screen is placed over the segregation, we know it exists, and the screen itself symbolizes the stigma that we feel. We understand that USCRI's primary job is to identify same-sex couples in the pool of applicants and place them in a separate pile. Being segregated in this way is as upsetting and insulting as a blanket rejection. We had hoped that the federal government would address the discrimination we experienced. Instead, they set up a system that, shielded from public view, segregates same sex couples, thereby perpetuating discrimination.

Marouf Decl. ¶ 20. Plaintiffs are also aware that Upbring will not provide them with the same opportunities to foster a Program child, given its recent entry into the Program. *Id.* ¶ 21. Plaintiffs still wish to foster a Program child; they have not reapplied because of the ongoing discrimination that they would suffer at the hands of the Consortium, acting on behalf of Federal Defendants, if they were to do so. *See id*. ¶¶ 20-21; Decl. B, Marouf Supp. Decl. ¶¶ 2-6.

ARGUMENT

I. PLAINTIFFS' URM PROGRAM[6] CLAIMS ARE NOT MOOT.

A defendant asserting mootness bears the burden of establishing that the case is moot. *See Honeywell Int'l, Inc. v. Nuclear Regulatory Comm'n*, 628 F.3d 568, 576 (D.C. Cir. 2010). That burden is a "heavy" one. *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 459 (D.C. Cir. 1998) (internal quotation marks omitted). A case is not moot if a court can grant "any effectual relief whatever to the prevailing party." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)

[6] In light of USCCB's decision to no longer participate in the UAC Program in the Dallas-Fort Worth area, Plaintiffs are no longer pursuing their claims for injunctive and declaratory relief as they relate to the UAC Program.

(internal quotations and alteration omitted); *see* also *Pub. Employees for Env't Resp. v. Nat'l Park Serv.*, No. 19-3629 (RC), 2021 WL 1198047, *11 (D.D.C. Mar. 30, 2021) (mem. op.) (noting that this is a "low bar" for plaintiffs to clear).

Where, as here, a governmental defendant seeks to moot a case by purporting to voluntarily cease the challenged conduct, it must show that (1) it is "*absolutely* clear the allegedly wrongful behavior could not reasonably be expected to recur," *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (emphasis added); and (2) "intervening events 'have *completely and irrevocably* eradicated the effects of the alleged violation.'" *Ctr. for Biological Diversity v. Kempthorne*, 498 F. Supp. 2d 293, 296 (D.D.C. 2007) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)) (emphasis added). Any other rule would allow the government to frustrate "the 'public interest in having the legality of the [challenged] practices settled.'" *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).

It is not "absolutely" clear that the Consortium "completely" eradicates the constitutional deficiencies of Federal Defendants' Program administration. On the contrary, it only exacerbates them. Plaintiffs therefore continue to suffer concrete injuries that are redressable by the Court. What is more, Federal Defendants retain authority to reinstate the pre-Consortium URM Program at any time, so any ostensible cessation of the constitutional injuries is not "irrevocabl[e]." Accordingly, Defendants have not met their heavy burden, and Federal Defendants' modification of the URM Program does not moot this case.

A. The Consortium Only Exacerbates the Constitutional Deficiencies of Federal Defendants' Program Administration.

By Federal Defendants' admission, they fail the two-part test set forth above, and accordingly, this case is not moot. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289

(1982) ("It is well settled that a defendant's [purported] voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.")

Rather than being "absolutely clear" that the religion-based discriminatory treatment of married same-sex couples cannot reasonably be expected to recur, Federal Defendants have provided a path for it to continue: Under the Consortium, as designed, USCRI will segregate prospective Program foster parents who are married same-sex couples from other applicants, based on their sexual orientation and sex and the same-sex character of their marriages, as a direct result of USCCB's religious condemnation of the couples. *See* PMF ¶¶ 91-92; *See* FDMF ¶¶ 89-91, 93. Indeed, the Consortium is specifically designed to do just that—funnel prospective Program foster parents who are married same-sex couples away from CCD on account of USCCB's religious objections. PMF ¶ 81; *See* FDMF ¶¶ 91, 93. This Court has recognized that the dignitary harm of unequal treatment at the hand of one's own government is a cognizable injury. *See Marouf v. Azar*, 391 F. Supp. 3d 23, 33 (D.D.C. 2019); *see also, generally*, *Heckler v. Matthews*, 465 U.S. 728, 739-40 (1984) (dignitary harm from differential treatment stigmatizes members of the disfavored group as inherently inferior); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-94 (1954) (segregation generates feelings of inferiority, regardless of whether the tangible factors of the segregated programs are equal). By segregating married same-sex couples from others, the Consortium only exacerbates the "stigma, rejection, and humiliation" experienced by Plaintiffs on account of the unequal treatment. PMF ¶ 101.

As a matter of law, this governmental discrimination against married same-sex couples violates the fundamental guarantees of equal protection and due process. *See* PMSJ at 16-26; *see also Obergefell v. Hodges*, 576 U.S. 644, 681 (2015); *United States v. Windsor*, 570 U.S. 744, 774-75 (2013); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Romer v. Evans*, 517 U.S. 620, 631-36

(1996). That is especially so when, as here, the discrimination is designed to accommodate the bias of a third party. *See Romer*, 517 U.S. at 631-36 (private religious and moral disapproval of lesbian, gay, and bisexual people is not a rational basis for government-facilitated discrimination); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("private biases" are not "permissible considerations for" governmental action); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448-49 (1985).

Additionally, it is undisputed that, if the Consortium operates as intended and married same-sex couples all are sent by USCRI to Upbring for screening, they will continue to receive less favorable treatment than married different-sex couples on account of USCCB's religious beliefs. Unlike married different-sex couples, who can be referred to either agency and can enjoy the much greater services provided by USCCB's subgrantee, the government intends for married same-sex couples will to be referred only to a new subgrantee with significantly less capacity for screening, training, licensure, and support for placements. *See* PMF ¶¶ 102-106. This religion-based discrimination compounds Federal Defendants' violations of the Equal Protection, Due Process, and Establishment Clauses. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 553 (1996).

Notably, Federal Defendants cannot establish mootness based on Plaintiffs' ability to apply to be foster parents through the Consortium, when Federal Defendants have purposefully kept themselves ignorant of discriminatory processes that the Consortium employs. *See* PMF ¶¶ 87-88. Indeed, Federal Defendants expressly acknowledge that Plaintiffs might be steered by USCRI back to CCD, only to experience again the very same discriminatory rejection as in 2017. *Id.* ¶¶ 93, 107.

Federal Defendants' delegation to Consortium participants of the screening of married same-sex couples, under a structure that is specifically designed to adopt the religious litmus tests of the participants, also violates the Constitution for an additional independent: Federal Defendants may not adopt USCCB's religious beliefs as a determinant of governmental decision-making. *See*

PMSJ at 28-32. Yet the Consortium has been specifically designed to segregate and refer married same-sex couples by reference to USCCB's religious beliefs. PMF ¶¶ 81-108. Indeed, Federal Defendants have impermissibly ceded to USCCB the inherent governmental function of determining USCRI's referral criteria, with no safeguards against impermissible discrimination. *Id.*; *see also Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982). Moreover, under the Consortium, Federal Defendants have granted USCCB a prospective blanket waiver absolving USCCB of any requirement to carry out any task under USCCB's delegated governmental authority, regardless of whether it substantially burdens USCCB's religious beliefs or whether it harms prospective foster parents and Program children. PMF ¶ 108. The Consortium thereby impermissibly operates to further USCCB's religious beliefs at the expense of the rights and interests of married same-sex couples and those of Program children. *See Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005) ("An accommodation must be measured so that it does not override other significant interests."); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (policies that give "unyielding weighting in favor" of religious observers "over all other interests" violate the Religion Clauses).[7]

This Court has recognized that equal treatment is a touchstone of the relief that Plaintiffs seek.[8] *Marouf*, 391 F. Supp. 3d at 37 ("Ordering the Federal Defendants to develop a system that removes barriers to same-sex couples becoming foster parents and evaluates their eligibility *by the*

[7] As Plaintiffs have previously explained, Federal Defendants have elsewhere conceded that analogous blanket waivers are impermissible. *See* PMSJ at 38.

[8] USCCB's assertion that the Consortium satisfies "what Plaintiffs demanded . . . in the manner Plaintiffs themselves proposed" grossly mischaracterizes Plaintiffs' position. USCCB's Mem. of P. & A. in Supp. of Mot. for Summ. J. ("USSCB's Mem.") at 14 (Dkt. 106-1) (emphasis omitted). Simply stated, Plaintiffs seek what they are entitled to by law: fully equal treatment, not just with respect to a common Program entrance portal, but rather from screening through processing, licensure, and placement. *See* Ex. 1, May 15, 2019 Hr'g Tr. at 9:9-17, 11:5-10. The Consortium fails to afford Plaintiffs what they seek.

same criteria as any heterosexual couple or person will make Plaintiffs whole.") (emphasis added). Plaintiffs continue to suffer unequal treatment on account of Federal Defendants' furtherance of USCCB's religious beliefs through the Consortium, leaving Plaintiffs with constitutional injuries for which the Court can provide relief. *See Ctr. for Food Safety v. Salazar*, 900 F. Supp. 2d 1, 7 (D.D.C. 2012) (plaintiffs "need only show that some form of effective relief could be available to them should they prevail—however partial the remedy, however uncertain its potential to truly address Plaintiffs' concerns.") (emphasis added). Accordingly, Defendants cannot show that it is absolutely clear that Plaintiffs "no longer ha[ve] any need of the judicial protection that [they] s[eek]," *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000), or that the Consortium has completely eradicated their constitutional injury, *County of Los Angeles v. Davis*, 440 U.S. at 631.

B. Plaintiffs' Claims Are Also Not Moot Because Federal Defendants Can Reinstate the Pre-Consortium URM Program at Any Time.

Even if the Court could find that the Consortium has remedied all of the constitutional deficiencies at the core of this litigation—which it does not—the modification of the URM Program would not moot this case because Federal Defendants "retain authority to reinstate [the pre-Consortium URM Program] at any time." *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021); *accord Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (governor's directive to end an agency program did not moot challenge to program because State remained free to "revert to its [prior] policy"). Here, Federal Defendants' modification of the URM Program does not carry the force of statute or regulation, and current or future officials are "free to return to [the] old ways." *See Davis v. City of New York*, 812 F. Supp. 2d 333, 339 (S.D.N.Y. 2011) (quoting *City of Mesquite*, 455 U.S. at 289 n.10).

Federal Defendants make no attempt to argue that their unlawful Program administration will not recur. Rather, they continue to defend the lawfulness of the pre-Consortium URM Program. Courts routinely decline to find a case moot when defendants continue to defend the legality of the challenged policy. *Reeve Aleutian Airways, Inc. v. United States*, 889 F.2d 1139, 1143 (D.C. Cir. 1989) ("Indeed, DOD's very defense of [the] regulations makes it more likely that [the plaintiff] will be subject to the procedures."); *In re Ctr. for Auto Safety*, 793 F.2d 1346, 1351-53 (D.C. Cir. 1986) (where defendant officials vigorously assert legality of challenged conduct, it is legitimate for plaintiff and the court to expect repetition of that conduct).

For the foregoing reasons, Defendants have not sustained their heavy burden of proving mootness. This Court should reject their attempt to frustrate judicial review of their unconstitutional administration of the URM Program.[9]

[9] Federal Defendants assert that the Court should decline to award equitable or declaratory relief even if this case is not moot because, they say, that "[redacted]" and "[redacted]" Program children. FD's Mem. at 27-29. Federal Defendants have not, however, presented evidence showing that Plaintiffs' requested relief would have that, or any other, adverse effect on their ability to care for Program children, or that granting relief here would otherwise be detrimental to the public interest. On the contrary, the relief requested would fulfill the URM Program's core mission of serving the best interests of Program children, by ensuring that the children are not deprived of the full range of foster home options for a reason unrelated to child welfare. Indeed, Plaintiffs have presented substantial evidence that requiring child placement agencies to comply with nondiscrimination obligations would not reduce the availability of foster families for children in the foster care system. *See* PMF ¶ 132. Even if certain faith-based child placement agencies were to discontinue providing foster care services because they have religious objections to serving all qualified families, there is no evidence that this would cause a reduction in the number of available foster families or otherwise impair the government's ability to meet the needs of children in its care. *See, e.g.*, *id.* ¶¶ 133-51.

II. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THE MERITS.[10]

A. Defendants Are Not Entitled to Summary Judgment on Plaintiffs' Fifth Amendment Claims.

Defendants do not dispute that Federal Defendants' actions discriminate on the basis of sexual orientation, sex, and the exercise of the fundamental right to marry.[11] Nor do Federal Defendants dispute that the discrimination is subject to heightened scrutiny.[12] Under any level of judicial scrutiny, there is no adequate justification for the discrimination; Federal Defendants do not contend otherwise.[13] Instead, Defendants assert that Plaintiffs' Fifth Amendment claims fail

---

[10] USCCB's motion for summary judgment is procedurally improper because Plaintiffs are not seeking relief against USCCB. *See* Fed. R. Civ. P. 56(b) (2009 amendment) ("A party *against whom relief is sought* may move . . . for summary judgment on all or part of the claim." (emphasis added)). Although Rule 56's text was revised in 2010, the Committee Notes indicate that the standard for granting summary judgment remains unchanged, and there is no indication that the Committee intended to authorize motions for summary judgment by nominal defendants that are neither seeking relief nor subject to claims for relief against them, which is the posture of USCCB here.

[11] USCCB mischaracterizes the liberty interest asserted by Plaintiffs as a right to be a foster parent. *See* USSCB's Mem. at 47. In doing so, USCCB disregards Plaintiffs' actual Fifth Amendment claims. Plaintiffs' due process argument is based on Federal Defendants' infringement of Plaintiffs' fundamental rights to marry, to have their marriage respected, and to family integrity and intimate association. Plaintiff's equal protection argument is based on Federal Defendants' discrimination against Plaintiffs based on the exercise of their fundamental right to marry (in addition to their sexual orientation and sex). *See* PMSJ at 16-24.

[12] USCCB asserts that because, in its view, Federal Defendants' conduct survives Plaintiffs' First Amendment claim, it necessarily follows that Plaintiffs' Fifth Amendment claims are subject to rational basis review. *See* USSCB's Mem. at 36. That is doubly wrong. First, as set forth in Plaintiff's Motion and above, Federal Defendants' conduct does not survive Plaintiff's First Amendment claim. Second, in *Conn. v. Gabbert*, on which USCCB relies, the Supreme Court held only that, when the Constitution "'provides an explicit textual source of constitutional protection, a court must assess a plaintiff's claims under that explicit provision and not the more generalized notion of substantive due process." 526 U.S. 286, 293 (1999) (internal quotations omitted). Because the texts of the Religion Clauses of the First Amendment do not explicitly protect Plaintiffs' right to equal protection under the law or their fundamental right to marry, their claims of transgressions of these constitutional rights are properly evaluated under the rubric of the Fifth Amendment, not that of the First Amendment.

[13] As for USCCB's contention, while the government has a constitutional obligation not to unjustifiably infringe an individual's religious liberty, accommodation principles, as explained in

because they concern "merely private conduct," not governmental action.[14] FDs' Mem. at 20 (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)).

Defendants are wrong. Just as in *Shelley*—the very case Federal Defendants cite—Plaintiffs here challenge as unconstitutional "the full coercive power of government" being put in service of USCCB's desire to exclude same-sex couples in a manner that deprives Plaintiffs of the "full enjoyment of [their] rights on an equal footing." 334 U.S. at 19. Plaintiffs brought this lawsuit against *Federal Defendants*; USCCB is joined as a nominal defendant only. Plaintiffs' claims are directed only at and seek relief only from *Federal Defendants*: Plaintiffs challenge: (1) *Federal Defendants'* award of a Program grant to USCCB despite knowing that USCCB would administer the grant in accordance with its religious beliefs, including its religious belief condemning married same-sex couples; and (2) *Federal Defendants'* failure to redress the exclusion of married same-sex couples from the Program by a Program grantee on account of its religious objections, despite knowing that the discrimination is ongoing. Confirming that this is so, Plaintiffs seek a declaration that *Federal Defendants* have violated the Constitution and an injunction that would enjoin only *Federal Defendants'* conduct. And Federal Defendants do not and cannot dispute that they are governmental actors. Accordingly, Defendants' assertions under the state-action doctrine have no bearing whatever. *See, e.g.*, *Barrows v. Becerra*, 24 F.4th 116, 137 (2d Cir. 2022) (affirming

---

depth in Plaintiffs' opening brief, are not without limit. When, for example, a religious exemption from the law would harm third parties, it is not a permissible (much less required) religious accommodation. *See* PMSJ at 34-36. It is circular at best to argue that that very harm, which is at the heart of our Equal Protection and Due Process claims, can be justified by accommodation principles.

[14] USCCB asserts that no equal protection claim can lie because Federal Defendants have not intentionally discriminated against married same-sex couples. *See* USSCB's Mem. at 38. But, in addition to knowingly enabling, ratifying, and funding USCCB's religion-based discrimination, PMF ¶¶ 15-24, 30-31, 41-52, Federal Defendants created the Consortium, which is expressly designed to segregate married same-sex couples for unequal treatment according to USCCB's religious disfavor of these couples, PMF ¶¶ 92, 101.

rejection of state action defense where plaintiffs challenged Medicare classifications by Secretary of Health and Human Services).

At least one federal district court has rejected a similar state action defense in a case with similar facts. In *Dumont v. Lyon*, the plaintiffs sued the directors of two state agencies over their practice of permitting state-contracted, taxpayer-funded child-placing agencies to use religious criteria to screen prospective foster and adoptive parents for child placements. 341 F. Supp. 3d 706, 713 (E.D. Mich. 2018). Denying the defendants' motion to dismiss, the court held that "the 'gravamen' of Plaintiffs' Complaint is not the purely private decisions of the faith-based agencies in turning them away," but instead "the actions of Defendant state officials in entering into contracts for the provision of state-contracted services," which they undertook with full knowledge and acceptance "that certain faith-based agencies may elect to discriminate on the basis of sexual orientation in carrying out those state-contracted services, conduct that . . . the State could not take itself." *Id.* at 745; *see also Rogers v. U.S. Dep't of Health & Hum. Servs.*, 466 F. Supp. 3d 625, 642-43 (D.S.C. 2020) (denying motion to dismiss claims against state and federal entities brought by same-sex couple turned away by faith-based child placing agency; rejecting argument that "[e]ssentially . . . neither a state nor a federal agency can be held accountable for a grantee's known, and explicitly permitted, exclusion of persons from a government-funded program based on religious criteria"; and allowing claims to proceed where plaintiffs' allegations "show that the stigma and practical barriers to fostering were the result of the Defendants' conduct") (emphasis omitted).

Here, the governmental action is even more clear. *Federal Defendants* entered into a Program grant agreement with USCCB, and in doing so knowingly excluded Plaintiffs and other married same-sex couples from equal participation in the URM Program on account of religious

objections to the couples. And *Federal Defendants* created the Consortium, under which married same-sex couples are systematically segregated from other Program foster parent applicants for unequal treatment on account of religious objections. These actions are those of *Federal Defendants*, not any private entity. Because Plaintiffs seek redress from governmental agencies and officials, not from private parties, the state action defense must be rejected.

B. Defendants Are Not Entitled to Summary Judgment on Plaintiffs' First Amendment Claim.

As Plaintiffs have already shown, Federal Defendants have violated the First Amendment's Religion Clauses by repeatedly favoring USCCB's religious beliefs in the course of administering the URM Program on the government's behalf. *See* PMSJ at 25-38. Federal Defendants' constitutional violation continues to this day. *See supra* § I. Nothing in Defendants' summary judgment motions shows otherwise.

1. Defendants wrongly suggest that *Fulton* disposes of Plaintiffs' First Amendment claim.

The Supreme Court's decision in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), poses no obstacle to relief here. First of all, no Establishment Clause claim was before the *Fulton* Court, so the Establishment Clause could not and did not figure into the decision there. Rather, *Fulton* was a free exercise case involving what has come to be called the unconstrained discretion rule, under which the creation of a formal mechanism for unfettered grants of exceptions renders a policy not generally applicable by "invit[ing] the government to decide which reasons for not complying with the policy are worthy of solicitude." *Id*. at 1879 (internal quotations and alteration omitted). The Court held that Philadelphia's foster care program runs afoul of the Free Exercise Clause because the program formally permits a public official or designee to, entirely "in his/her sole discretion," grant individualized exceptions from nondiscrimination requirements, but the city categorically excludes religious objections as a basis for obtaining such an individualized

exception. *Id.* at 1878, 1882 ("On the facts of this case, [the city's] interest cannot justify denying [the child welfare agency] an exception for its religious exercise."). Thus, *Fulton*'s holding was narrowly limited by its facts and concerned only "individualized exemptions" weighed according to vague, overly flexible, unlimited, discretionary standards like "good cause," "necessity," or "reasonableness." As Plaintiffs explained in their opening brief, that type of unfettered discretionary exemption process is simply not at issue here. *See* PMSJ at 35-36. In *Fulton,* that no one had ever been turned away or otherwise harmed by the child welfare agency was central to the Court's decision; but that is manifestly not so here, where Plaintiffs *were* turned away—and Federal Defendants acknowledge that they might be again. *Fulton*, 141 S. Ct. at 1882.

2. Defendants misapply the Supreme Court's guidance in *Kennedy*.

Defendants note that Establishment Clause challenges are evaluated with reference to the First Amendment's "historical practices and understandings." FDs' Mem. at 16 (quoting *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407, 2428 (2022)); *see also* PMSJ at 25-38.[15] Yet, after acknowledging the Supreme Court's most recent guidance, Defendants go off on a tangent and do not seriously engage with those considerations.

The Establishment Clause claim here does not challenge the government's ability, as a general matter, to engage with religious organizations to provide secular services. The constitutional concern here is that USCCB is not merely providing secular services that "happen to coincide with [its] religious views." *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988); *accord* FDs' Mem. at 16-18 (quoting *Bowen*, 487 U.S. at 621). Instead, Federal Defendants are enabling and ratifying USCCB's administration of a government program (and use of taxpayer funds) to

[15] All parties agree that the Supreme Court has refined its Establishment Clause analysis. Hence, Plaintiffs have not relied on the test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in advancing their First Amendment claim. *See* PMSJ at 25-38.

discriminate against prospective Program foster parents who do not "mirror the Holy Family." PMF ¶ 28.

Federal Defendants miss the point when they assert that the Establishment Clause permits religious organizations to provide secular services under government programs without ceding their religious character. FDs' Mem. at 16. While the Establishment Clause permits religious organizations to operate government programs, they cannot use their religious character as a shield to avoid fulfilling the basic objective of the program, nor may they administer a government program on the government's behalf in a manner that the Constitution forbids the government itself to do. Federal Defendants may not discriminate against married same-sex couples on religious (or any other) grounds, so Federal Defendants must not acquiescence to USCCB's religion-based discriminatory treatment of married same-sex couples in a program operated on Federal Defendants' behalf. *See Norwood v. Harrison*, 413 U.S. 455, 463-67 (1973).

Further, government runs afoul of the First Amendment when, in the name of accommodating the beliefs of a religious entity, it shifts costs, burdens, or harms to nonbeneficiaries. *Caldor*, 472 U.S. at 709-10. Hence, as explained in Plaintiffs' opening brief, Federal Defendants cannot excuse and enable USCCB's discrimination against Plaintiffs and others similarly situated in a federal program by calling it a religious accommodation, on account of the significant harms to prospective foster parents and Program children—harms that are directly contrary to the core mission of the Program to make placements in the best interests of the children. *See* PMSJ at 32-38; *cf. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334-35 (1987) ("At some point, accommodation may devolve into 'an unlawful fostering of religion[.]' ") (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 145 (1987)).

As for Federal Defendants' invocation of *Amos*, that decision upheld a provision in the Civil Rights Act of 1964 that exempts religious organizations from the prohibition against employment discrimination based on religion. The Court concluded that the exemption does not constitute impermissible governmental favoritism but instead is a neutral measure that allows religious institutions to advance their faith on their own behalf. 483 U.S. at 337. Here, by contrast, Federal Defendants' putative accommodation of USCCB's religious beliefs is not a "[redacted]" FDs' Mem. at 17, but instead unlawfully fosters, underwrites, and imposes those specific religious beliefs in a government program, categorically depriving Plaintiffs and similarly situated married same-sex couples of an equal opportunity to serve as Program foster parents—and hence also depriving Program children of placement opportunities that might be in their best interests. As Plaintiffs have already detailed, Federal Defendants have elsewhere conceded that an exemption from nondiscrimination requirements in the foster care context is improper when it fails to take into account the harms to third parties. *See* PMSJ at 38 (describing Federal Defendants' withdrawal of exemption from nondiscrimination requirements because it applied to entities that had neither requested the exemption nor shown any substantial burden on their religious exercise that might warrant it).

USCCB's parade of horribles lends no support to Defendants' motions for summary judgment. *See* USSCBs' Mem. at 35. USCCB elides the critical distinction between receipt of federal funds, on the one hand, and delegation of federal authority, on the other. Plaintiffs do not argue that, whenever a private party merely receives federal funds, the constitutional restrictions on the government are necessarily imputed to that party. Nor is that what is going on here. Rather, Federal Defendants have delegated Program administration to USCCB in a manner that enables and ratifies religion-based discrimination against married same-sex couples in a government

program. The Constitution simply does not permit Federal Defendants to do indirectly what they may not do directly. *See Norwood*, 413 U.S. at 463–67.

Nor is there a passage of time without incident that creates a presumption here that unconstitutional conduct can never happen in the future; on the contrary, the unconstitutional conduct is ongoing. This is not, therefore, anything like *American Legion v. American Humanist Association* (cited at FDs.' Mem. at 16), in which "identifying [the] original purpose or purposes" of a static monument erected a century earlier was "especially difficult." 139 S. Ct. 2067, 2082 (2019). The recent and continuing express and impermissible religion-based rejection of married same-sex couples from a federal program, including the government's ratification and exacerbating of that discrimination under the Consortium, can hardly be compared to the old, passive display in *American Legion*. PMF ¶¶ 15-20. Federal Defendants knew that USCCB would administer its Program grant and turn away couples like Plaintiffs based on religious criteria, yet Federal Defendants awarded the grant to USCCB anyway, thus delegating to USCCB the authority to discriminate in the federal Program. *See id.* ¶¶ 10, 15-24. Any doubt about the consequences of USCCB's administration of its Program grant in accordance with its religious beliefs was eliminated when Marouf notified Federal Defendants of the religion-based discriminatory treatment Plaintiffs received from USCCB's subgrantee. There is no reason to presume that Federal Defendants' continuing delegation of authority to USCCB to act on its behalf, with knowledge of USCCB's religious litmus test and without meaningful (or any other) safeguards for prospective foster parents or Program children, can be squared with the government's constitutional obligations.

3. The specific governmental interest here—dealing with children as refugees and asylum seekers—is unique given the historical role and plenary power of the federal government when it comes to immigration.

As for proper consideration of history and tradition, both Federal Defendants and USCCB provide an oversimplified, incomplete, and therefore inaccurate account of the role of private organizations in the provision of foster care services; and they completely ignore the context and history of federal control over immigration and refugee children.[16]

The Program history on which Defendants purport to rely dates back *only to 1948*. Thus, even by Defendants' account, there is no relevant history that dates back to the time of the framing of the Constitution.

It is important to bear in mind that child welfare programs for *refugees and asylum seekers* represent a modern exercise of *Congress's plenary power over immigration*. Thus, they are *unique* creatures, distinct from other child welfare programs and their history.

The federal government's plenary authority over immigration goes back to the birth of the Nation. As early as 1798, with the United States on the brink of war with France, Congress acted on immigration by passing the Alien and Seditions Act of 1978. *Alien and Seditions Act*, Nat'l Archives (July 6, 1798), *available at* https://www.archives.gov/milestone-documents/alien-and-sedition-acts. The Alien and Sedition Acts allowed the President to imprison or deport aliens who were deemed dangerous to "peace and safety" (Alien Friends Act of 1798) or were citizens of a nation with which the United States was at war (Enemy Alien Act of 1798). Congress also increased the residency requirement for naturalization from five to fourteen years. *Id.*; *see also* Naturalization Act of 1798, 5 Cong. Ch. 54, 1 Stat. 566 (enacted June 18, 1798).

[16] It is noteworthy that the URM Program started out as partnerships with individual states, not private entities. The particular program at issue in this case was administered through the state of Texas until 2017, when Texas withdrew from the program. *See* FDMF ¶ 59. USCCB was substituted as "replacement designee" to fulfill those state duties. *See id.*

The Supreme Court has repeatedly held that the right to expel or welcome foreigners, as well as to define the steps for entrance into, and the terms of lawful presence in, the country, is exclusively a federal power; the states may not regulate in the area of immigration. *See Takahashi v. Fish & Game Comm'n*, 334 U.S, 410, 419 (1948); *see also Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893) (federal government has inherent sovereign power to admit foreigners "only in such cases and upon such conditions as it may see fit to prescribe[e]"); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) ("The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States.").

Against this background, Congress enacted the first refugee legislation in 1948, following the admission of more than 250,000 displaced Europeans after World War II. *See History*, ORR (Nov. 12, 2021), https://www.acf.hhs.gov/orr/about/history. This legislation provided for the admission of an additional 400,000 displaced Europeans. Later laws provided for admission of persons fleeing Communist regimes, including, in the 1960s, Cubans fleeing Fidel Castro *en masse*. *Id*. Federal Defendants' program for unaccompanied refugee children continues this effort to meet international humanitarian needs.

While it is true that many of these waves of refugees were assisted by private ethnic and religious organizations in the United States, which formed the basis for certain public-private partnerships in U.S. resettlement efforts today, these refugee programs—including that before this Court today—have been possible only through action by the federal government based on its plenary authority over immigration, which dates to the founding of the country but has been exercised to establish child welfare programs for refugees and asylum seekers only in modern

times.[17] No private organization, including USCCB, has independent authority to bring foreign children into the country or provide them refuge. Only the federal government can fill this unique role. Moreover, public-private collaboration cannot impair the principle—unchanged by *Kennedy*—that the government may not accomplish through private actors that which it is constitutionally forbidden to do itself. *Norwood*, 413 U.S at 465.

4. The government has played a substantial role in overseeing child welfare since the Nation's founding, including to safeguard against religious discrimination, proselytization, and coercion.

The government's substantial role in today's child welfare system can be traced to English policies adopted in the colonies in the 17th century. All colonies enacted some version of the Elizabethan poor laws, which made government responsible for the care of children in need, and adopted the doctrine of *parens patriae*, which provided the foundation for the state's active role in child welfare and the post-revolutionary creation of the "best interests of the child" standard. *See generally* William P. Quigley, *Work or Starve: Colonial American Poor Laws*, 31 U.S.F. L. Rev. 35, 48-54 (1996). These influences provide the basis for today's publicly managed system for caring for dependent children.

The long-standing doctrine of *parens patriae* also shaped colonial understanding of the government's responsibility for children, giving rise to the foundational principle that the government should care for "those who cannot protect themselves," *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1, 57 (1890); *see also Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (recognizing "the state as *parens patriae*" may "[act] to guard the general interest in youth's well being").

[17] Foster care programs for children—refugees or otherwise—as we know them today simply did not exist in the early days of the Nation, *see infra* at 26.

State thus had both the authority and the duty to determine the best interests of children, and to take action to promote children's welfare in accordance with these interests. Indeed, the "best interests of the child" emerged as a new legal concept born out of the *parens patriae* doctrine. *See Hiller v. Fausey*, 904 A.2d 875, 893 (Pa. 2006) (Newman, J., concurring). That concept gave courts "the power, if the best interests of the child require[d] it, to take [the child] away from both parents and commit the custody to a third person." *Dietrich v. Anderson*, 43 A.2d 186, 192 (Md. 1945). The government was recognized as "a guardian of all children and may interfere at any time and in any way to protect and advance their welfare and interests." *Id.*; *see also In re Toulmin*, 1 Charlton 489, 494–95 (Ga. 1836) (legal right of the parent must be made subservient to the true interests and safety of the child, and to the duty of the state to protect its citizens of whatever age); *Sohier v. Mass. Gen. Hosp.*, 57 Mass. 483, 497 (1849) (deeming it "indispensable" that the legislature be permitted to act in "[t]he best interest" of "infants . . . who cannot act for themselves"). Building on and reinforcing each other, the doctrines of *parens patriae* and the best interests of the child thus created from the outset a strong public interest in and authority over child welfare that continues to this day.

Notably, at the founding of the country, child welfare programs concerned placing children in institutions, and it was only subsequently, in the late 1800s, that we came to see early efforts to place children in homes (what we know today as foster care[18]), which underscored the need for

[18] Foster care, from its inception, has always been different from the institutional care that preceded it, growing more narrowly and concretely out of the fact that only the state can remove children from their parents and terminate parental rights, thereby making children wards of the state. Thus, foster care is necessarily a governmental function. More to the point here, care for refugee children is necessarily the domain of the federal government. Whatever Defendants may say about the historic role of private institutions in providing institutional services to orphaned children, it is categorically inapplicable to care for refugee children.

greater government involvement in child welfare efforts.[19] Accordingly, any historical practice from the early days of the Nation to which Defendants might point is inapposite.

From the Elizabethan poor laws to the establishment of public child welfare standards in America, the history of child placement—and particularly foster care—is one of continuous government involvement, oversight, and regulation.

* * *

In the end, it is specious to argue that Federal Defendants' refugee children program in Texas did not delegate a uniquely governmental function—without any constitutionally sufficient safeguard—to a religious organization for operation in accordance with the organization's religious beliefs, to the detriment of married same-sex couples and Program children alike. *See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 696-97 (1994) (delegating governmental powers to religious bodies without adequate safeguards impermissibly fuses governmental and religious functions); *Larkin*, 459 U.S. at 123 ("delegating a governmental power to religious institutions . . . inescapably implicates the Establishment Clause"). Federal Defendants impermissibly did this without consideration of the harm to third parties. *Cutter*, 544 U.S. at 722; *Caldor*, 472 U.S. at 709-10.

Kennedy is consistent with and reinforces Plaintiffs' position: The federal government may not delegate to religious organizations a core federal function such as regulation of and care for refugee children, without establishing safeguards to protect foster parents and children against religious discrimination, coercion, and harm. Federal Defendants have thus violated the Establishment Clause.

---

[19] Ex. 2, Stephen O'Connor, *Orphan Trains: The Story of Charles Loring Brace and the Children He Saved and Failed*, 148-55, 168-70 (2001), available at https://archive.org/details/orphantrainsstor0000ocon_o7a7/page/n7/mode/2up.

CONCLUSION

For the foregoing reasons, Defendants' motions for summary judgment should be denied.

Dated: September 14, 2022

Respectfully submitted,

By: /s/ *Kenneth Y. Choe*
Kenneth Y. Choe (pro hac vice)
Jessica L. Ellsworth (D.C. Bar No. 484170)
James A. Huang (pro hac vice)
Michael D. Gendall (D.C. Bar No. 1029790)
Brendan C. Quinn (D.C. Bar No. 1616841)
Katherine Culora (D.C. Bar No. 1671154)
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004–1109
Telephone: (202) 637-5600
Facsimile: (202) 637-5910
ken.choe@hoganlovells.com
jessica.ellsworth@hoganlovells.com
james.huang@hoganlovells.com
mike.gendall@hoganlovells.com
brendan.quinn@hoganlovells.com
katherine.culora@hoganlovells.com

Russell A. Welch (pro hac vice)
HOGAN LOVELLS US LLP
609 Main Street, Suite 4200
Houston, TX 77002
Telephone: (713) 632-1437
Facsimile: (713) 632-1401
russell.welch@hoganlovells.com

Camilla B. Taylor (pro hac vice)
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
65 E. Wacker Place
Chicago, IL 60601
Telephone: (312) 663-4413
ctaylor@lambdalegal.org

Karen L. Loewy (DC Bar No. 1722185)
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
1776 K Street, N.W. 8th Floor
Washington, D.C. 20006-2304

Telephone: (202) 804-6245
kloewy@lambdalegal.org

Richard B. Katskee (D.C. Bar No. 474250)
Kenneth D. Upton, Jr. (D.C. Bar No. 1658621)
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1310 L Street, N.W., Suite 200
Washington, D.C. 20005
Telephone: (202) 898-2133
katskee@au.org
upton@au.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that, on September 14, 2022, a true and correct copy of the foregoing document was filed using the Court's CM/ECF System, which will serve all counsel of record.

By: /s/ *Kenneth Y. Choe*
Kenneth Y. Choe (pro hac vice)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FATMA MAROUF and BRYN ESPLIN, *Plaintiffs,* v. XAVIER BECERRA, in his official capacity as Secretary of the United States Department of Health and Human Services, *et al.*, *Defendants.*	Case No. 1:18-cv-378 (APM)

PLAINTIFFS' RESPONSE TO
DEFENDANT UNITED STATES CONFERENCE OF CATHOLIC BISHOPS'
STATEMENT OF UNDISPUTED MATERIAL FACTS
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Local Civil Rule 7(h), and this Court's August 23, 2021 Order (Dkt. 94), Plaintiffs Fatma Marouf and Bryn Esplin ("Plaintiffs"), by and through their undersigned attorneys, respectfully submit this response to Defendant United States Conference of Catholic Bishops' ("USCCB") Statement of Undisputed Material Facts (Dkt. No. 106-2) ("USCCBMF"). For ease of reference, Plaintiffs follows the same headings, format, and numbering used by USCCB in its statement of undisputed material facts. Plaintiffs' use of such headings, format, and numbering is in no way an admission of content or accuracy.

A. Unaccompanied Immigrant Children Programs

1. The Office of Refugee Resettlement ("ORR") is a component of the U.S. Department of Health and Human Services. (Fed. Def'ts' Answer to Amend. Compl. ¶ 10.)

Plaintiffs' Response: Admitted.

2. ORR administers grants and funding for the Unaccompanied Refugee Minor Program ("URM Program"). (Fed. Def'ts' Answer to Amend. Compl. ¶ 17; App. 8, 519–20.)

Plaintiffs' Response: Admitted.

3. The URM Program operates to care for children who are unaccompanied by a parent or guardian but have legal status in the United States. (App. 130, 451, 507–10; *see also* 8 U.S.C. § 1522.)

Plaintiffs' Response: Admitted.

4. Through the URM Program, children receive foster-care services and benefits, which may include long-term foster-care placements. (App. 130, 451, 507–12.)

Plaintiffs' Response: Admitted.

5. Eligible children include refugees, victims of trafficking, and asylees. (App. 130, 506, 508–09.)

Plaintiffs' Response: Admitted.

6. ORR administers the Unaccompanied Alien Children Program ("UC Program"). (App. 8, 362, 529; *see also* 6 U.S.C. § 279(g).)

Plaintiffs' Response: Admitted.

7. The UC Program operates to care for unaccompanied children who lack lawful immigration status. (App. 363–64, 528–29, 543–44, 546–47.)

Plaintiffs' Response: Admitted.

8. Like the URM Program, the UC Program provides eligible children with foster-care services and benefits, which may include long-term foster-care placements. (App. 191, 364, 530–37, 541–44, 546–47.)

Plaintiffs' Response: Admitted.

9. ORR does not provide foster-care services directly in its administration of either program. (App. 42, 484–87, 513–14, 521–23.)

Plaintiffs' Response: Admitted. *See also* Pls.' Statement of Undisputed Materials Facts ("PMF") ¶¶ 2-3 (Dkt. 107-01) (Program responsibilities, including recruitment and screening of prospective foster parents, training of foster parents, and placement of Program children with foster parents).

10. Instead, ORR issues grants to a network of public and private agencies to care and provide services for eligible children. (App. 8, 19–21, 69, 72–73, 79, 216, 248, 264, 322, 364, 506–10, 517–20, 530–33, 540–44, 546–47.)

Plaintiffs' Response: Admitted.

11. ORR's criteria for selecting grantees in the URM Program and the UC Program are secular and neutral. (App. 57–60, 119–23, 411–14, 464–67.)

Plaintiffs' Response: Denied. ORR awarded Program grants to USCCB despite knowing that it would administer them in accordance with its religious beliefs, including its religious belief condemning same-sex married couples. *See* PMF ¶¶ 15-22.

12. Faith-based organizations participate in both programs. (App. 8, 19–22, 32–33, 44–48, 63–64, 123, 275, 481, 496; *see also* 45 C.F.R. § 87.3(a).)

Plaintiffs' Response: Admitted.

B. USCCB and Its Historical Partnership with the Federal Government To Care for Unaccompanied Immigrant Children.

13. USCCB is an assembly of Catholic bishops that organizes and conducts religious and charitable activities in the United States and abroad. (App. 2)

Plaintiffs' Response: Admitted.

14. USCCB's religious mission includes, and has included for decades, "car[ing] for immigrants." (App. 2, 237.)

Plaintiffs' Response: Admitted, but see PMF ¶ 31; *see also id.* ¶¶ 16-17.

15. In executing its mission, USCCB became and continues to be one of the largest refugee-settlement agencies in the world. (App. 2.)

Plaintiffs' Response: Admitted.

16. USCCB has worked with the government on refugee resettlement since before ORR and the programs at issue were established. (App. 3, 62, 149–50, 156, 451.)

Plaintiffs' Response: Admitted.

17. ORR has regularly awarded grant funds to USCCB under the URM and UC Programs since their inception. (App. 3, 6, 8.)

Plaintiffs' Response: Admitted.

18. ORR awarded a grant to USCCB under the URM Program for the Fiscal Year 2017 grant period encompassing February 2017. (App. 6, 296.)

Plaintiffs' Response: Admitted.

19. Likewise, ORR awarded a grant to USCCB under the UC Program for Fiscal Year 2017 grant period encompassing February 2017. (App. 6, 34–35, 329, 456.)

Plaintiffs' Response: Admitted.

20. USCCB does not provide foster-care services directly. (App. 8.)

Plaintiffs' Response: Admitted, *but see* PMF ¶¶ 8-11.

21. Instead, it awards subgrants to various organizations for that purpose. (App. 8.)

Plaintiffs' Response: Admitted, *but see* PMF ¶¶ 8-11.

22. USCCB allocates funds provided by ORR in a manner consistent with its sincerely held religious beliefs. (App. 8.)

Plaintiffs' Response: Admitted.

23. Among other things, it would violate USCCB's sincerely held religious beliefs to fund any program that provides services contrary to Catholic teaching. (App. 6–8.)

Plaintiffs' Response: Admitted.

24. While USCCB may allocate funds to organizations that do not share its religious beliefs, USCCB will not and does not allocate funds to any organization that would use those funds to provide services contrary to the teaching of the Catholic Church. (App. 6–8.)

Plaintiffs' Response: Admitted.

25. Services contrary to the teaching of the Catholic Church, include, but are not limited to licensing or placing children with foster parents who are same-sex couples. (App. 6–8.)

Plaintiffs' Response: Admitted.

26. USCCB has no objection to serving, or allocating grant funds to organizations who will serve, all children in the URM and UC Programs, "including lesbian, gay, bisexual, and transgender (LGBT) populations." (App. 155, 247–48, 452.)

Plaintiffs' Response: Denied in that USCCB does not serve the best interests of Program children who would be best served by placement in a foster home headed by a married same-sex couple, and USCCB's subgrantee denied knowledge of any LGBT children in the Programs in its care. *See* PMF ¶¶ 119, 120, 126; *see also* Ex. 5, Dana Springer Deposition Transcript at 55:10 – 56:2.

27. One USCCB subgrantee (under both the URM and UC Programs) was Catholic Charities of Fort Worth ("CCFW"). (App. 7, 10.)

Plaintiffs' Response: Admitted.

28. CCFW provided foster services for unaccompanied refugee minors and unaccompanied alien children in Fort Worth, Texas. (App. 7, 10.)

Plaintiffs' Response: Admitted.

C. Texas Becomes First State to Withdraw from URM Program.

29. In January 2017, the State of Texas withdrew from the URM Program. (App. 85–88, 90)

Plaintiffs' Response: Admitted.

30. Texas's withdrawal required ORR to find a "replacement designee" to operate the URM Program in Texas on a "very short time frame." (App. 87–90, 92–93, 145–46.)

Plaintiffs' Response: Admitted.

31. Texas's size and the nature of the URM Program made the task of filling the role a "large undertaking." (App. 88–89, 92, 124.)

Plaintiffs' Response: Admitted.

32. ORR identified two organizations as capable of filling the "replacement designee" role. (App. 123–24, 129.)

Plaintiffs' Response: Admitted.

33. In ORR's view, of the two viable options, USCCB was "best equipped" for the role. (App. 123–24, 129.)

Plaintiffs' Response: Admitted.

34. On November 16, 2016, USCCB submitted an application to ORR to serve as replacement designee in Texas. (App. 461–62.)

Plaintiffs' Response: Admitted.

35. ORR approved a revised version of USCCB's application to serve as replacement designee in Texas in mid-January 2017. (App. 124–25, 254, 296, 474–77; *see also* App. 450–54 (final application for FY 2017).)

Plaintiffs' Response: Admitted.

D. Plaintiffs Cannot Foster Through CCFW Due to Its Religious Beliefs.

36. Plaintiffs Fatma Marouf and Bryn Esplin are a legally married same-sex couple. (App. 6.)

Plaintiffs' Response: Admitted.

37. Plaintiffs have lived in the Fort Worth, Texas area since August 2016. (App. 159.)

Plaintiffs' Response: Admitted.

38. On February 16, 2017, Plaintiff Marouf emailed CCFW about fostering a refugee child. (App. 342.)

Plaintiffs' Response: Admitted.

39. Like USCCB, CCFW believed that it could not, consistent with its religious beliefs, license or place foster children with same-sex couples. (App. 7, 10, 184–85.)

Plaintiffs' Response: Admitted.

40. Accordingly, CCFW informed Plaintiffs Marouf and Esplin that it would not accept their application to be foster parents. (App. 7, 160, 167, 171, 181, 353.)

Plaintiffs' Response: Admitted.

41. Plaintiffs emailed ORR's URM Program office about their interaction with CCFW. (App. 7, 161, 338–40.)

Plaintiffs' Response: Admitted. *But see* PMF ¶ 29 (Plaintiff Marouf sent the e-mail).

42. Plaintiffs' email came as a "surprise" to ORR. (App. 42–43, 104–05.)

Plaintiffs' Response: Denied in that ORR knew that USCCB would administer its Program grants in a manner consistent with its religious beliefs, including its religious belief condemning married same-sex couples. *See* PMF ¶¶ 18-21.

43. To ORR officials' knowledge, ORR had never before received a complaint about any provider refusing to place children with same-sex couples. (App. 36–37, 54–56, 104–05, 192–93, 218, 222–23, 261.)

Plaintiffs' Response: Admitted.

44. USCCB's URM grant application for fiscal year 2017 stated that it would have to "ensure that services provided under this application are not contrary to the authentic teaching of the Catholic Church, its moral convictions, and religious beliefs." (App. 8, 452.)

Plaintiffs' Response: Admitted.

45. USCCB's UC grant application for fiscal year 2017 stated that it would have to "ensure that services provided under this application are not contrary to the authentic teaching of the Catholic Church, its moral convictions, and religious beliefs in an approach that is consistent with the ACF Policy on Grants to Faith-Based Organizations." (App. 8, 456.)

Plaintiffs' Response: Admitted.

46. The sample Third-Party Agreement attached as Appendix A-8 to USCCB's UC Program grant application to ORR for fiscal year 2017 includes a provision entitled "Catholic Identity," which states that "USCCB/MRS must ensure that services provided to those serviced under this Agreement are not contrary to the authentic teaching of the Catholic Church, its moral convictions, and religious beliefs. Accordingly, USCCB/MRS expects that the Sub-recipient will provide services under this Agreement within certain parameters including, among other things,

that the Sub-recipient will not provide, refer, encourage, or in any way facilitate access to contraceptives or abortion services." (App. 8–9, 458–59.)

Plaintiffs' Response: Admitted.

47. Prior to Plaintiffs' inquiry, ORR had encountered USCCB's and its subgrantees' religious objections only in the context of the provision of certain services to children—namely, abortion and contraception. (App. 30–31, 38–39, 95, 98–99, 108–09, 202, 204, 240–41, 262–63.)

Plaintiffs' Response: Denied in that ORR encountered such objections as to all conceivable contexts when processing USCCB's grant application. *See also* PMF ¶¶ 60-76 (detailing instances in which ORR encountered such objections in the context of prospective Program foster parents who were a married same-sex couple and a lesbian individual).

48. Likewise, the application process for both the URM and UC Programs focused not on prospective foster parents, but rather on what services, if any, organizations could or could not provide to unaccompanied minors. (App. 130–31, 197–98, 212–15, 244–45.)

Plaintiffs' Response: Denied. (1) At the time that ORR awarded the grants to USCCB, ORR was aware that: (a) USCCB had stated that it would administer the Programs in accordance with its religious beliefs; and (b) USCCB's religious beliefs include a religious belief condemning married same-sex couples, and (2) delegated Program grant responsibilities include recruitment, screening, training, and licensing of Program foster parents, and the placing of Program children in foster homes that are in their bests interests. *See* PMF ¶¶ 8-11, 15-22.

49. Prior to the incident at issue in this case, there were no communications between USCCB and the Federal Defendants regarding the specific question of how the religious beliefs of USCCB or its subgrantees applied to the placement of children with foster parents who are same-sex couples. (App. 28–29, 59, 100–01, 122, 148, 202, 212–15, 263, 500.)

Plaintiffs' Response: Denied in that Federal Defendants knew that USCCB would administer its Program grants in a manner consistent with its religious beliefs, to the detriment of married same-sex couples and Program children. *See* PMF ¶¶ 18-21.

50. ORR was thus not aware that USCCB's and CCFW's adherence to their religious beliefs would result in the denial of same-sex couples as foster parents. (App. 43, 93–98, 102– 03, 139–44, 179–80, 212–15, 265.)

Plaintiffs' Response: Denied. (1) At the time that ORR awarded the grants to USCCB, ORR was aware that: (a) USCCB would administer the Programs in accordance with its religious beliefs; and (b) USCCB's religious beliefs include a religious belief condemning married same-sex couples, and (2) delegated Program grant responsibilities include recruitment, screening, training, and licensing of Program foster parents, and the placing of Program children in foster homes that are in their bests interests. *See* PMF ¶¶ 8-11, 15-22.

51. Due to a refocusing of its mission, CCFW no longer provides foster-care services. (App. 178, 186–88; 469–72.)

Plaintiffs' Response: Admitted.

52. As of July 1, 2019, USCCB began allocating funds received from ORR to Catholic Charities of Dallas ("CCD"), which has taken over services for unaccompanied alien children or unaccompanied refugee minors previously provided by CCFW. (App. 10, 186–88, 357, 469–72.)

Plaintiffs' Response: Admitted.

E. ORR Seeks Alternative Providers to Accommodate Plaintiffs.

53. To accommodate Plaintiffs' desire to foster immigrant children from the programs, ORR searched for organizations that could provide additional foster-care services in the Dallas-Fort Worth area. (App. 44–45, 53, 57, 115–16, 194–96, 206–07, 224–29, 252.)

Plaintiffs' Response: Admitted, but ORR has failed in its attempted accommodation. *See* PMF ¶ 91.

54. In May 2020, ORR appointed Lutheran Immigration and Refugee Services ("LIRS") as a second replacement designee for the URM Program in Texas. (App. 115–16, 252–54, 482, 494–95)

Plaintiffs' Response: Admitted.

55. LIRS provides services under the URM Program in the Dallas-Fort Worth area through its subgrantee, Upbring. (App. 115–16, 252–54, 275, 482, 494–95.)

Plaintiffs' Response: Admitted.

56. Around the same time, Baptist Children Family Services ("BCFS") received a grant for the UC Program in the same area. (App. 47–48, 194–95, 206–07.)

Plaintiffs' Response: Admitted.

57. Both programs are in operation today. (App. 47–48, 115–16, 194–95, 226, 252, 279, 491.)

Plaintiffs' Response: Denied. *See* Ex. 4, Anne Mullooly Deposition Transcript, May 18, 2022 at 52:7-53:3 (Upbring is less established than CCD, with fewer staff and resources available to license Program foster parents and support Program child placements); *see also* Ex. 6, Anne Mullooly Deposition Transcript, Dec. 8, 2020 at 77:19-78:16.

58. Both programs are willing to license and make placements with same-sex couples. (App. 52, 116, 206, 268, 491.)

Plaintiffs' Response: Admitted.

59. The government has also named "a neutral third party"—the U.S. Committee for Refugees and Immigrants ("USCRI")—"to field all inquiries from prospective URM foster parents in the Dallas/Fort Worth, Texas area." (App. 427, 444, 482.)

Plaintiffs' Response: Denied in that USCRI is not a "neutral third party" to the extent that it segregates married same-sex couples from other Program foster parent applicants for unequal treatment, and does so by reference to USCCB's religious belief condemning married same-sex couples. *See* PMF ¶¶ 84-85, 87-89, 91.

60. As of March 28, 2022, (Dkt. 102 at 1; App. 280, 481), USCRI works in consortium with LIRS and its subgrantee Upbring, as well as USCCB and its subgrantee CCD, to "ensure that all prospective foster parents in the Dallas-Fort Worth area have the opportunity to work with a URM provider." (App. 274, 284, 293.)

Plaintiffs' Response: Denied. Either (1) USCRI refers married same-sex couples to CCD, which refuses to work with them; or (2) USCRI segregates all married same-sex couples from other Program foster parent applicants for unequal treatment, and does so by reference to USCCB's religious belief condemning married same-sex couples. *See* PMF ¶¶ 91-92.

61. Specifically, USCRI is tasked with "establish[ing] a hotline and email address to receive inquiries from individuals or couples interested in fostering minors in the URM program in the Dallas/Fort Worth, Texas area"; "respond[ing] to all inquiries from individuals or couples interested in fostering minors in the URM program in the Dallas/Fort Worth, Texas area"; and "conduct[ing] initial intakes of the individuals or couples, to collect basic demographic and family composition information." (App. 285–87, 431–40, 442, 444, 482.)

Plaintiffs' Response: Admitted. *But see*, *supra*, resp. to USCCBMF ¶ 59.

62. Following intake, USCRI will "refer such prospective foster parents to either Catholic Charities Dallas or Upbring for training and licensing in accordance with applicable Texas law." (App. 285–87, 431–40, 442, 444, 481–82.)

Plaintiffs' Response: Admitted. *But see*, *supra*, resp. to USCCBMF ¶ 59.

63. USCRI's referrals are based on information collected during the intake process, including, "[d]emographic information, household and background information," as well as "criteria" established by each consortium partner, which can include religious objections. (App. 277–78, 281–82, 288–89, 434, 442.)

Plaintiffs' Response: Admitted. *But see*, *supra*, resp. to USCCBMF ¶ 59.

64. CCD and Upbring have committed to "refer all" prospective foster parents to USCRI, to "respond to referrals from USCRI" within established timeframes, and to "license all [prospective foster parents] that meet Texas state licensing, agency, accreditation, and home study requirements." (App. 276–78; 431, 442.)

Plaintiffs' Response: Denied in that CCD will not "license all [prospective foster parents] that meet Texas state licensing, agency, accreditation, and home study requirements" because it will not license such prospective foster parents who are married same-sex couples. PMF ¶¶ 84-85, 87-89, 91. Additionally, CCD is not required to send prospective foster parents to USCRI if they already are part of CCD's network, or enter its network because the applicants initially are interested in domestic foster care or the UAC Program. PMF ¶¶ 96-97.

65. In the event it becomes apparent that either CCD or Upbring is unable to work with certain prospective foster parents "for reasons unrelated to Texas licensing requirements," they will refer those individuals to the other subgrantee or back to USCRI. (App. 283, 290–92, 434.)

Plaintiffs' Response: Denied as to the factual assertion that CCD or Upbring will refer potential foster parents to other subgrantees in the event it becomes apparent that either CCD or Upbring is unable to work with those foster parents. *See* USCCB's App. 283: 8-14 ("If at any time the URM provider, whether it's Catholic Charities Dallas or Upbring makes the determination that they are not able to continue working with that individual or couple, *that they would then refer back to USCRI and then USCRI would then make a determination to refer to the other URM provider agency*.") (emphasis added).

66. The government has confirmed that neither USCRI nor LIRS (i.e., Upbring) has any "objection to working with same-sex couples seeking to foster children through the URM program." (App. 279, 491.)

Plaintiffs' Response: Admitted.

67. ORR has elected not to fund USCCB's long-term foster-care services in the UC Program as of February 28, 2021. (App. 3.)

Plaintiffs' Response: Admitted.

Dated: September 14, 2022

Respectfully submitted,

By: /s/ *Kenneth Y. Choe*

Kenneth Y. Choe (pro hac vice)
Jessica L. Ellsworth (D.C. Bar No. 484170)
James A. Huang (pro hac vice)
Michael D. Gendall (D.C. Bar No. 1023790)
Brendan C. Quinn (D.C. Bar No. 1616841)
Katherine Culora (D.C. Bar No. 1671154)
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004–1109
Telephone: (202) 637-5600
Facsimile: (202) 637-5910
ken.choe@hoganlovells.com
jessica.ellsworth@hoganlovells.com
james.huang@hoganlovells.com

mike.gendall@hoganlovells.com
brendan.quinn@hoganlovells.com
katherine.culora@hoganlovells.com

Russell A. Welch (pro hac vice)
HOGAN LOVELLS US LLP
609 Main Street, Suite 4200
Houston, TX 77002
Telephone: (713) 632-1437
Facsimile: (713) 632-1401
russell.welch@hoganlovells.com

Camilla B. Taylor (pro hac vice)
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
65 E. Wacker Place
Chicago, IL 60601
Telephone: (312) 663-4413
ctaylor@lambdalegal.org

Karen L. Loewy (DC Bar No. 1722185)
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
1776 K Street, N.W. 8th Floor
Washington, D.C. 20006-2304
Telephone: (202) 804-6245
kloewy@lambdalegal.org

Richard B. Katskee (D.C. Bar No. 474250)
Kenneth D. Upton, Jr. (D.C. Bar No. 1658621)
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1310 L Street, N.W., Suite 200
Washington, D.C. 20005
Telephone: (202) 898-2133
katskee@au.org
upton@au.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2022, a true and correct copy of the foregoing document with attachments was filed using the Court's CM/ECF System, which will serve all counsel of record.

By: /s/ *Kenneth Y. Choe*

Kenneth Y. Choe (pro hac vice)

DECLARATION A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FATMA MAROUF and BRYN ESPLIN, *Plaintiffs,* v. XAVIER BECERRA, in his official capacity as Secretary of the United States Department of Health and Human Services, *et al.*, *Defendants.*	)	Case No. 1:18-cv-378 (APM)

DECLARATION OF KENNETH Y. CHOE IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

I, Kenneth Y. Choe, declare that I am over 18 years of age and otherwise competent to testify as to the matters herein, which are based on my personal knowledge:

1. I am a partner at the law firm Hogan Lovells US LLP, and counsel for Plaintiffs Fatma Marouf and Bryn Esplin ("Plaintiffs") in the above-captioned matter. I make this declaration in support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, and I do so based on personal knowledge of the matters stated herein and my personal review of the referenced documents.

2. Attached as Exhibit 1 is a true and correct copy of excerpts from the transcript of the hearing held on May 15, 2019.

3. Attached as Exhibit 2 is a true and correct copy of excerpts of Stephen O'Connor, *Orphan Trains: The Story of Charles Loring Brace and the Children He Saved and Failed* (2001), also available at

https://archive.org/details/orphantrainsstor0000ocon_o7a7/page/n7/mode/2up (last visited Sept. 14, 2022).

4. Attached as Exhibit 3 is a true and correct copy of excerpts from the November 6, 2020 deposition transcript of Bryn S. Esplin.

5. Attached as Exhibit 4 is a true and correct copy of excerpts from the May 18, 2022 Rule 30(b)(6) deposition transcript of Anne Mullooly, a representative of Federal Defendants.

6. Attached as Exhibit 5 is a true and correct copy of excerpts from the November 18, 2020 deposition transcript of Dana Springer.

7. Attached as Exhibit 6 is a true and correct copy of excerpts from the December 8, 2020, Rule 30(b)(6) deposition transcript of Anne Mullooly, a representative of Federal Defendants.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 14th day of September 2022, in Washington, D.C.

Kenneth Y. Choe

DECLARATION B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FATMA MAROUF AND BRYN ESPLIN, *Plaintiffs*, v. XAVIER BECERRA, in his official capacity as Secretary of the UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, *Defendants.*	Case No. 1:18-cv-378 (APM) **DECLARATION OF FATMA MAROUF IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**

Fatma Marouf, of lawful age and competent to testify as to each fact below, makes the following declaration based on her personal knowledge:

1. I submit this declaration in support of Plaintiffs' opposition to Defendants' motions for summary judgment.

2. My wife, Bryn Esplin, and I have discussed and considered whether to apply to become foster parents under the Unaccompanied Refugee Minors Program since the government purportedly instituted the "Consortium" in the Dallas-Fort Worth area.

3. In addition, we have discussed and considered whether to apply to become foster parents under the Unaccompanied Alien Children Program since Defendant United States Conference of Catholic Bishops ceased participation in such program in the Dallas-Fort Worth area.

4. As explained in detail in paragraphs 20 and 21 of my declaration dated July 22, 2022, the Consortium model remains a discriminatory scheme that disfavors us as a married same-sex couple

5. Until we have a fully equal opportunity to apply do be foster parents under *both* Programs, we have chosen not to re-apply to become foster parents under the either Program.

6. We continue to seek the same range of opportunities to be foster parents to Program children as married different-sex couples, and feel like second-class citizens on account of being offered decidedly less than a fully equal set of opportunities.

I declare under penalty of perjury that the foregoing is true and correct. If called as a witness in the matter, my testimony would be consistent with this declaration.

Dated September 13, 2022.

Fatma Marouf

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FATMA MAROUF, ET AL.,	:	
	:	
Plaintiffs,	:	Docket No. CV 18-378
vs.	:	
	:	Washington, D.C.
	:	Wednesday, May 15, 2019
ALEX M. AZAR, II, ET AL,	:	2:05 p.m.
	:	
Defendants.	:	

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE AMIT P. MEHTA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiffs:
KEN CHOE, Esquire
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004

JAMIE A. GLIKSBERG, Esquire
Lambda Legal
105 West Adams St.
Suite 260
Chicago, IL 60603

For Defendants:
JAMES R. POWERS, Esquire
MICHELLE R. BENNETT, Esquire
U.S. Department of Justice
1100 L Street, NW
Washington, DC 20005

DAVID T. RAIMER, Esquire
Jones Day
51 Louisiana Avenue, NW
Washington, DC 20001

Appearances continued:

Court Reporter: CRYSTAL M. PILGRIM, RPR
Official Court Reporter
United States District Court
District of Columbia
333 Constitution Avenue, NW
Washington, DC 20001

P-R-O-C-E-E-D-I-N-G-S

THE DEPUTY CLERK: Your Honor, we have civil action 18-378 Fatma Marouf et al versus Alex M. Azar et al. Counsel please come forward and identify yourselves for the record.

MR. POWERS: Afternoon, Your Honor, Jim Powers on behalf of the United States. With me at counsel table is Michelle Bennett from the Department of Justice.

THE COURT: Mr. Powers.

MR. RAIMER: Good afternoon, Your Honor, David Raimer, U.S. Office of Catholic Bishops. At counsel table with me is Anthony Dick.

MR. CHOE: Your Honor, Ken Choe for plaintiffs and with me at counsel table is Jamie Gliksberg.

THE COURT: Welcome back everyone. So you are here for a status hearing in light of the filing that was made just a week or so ago indicating that there had been some movement by the Department of Health and Human Services identifying a program that could assist in terms of placement. So Mr. Powers, you want to fill us in.

MR. POWERS: Certainly, Your Honor. So as we stated in the notice, BCFS Health and Human Services a non-profit in Texas is starting an unaccompanied alien children foster care program in Dallas, Fort Worth for approved change in scope to an existing agreement that or has with BCFS and they will be transitioning services they currently provide in California to

Dallas, Fort Worth.

We understand that program was underutilized in California, so there are sound problematic reasons to move the services into the area. And we understand that BCFS does not have any religious or other objections to working with the same sex couples with respect to foster parents.

THE COURT: Okay, so have you had discussions with plaintiffs' counsel about how all of this impacts the case in their view of the case?

MR. POWERS: We have not yet. We informed plaintiffs about the news as part of asking their position on the motion for a status conference, but we have not yet conversed about their views about this development.

THE COURT: So when you say the program will be fully operational, are you expected to be fully operational in the fall. Does that mean that BCFS will be in a position to evaluate applications and make foster care placements at that time?

MR. POWERS: I believe so. I mean, as I understand what BCFS has informed the government is that as of June 1 they will open with the intent to recruit staff and foster parents. Based on that representation, the government's estimate is that things would be fully operational as of October.

THE COURT: You think? They've actually made a representation that they will start evaluating potential foster

parents before October?

MR. POWERS: I think that the way that it was represented was that they would open with the intent to recruit staff and foster parents beginning June 1. Obviously, there's a start up period. But this is, I believe, a currently licensed child placing agency in Texas, and that is something that is in their control to get started.

THE COURT: Okay, thank you. That's very helpful, thank you very much. I appreciate the efforts that DHS has made to get to this point.

MR. POWERS: Thank you, I would like to make one note for Your Honor's information. It's my understanding that Catholic Charities Fort Worth is going to be leaving the URM program in terms of providing services.

My understanding is that they will continue to provide services under the UAC program and there's a transition taking place between CCFW and Catholic Charities of Dallas that USCCB is overseeing. I would defer to counsel for them in terms of any information the Court needs about that issue, but I just wanted to raise that for the Court's information.

THE COURT: Okay. While we're on the subject, Mr. Raimer you want to fill me in on developments?

MR. RAIMER: Sure. And I don't have major details on that beyond what was represented by the government, but that CCFW is effectively leaving the foster care business in the

Dallas, Fort Worth area and USCCB is coordinating with Catholic Charities Dallas to essentially stand up an entity that would step into its shoes.

THE COURT: I'm sorry, you said USCC?

MR. RAIMER: Sorry, US Conference of Catholic Bishops.

THE COURT: Right and it's standing up for?

MR. RAIMER: It's standing up a Catholic Charities of Dallas. So when I say CCFW I'm referring to Catholic Charities of Fort Worth.

THE COURT: Right.

MR. RAIMER: Which was the entity that was involved below this litigation. They are leaving the foster care business.

THE COURT: Okay.

MR. RAIMER: And Catholic Charities of Dallas which is obviously in the same region. USCCB is working with them and ORR to essentially stand up Catholic Charities Dallas as a replacement provider.

THE COURT: I see. In other words, the foster care responsibilities will just transfer from one Catholic Charities, I don't know if subsidiary is the right word, to the other.

MR. RAIMER: That's effectively my understanding. There may be some details and implementation that are all being

worked out, but that's the general effect.

THE COURT: All right, well thank you.

Mr. Choe, you want to fill me in on what your view of the world is now in light of these developments?

MR. CHOE: Thank you, Your Honor. When the government apprised plaintiffs of this development late last week, we did indicate to the government at the time that we respectively posit that this development does not in any way materially affect our claims. They certainly do not moot our claims. And if I could just make observations in two buckets.

The first is what I'll call more practical and the second is more about the fundamental nature of our claims. The first one on a practical level. Of course today there is no other alternative child welfare agency on the ground in the geographic area.

In terms of timing, although there is representation of an expectation that this alternative service provider will be up and running in October which is of course several months from now. Even as this case suggests, the government despite its good faith efforts has not been correct in terms of its predictions about timing.

Of course our clients have suffered this injury over two years ago and of course proceeded to vindicate their rights by prosecuting their claims.

Another practical consideration is that the government

suggests, it appears that this provider would participate in only the UAC program, also participate in the URM program.

As you know from the allegations in plaintiffs' complaint, it is very important to hop in, that they be considered as well for an opportunity to foster in the URM program. It's of particular importance to our clients.

And then another consideration is we don't yet know whether this alternative service provider will present additional established cause of concerns.

Just a cursory look at the BCFS website suggest that from a foster parenting fact sheet that it might make as a condition of foster parenting attendance at a faith based church. And so we don't know whether there will be an additional different ways in which the religious beliefs of the grantee or subgrantee the program would cause a constitutional concern. So you know these are all to be seen.

Of course I would note that that is fairly encompassed by the claims that plaintiffs have brought. Plaintiffs of course their fundamental claims they wish to be able to participate in these government funded administered programs without reference to the religious beliefs of the grantees and subgrantees.

It just so happened in 2017 it happened to arise in the context of religious beliefs about grantees and subgrantees. It just so happened in 2017 it happened to arise in the context of a religious belief about same sex marriage. But more

fundamentally, their claim is about a system that is free of any type of impermissible religious consideration. So that's just some of the practical issues you see.

I think what's more important to understand is the fundamental nature of our claims because even if tomorrow this alternative service provider were up and running, if it were to participate in both USC and URM even if it didn't present any impermissible religious criterion.

As Your Honor may recall, the fundamental claim and harm to our client is the ability to access this program without reference to some sort of discrimination based on this government endorsed discrimination. As you may recall from the last hearing, it's clear that simply being referred to another service provider does not cure that fundamental harm or address that alleged concern. So we feel like in some ways this development standing alone does not appear to materially affect our claims.

THE COURT: It would show insofar as you are seeking remedies for past harms that probably makes sense. But it does seem to me that it would have an impact on any prospective remedies that you were seeking. You are seeking sort of preliminary injunctive remedies which would require HHS to make modifications to its program, et cetera. And so these developments might have an affect on that aspect of your case.

MR. CHOE: Your Honor, of course as indicated we

would wait to see what actually develops. We of course would need to confer with our client. But fundamentally, our clients wish to foster a child through a system that does not discriminate based on these considerations. So if as feared, you know, notwithstanding the crisis of this child welfare agency service provider, they still confront a system along those lines, I think they would still feel like they would not have redress for that concern.

THE COURT: Right. But that's -- well, let me put it this way. If the concern that you identified that this new provider BCFS I would say doesn't have any condition of either identifying one's faith or something more substantial actually. Attending and identifying, that would not, that would hopefully, well let me ask. I think that sounds like that would resolve some of the concerns or at least address most of the concerns prospectively.

MR. CHOE: That would present -- our clients would be willing to go through the process with that alternative provider understanding that this is new itself and treats them differently as a result. And I can represent to the Court today that our clients would be willing to do that because it is just as important to them that they access the system through a system that is not, does not present the constitutional concerns they have alleged.

THE COURT: Maybe I'm misunderstanding.

Are you saying that even if there's no religious test that they still would somehow be discriminated against in a system that did not discriminate against them based upon their same sex claim status?

MR. CHOE: The discrimination that would persist would be the fact that they would not have the equal opportunity of others similarly qualified with the evidence to go through the CCFW doorway. We'll talk about the CCFW program in a second. But that is the fundamental concern that they would continue to have.

THE COURT: CCFW is no longer in the picture.

MR. CHOE: I understand that. I didn't understand that they were dropping out as to the UAC program.

Fundamentally, the Supreme Court has recognized in well established case law that this sort of stigma or dignitary harm is itself a cognizable harm that persists and is actionable. So Hedler v. Matthews makes it clear that that's the case in the equal protection context.

The Northeastern Chapter of General Contractors of America v. City of Jacksonville makes it clear. In that particular case it was about minority business centers trying to seek contracts. And in that case, the Court held that the discriminatory barrier itself is the harm. It doesn't matter whether -- it didn't matter in that case whether plaintiffs had actually alleged that it would not get the actual contract in

the end. So it is ultimately the denial of equal access that is itself cognizable harm.

On the establishment clause side, there is an analogue to that. So for example in Texas Mudley v. Bullock, the Court made clear that where there's this disfavoring of community based on the religious considerations that necessarily sends a message of endorsement of favor religious consideration to the detriment of those who are disfavored and discriminated against. That's exactly the sort of concern that's happening here.

THE COURT: We talked about this at great length and my understanding was that at the time even if you were not seeking it would be to have the Catholic Charities affiliate removed as a, for lack of a better word, vendor or provider. But it sounds like what you're saying may be different now.

MR. CHOE: So if plaintiffs can clarify. Ultimately what plaintiffs are seeking is for the government to fund and administer a program that is not based on these extraneous religious beliefs of the grantees and subgrantees.

How the government comes to comply with its constitutional obligations, the plaintiffs are agnostic. Obviously one way to do it would be to require the grantee, grantees to process these applications regardless of the religious beliefs. What plaintiff has been emphasizing is that it is not necessarily the only way the government can come into compliance with its

obligations.

It can choose to come into compliance that way, but there may be other ways to do that. An incident where they would simultaneously accommodate their religious beliefs, in this case USCCB. If that were the case, plaintiffs would have no objection.

THE COURT: So how would that happen?

MR. CHOE: So in the settlement discussions the parties reported -- maybe it would be helpful to talk a little bit about plaintiffs' approach to those discussions. So at the top of those discussions, plaintiffs' thought it would be helpful to all parties if it were to set forth kind of the bottom line principles that the plaintiffs were seeking.

One of those principles was that when it came to the application process, our clients and others like them would not face differential treatment.

We propose one way in which that could happen which would be if there were an alternative service provider in the geographic area for all of the applications to go through that alternative service provider. And then everyone would be on equal footing. Everyone would be treated equally and CCFW would still have access to those licenses to the many foster parents. They just wouldn't be processing them selectively.

I'll let the government speak for itself, but the representation that was made to plaintiffs, as we understood

it, was that the government would not entertain that as a potential solution. So of course plaintiffs were open to any other alternative that would achieve the principle that was articulated by plaintiffs.

THE COURT: Can you repeat what your proposal was? Maybe I didn't follow.

MR. CHOE: The proposal is that if there were a second service provider in the geographic area that all would be applicants for the foster parenting opportunities under these programs and would apply through that service provider and not through CCFW because CCFW would only want to process some of the applicants because of its religious convictions. But if there were an alternative service provider that did not impose those kinds of religious litmus tests then --

THE COURT: So then how would Catholic Charities affiliates come in the picture if everybody is having to apply through a non religious based organization? How do applications end up with Catholic Charities?

MR. CHOE: Sure, and then USCCB, the government can talk more about that and try to understand eventually from discovery. But as we understood it, they would still be participants in these programs because they would still provide services to children, children would be placed in their care and they would provide services and they would receive payments from the government as a result. So they would still be

receiving grant monies. They would still be providing services to children.

THE COURT: But they wouldn't be able to do any foster placement?

MR. CHOE: Right -- no, no. They just wouldn't -- the one thing they wouldn't do is they wouldn't process foster parenting applications. That would be done by somebody else. Those who were successfully processed and licensed by the other provider. Those licensed foster parents would still be available to CCFW for placement of the children under care. They just wouldn't be handling the paper work of processing and licensing them.

THE COURT: If your concern is a system in which your clients are not treated differently by virtue of their same sex status, does that really solve the problem? In other words, they're still a channeling of your clients to one service provider over the other. Does it really matter who's shuffling the paper on the front end? They still aren't going to get foster placement through Catholic Charities.

MR. CHOE: So, Your Honor, the difference there is everyone would be treated equally. So all comers would be sent to the alternative service provider and processed without regard to religious consideration.

So in that sense, our client would not have an objection because they would be entering a system where they were treated

like everyone else without regard to religious consideration. That's why we propose this as a potential solution because it seems like one that would achieve all objectives.

Of course, we can't speak for the government in terms of whether it would be willing to do that, but it seemed to us something worth considering.

The government says first if it's something they're willing to consider. But then if that's not, for whatever reason, we would want the government to come back with another proposal which if we could come up with another one. But that's the one we would come up with.

The other alternative is simply to require the grantees and subgrantees to process all the applications. Because we understood that the potential objective the government was not to achieve, reach that result. That's why we thought it would be helpful to offer this alternative which seemed to us to make sense and be administrable.

THE COURT: Would your clients be satisfied if that was just available in the Dallas, Fort Worth area or are they looking for something at least in terms of resolving the case on a more national scale?

MR. CHOE: We have sought declaratory relief and certainly to the extent any injunctive relief were limited to this area. It would seem hard for the government to maintain, you know, because the principle is the same everywhere, right.

In the sense that it's a single government funded administered program.

THE COURT: From what I understand, from what I recall, the reason they're different in terms of who the providers are and so maybe this problem doesn't quite present itself in the same way elsewhere.

MR. CHOE: It may or may not present itself elsewhere, but the ultimate question is whether it's a national policy. They can allow, affirmatively allow their grantees and subgrantees to oppose unrelated religious considerations in the processing of would be applicants to this program.

THE COURT: Okay, that's helpful. Thank you, Mr. Choe, I appreciate --

MR. CHOE: Thank you, Your Honor.

THE COURT: -- your explanation of where things stand.

Mr. Powers, I don't know if you wish to respond, react.

MR. POWERS: If I can just clarify a few points.

THE COURT: Or have some suggestions.

MR. POWERS: So in terms of the suggestion about sort of a channeling or things of this nature. I think it might help to just kind of clarify how the programs work in the sense that ORR partners with these agencies, but the agencies are the licensed child placing agencies within these states. Those are sort of the storefronts if there is any storefront, so to

speak.

People would work with those entities to attempt to become licensed as foster parents under the State of Texas, in this instance the foster care system. Those entities are working with different populations that could be, you know, persons from the state foster system. It could be persons from the unaccompanied children, Unaccompanied Refugee Minor system. Basically a person who is working with one of these entities sort of works with that provider to determine the population that they may be suitable for, then that provider works with, in our case, ORR to end up with a case file that is sort of connected with those parents.

So there's not really a basis for this kind of a interposition of the government or of just one agency because that presupposes the government sort of standing between or is sort of the only entity that is receiving foster parent applications.

But again, the government is not a licensed child placing agency under the State of Texas laws. We don't have the capacity to kind of wholescale rejigger the programming that way.

So I think in terms of what relief the Court could issue, it would need to require the government to stop funding certain entities or things of that nature and that wouldn't be to anybody's benefit. So I think that that's -- I think that's

why the government has instead come up with this alternative approach.

THE COURT: At least I understood Mr. Choe to say something slightly differently which is that you've got two providers in a geographic area. One that is amenable to placement with same sex couples, the other is not.

All applications would have to go through that storefront and using your lexicon that does not discriminate based upon a same sex couple status, in that they will do the initial clearing and that doesn't mean that that entity also does placement. It's just that I guess there's only one door to go through and you can then be put in a different, you can go on one line or the other. Once you get through the door. I think their concern is that there's two different doors to even get into the program.

MR. POWERS: I think that's not something that the government has contemplated. I think one good reason is that it does reduce the number of opportunities and entities recruiting foster parents to work with these populations that do need care.

I think also it conceivably opens the government up to arguments that we have a differentially treated entity in violation of RFRA, the Religious Freedom Registration Act or a violation of the Free Exercise Clause. So I don't think that kind of differentially treating certain entities on the basis

of their religious views is a viable option for the government or at least at present is not one that is being considered.

THE COURT: Okay. Mr. Choe you want --

MR. CHOE: Your Honor, may I just address a couple of points quickly?

I just want to address a couple of things briefly. There was a sense that the proposal that plaintiffs had proffered would somehow reduce the number of potential respective foster parent applicants. That would not be the case because to the extent CCFW or any others wanted to actively recruit any one grade into the program, it would simply be everyone would be sent to just one door. So it's not that there are fewer people being recruited. It's just how they got processed that is going to be different.

I did want to mention, we were not aware until today that CCFW would be ceasing its participation in the URM program. But from what we understand, and counsel for USCCB can correct me if I'm wrong, it sounds like those grantee responsibilities will shift to a different entity associated with USCCB. There would still be some more considerations there.

THE COURT: Right.

MR. CHOE: Finally, the last point is just in terms of the children in the care of CCFW. Your Honor had asked whether CCFW would still have access to licensed foster care parents, the answer is yes. But conversely we want to make

sure that every foster parent licensed through the alternative door would be considered for each of the children in the pool including those at CFCFW. Now CCFW wouldn't have to itself place that child even if that contravened its conscious.

But we believe there is a way in which the system could be developed that would allow for complete consideration for all of the licensed foster care parents. Thank you, Your Honor.

THE COURT: Mr. Raimer.

MR. RAIMER: If I could just make one point of clarification regarding the extent of Catholic Charities Fort Worth participation in the future.

My understanding is that they are moving out of both programs. There is more definite dates on the URM program that is targeted for June 30th. But they're also planning to leave the UAC program as well, and Catholic Charities Dallas would be standing up hopefully for both of those as well. Again, there's some logistical issues that are being worked through there, but that is the intent of those entities at this point in time.

THE COURT: So the Dallas entity would still be doing placement for both of those?

MR. RAIMER: Yes.

THE COURT: Okay, well it's not clear to me where any of this leaves us other than its all new facts to consider. I guess the question is is there any benefit of trying to go back

to the table in terms of trying to resolve things? Whether there's a benefit to try to send this to mediation in some way, try and find somebody who could mediate something of this magnitude.

What are your thoughts? I'm open to hearing things. Obviously, the motion is still pending. I apologize for not having ruled on it yet. That's what I'm trying to say, I'm sorry I haven't gotten to rule on it yet. I wish I had by now, but I just haven't.

MR. POWERS: Your Honor, I can respond to your question briefly.

THE COURT: Sure.

MR. POWERS: At least given the current position as stated by plaintiffs, it doesn't seem to us at the moment that mediation would be a productive step at least under the current kind of posture of the case. I think that potentially we put this before the Court as quickly as we could, and so we're not in a position to say definitely whether we may seek to assert that. We're new to the case in some respects; obviously, the facts still need to be developed a little bit --

THE COURT: Right.

MR. POWERS: -- to get to that point. But we may assert arguments regarding mootness in a procedurally appropriate fashion or attempt to at the appropriate time.

THE COURT: Okay.

MR. CHOE: And Your Honor, consistent with the government's position, plaintiffs' believe that their claims should continue to be prosecuted for a number of reasons. As previously stated, there is currently now a second service provider in the geographic area what a service provider would be at some point in the future, what plaintiffs would want to continue. Also given the government's position from past conversations and their willingness to proceed to kind of the conditions that we were proposing, it doesn't appear at this point that those kinds of discussions would be fruitful.

One additional point. The government had talked about the only potential order would be for the government to cease funding for certain entities. That's not necessarily the relief that plaintiffs are seeking here.

Plaintiffs could envision the Court saying look government, you have a certain obligation under the constitution to make sure that this program is equally available without regard to religion. The government can decide how it wants to come into compliance. One way could be to enforce, require grantees or subgrantees to process the applications without regard to religion. But it could be that the government could come up with an alternative that is consistent with that order of principles, so it wouldn't have to be --

THE COURT: Well, this has been helpful. What I'll

tell the parties is this, it is my intention to get to the motion soon. In terms of my own mental sequencing of cases, there's one that I need to resolve in the immediate future, and then I should be able to turn my attention to this matter.

So while it's been some number of months since the case, since you all last reported to me that you aren't able to resolve that and my commitment to help focus on getting the motion resolved and then we can kind of see where we are at that point, okay.

All right, thank you all, I appreciate it.

(Proceedings adjourned at 2:40 p.m.)

-oOo-

CERTIFICATE

I, Crystal M. Pilgrim, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the stenographic notes provided to me by the United States District Court, of the proceedings taken on the date and time previously stated in the above matter.

/s/ Crystal M. Pilgrim, FCRR, RMR Date: September 12, 2022

EXHIBIT 2

ch 7

Happy Circle

> Wherever we went . . . we found the children sitting at the same table with families, going to the school with the children, and every way treated as well as any other children. Some, whom we had seen once in the most extreme misery, we beheld, sitting, clothed and clean, at hospitable tables, calling the employer "Father!" loved by the happy circle, and apparently growing up with as good hopes and prospects as any children of the country.
>
> — Charles Loring Brace, 1859[1]

IN TERMS OF scope and influence, the Emigration Plan of the Children's Aid Society was an enormous success. Throughout the second half of the nineteenth century the society alone placed an average of 2,500 children a year, and an ever-growing number of other organizations were following its example. By the 1870s the Five Points Mission, the New York Juvenile Asylum, the New York Foundling Hospital, and the New England Home for Little Wanderers in Boston all had orphan train programs of their own. At first such programs were confined to East Coast cities, but as western cities grew they too followed Brace's example when dealing with the problems of their poor. The Illinois Children's Home Society and the Boys and Girls Aid Society of San Francisco were among many organizations that found country homes for orphans and slum children. Indeed, the idea of rescuing "friendless" children by finding homes for them became almost fashionable. For many years *The Delineator*, a women's magazine edited by Theodore Dreiser, carried brief, heartbreaking descriptions of poor and parentless children in every issue and asked readers to take them in by indenture, outplacement, or adoption.

Brace's Emigration Plan may have been even more influential in Europe than in the United States. Several European nations, including

Germany, Norway, and Sweden, set up orphan train–like programs, but none so enthusiastically as the English. The largest of the British programs directly inspired by Brace's work was Dr. Barnardo's, which alone exported more than 80,000 English slum children to the commonwealth.

It is impossible to determine the exact number of children transported by all orphan train programs. None of these organizations kept very exact records. Many of them would enter the same child two and three times on their rosters. Not all of the organizations, including the CAS, bothered to sort out clearly which children were benefiting from which programs. And some, like the New York Foundling Hospital, have still not opened their records to public scrutiny. Estimates of the number of children the Children's Aid Society placed range between 32,000 and 300,000.[2] Victor Remmer, the current CAS archivist and a former director of the society, says that by his count the CAS placed approximately 105,000 children between 1853 and the early 1930s. The most widely quoted figure for the total number of children placed by all orphan train–like programs in the United States is 250,000 — although that figure is little more than a guess.

The true test of the orphan trains' success is not, of course, their extensiveness or their adoption by other organizations, but the degree to which they actually helped the children who rode them — and here the facts are decidedly more ambiguous and obscure. Approximately 20 percent of CAS records made under Brace's stewardship are so incomplete that it is impossible to get any idea of how a child fared in his or her new home, and most of the remaining files are so fragmentary that conclusions based on them can only be educated guesses at best.

Calibrating the degree to which the Emigration Plan satisfied the needs of children is also made difficult by the fact that during the nineteenth century children's needs were conceived of very differently and in fact were very different (in certain significant particulars at least) from the needs of children today. To mention only one obvious example: during the 1800s not only was it thought to be good and right that children should work long hours, but the economic structure of the entire society dictated that if lower-class children did not work, they and their families were going to end up hungry and homeless. Although it is perfectly true that any modern-day program that

aimed to help twelve-year-olds by getting them full-time jobs would be barbaric, any mid-nineteenth-century program that did not consider child labor normal and beneficial would have been a nonsensical pipe dream. It is very difficult in an era when child labor is thought to be almost as abhorrent a crime as slavery to consider that in an earlier era decent, even admirable, people saw nothing wrong with children doing what we think of as adult work. But this is precisely the sort of leap our moral imagination must make if we are to understand the orphan trains.

The final factor complicating any evaluation of the Emigration Plan's effectiveness is the paradox that the orphan trains look worst when they are judged by some of Charles Loring Brace's own publicly elaborated standards, particularly in regard to the desirability of adoption.

Although Brace frequently talked about the Emigration Plan as a means of getting children jobs, in his annual reports and other promotional writings he tended to present its typical and ideal result as adoption. This was the implication of all his arguments about the importance of removing poor children from bad families and all the anecdotes of the orphan train riders' happiness in their new homes. The ideal of adoption was even implicit in the verbal agreement that the CAS had with the children's employers: the child would be treated exactly like the employer's own birth children and kept until age twenty-one.

Anyone who accepted adoption as the ideal goal of the orphan trains would have been deeply disappointed by their actual results, and anyone who believed that the typical orphan train rider ended up adopted would have felt equally betrayed, because the truth is that only a minority of orphan train riders ever experienced anything like what we would call adoption today. In a comprehensive statistical analysis of 280 placements made by the Children's Aid Society during its first year of operation, sociologist Bruce Bellingham found that a mere 20 percent of the children stayed in their placements for sufficient duration and had enough familial involvement to approximate the modern understanding of adoption. He also found that an additional 24 percent stayed at their placements because they found them satisfactory as jobs. But fully 56 percent of the placements expired before the terms set in their verbal agreements, many in only a matter of

days. Sixteen percent of placed children ended up returning on their own to New York or to their families. And 11 percent were retrieved by their kin.[3]

The first independent analysis of CAS records, conducted in 1922 by Georgia G. Ralph of the New York School of Social Work, would seem to indicate that as time passed the Emigration Plan made some progress toward fulfilling Brace's publicly stated ambitions. Although Ralph made no attempt to distinguish placements that were adoptions from those that were merely jobs, she found that 56 percent of the placements made in 1865 (the first year she studied) lasted at least as long as their verbal agreements stipulated, and that in 1875 that number rose to 60 percent. Eight percent of the children placed in 1865 returned to New York or their families, and 5 percent ended up in jail. For 1875 those figures were 10 percent and 4 percent, respectively.[4]

Bellingham, who conducted his study in the early 1980s, did not categorize placements as successes or failures on the basis of duration, but Ralph accepted Brace's claim that adoption — or at least long-term placement — should be the ideal goal of emigration. Thus, she labeled those placements that endured for their expected term as "favorable" and those that did not as "unfavorable." Although this interpretation would seem to present the majority of placements as successes, it would also give the early Emigration Plan a failure rate upward of 40 percent — a rate that hardly seems to justify the extravagant claims so often made for the plan in CAS literature.

Ralph did her study at a time when Brace's arguments about the desirability of removing poor children from their homes were far more widely accepted than they are today. Nowadays, when a child is taken from his or her family, adoption is not a primary goal but a last, best hope. The first priority is family preservation. Only when a family is so troubled that a child's safety or healthy development is at risk will the child be removed from the home and placed in foster care. The hope is that the child's stay in foster care will be as brief as possible and last only as long as it takes the family — ideally with the help of social service agencies — to get over whatever crisis led to the child's removal. Only when the child is orphaned or the parents are deemed permanently unable to provide adequate care does adoption become a primary goal. In general, only a small proportion of children who are removed from their homes end up being adopted. The vast majority go in and out of foster care in a matter of days or weeks.

From the modern perspective, then, Bellingham's finding of a 20 percent adoption rate might seem not at all low but excessively high, and Ralph's 56 percent and greater "favorable" outcome rates would seem to be even worse. By the same token, it is the roughly 10 percent of children who ultimately returned to their families who would seem to represent the orphan train program's greatest success.

It is not, however, truly fair or meaningful to compare the orphan trains to the whole spectrum of modern foster care. Although the orphan trains are the direct antecedent of foster care, the typical foster child today is probably more similar to the boys and girls who stayed briefly at the CAS lodging houses than to the average orphan train rider. The children the CAS sent west tended to be its hardest cases. They were more likely than the beneficiaries of other programs to have been incarcerated in jails or asylums, and more likely to have been abused or neglected by their families. If we look only at today's hardest cases — those children in foster care for more than eighteen months — we find that roughly 25 percent of them end up being adopted,[5] a proportion fairly close to Bellingham's figure. Although it would be a mistake to place too much weight on a comparison of two such different mechanisms in two such different eras, the rough correspondence between orphan train and present-day hard-case adoption rates suggests at the very least that, when it came to helping children become part of new families — Brace's publicly stated ambitions aside — the Emigration Plan may have succeeded as well as could reasonably be expected.

Another way in which Brace misrepresented his work was by portraying the CAS as an *active* agency, "saving" children, "reforming" character, "draining" the city of its poor, rather than as the more *passive* agency that it actually was. One of the most important differences between the CAS and the other major child welfare organizations of the era — the houses of refuge, juvenile asylums, and orphanages — is that it did not impose a mandatory program of moral reform on children. Whatever reform the CAS effected was achieved by offering children help in getting what they most needed to become happy and productive members of society — jobs, homes, shelter, education. At least in theory, no child was ever required to accept this help — though obviously, young children did not have a choice when their parents or guardians put them on the orphan trains, and any child who came

into contact with the CAS was subjected to heavy persuasion. But even so, however Brace may have represented the CAS to wealthy contributors, he had designed it to be a tool of the working — or "dangerous" — classes, and this was in fact how it succeeded best.

The Morrow family's experience was typical. Johnny was subjected to an intense campaign promoting western migration — a campaign he ended up abetting in his own writing — but no one at the CAS ever thought the worse of him for choosing not to ride the orphan trains. On the contrary, every reference in CAS records to Johnny is radiant with affection and respect. And likewise, no one at the CAS decided what should happen to Johnny's siblings as their home life became intolerable or they got into trouble on the streets. It was Johnny himself who decided — as de facto head of the family — to put his siblings, one by one, on orphan trains. And when Johnny went out to Iowa and found that Willie had not remained with his original placement but had traveled on his own from employer to employer and state to state, going as far away as Wisconsin, Johnny never saw this as a failure of the Children's Aid Society. On the contrary, Willie had been doing precisely what the Emigration Plan was primarily designed for: he had been trying to take advantage of the supposedly greater opportunities open to him in the West — something he could never have done had he been required to stay with his original, less than satisfactory employer. Thus, when Willie returned to New Haven with Johnny, it was the West that had failed, not the orphan trains.

And no one at the CAS seems to have seen anything particularly worrisome in Willie's case. Although the CAS record keeper was clearly perturbed that Johnny had "smuggled" his brother home, his or her account of Willie's travels from placement to placement across four western states includes no harsher comments than "doing well" and "getting along finely."[6] A similar complacency colors John Jackson's record-book entry. His original employer, James DeHaven, seems to have felt no shame in reporting that John had grown "dissatisfied" on his farm and had left to work for a neighbor. He claimed to still "like" John and to be in touch with him. And the CAS seems to have found nothing about the situation that merited investigation or even concern.[7] Drifting was a perfectly normal and acceptable consequence of the Emigration Plan as actually managed by the CAS, if not in how the CAS presented the program to the public

Georgia G. Ralph would have placed these two cases in her "un-

favorable" category, but this was clearly not the way CAS workers viewed them. With all of Brace's rhetoric about children finding better families and homes, the CAS workers well understood that a placement might succeed even if it was not permanent, and that even children had a right to determine their own lives. CAS workers also understood that transportation west did not diminish children's obligations or bonds to their birth families. The record books from the early decades of the Emigration Plan commonly mention that a child returned to New York "to care for mother," or because "the family's situation improved." Neither the record keepers nor the employers seem to find anything improper about this. In their autobiographical writings, in fact, some orphan train riders mention that their employers paid for their transportation home. Bellingham finds only one case in which a birth parent was prevented from retrieving his or her child, and only a handful of cases in which the society or the child's employer even attempted to prevent retrieval by birth parents.[8] The records also show almost no evidence of children being taken directly from unwilling parents, although there are countless cases of the CAS not bothering to contact the parents of children who came to their offices on their own, or not bothering to substantiate children's claims to be orphans. (Again, Johnny Morrow's and John Jackson's cases are perfect examples.)

The Emigration Plan had many grievous faults, in particular its failure to provide adequate screening of and assistance to foster parents and employers, adequate monitoring and supervision of placements, and adequate help to birth families so that they could remain intact. But the program also provided children with many real and important benefits. At a time when it was necessary for poor children to work, the Emigration Plan got children jobs, and at a time when even very young children would travel great distances to find work, the CAS not only provided them with free transportation but, if things did not work out with one employer, sent them a ticket to another or back to New York. The Emigration Plan also helped runaways escape difficult or abusive families. Like orphanages, the orphan trains provided a service to parents who temporarily or permanently were unable to care for their children — although it was certainly more difficult to retrieve a child from out west than from a New York orphanage. For children who truly needed new and decent families, the orphan trains offered the chance, although by no means the certainty, of finding

such families. The orphan trains also gave homeless children an alternative to jails, juvenile asylums, and traditional indentured servitude. And finally, the CAS treated poor children (if not their parents) with more respect, and had more faith in their capabilities, fundamental goodness, and future prospects, than any other organization that preceded them — as well as many that followed. And the orphan trains represented the very pinnacle of the Children's Aid Society's optimism.

In the first circular by which Charles Loring Brace announced to the world the existence of his new organization he made sure to assert: "We do not propose in any way to conflict with existing Asylums and Institutions, but to render them a hearty cooperation, and, at the same time, to fill a gap, which of necessity, they have all left."[9] Although it may have been politically wise for Brace to avoid presenting his fledgling effort as competition for the city's biggest and very well established institutions for the management of street children, his assertion was almost entirely disingenuous. Not only would the CAS compete directly with the New York Juvenile Asylum and the House of Refuge for a never very substantial pool of tax money and charitable contributions, but Brace stood firmly on the opposite side of a philosophical fence from the managers of the two institutions. This disagreement did not consist only of differing opinions about the effectiveness of caring for children in large groups, or about subjecting them to military-style discipline, but extended all the way down to the most fundamental understanding of heart, mind, and soul.

Brace was a proponent of a decidedly optimistic view of human nature. He saw human beings as fundamentally good, and evil as largely exterior to our essential character. Although Brace certainly acknowledged the role of biological inheritance in behavior, he believed that moral character was shaped primarily by the environment. The vast majority of children raised in decent homes and coherent communities, he believed, tended to grow into good men and women. This belief provided the whole rationale for the Emigration Plan. All human beings, under all circumstances, had the potential to do evil, but the general tendency was nevertheless very much in the direction of virtue — how else could a just, all-knowing, and father-like God arrange things?

Brace's implication that the CAS had been working with "great numbers" of the Irish poor who had been responsible for the riots was by no means inaccurate. For most of the nineteenth century the Irish accounted for 20 percent of the orphan train riders and were the largest single ethnic group served by the CAS, apart from the Americans, many of whom were of Irish extraction. The high proportion of Irish on CAS rosters did not mean, however, that the Irish universally welcomed the society's efforts. Many Irish, and Catholics in general, saw the CAS as a key element in a Protestant plot to destroy their faith.

There had been no significant Roman Catholic presence in New York City until the century of exponential growth that began with the building of the Erie Canal in 1826. By 1865 New York's 400,000 Catholics made up half of the city's population and were by far its largest denomination.[39] Some of them were Italian, German, and French, but the vast majority of New York Catholics were Irish who had fled the famine in the 1840s, '50s, and '60s.

Throughout the famine years the main object of the New York Catholic church was simply to keep up with the explosive growth of its congregation. The deep poverty of most New York Catholics kept the church perpetually short of funds to finance the building of new churches and schools, and all such institutions, once established, tended to operate on the very edge of financial insolvency. Up until the Civil War, apart from an orphanage built in 1817, there were no substantial Catholic urban aid or reform organizations. As a result, when the church's poorest parishioners needed help, they had no choice but to turn to Protestant charities, which many believed were primarily, if covertly, intended to lure Catholics away from their church. Up until the 1840s even the public schools were run by a semiprivate Protestant society that promoted a markedly anti-Catholic curriculum and insisted on the use of the Protestant King James Bible in class. (It was in fact a dispute between the city and Catholic Bishop John Hughes that led to the removal of the Bible from the classroom and — much to Hughes's dismay — to the gradual secularization of New York public education.)

Practically from its foundation, the Children's Aid Society was one of the Protestant relief organizations most hated by Catholics, largely because of its Emigration Plan, which was commonly seen as little

more than institutionalized child snatching. A multipaneled cartoon in an Irish American newspaper portrayed one of the society's agents as a dour ghoul who only smiles when a westerner gives him $20 for a frightened Catholic newsboy. The agent is shown lecturing the boy on the "iniquities of popery." And the CAS's success at accomplishing what "England failed to effect by the sword" is illustrated by the cartoon's final panel, which shows the boy, fully grown, a "Baptist Preacher," and a near twin of the ghoulish agent who "rescued" him.[40]

At first Catholic opposition to the CAS was purely ad hoc. An anecdote often repeated in the Catholic community during the nineteenth century told of a priest who intervened at the last minute to stop the departure of an orphan train and restore a group of Catholic children to their mothers, who had been "wild with grief."[41] And Brace himself, in *The Dangerous Classes,* told of an Italian priest named Rebiccio who in 1855 "flung ferocious anathemas" from the pulpit on all who permitted their children to attend the society's first Italian School. To Brace's immense satisfaction, however, the "whole opposition scheme exploded" when Rebiccio absconded with funds he had collected from his Five Points parishioners on the pretext of building a church and starting a school of his own.[42]

The earliest program aimed at countering Brace's influence — the Catholic Protectory, founded by Levi Silliman Ives in 1863 — could hardly have been more opposite to the Children's Aid Society in philosophy, or more directly confrontational.

Levi Silliman Ives had been raised an Episcopalian and had so devoted himself to his church that when he visited Rome in 1852, at the age of fifty-five, he was bishop of North Carolina. Under the influence of the grandeur and poignant beauty of Italian churches, however, as well as his conversations with devout Catholics, Ives came to feel that he had lived more than half a century in tragic error. He resigned his post, converted to Catholicism, and, on his return to the United States, joined the faculty of Saint John's College in New York, a Jesuit institution that later became Fordham University.

Ives believed that the CAS orphan trains were truly charitable, at least in intent, for Protestant children. But when the children "differed from their benefactors in their religion," charitable intentions yielded to a "temptation . . . to place a bar between these children and their parents; to sever the precious tie which binds them to the parental

heart and the parental influence." The cutting of these ties was accomplished, Ives maintained, in subtle stages:

> Concealment is first resorted to, a veil of secrecy is drawn over the proceedings, parental inquiries are baffled, the yearnings of the mother are stilled by tales of the wonderful advantages to her children, and promises of their speedy restoration to her arms. Yet all this while they are undergoing a secret process by which, it is hoped, that every trace of their early faith and filial attachment will be rooted out; and, finally, that their transportations to that indefinite region, "the far West," with changed names and lost parentage, will effectually destroy every association which might revive in their hearts a love for the religion of which they had been robbed, — the religion of their parents. Here, then, a new principle has been at work. What charity commenced, fanaticism has grossly perverted. . . . We had looked for a great benefit, and behold a great wrong, a foul injustice, has been practiced.[43]

With all of his distaste for the orphan trains, Ives began his career in charity by attempting to duplicate them. For some years before founding the Society for the Protection of Destitute Roman Catholic Children in New York, the organization that managed the protectory, he had been finding, informally, "good homes in the country for untrained and destitute Catholic children," and it was this experience that most determined the protectory's goals and methods. Ives did not simply disapprove of the CAS for kidnapping good Catholic children; he found the entire practice of outplacement "perfectly preposterous." In the protectory's first annual report he explained that although he had found homes for many children, "I can call to mind only a single instance where the child either did not abscond or prove to be utterly ungovernable and worthless."

Ives fell securely within the camp of those who took a pessimistic view of human nature and thus believed that children, especially poor children, could be saved from their vicious impulses only by being subjected to strict control. As he saw it, the prime reason for the utter failure of outplacement was that the practice alienated children from "the religion of their parents," by which phrase he meant not merely Catholicism but the inculcation of religious values through parental authority. As he explained it:

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:18-cv-378 (APM)

FATMA MAROUF, et al.,)
)
Plaintiffs)
)
VS)
)
ALEX AZAR, in his)
official capacity as)
Secretary of the UNITED)
STATES DEPARTMENT OF)
HEALTH AND HUMAN)
SERVICES, et al.,)
)
Defendants)

****

ORAL AND VIDEOTAPED DEPOSITION OF

BRYN S. ESPLIN

APPEARING REMOTELY

NOVEMBER 6, 2020

****

ORAL AND VIDEOTAPED DEPOSITION OF BRYN S. ESPLIN, produced as a witness at the instance of the DEFENDANT, U.S. CATHOLIC CONFERENCE OF BISHOPS, and duly sworn, was taken in the above-styled and numbered cause on NOVEMBER 6, 2020, from 12:29 p.m. to 3:03 p.m., before Donna L. Garza, CSR, in and for the State of Texas, reported by machine shorthand and appearing remotely from Polk County, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto; that the deposition shall be read and signed before any notary public.

REMOTE APPEARANCES

FOR THE PLAINTIFFS:
Mr. Brendan Quinn
HOGAN LOVELLS, LLP
555 Thirteenth Street, Northwest
Washington, D.C. 20004
brendan.quinn@hoganlovells.com

Mr. Kenneth Upton
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
upton@au.org

Ms. Camilla Taylor
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
ctaylor@lambdalegal.org

FOR THE FEDERAL DEFENDANTS:
Mr. Jason Lynch
U.S. DEPARTMENT OF JUSTICE
Civil Division
1100 L Street, Northwest
Washington, D.C. 20005
jason.lynch@usdoj.gov

FOR THE DEFENDANT, U.S. CATHOLIC CONFERENCE OF BISHOPS:
Mr. John D. Goetz
Mr. Joshua R. Sallmen
JONES DAY
500 Grant Street, Suite 4500
Pittsburgh, Pennsylvania 15219-2514
jdgoetz@jonesday.com
jsallmen@jonesday.com

Mr. Jason E. Cellier
JONES DAY
325 John H. McConnell Boulevard, Suite 600
Columbus, Ohio 43215
jcellier@jonesday.com

A. It was me, Fatma, and -- I believe -- Ms. Springer.

Q. And Ms. Springer, you understood, works for CCFW?

A. Yes.

Q. Anyone else, to your knowledge, participate in that call?

A. Not to my knowledge.

Q. And how long was the call?

A. I seem to remember it being about 30 minutes to 45 minutes.

Q. Did you keep any notes from the call?

A. I -- yes. I kept notes about the requirements Ms. Springer was describing regarding foster care criteria.

Q. Do you still have those notes in your possession?

A. I -- I do not.

Q. Okay. Was Ms. Marouf taking notes during the conversation?

A. We were sharing a notebook.

Q. I see. Were you together during the call?

A. Yes. We were right next to each other.

Q. I understood if -- from this morning that you were both talking on an iPhone on the speakerphone?

A. Yes. We -- it was a speakerphone. We were next to each other.

Q. Okay. So you were sharing a notebook, took some notes. But they don't exist currently; is that right?

A. To the best of my knowledge, we don't -- I don't have them.

Q. Okay. So can you tell me -- the best of your recollection -- what was described on the call?

A. Yes. So the call started with Ms. Springer telling us a little bit more about the program and the population to whom they -- they served, which were refugee children; and also the requirements for -- licensure, perhaps, is the word -- for the requirements for becoming foster parents in that program.

Q. Okay. What else was described or discussed?

A. I can -- do you want me to enumerate some of the criteria --

Q. Sure.

A. -- that was discussed?

Q. Whatever -- whatever -- I'm trying to get all your recollections of --

A. Okay.

Q. -- what was discussed.

A. So they -- Ms. Springer told us a little bit

about some of the background of the foster children, that some had come from South America; some would come from Middle Eastern countries.

That they -- that their requirements for being foster parents through that program that I was taking notes about was in regards to specific amounts of space, like a dresser drawer, like kind of living arrangements, and then things like a fire extinguisher, safety, a background check for us -- and enumerating those factors.

And then Ms. Springer said another requirement is that our foster parents mirror the Holy Family. And at that point, I remember being stunned. Fatma and I were both stunned and took a moment. And Fatma clarified what she meant by mirroring the Holy Family to ensure -- made it very clear that Fatma and I are women and married and if that precluded us. And Ms. Springer said yes, that we were not eligible because we were a same-sex couple.

Q. And did you or Fatma ask why you were being excluded? What was the basis for being excluded?

A. Yes. That basis -- we tried to clarify what that basis was and understand and get clarity that that basis was because we were a same-sex couple.

Q. And how long had the discussion preceded

before this exchange about the Holy Family occurred?

A. It had -- to the best of my recollection, it had been about 20 minutes describing the characteristics of the program; the children under their care; and then those sort of enumerated criteria, like the fire extinguisher; and -- and then the Holy Family requirement was after that.

So it had been -- it feels like a great time had passed until that requirement was told to us.

Q. And after the comment was made and you were -- you -- Fatma had clarified that as a same-sex couple, you would not be eligible to participate in the program, what was discussed after that point?

A. So after -- after that point, when we had clarity, I remember that Fatma asked whether Ms. Springer was aware that LGBTQ status, sexual orientation was a basis for asylum. Ms. Springer said she was not aware of that. And Fatma inquired further about whether there were any LGBT youths in their care. And Ms. Springer said no.

Q. And what else was discussed?

A. I believe that was -- that -- that part of the conversation was near the very end, so I don't know that -- I don't recall more being discussed other than Fatma discussing that sexual orientation was a basis for

asylum; asking about whether there were kids who were LGBT in their care, and Ms. Springer saying no.

And then -- that I remember, the call concluded. I think we thanked her for her time, vice versa.

Q. Did Ms. Springer indicate whether the Holy Family comment was based on Catholic Charities' religious beliefs?

A. Yes. To the best of my recollection, she said the -- our requirement is that our families mirror the Holy Family.

Q. Did you understand that requirement was based on Catholic Charities' religious beliefs?

A. Yes.

Q. Did you have any reason to doubt the sincerity of what Ms. Springer was relaying to you about Catholic Charities' religious beliefs?

A. Can you repeat that? Did you say --

Q. Yes.

A. -- sincerity?

Q. Yes. Did -- did you have any reason to believe that Ms. Springer was not being sincere in telling you that the Holy Family remark was based on Catholic Charities' religious beliefs?

A. No. I believe she was sincere.

WITNESS CORRECTIONS AND SIGNATURE

Please indicate changes on this sheet of paper, giving the change, page number, line number and reason for the change. Please sign each page of changes.

PAGE/LINE	CORRECTION	REASON FOR CHANGE
54:22	"particular program requirements"	Transcription Error
63:10	"definition of brain death or death by neurological"	Transcription Error
64:9	"Of course."	Transcription Error
71:23	"Of course."	Transcription Error

Bryn S. Esplin

BRYN S. ESPLIN

I, BRYN S. ESPLIN, have read the foregoing deposition and hereby affix my signature that same is true and correct, except as noted above.

BRYN S. ESPLIN

STATE OF _____ *
COUNTY OF _____ *

Before me, _____, on this day personally appeared BRYN S. ESPLIN, known to me, or proved to me under oath or through _____ (description of identity card or other document), to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office on this, the _____ day of _____, 2020.

_____
Notary Public, State of _____

My Commission Expires: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:18-cv-378 (APM)

FATMA MAROUF, et al.,)
)
Plaintiffs)
)
VS)
)
ALEX AZAR, in his)
official capacity as)
Secretary of the UNITED)
STATES DEPARTMENT OF)
HEALTH AND HUMAN)
SERVICES, et al.,)
)
Defendants)

REPORTER'S CERTIFICATION
ORAL AND VIDEOTAPED DEPOSITION OF
BRYN S. ESPLIN
APPEARING REMOTELY
NOVEMBER 6, 2020

I, Donna L. Garza, a Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, BRYN S. ESPLIN, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness remotely;

I further certify that pursuant to FRCP Rule 30(e)(1) that the signature of the deponent:

_____X_____ was requested by the deponent or a party before the completion of the deposition and is to be returned within 30 days from the date of receipt of the transcript. If returned, the attached changes and Signature Page contains any changes and the reasons therefor;

_____ was not requested by the deponent or a party before the completion of the deposition.

I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken. Further, I am not a relative or employee of any attorney of record in this cause, nor am I financially or otherwise interested in the outcome of the action.

Subscribed and sworn to on this the _____ day of November, 2020.

Donna Garza

_____

Donna L. Garza, CSR NO. 4785
Expiration Date: 12-31-22
US Legal Support, Inc.
Firm Registration No. 122
16825 Northchase Drive
Suite 800
Houston, Texas 77060
(713) 653-7100

EXHIBIT 4

UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

- - -

FATMA MAROUF and BRYN ESPLIN, a Married Couple, Plaintiffs,	:	CASE NO. 1:18-cv-378 (APM)
V.	:	
ALEX AZAR, in his official capacity as Secretary of the UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendants.	:	

- - -

May 18, 2022

- - -

Videoconference deposition of ANNE MULLOOLY, ORR/URM, (with all parties participating remotely), commencing at 9:02 a.m. on the above date, before Teresa M. Beaver, Professional Court Reporter and Notary Public.

- - -

US LEGAL SUPPORT
(877) 479-2484

A P P E A R A N C E S :

(VIA VIDEOCONFERENCE)
HOGAN LOVELLS U.S., LLP
BY: KATHERINE CULORA, ESQUIRE
(D.C. office)
and
RUSSELL WELCH, ESQUIRE
and
KENNETH CHOE, ESQUIRE
(D.C. office)
609 Main Street, Suite 4200
Houston, Texas 77002
katherine.culora@hoganlovells.com
russell.welch@hoganlovells.com
ken.choe@hoganlovells.com
Counsel for the Plaintiffs

and

(VIA VIDEOCONFERENCE)
LAMBDA LEGAL DEFENSE AND EDUCATION
BY: CAMILLA B. TAYLOR, ESQUIRE
65 E. Wacker Place, Suite 2000
Chicago, Illinois 60601-7245
ctaylor@lambdalegal.org
Counsel for the Plaintiffs

and

(VIA VIDEOCONFERENCE)
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
BY: KENNETH DALE UPTON, JR., ESQUIRE
1310 L. Street N.W., Suite 200
Washington, D.C. 20005
upton@au.org
Counsel for the Plaintiffs

A P P E A R A N C E S :

(VIA VIDEOCONFERENCE)
U.S. DEPARTMENT OF JUSTICE -
CIVIL DIVISION
BY: JASON LYNCH, ESQUIRE
1100 L Street, H.W.
Washington, D.C. 20005
jason.lynch@usdoj.gov
Counsel for the Federal Defendants and
the Witness

(VIA VIDEOCONFERENCE)
JONES DAY
BY: DAVID T. RAIMER, ESQUIRE
(D.C. office)
500 Grant Street, Suite 4500
Pittsburgh, Pennsylvania 15219-2514
dtraimer@jonesday.com
Counsel for the U.S. Conference of
Catholic Bishops

- - -

A L S O P R E S E N T :

KEVIN LAKE, ESQUIRE
HHS

LLEWELLYN WOOLFORD, ESQUIRE
HHS

- - -

MULLOOLY

agree.

MR. LYNCH: Jason Lynch from the Department of Justice on behalf of the federal defendants, I agree.

MR. RAIMER: David Raimer on behalf of the U.S. Conference of Catholic Bishops, I agree.

- - -

ANNE MULLOOLY, ORR/URM, after having been duly sworn, was examined and testified as follows:

- - -

EXAMINATION

- - -

BY MS. CULORA:

Q. Good morning, Miss Mullooly. Can you please state your name for the record?

A. Ann Mullooly.

Q. Miss Mullooly, have you ever been deposed before?

A. Yes.

Q. Since you're familiar with how this works, I'll quickly go over some ground

MULLOOLY

(Whereupon, there was a recess.)

- - -

THE COURT REPORTER: Back on the record. 10:20.

BY MS. CULORA:

Q. Miss Mullooly, I want to talk about Upbring a little bit. Is Upbring currently in a position to license foster parents?

A. Yes.

Q. And how many, I think you mentioned they licensed just one foster parent. Is that right?

A. That is our understanding.

Q. Do you know how many employees are in the program to help with recruitment efforts or licensure?

A. I don't have that information in front of me. I believe that they have -- so, they are still in the process of hiring staff. I think they -- it's kind of this gradual buildup as they license families and start to take cases, then they will continue to fill out their staffing. But they do have

someone on staff that is responsible for training and licensing foster parents.

Q. I know you said that the Upbring can't -- won't have children in their program until they have licensed foster parents.

Is there a guarantee that Upbring will get those children for the licensed foster parents?

A. I don't think the government can guarantee children for every single licensed foster family. The idea is for the URM provider agencies, they are the ones that have the ability to license foster parents and then they would signal to LIRS and to ORR that they are ready to start looking at referrals and then we can send them referrals for them to review.

Ultimately, it is up to the licensed foster parent to decide if they want to accept the referral that is presented to them.

So, it's not ORR's -- can't guarantee that that foster family is going to receive a child. It's ultimately the foster

MULLOOLY

C E R T I F I C A T E

I hereby certify that the proceedings and evidence noted are contained fully and accurately in the notes taken by me on the deposition of the above matter, and that this is a correct transcript of the same.

Teresa M. Beaver

(The foregoing certification of this transcript does not apply to any reproduction of the same by any means, unless under the direct control and/or supervision of the certifying shorthand reporter.)

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FATMA MAROUF, et al.,)
)
Plaintiffs,) Civil Action No.
) 18-cv-00378 (APM)
VS.)
)
ALEX AZAR, et al,)
)
Defendants.)

ORAL AND VIDEOTAPED REALTIME DEPOSITION OF
CATHOLIC CHARITIES, DIOCESE OF FORT WORTH, INC.
DANA SPRINGER
TAKEN VIA ZOOM VIDEOCONFERENCE
NOVEMBER 18, 2020
REPORTED REMOTELY

ORAL AND VIDEOTAPED VIDEOCONFERENCE DEPOSITION OF DANA SPRINGER, produced as a witness at the instance of the Plaintiffs, and duly sworn, was taken in the above-styled and numbered cause on November 18, 2020, from 9:03 a.m. CST to 3:13 p.m. CST, before Christy Cortopassi, CSR in and for the State of Texas, reported by machine shorthand remotely, with the witness being located at the law offices of Vitek Lange, 300 Throckmorton Street, Suite 650, Ft. Worth, Texas 76102, pursuant to the Federal Rules of Civil Procedure, the Emergency Order Regarding the COVID-19 State of Disaster and the provisions stated on the record or attached hereto.

REMOTE APPEARANCES

FOR THE PLAINTIFFS:

MR. MICHAEL A. BURNS
Hogan Lovells LLP
100 International Drive
Site 2000
Baltimore, Maryland 21202
410.659.2728
michael.burns@hoganlovells.com

-AND-

MR. KENNETH UPTON
Americans United For Separation of Church and State
upton@au.org

MS. CAMILLA TAYLOR
Lambda Legal Defense and Education Fund, Inc.
Ctaylor@lambdalegal.org

FOR THE FEDERAL DEFENDANTS:

MR. JASON LYNCH
U.S. Department of Justice
Civil Division
1100 L Street, Northwest
Washington, D.C. 20005
jason.lynch@usdoj.gov

FOR THE DEFENDANT U.S. CATHOLIC CONFERENCE OF BISHOPS:

MR. JASON A. CELLIER
MR. JOSHUA SALLMEN
MR. DAVID RAMIER
Jones Day
325 John H. McConnell Boulevard
Suite 600
Columbus, Ohio 43215
614.281.3817
jcellier@jonesday.com

(Appearances continued)

FOR THE DEPONENT DANA SPRINGER:

MR. SID LANGE
Vitek Lange
300 Throckmorton Street
Suite 650
Fort Worth, Texas 76102
817.885.5610
slange@viteklange.com

ALSO PRESENT:
Mr. Rick Bell, Videographer

MR. LANGE: Object to form.

A. I don't know.

Q. (BY MR. BURNS) Doesn't CCFW have records of foster parents?

A. Absolutely.

Q. But you are not sure whether any of those foster parents have been Muslim?

MR. CELLIER: Object to scope.

A. I just don't know off the top of my head.

Q. (BY MR. BURNS) Are there any lesbian, gay, bisexual, transgender -- which going forward I'll just refer to as LGBT -- children in the URM or UAC programs?

A. I don't know.

Q. Why don't you know?

A. Because we no longer operate those programs.

Q. When CCFW operated those -- administered those programs, were there any LGBT children in the programs?

A. I still don't know.

MR. CELLIER: Object to scope.

A. We don't require children to disclose that.

Q. (BY MR. BURNS) You don't require children to disclose it. Did you ask children?

A. I don't know. I didn't do intakes with children.

Q. But you don't know whether it was the policy of

CCFW to ask whether a child is LGBT?

A. I don't know.

Q. Was it CCFW's position that a child's sexual orientation was not an important consideration in making foster placement decisions?

MR. CELLIER: Object to form.

MR. LANGE: Object --

A. Could you, please, repeat?

Q. (BY MR. BURNS) Was it CCFW's position while it was administering the URM and URC programs that sexual -- excuse me -- that a child's sexual orientation was not important -- I'm just going to start over on this one.

A. Okay.

Q. Yeah. Was it CCFW's position while it administered the URM and UAC programs that a child's sexual orientation was not an important consideration in making foster placement determinations?

MR. LANGE: Object to form.

MR. CELLIER: Object to form.

A. I can't say that it wasn't important but it was not a consideration.

Q. (BY MR. BURNS) If it had been important, CCFW would have included it as a consideration, wouldn't it?

MR. CELLIER: Object to form.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FATMA MAROUF, et al.,)
)
Plaintiffs,)
)
VS.) Civil Action No.
) 18-cv-00378 (APM)
ALEX AZAR, et al,)
)
Defendants.)

REPORTER'S CERTIFICATION
DEPOSITION OF DANA SPRINGER
CATHOLIC CHARITIES, DIOCESE OF FORT WORTH, INC.
NOVEMBER 18, 2020
REPORTED REMOTELY

I, Christy Cortopassi, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, DANA SPRINGER, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That the deposition transcript was submitted on _____ to the witness or to the attorney for the witness for examination, signature and return to me by _____;

That the amount of time used by each party at the deposition is as follows:

MR. MICHAEL A. BURNS.....03:21
MR. JASON LYNCH.....00:00
MR. JASON A. CELLIER.....00:25

MR. SID LANGE.....00:00

I further certify that pursuant to FRCP No. 30(f)(i) that the signature of the deponent:

__X__ was requested by the deponent or a party before the completion of the deposition and that the signature is to be returned within 30 days from date of receipt of the transcript. If returned, the attached Changes and Signature Page contains any changes and the reasons therefor;

_____ was not requested by the deponent or a party before the completion of the deposition.

I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken, and further that I am not financially or otherwise interested in the outcome of the action.

Certified to by me this _____of_____, 2020.

_____
Christy Cortopassi, Texas CSR 6222
Expiration Date: 10/31/2022
Firm Registration No. 343
U.S. LEGAL SUPPORT, INC.
8144 Walnut Hill, Suite 350
Dallas, Texas 75231
214.741.6001

EXHIBIT 6

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA
----------X
FATMA MAROUF and BRYN ESPLIN,
a Married Couple,

PLAINTIFFS,

-against-

Case No.:
1:18-cv-378
(APM)

ALEX AZAR, in his official capacity
as Secretary of the UNITED STATES
DEPARTMENT OF HEALTH AND HUMAN
SERVICES,

DEFENDANT.
----------X

DATE: December 8, 2020
TIME: 9:02 A.M

REMOTE VIDEOTAPED DEPOSITION of

ANNE MULLOOLY, taken by the Plaintiffs,

pursuant to a notice and to the Federal

Rules of Civil Procedure, held remotely via

Zoom Videoconference, before Suzanne

Pastor, a Notary Public of the State of New

York.

A P P E A R A N C E S:
(All appearances via Zoom Videoconference)

HOGAN LOVELLS U.S., LLP
Attorneys for the Plaintiffs
100 International Drive, Suite 2000
Baltimore, Maryland 21202
BY: MICHAEL A. BURNS, ESQ.
410.659.2728
michael.burns@hoganlovells.com
AND: BRENDAN C. QUINN, ESQ. (D.C. Office)
202.637.6533
brendan.quinn@hoganlovells.com
AND: RUSSELL WELCH, ESQ. (Houston Office)
713.632.1437
russell.welch@hoganlovells.com

-and-

CAMILLA TAYLOR, ESQ.
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
65 E. Wacker Place, Suite 2000
Chicago, Illinois 60601-7245
312.663.4413
ctaylor@lambdalegal.org

-and-

KENNETH DALE UPTON, JR., ESQ.
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1310 L. Street N.W., Suite 200
Washington, D.C. 20005
202.466.3234
upton@au.org

APPEARANCES OF COUNSEL (Continued)

U.S. DEPARTMENT OF JUSTICE - CIVIL DIVISION
Attorneys for the Federal Defendants and the Witness
1100 L Street, N.W.
Washington, D.C. 20005
BY: JAMES R. POWERS, ESQ.
202.353.0543
james.r.powers@usdoj.gov
BY: JASON LYNCH, ESQ.
202.514.1359
jason.lynch@usdoj.gov

JONES DAY, LLP
Attorneys for the Defendant UNITED STATES CONFERENCE OF CATHOLIC BISHOPS
500 Grant Street, Suite 4500
Pittsburgh, Pennsylvania 15219-2514
BY: JOSHUA R. SALLMEN, ESQ.
412.394.7978
jsallmen@jonesday.com
AND: JASON E. CELLIER, ESQ.
614.281.381
jcellier@jonesday.com
AND: DAVID T. RAIMER, ESQ.
202.879.3890
dtraimer@jonesday.com

ALSO PRESENT:

KEVIN LAKE, ESQ., HHS

STEVE DECANIO, Videographer,
U.S. LEGAL SUPPORT

THE VIDEOGRAPHER: We are now on the record. This is the remote video recorded deposition of Ms. Anne Mullooly. Today is Tuesday, December 8, 2020. The time is now 9:02 a.m. in the New York time zone.

We are here in the matter of Fatma Marouf versus Alex Azar. My name is Steve DeCanio, remote video technician on behalf of U.S. Legal Support.

At this time, the court reporter Sue Pastor on behalf of U.S. Legal Support will please enter the statement for remote proceedings into the record so we may begin.

THE REPORTER: Good morning. The attorneys participating in this deposition acknowledge that I am not physically present in the deposition room and that I will be reporting this deposition remotely.

They further acknowledge that in lieu of an oath administered in person, the witness will verbally

declare his testimony in this matter is under penalty of perjury.

The parties and their counsel consent to this arrangement and waive any objections to this manner of reporting. Please indicate your agreement by stating your name and your agreement on the record.

MR. BURNS: Michael Burns from Hogan Lovells for plaintiffs. I agree.

MR. POWERS: Jim Powers from the Department of Justice on behalf of the federal defendants. We agree.

MR. SALLMEN: Josh Sallmen, Jones Day on behalf of USCCB. We agree.

THE REPORTER: Will the witness kindly present her government-issued identification by holding it up to the camera for verification.

(The witness complies.)

A N N E M U L L O O L Y, called as a witness, having been first duly sworn by a Notary Public of the State of New York, was

examined and testified as follows:

EXAMINATION BY

MR. BURNS:

Q. Good morning, Ms. Mullooly.

A. Good morning.

Q. As I said, my name is Michael Burns. I represent the plaintiffs in this matter. Could you please just share your full name, say it one more time.

A. Anne Mullooly.

Q. Have you ever been deposed before, Ms. Mullooly?

A. No, I have not.

Q. Okay, so I'm just going to go through some ground rules as well as some unique rules due to the remote deposition -- remote aspect of the deposition today.

First, do you understand that your testimony today is under oath?

A. I do.

Q. So it's the same sort of testimony you would give under oath in a courtroom. Do you understand?

A. Yes.

infants and toddlers that are currently being held in custody.

Q. And that's different?

A. I think that's -- she's referring to the UAC program. Because URMs are not held in custody.

Q. Thanks for the clarification.

Is the government aware of an individual named [redacted]?

MR. SALLMEN: Object to scope.

A. She's probably another person that inquired to be a foster parent.

Q. Circling back on LIRS as replacement designee for the URM program in the Dallas/Ft. Worth area, I think you testified earlier that they are not fully functional at this time, is that correct?

A. Correct.

Q. Does the government have an expectation as to when LIRS will be fully functional in the URM program in Dallas/Ft. Worth?

A. The government expects the program to be functional this fiscal year, in FY '21.

Q. Can you be more specific within fiscal year '21?

A. I can't guarantee you when the program will open. They're in the process of hiring staff, they're in the process of recruiting foster parents. They cannot accept any kids into the program until they have staffing in place and they have foster parents in place.

So the timeline for recruiting and licensing foster parents and the timeline for recruiting and hiring staff is -- I'm not able to comment on how long that will take. But we do expect the program to be fully functioning and operating this fiscal year.

Q. Understood. Is it possible for a same sex married couple living in Dallas/Ft. Worth to become foster parents in the URM program right now?

A. Possibly.

Q. How?

MR. POWERS: Object to form.

MR. SALLMEN: Object to form.

A. It's possible that Catholic

D E C L A R A T I O N

I hereby certify that having been first duly sworn to testify to the truth, I gave the above testimony.

I FURTHER CERTIFY that the foregoing transcript is a true and correct transcript of the testimony given by me at the time and place specified hereinbefore.

Anne M. Mullooly -S

Digitally signed by Anne M. Mullooly -S
DN: c=US, o=U.S. Government, ou=HHS, ou=ACF, ou=People, 0.9.2342.19200300.100.1.1=2002075126, cn=Anne M. Mullooly -S
Date: 2021.01.12 13:20:42 -05'00'

_____
ANNE MULLOOLY

Subscribed and sworn to before me

this _____ day of _____ 20___.

_____
NOTARY PUBLIC

C E R T I F I C A T E

STATE OF NEW YORK)
: SS.:
COUNTY OF ALBANY)

I, SUZANNE PASTOR, a Notary Public for and within the State of New York, do hereby certify:

That the witness whose examination is hereinbefore set forth was duly sworn and that such examination is a true record of the testimony given by that witness.

I further certify that I am not related to any of the parties to this action by blood or by marriage and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this day, December 20, 2020.

Suzanne Pastor

SUZANNE PASTOR

Errata Sheet

NAME OF CASE: FATMA MAROUF and BRYN ESPLIN -against- ALEX AZAR

DATE OF DEPOSITION: 12/08/2020

NAME OF WITNESS: Anne Mullooly

Reason Codes:

1. To clarify the record.

2. To conform to the facts.

3. To correct transcription errors.

Page 18 Line 14 Reason 3

From NCCB to USCCB

Page 34 Line 2 Reason 1 or 3

From and medical assistance from the grants is to and medical assistance grants is

Page 71 Line 7 Reason 3

From The name is familiar to me. I to The name is familiar to me. He

Page 81 Line 20 Reason 1 or 3

From there's no expectation -- they already to there's an expectation -- they already

Page 90 Line 25 Reason 3

From USCC to USCCB

Page 92 Line 10 Reason 1 or 3

From would be ORR custody. In the UAC program to would be in ORR in the UAC program.

Page 96 Line 2 Reason 3

From USCC to USCCB

Anne M. Mullooly -S

Digitally signed by Anne M. Mullooly -S
DN: c=US, o=U.S. Government, ou=HHS, ou=ACF, ou=People, 0.9.2342.19200300.100.1.1=2002075126, cn=Anne M. Mullooly -S
Date: 2021.01.15 11:48:47 -05'00'

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FATMA MAROUF and BRYN ESPLIN, *Plaintiffs,* v. XAVIER BECERRA, in his official capacity as Secretary of the United States Department of Health and Human Services, *et al.*, *Defendants.*	Case No. 1:18-cv-378 (APM)

[PROPOSED] ORDER DENYING
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS MATTER, having been brought before the Court on the Motion for Summary Judgment of Defendants United States Department of Health and Human Services ("HHS"); Administration for Children and Families ("ACF"); Office of Refugee Resettlement ("ORR"); Xavier Becerra, in his official capacity as Secretary of HHS; January Contreras, in her official capacity as Assistant Secretary for ACF; and Andrea Chapman, in her official capacity as Acting Director of ORR (collectively the "Federal Defendants") [Dkt. No. 109] and the Motion for Summary Judgment of Defendant United States Conference of Catholic Bishop ("USCCB") [Dkt. No. 106], and the Court having reviewed the papers submitted by Defendants and Plaintiffs, and the Court having considered any oral argument, and the Court having been advised of the entire record,

IT IS on this ____ day of _____, 2022 hereby

ORDERED that Federal Defendants' Motion for Summary Judgment is hereby **DENIED;** it is **FURTHER ORDERED** that USCCB's Motion for Summary Judgment is hereby **DENIED**.

_____
Hon. Amit P. Mehta
United States District Court Judge