UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FATMA MAROUF, *et al.*, Plaintiffs v. XAVIER BECERRA, *et al.*, Defendants.	Civil Action No. 1:18-cv-00378 APM

DEFENDANT U.S. CONFERENCE OF CATHOLIC BISHOPS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Plaintiffs' motion for summary judgment rests on a moot and misleading premise. According to Plaintiffs, all they "request" is "an opportunity equal to that of others to provide a Program child a safe, loving home." Pls.' Mem. ISO Mot. for Summ. J. ("Pls.' MSJ") 1. But that request is moot because it asks for something Plaintiffs already have. The government has gone to great lengths to ensure they can participate in the programs at issue through providers with no objection to placing children with same-sex foster parents. Indeed, these programs now operate in precisely the manner Plaintiffs previously said would "satisfy" their concerns: Plaintiffs may apply through a neutral clearinghouse that will pair them with service providers that will allow them to foster a child, drawing from the same pool of children available to all other applicants. Dkt. 80 ("MTD Oral Arg. Tr.") 68. This guarantees that Plaintiffs can participate on the same terms as all other prospective foster parents in the Dallas-Fort Worth area. The facts have simply overtaken Plaintiffs' case.

Plaintiffs' "straightforward" request is also misleading, Pls.' MSJ 1, because it is certainly not all they demand. To be sure, they previously assured this Court that they had no desire to "remove all of [the government's] funding" to Defendant U.S. Conference of Catholic Bishops ("USCCB"), MTD Oral Arg. Tr. 53, much less require USCCB to "render the determination as to [their] eligibility to be foster parents, or [to] make the decision to place a child with [Plaintiffs]," Dkt. 48 ("MTD Op.") 21 n.2 (quoting Dkt. 34 ("Pls.' MTD Opp.") 11). But that is now—literally—the relief they seek. Without even acknowledging their about-face, Plaintiffs now ask this Court to "prohibit[] Federal Defendants from awarding URM or UAC grants to" USCCB and to "requir[e]" the government to "ensure that Plaintiffs may apply to be foster or adoptive parents

to a child … through" USCCB. Pls.' Mot. for Summ. J. 3. These brazen efforts to shift the goalposts do not change the reality that Plaintiffs have already obtained the relief they said they were seeking.

In any event, Plaintiffs' claims also fail on the merits. Plaintiffs baldly assert that the government is discriminating against them and infringing on their fundamental rights, but they make no attempt to substantiate that assertion in light of how the government has structured the programs at issue. In fact, far from discriminating against Plaintiffs, the government has gone out of its way to ensure that they can participate in the programs and serve as foster parents. Accordingly, Plaintiffs' real complaint appears to be not that the government has refused to *include* them, but that it has refused to *exclude* USCCB. Plaintiffs are simply unwilling to tolerate USCCB's parallel presence in the programs, even if USCCB has no interaction with them and works in a manner that does not remotely affect them or their desire to become foster parents.

Plaintiffs' view of the law is mistaken. While the Constitution prohibits *the government* from operating according to religious principles, it does not prohibit private religious organizations from participating in government programs. The Supreme Court hardly could have made this point any clearer in recent years. In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Court unanimously ordered that a Catholic agency be allowed to participate in a public foster-care program even though it had a religious objection to placing foster children with same-sex couples. That fact alone should be dispositive, as the Supreme Court is not in the habit of ordering remedies that violate the Constitution. Indeed, the main difference with that case cuts against Plaintiffs' argument here: In *Fulton*, unlike this case, there was no neutral clearinghouse to direct applications to service providers willing to working with same-sex couples. Nonetheless, the Supreme Court

unanimously ordered the City of Philadelphia to allow the Catholic agency to participate. If Plaintiffs' position here were correct, that remedy would have violated not only the Establishment Clause but also the equal protection and due process components of the Fifth Amendment. That is not the law.

BACKGROUND

USCCB has previously detailed all material facts and procedural history in connection with its motion for summary judgment. *See* USCCB Mem. ISO Mot. for Summ. J. ("USCCB MSJ") 2–12; *see generally* USCCB's Statement of Undisputed Material Facts ("USCCB SUMF"). The following background is provided for context and to highlight relevant facts.

A. Unaccompanied Immigrant Children Programs.

The two federal programs at issue are the Unaccompanied Refugee Minor Program ("URM Program") and the Unaccompanied Alien Children Program ("UC Program"). USCCB SUMF ¶¶ 2, 6. These programs care for unaccompanied refugee or alien children, including through long-term foster-care placements, which the government provides indirectly by issuing grants to public or private, and secular or faith-based, agencies. *Id.* ¶¶ 3–5, 7–11; USCCB MSJ 33. Grantees may contract with subgrantee providers, who are directly responsible for licensing foster families. *E.g.*, USCCB SUMF ¶¶ 20–22, 55.

Within both the URM and UC programs, children are paired with foster parents through a national placement system. For example, when the government identifies a child in need of foster care who is eligible for the URM Program, the government generally notifies all of the grantees nationwide that the child is available to be placed with a foster family. The grantees then (generally through their subgrantee) notify the foster families they have licensed that a child is available. If

a provider tells the government it has a family that meets the child's needs, and the government approves, the provider will take custody of the child and place the child with that family. *See* Pls. Statement of Undisputed Material Facts ("Pls.' SUMF") ¶¶ 112–14; Supp. App. 36–41; *see also* Supp. App. 4–6 (similar process for UC Program). As a result, any child in the URM Program can be placed with foster parents licensed by any entity participating in "the national network of URM Program service providers." Pls.' SUMF ¶ 113; Supp. App. 40 (explaining that "any referral could go to any licensed foster parent in any pool of any URM provider agency").

The government selects program grantees according to secular and neutral criteria. USCCB SUMF ¶ 11. Federal regulations forbid grantees from using program funds to "support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), as part of the programs or services funded." 45 C.F.R. § 87.3(b).

USCCB is one of the world's largest refugee settlement agencies. It has served unaccompanied immigrant children for decades, placing them in foster-care programs long before the URM or UC programs existed. USCCB SUMF ¶¶ 15–16. Since the URM and UC programs began, the government has regularly, in both Democratic and Republican administrations, awarded grants to USCCB under both programs. *Id.* ¶ 17. USCCB is a "premier provider[]" and one of "the most longstanding in the URM program." Fed. Defs.' Statement of Undisputed Material Facts ("Fed. Defs.' SUMF") ¶ 35. During the pendency of this litigation, USCCB has ceased receiving UC Program funding for long-term foster care in Texas—it now participates only in the URM Program in that area. USCCB SUMF ¶ 67. USCCB is large enough that, if it were to withdraw

from the URM Program, nationwide program capacity would "shrink immediately by half." USCCB Appendix of Cited Material ("USCCB MSJ App.") 135, 151–53.

USCCB does not itself provide foster-care services, but instead awards subgrants to various organizations to do so. One such subgrantee was Catholic Charities of Fort Worth ("CCFW"), which is the entity that Plaintiffs approached in 2017. USCCB SUMF ¶¶ 20–21, 27–28, 38–40. Because USCCB is bound to avoid acting in violation of Catholic religious teaching on marriage and the family, it does not allocate funds to any organization that would use those funds to license or place children with same-sex foster couples. *Id.* ¶¶ 23–25. USCCB's religious beliefs are inseparable from its charitable mission to "care for immigrants," including unaccompanied children. *Id.* ¶¶ 14, 22–25.

When the government awarded a grant to USCCB, it was not aware that USCCB had a religious objection to working with subgrantees that would license and place children with same-sex foster parents. *Id.* ¶ 50. The government had never discussed that issue with USCCB, nor received any complaint about any provider refusing to place children with same-sex couples. *Id.* ¶¶ 43, 47, 49.

B. This Litigation.

Plaintiffs, a legally married same-sex couple in Fort Worth, sued the government and USCCB in early 2018 after USCCB's subgrantee CCFW refused to license them as foster parents the year before. *Id.* ¶¶ 36–40; Dkt. 1. They claimed that, by awarding grants to USCCB, the government violated the First Amendment's Establishment Clause and the Fifth Amendment's Due Process Clause and equal protection component.

In June 2019, this Court granted in part and denied in part USCCB's and the government's motions to dismiss for lack of standing. In particular, the Court held that plaintiffs lacked taxpayer standing to challenge the URM or UC programs, MTD Op. 9–15, which prevents Plaintiffs from asserting claims based on aspects of the programs that do not affect them personally.

At the same time, the Court rejected USCCB's argument that Plaintiffs lacked personal standing. USCCB contended that Plaintiffs' requested relief would not benefit them personally because it could only have the effect of either stripping USCCB of funding or else forcing USCCB out of the URM and UC programs by requiring its subgrantees to make same-sex foster placements as a condition of participation. Neither remedy would redress Plaintiffs' alleged injury, as it was entirely speculative whether another provider could step into USCCB's shoes in the Dallas-Fort Worth area. *See* Dkt. 29-1 ("USCCB MTD") 9–11; MTD Op. 16. But the Court held that Plaintiffs had standing to pursue a different type of remedy: although their complaint had initially sought an injunction "stripping USCCB of funding" or forcing the licensing of same-sex foster parents "through USCCB," Plaintiffs had since "backed off" that demand and narrowed their requested relief. MTD Op. 20–21, 21 n.2. At oral argument, Plaintiffs' counsel stated that they were "not asking that the government remove all of its funding to USCCB." MTD Oral Arg. Tr. 53; *id.* at 67–68 ("[W]e are not looking to take away funding from USCCB."). Plaintiffs also told the Court that they did "'*not* demand that USCCB necessarily render the determination as to [their] eligibility to be foster parents, or make the decision to place a child with [Plaintiffs].'" MTD Op. 21 n.2 (quoting Pls.' MTD Opp. 11); Pls.' MTD Opp. 10–11 (stating that it was "not Plaintiffs' objective" to "force USCCB to administer the URM and UC programs in a manner that violates its religious doctrine").

Instead, this Court found that Plaintiffs were simply "seek[ing] injunctive relief requiring the Federal Defendants to ensure that they may apply to be foster … parents under the URM Program or the UC Program without disfavoring them based on their sexual orientation." MTD Op. 20–21. Plaintiffs "signaled openness to relief that 'accommodat[es] the religious views of URM and UC grantees,' so long as it does not 'ultimately restrict placement options based solely on USCCB's religious doctrine and does not impose materially unequal burdens, stigma, or indignity on religiously disfavored applicants.'" *Id.* at 21 n.2 (quoting Pls.' MTD Opp. 11).

Accordingly, Plaintiffs said they were content to leave USCCB operating as it always has, as long as certain conditions were met. Specifically, they told the Court that they were "happy to create religious accommodations to ensure that [USCCB] can continue," and "wouldn't have any objections" so long as "there were no obstacles put in front of [same-sex couples] that weren't put in front of other couples." MTD Oral Arg. Tr. 49, 68. And it would "immediately redress" their claims, they said, if (1) the government "or someone else" were to "take over the application process" and "create a screening process" that all prospective foster parents would "have to go through" that would "determin[e]" the "grantee they go to," and (2) if there were "another provider in the Fort Worth area" that did not object to placing children with same-sex couples. *See id.* at 57, 62, 65–68. That way, both USCCB subgrantees and Plaintiffs could participate in the programs, and Plaintiffs would be "satisf[ied]." *Id.* at 68. This Court relied on Plaintiffs' reformulated request for relief to rule in their favor. *See* MTD Op. 20–22.

In the three years since that ruling, the government has fulfilled both of Plaintiffs' requests.

First, the government appointed a new grantee for the URM Program in the Dallas-Fort Worth area, Lutheran Immigration and Refugee Services ("LIRS"), whose subgrantee Upbring is

willing to license and place children with same-sex foster parents. USCCB SUMF ¶¶ 54–55, 57–58. The government also awarded a UC Program grant to another area provider, Baptist Child and Family Services ("BCFS"), which is also willing to license and place children with same-sex foster parents. *Id.* ¶¶ 56–58. And again, USCCB no longer participates in the UC Program in Texas.

Second, within the URM Program, the government has designated "a neutral third party," the private U.S. Committee for Refugees and Immigrants ("USCRI"), to act as a clearinghouse that fields all inquiries from prospective foster parents in the Dallas-Fort Worth area and handles initial intake. *Id.* ¶¶ 59–61. Should Upbring or USCCB's new subgrantee, Catholic Charities Dallas ("CCD"), which replaced CCFW, receive inquiries from prospective foster parents, they have committed to refer them to USCRI. *Id.* ¶¶ 51–52, 64. USCRI's role is to conduct intake and then refer prospective foster parents to either Upbring or CCD, based on information collected during intake and subgrantees' criteria. *Id.* ¶¶ 62–63. In short, this third-party clearinghouse works with LIRS, USCCB, and their respective subgrantees to "ensure that all prospective foster parents in the Dallas-Fort Worth area have the opportunity to work with a URM provider." *Id.* ¶ 60. Neither USCRI nor Upbring have any "objection to working with same-sex couples seeking to foster children through the URM program." *Id.* ¶ 66.

Under the new system as modified by the government, Plaintiffs are now able to pursue fostering through both the URM and UC programs in Dallas-Fort Worth, on exactly the terms they previously stated would satisfy their concerns and provide the relief they sought in this litigation. But nevertheless, it is undisputed that Plaintiffs have never sought to foster a child through the modified URM or UC programs. *See* Pls.' SUMF ¶¶ 38–40. Instead, even after the government

modified the programs to Plaintiffs' specifications, they continue to pursue this litigation—apparently to ensure that USCCB is fully excluded from the programs.

All parties moved for summary judgment on July 27, 2022. Both USCCB and the government have moved for summary judgment on the ground of mootness, as well as the merits of Plaintiffs' claims.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE MOOT.

To avoid mootness, a plaintiff must maintain "a personal interest in the dispute" at all stages of a case. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 792 (2021). Thus, even if standing existed at the outset, the case becomes moot if the plaintiff obtains all of the relief that was sought, at which point the court "can no longer provide . . . any effectual relief." *Id.* "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109 (1998), nor do "[t]he emotional consequences of a prior act," *Fair Emp. Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1272–74 (D.C. Cir. 1994). Instead, there must be "continuing, present adverse effects," *Steel Co.*, 523 U.S. at 109, or a "real and immediate" threat of injury, *City of L.A. v. Lyons*, 461 U.S. 95, 102, 104 (1983) (noting same as to declaratory relief). Otherwise, plaintiffs are not seeking "a remedy that redresses [their] injury." *Uzuegbunam*, 141 S. Ct. at 796.

A. Plaintiffs Have Obtained the Relief They Said They Were Seeking.

Plaintiffs' claims are moot because they have now obtained all of the relief they said they were seeking in this case. Plaintiffs complain about "losing the benefit of participating in" the URM and UC programs, being "exclud[ed]," and being told that "the *only* path to participation …

is to 'mirror the Holy Family.'" *E.g.*, Pls.' MSJ 17, 20, 27 (emphasis added). But those statements simply ignore the changes that the government has made to the programs at issue. Under the programs as currently structured, Plaintiffs may participate in the URM and UC programs, and on precisely the terms that they previously told this Court would redress their injury.

First, the government has procured both a URM Program provider and a UC Program provider in the Dallas-Fort Worth area that do not object to working with same-sex couples. Pls.' SUMF ¶¶ 80, 82–83; USCCB SUMF ¶¶ 53–58. Thus, as Plaintiffs requested, there is now "another provider in the Fort Worth area" that is able to work with them. MTD Oral Arg. Tr. 68.

Second, as Plaintiffs again do not dispute, the government has "sought out and funded" USCRI to act as a third-party clearinghouse for the URM Program, conducting intake for all prospective foster parents in the Dallas-Fort Worth area and directing them to a provider. Pls.' SUMF ¶¶ 84–86, 91; Pls.' MSJ 24.[1] Plaintiffs do not claim that USCRI has any objection to referring same-sex couples. Thus, as Plaintiffs requested, "someone else" has now "take[n] over the application process" from USCCB and "create[d] a screening process" that is "the same for everyone": all prospective foster parents "have to go through" USCRI, which "determine[s]" the "grantee they … go to." MTD Oral Arg. Tr. 57–58, 60, 62. Plaintiffs will never have to apply to a religious organization or any other organization that will turn them away. Like all other applicants, they can apply to USCRI and be matched with a provider that will license them to be foster parents.

[1] Because USCCB no longer participates in the UC Program in Texas, *supra* p. 4, a similar accommodation for that program was not required.

Accordingly, Plaintiffs now have achieved exactly what they proposed, which they assured this Court would "immediately redress" their claims. *Id.* at 65. There is no further relief this Court could provide them. The government has "develop[ed] a system that removes barriers to same-sex couples becoming foster parents and evaluates their eligibility by the same criteria as any heterosexual couple or person," which this Court said in ruling on the motion to dismiss would "make Plaintiffs whole." MTD Op. 22. Yet Plaintiffs now assert that the very arrangement they requested somehow injures them, demanding exactly what they previously disclaimed: to be able to "apply to be foster or adoptive parents to a child under the [URM or UC programs] *through Federal Defendants' grantee USCCB* absent religious or other criteria that disfavor them based on their sexual orientation or sex or the same-sex character of their marriage," and "as necessary," to "*prohibit[] Federal Defendants from awarding URM or U*[*C*] *grants* to" USCCB. Pls.' Mot. for Summ. J. 3 (emphasis added).[2]

Plaintiffs are bound by their prior statements to the Court about the relief they sought. *McCarthy v. Azure*, 22 F.3d 351, 355 n.4 (1st Cir. 1994) (holding that a plaintiff "will be disabled from pursuing any … claims" he agreed "to abandon"). Judicial estoppel "prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to

[2] Because this Court rejected Plaintiffs' effort to establish taxpayer standing, MTD Op. 15, Plaintiffs at most have standing to challenge these programs as applied to Plaintiffs themselves in the Dallas-Fort Worth area, *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982) (standing only to challenge conduct to which one has been subject); *Bauchman v. W. High Sch.*, 132 F.3d 542, 560 (10th Cir. 1997) (limiting "allegations and evidence" of Establishment Clause claim against local high school to the one year in which plaintiff, personally, was a member of the allegedly violative school choir). For this reason, Plaintiffs cannot base their own standing on claims about injuries to *other* same-sex foster applicants, to *program children* (whom USCCB will serve regardless of sexual orientation or gender identity, *see* USCCB SUMF ¶ 26), or to any other protected class.

prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749, 751 (2001) (noting that "unfair advantage" or "unfair detriment" to opponent is estoppel consideration). Plaintiffs' narrowed request for relief was a critical part of this Court's reasoning in finding standing at the pleadings stage. *See* MTD Op. 20–22, 21 n.2. It allowed this Court to distinguish not one, but two cases that otherwise would have compelled a ruling in Defendants' favor. *See id.* at 20–22 (distinguishing both *Freedom Republicans, Inc. v. Federal Election Commission*, 13 F.3d 412 (D.C. Cir. 1994), and *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), on these grounds). It is thus the reason why USCCB and the government have had to litigate this case in the ensuing years—not to mention the reason that the government proceeded to restructure the URM Program to give Plaintiffs the relief they said they wanted.

As Plaintiffs "succeeded in persuading [this Court]" that they did not seek the relief they now seek, they cannot now contradict that representation. *Maine*, 532 U.S. at 750; *see Temple Univ. Hosp., Inc. v. NLRB*, 929 F.3d 729, 735 (D.C. Cir. 2019) (sufficient for estoppel that court "adopted" prior position, whether or not that position amounted to "deception" or was "a but-for cause" of its decision). The Third Circuit reached the same conclusion where a plaintiff obtained a preliminary injunction due to "the asserted unavailability of monetary relief," then, having "benefited from his original position" that damages were unavailable, later sought damages once "injunctive relief [was] no longer possible." *Murray v. Silberstein*, 882 F.2d 61, 66 (3d Cir. 1989). The court refused to allow the plaintiff to "retreat from his original position," then concluded that, as "there is no relief which [he] may obtain," the case was moot. *Id.* at 66–67. So too here. Plaintiffs clearly spelled out the relief they wanted, and now they have it. That moots their case. Even if their previous statements were not quite judicial admissions, they are surely "the next

closest thing" when it comes to establishing the absence of a live controversy. *Institut Pasteur v. Chiron Corp.*, No. 03-0932, 2005 WL 366968, at *13 (D.D.C. Feb. 16, 2005).

B. Plaintiffs Are No Longer Suffering Any Cognizable or Redressable Injury.

In any event, even if Plaintiffs were allowed to contradict their previous statements about the relief they sought in this lawsuit, their claims are still inescapably moot. As to the UC Program, Plaintiffs do not dispute that USCCB no longer participates in the program in Texas. Pls.' SUMF ¶ 80. Nevertheless, Plaintiffs inexplicably request declaratory and injunctive relief pertaining to this program. Pls.' Mot. for Summ. J. 2–3. These requests are moot, as there is no prospective relief this Court could order given that USCCB does not participate in the UC program in the relevant geographic area.[3]

As to the URM Program, in which a USCCB subgrantee in the Dallas-Fort Worth area still participates, Plaintiffs advance three flimsy assertions of continuing harm from the arrangement they requested, but none can stave off mootness.

First, Plaintiffs claim that the new "consortium" system harms them because USCRI will direct "all same-sex couples" to Upbring, which is willing to work with them but has "zero Program children currently in its care, and a smaller staff and budget" than USCCB's subgrantee. Pls.' MSJ 24. But this assertion is highly misleading and does not involve any harm to Plaintiffs.

[3] Plaintiffs have no claim for retrospective relief with respect to either program, as they conceded they cannot seek even nominal damages on their current claims. Pls.' MTD Opp. 22 & n.5. Specifically, they disclaimed any attempt to pursue such relief against the federal agency defendants, and admitted the need to amend their pleadings to before such relief could be sought against any federal officials. *Id.* (acknowledging "the need to sue these officials in their individual capacities, in addition to their official capacities"). They have not done so, and in any event, this Court has already cabined the scope of available relief. MTD Op. 20–21; USCCB MSJ 15–16; *supra* pp. 5–7, 10–11.

To start, Plaintiffs fundamentally misstate how the program works when they assert that Upbring is an inferior provider because it has no children "currently in its care." *Id.* No URM provider, including USCCB's subgrantee, has "a pool of children that are just waiting to be placed." Supp. App. 38; *see supra* pp. 3–4. Instead, as Plaintiffs elsewhere admit, the government refers potential URM youth to "the national network of URM Program service providers." Pls.' SUMF ¶ 113. If a provider has licensed a suitable foster family, it submits a "'placement assurance memo' indicating that [it] ha[s] a licensed foster family or other placement that would suit the youth's needs." *Id.* If the government approves of the placement, it will transfer the child to the provider, who then pairs the foster parents with a foster child. Supp. App. 37–38. Thus, the government entrusts a child to a provider only after that provider has proposed a foster family for the child and the government has signed off. Accordingly, the fact that Upbring has no children "currently in its care" bears not at all on whether Upbring could match a referred child with Plaintiffs in exactly the same way as USCCB's subgrantee.

Similarly, while it may be true that Upbring has licensed fewer families to date and has a smaller staff and proposed budget than a USCCB subgrantee, that simply reflects the fact that Upbring is a new organization with a smaller size. It does not show that Upbring's quality of service is any worse, and thus does not indicate that Plaintiffs would be in any way "treat[ed] less favorably" than prospective foster parents who work with USCCB's subgrantee. Pls.' MSJ 25 n.10. Smaller foster organizations are not inherently worse than larger ones, any more than family-owned restaurants are necessarily worse than large commercial chains. To show injury, Plaintiffs would need some actual evidence that Upbring's service is somehow inferior. But they cannot point to any such evidence. All they can muster is a "conjectural or hypothetical" threat that

Upbring would provide materially worse service than USCCB's subgrantee, but such speculation is not enough to show actual injury. *Lyons*, 461 U.S. at 102; *see also* Supp. App. 39–40 (explaining that the fact that Upbring has licensed fewer families than CCD does not in any way mean that Upbring's families "are less likely to receive a placement" than their counterparts at CCD); *id.* at 112–16 (explaining that Upbring's budget estimates impose no constraints on its activities and that "[a]t any time they can tell [the government] that they need more money").

Second, Plaintiffs suggest they are injured by the mere *awareness* that the private clearinghouse, USCRI, would direct their foster application toward a service provider willing to work with them instead of a USCCB subgrantee. They liken this to "segregation," which they say imposes a "stigma" on them. *See* Pls.' MSJ 11. But this is belied by their counsel's previous statements when they told this Court that precisely such an arrangement would satisfy them. *Supra* pp. 5–7. And more importantly, it is a far cry from "segregation" when the government itself is not imposing any separation or distinction, but is simply offering funds as part of a neutral program that allows many different private service providers to participate. The fact that some participating providers may have private religious objections to providing some services does not mean that *the government* is imposing the stigma of discrimination on anyone. And in the absence of an actual denial of equal treatment by the government, an assertion of "abstract stigmatic injury" is not enough to support standing. *Allen v. Wright*, 468 U.S. 737, 755 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014); *Penkoski v. Bowser*, 486 F. Supp. 3d 219, 228–29 & n.9 (D.D.C. 2020) (that plaintiffs found allegedly discriminatory public display "painful, threatening, and offensive" is insufficient for standing without corresponding discriminatory treatment or concrete evidence to substantiate fears of it).

As explained, Plaintiffs offer no evidence that the consortium arrangement gives them anything less than a full and equal opportunity to become foster parents through the URM Program. USCCB's participation in the program has no tangible effect on Plaintiffs. Indeed, if the government were ordered to exclude USCCB, it would have no impact on Plaintiffs whatsoever. In such circumstances, Plaintiffs' "mere personal offense" that USCCB is allowed to participate in the program does not suffice for standing. *In re Navy Chaplaincy*, 534 F.3d 756, 761, 765 (D.C. Cir. 2008). Neither Plaintiffs' "aware[ness]" of USCCB's involvement, nor the purportedly unconstitutional "message" that involvement sends, constitutes an injury for purposes of Article III. *Id.* at 763–64.

Third, Plaintiffs claim that USCRI *might* fail to direct them to Upbring, and send them to USCCB's subgrantee instead, which then would refuse to work with them. Pls.' MSJ 25 n.10. But this is entirely speculative, and Plaintiffs cannot establish that they are "realistically threatened" by this hypothetical possibility. *Lyons*, 461 U.S. at 109. After all, Plaintiffs concede that USCRI's "sole purpose" is to direct prospective parents to a provider willing to work with them; that it will do so "based on," inter alia, "family composition" and the providers' "criteria"; and that, in an effort to ensure "all prospective applicants … will have an opportunity to work with a provider," the government understands USCRI is "likely [to] refer all same-sex couples to Upbring." Pls.' SUMF ¶¶ 84, 86, 91–92. In any event, even assuming USCRI mistakenly directed Plaintiffs to approach USCCB's subgrantee, there is no reason to think Plaintiffs would actually do so given their past experience. If they did and were again turned away, that would surely be an "injury … largely of [Plaintiffs'] own making," not one that is "fairly traceable to the defendant's challenged conduct." *Nat'l Fam. Planning & Reprod. Health Ass'n, v. Gonzales*, 468 F.3d 826,

831 (D.C. Cir. 2006). Such speculative self-injury is not enough for Article III standing, which requires a "real and immediate" threat of injury, not a "conjectural or hypothetical" one.

For all these reasons, Plaintiffs' claims are moot because they have already received the relief they requested—the government has established the exact type of consortium arrangement that they themselves proposed. They can now apply through a neutral clearinghouse, get paired with a service provider that will license them as foster parents, and obtain access to the same pool of potential foster children as any other applicant. This is precisely what Plaintiffs previously told the Court they wanted, and they should be held to it. Indeed, they do not even try to claim that any "voluntary cessation" exception to mootness would apply here, as there is no reason to think the government would abandon the consortium before Plaintiffs can take advantage of it. *See Citizens for Resp. & Ethics in Wash. v. Wheeler*, 352 F. Supp. 3d 1, 14 (D.D.C. 2019); *see also* USCCB MSJ 15–16.

II. EVEN IF NOT MOOT, PLAINTIFFS' CLAIMS FAIL.

Plaintiffs contend that, by awarding grants to USCCB, the government has violated both the Establishment Clause and the Fifth Amendment's equal protection and due process components. They are wrong across the board, and their arguments would condemn the relief ordered by the unanimous Supreme Court in *Fulton* just last year.

Allowing USCCB to receive government funds is not an "establishment of religion," as it bears none of the historical hallmarks of establishment. There is no evidence that the government chose USCCB *because* of its religion, rather than its effectiveness in caring for unaccompanied immigrant children. The government selects grantees by reference to secular, neutral criteria, and does not itself share USCCB's objection to same-sex couples serving as foster parents. Foster-

care services are not a traditional government function, but a traditional private and religious function that private religious groups and families have long performed. Nor has the government given USCCB or the Catholic Church a monopoly on foster-care services; quite the opposite, it has ensured that *other* service providers are available to license same-sex foster parents like Plaintiffs. Accordingly, in claiming that the government has injured them by allowing USCCB to participate, Plaintiffs ignore the fact that the government has deliberately structured the URM Program to *avoid* excluding them.

As to equal protection and due process, Plaintiffs assert that the government is discriminating against them and depriving them of fundamental rights. But that is simply not true. The government is not discriminating against Plaintiffs or burdening them in any way. It has merely established a neutral funding program that allows both religious providers and Plaintiffs to participate simultaneously, while reconciling their competing demands. To the extent Plaintiffs believe it is discriminatory for USCCB and its subgrantees to follow Catholic religious beliefs and practices regarding marriage, that alleged discrimination is not attributable to the government and thus cannot support any constitutional claim.

In short, the arrangement that the government has struck here is a success story, accommodating all of the competing interests at stake by allowing both USCCB and Plaintiffs to participate with the shared goal of caring for unaccompanied immigrant children. By attacking this arrangement and seeking to exclude USCCB from the program, Plaintiffs are undermining the very concepts of pluralism and toleration that they claim to support. The first casualty of their scorched-earth approach would be the thousands of refugee children served by USCCB every day. The Constitution does not require that result.

A. Plaintiffs' Establishment Clause Claim Fails.

Plaintiffs contend that, by allowing USCCB to participate in the programs at issue, the government has "violated the Religion Clauses," first by delegating a public function to USCCB without "adequate safeguards," and second by accommodating religious exercise to the detriment of third parties. Pls.' MSJ 27. Both arguments fail for multiple reasons.

1. Plaintiffs' Arguments Contradict *Fulton*.

As an initial matter, ruling for Plaintiffs here would require the Court to conclude that the Establishment Clause *prohibits* what the Supreme Court unanimously held was *compelled* by the Free Exercise Clause in *Fulton.* That cannot be, because these clauses have "complementary purposes, not warring ones." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2426–27 (2022). Plaintiffs struggle to resist this point, but their efforts fail.

First, Plaintiffs note that *Fulton* found a Free Exercise violation because the antidiscrimination policy there allowed individualized exemptions. Pls.' MSJ 35. But the *reason* for the remedy that the Supreme Court ordered in *Fulton* is entirely beside the point. What matters is that the Court ordered the City of Philadelphia to allow a Catholic foster agency to participate in a public foster program despite its religious objection to licensing same-sex couples. Plaintiffs thus cannot escape the fact that, under their theory, the relief ordered by the Supreme Court in *Fulton* would be unconstitutional. That would be an astonishing result.

Second, Plaintiffs puzzlingly describe the *Fulton* remedy as turning on Philadelphia's failure to present "particularized evidence of harm to third parties." *Id.* at 35 & n.12. But the potential for "third-party harm" in *Fulton* was essentially the same as it is here: The Catholic foster agency participated in a public funding program while refusing to license same-sex foster couples,

who could instead work with *other* funding recipients that did not have religious objections. It beggars belief to suggest the Supreme Court was blind to the possibility that this could result in some same-sex couples being referred from one provider to another, or even turned away. If anything, there was *greater* potential for third-party harm in *Fulton*, as the government there had not set up a neutral clearinghouse to ensure that same-sex applicants would not be rejected when they applied to be foster parents. Nor had the government taken the same affirmative steps as here to ensure that alternative service providers would be available for same-sex foster parents. By contrast, because the government here has established a neutral clearinghouse for applications *and* guaranteed that same-sex couples like Plaintiffs can be foster parents under the URM Program, this case involves no conceivable harm to third parties.[4]

2. The Government Has Not Delegated a Traditional Government Function to USCCB.

According to Plaintiffs, the government has also violated the Establishment Clause by delegating a governmental function to a religious organization without implementing adequate "safeguards" to prevent discrimination. Pls.' MSJ 28–32. This theory fails for three reasons.

First, and most fundamentally, providing foster-care services is not a traditional government function. Instead, foster-care and adoption services in the United States were

[4] Plaintiffs also gesture at an unpublished district court order in a case concerning constitutional challenges to South Carolina's exemption of a foster agency from an antidiscrimination regulation. Pls.' MSJ 36; *see* Order, *Rogers v. U.S. Dep't of Health & Hum. Servs*., No. 6:19-cv-01567-JD (D.S.C. Dec. 2, 2021), ECF No. 201. The court there simply concluded that, "at this stage of litigation," *Fulton* did not render the "plaintiff incapable of prevailing" on the pleadings, because *Fulton* concerned a Free Exercise Clause claim and the case before the court did not. *Id*. at 4, 6. The cursory *Rogers* order is hardly authority for Plaintiffs' position that it violates the Constitution to permit USCCB to participate in these programs.

historically private (and overwhelmingly religious) activities. The government is a relative newcomer in this space, and it is still common for governments to work with private organizations to arrange foster care, rather than handling it themselves. *See* USCCB MSJ 22–24; Fed. Defs. SUMF ¶¶ 22–37. Foster care for unaccompanied immigrant children follows the same pattern: USCCB was providing foster care to this population before either the URM or UC programs existed. USCCB SUMF ¶¶ 13–17. USCCB, in providing foster care through subgrantees, is doing the same thing it has always done. The government is simply subsidizing that private activity, through grants that are equally available to religious or secular providers.

Apart from ipse dixit, Plaintiffs provide no authority for the proposition that foster care (much less the choice of referral criteria for a foster-care consortium, *see* Pls.' MSJ 31) is a traditional government function. Instead, they rely on *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), but that case actually helps USCCB by illustrating how foster-care services differ from true governmental functions that cannot be delegated to religious entities. In *Larkin*, the State of Massachusetts impermissibly delegated government power to houses of worship by giving them a coercive veto power over zoning decisions and alcohol sales. Setting zoning rules and regulating alcohol sales are, without question, "traditionally a governmental task" and "a power ordinarily vested in agencies of government." *Id*. at 121–22. The same is not true of providing foster-care services, which were traditionally a private (and predominantly religious) charitable function before the government got involved in subsidizing them.

Second, even if foster-care services were a traditional government function, the government has not surrendered this function to USCCB. The delegation prohibited by the Establishment Clause is the practice of "us[ing] the established church to carry out certain civil

functions, often giving [it] a monopoly over a specific function." *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1609 (2022) (Gorsuch, J., concurring). But here, far from giving USCCB *monopolistic* power over foster-care services, the government retains exclusive control over the programs at issue, setting and monitoring performance benchmarks, and periodically deciding whether to issue or renew grant awards. *See* USCCB MSJ 25; *see also* USCCB SUMF ¶¶ 10–11; Fed. Defs.' SUMF ¶¶ 4, 6, 8–9, 15–16, 20–21, 42–53, 55–72 . More importantly, the government gives out grants to *different* grantees of *different* religions (or no religion). Just in the Dallas-Fort Worth area, the government has awarded funds to a Catholic entity (USCCB), a Lutheran organization (LIRS), a Baptist agency (BCFS), and a secular entity (USCRI). *See supra* pp. 7–8. Indeed, the government in this case has intentionally *avoided* giving USCCB a "monopoly" that would allow it to prevent same-sex couples from serving as foster parents. *See* USCCB SUMF ¶¶ 56–67. Because the government has ensured that alternative providers will license same-sex foster parents, USCCB is not in a "monopoly" position to exclude them from the program.

Third, and relatedly, there is no absence of "safeguards" here. The government has ensured that same-sex couples will apply through a neutral clearinghouse just like everyone else, and thus will not have their applications rejected by any religious organization. It has also ensured that alternative providers will work with Plaintiffs to become foster parents regardless of their same-sex status. Moreover, the government determines which agencies participate in these programs according to secular and neutral criteria, USCCB SUMF ¶ 11, *not* "according to a religious criterion." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 698–99 (1994) (explaining that it is "a government's purposeful delegation on the basis of religion," as opposed to "a delegation on principles neutral to religion" that is problematic); *Larkin*, 459 U.S. at 121–22,

125 (explaining that, by ceding licensing veto authority to churches, Massachusetts created danger that churches would favor congregants' applications over members of other churches). The government forbids grantees from using program funds for "explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization)." 45 C.F.R. § 87.3(b). And while Plaintiffs vaguely accuse the government of allowing USCCB to use public power and funds "to impermissibly further religious doctrine," Pls.' MSJ 29, 32, they nowhere accuse USCCB of violating this regulation.

Instead, Plaintiffs suggest that the bare fact that USCCB is religious somehow poses an Establishment Clause problem. *See id.* at 29 ("The actual religious belief and its ultimate effect are immaterial."). But there is a "long history of cooperation and interdependency between governments and … religious organizations." *Bowen v. Kendrick*, 487 U.S. 589, 609, 611 (1988) (upholding federal funding of religious entities' teen-pregnancy care and counseling services and rejecting the argument "that any time a government aid program provides funding to religious organizations in an area in which the organization also has an interest, an impermissible 'symbolic link' [is] created"); USCCB MSJ 20–21. The Supreme Court's cases "dispel[] any notion that a religious person can never be in the State's pay for a secular purpose." *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 746–47 (1976) (upholding government funding for religious school); *cf. McDaniel v. Paty*, 435 U.S. 618, 626, 629 (1978) (prohibiting clergy from holding public office "punish[es] a religious profession" in violation of First Amendment). That is so even where a religious organization's beliefs will affect the way that it administers a government program. *Lown v. Salvation Army, Inc.*, 393 F. Supp. 2d 223, 249–52 (S.D.N.Y. 2005) (no Establishment Clause problem where the government provided the Salvation Army with funds for social services, even

though the Salvation Army used funds to hire employees based on religious criteria); *ACLU of N. Cal. v. Azar*, No. 16-cv-03539, 2018 WL 4945321, at *14 (N.D. Cal. Oct. 11, 2018) (same where USCCB used federal funds to care for trafficking victims, while refusing to provide them with access to abortion or contraception).

In short, it is well settled that "the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs," *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020), even though their religious beliefs will affect the way that the organizations use government funds, *Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987, 1997, 2002 (2022). Indeed, the Supreme Court has routinely held that state aid given to religious organizations via neutral grant programs does not violate First Amendment, even though those funds will be "use[d]" for "religious" purposes, *id.*—up to and including "use of that aid to indoctrinate," *Mitchell v. Helms*, 530 U.S. 793, 820 (2000) (plurality op.). As long as the government itself is not directing the religious conduct at issue, there is no constitutional problem.

3. Allowing USCCB To Participate in the URM Program Is Both a Proper and Necessary Religious Accommodation.

Plaintiffs argue that, by allowing USCCB to operate in a manner consistent with its religious beliefs, the government is impermissibly "accommodat[ing] religion." Pls.' MSJ 32–38. According to plaintiffs, this accommodation is forbidden because the Free Exercise Clause does not *require* it, and because it supposedly imposes "undue burdens on third parties." *Id.* at 33. They are wrong on both counts.

First, as an initial matter, the URM Program as it now operates in the Dallas-Fort Worth area imposes no "third party harms" whatsoever—on Plaintiffs or on any other same-sex couple.

The government has procured an alternative provider with no objection to working with same-sex couples, and has designated USCRI as a neutral clearinghouse for all applicants. In light of those undisputed facts, Plaintiffs' insinuation that USCRI and all providers are somehow conspiring to use secret religious criteria in referring applicants makes little sense. *See id.* at 31, 37–38. The government has managed to accommodate all competing interests by allowing USCCB to continue to participate in the URM Program on terms consistent with its faith while ensuring that Plaintiffs are able to apply to serve as foster parents without their sexual orientation in any way affecting their eligibility. The government is thus not accommodating USCCB to Plaintiffs' detriment in any way.

In any event, the Supreme Court has regularly upheld religious exemptions involving far greater "third party" burdens than anything Plaintiffs assert here. For example, the Court has permitted Congress to exempt conscientious objectors from the military draft, even though that exemption results in other people being sent to war in place of religious objectors. *See Gillette v. United States*, 401 U.S. 437, 453 (1971) ("[I]t is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with our happy tradition of avoiding unnecessary clashes with the dictates of conscience."). And more to the point, courts have repeatedly upheld religious exemptions from otherwise applicable antidiscrimination policies, notwithstanding such exemptions' significant burdens on third parties. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987) (Title VII's exemption allowing religious employers to fire employees on the basis of religion); *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664 (1970) (property-tax exemption for churches, increasing costs for other taxpayers); *see also Hosanna-Tabor Evangelical Lutheran Ch. & Sch. v. EEOC*, 565 U.S. 171,

196 (2012) (religious exemption from discrimination laws); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2069 (2020) (same); *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (2d Cir. 1996) (public school's exempting Bible club from antidiscrimination policy).[5]

Second, contrary to Plaintiffs' argument, religious accommodations need not be constitutionally *required* in order to be constitutionally *permissible*. "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz*, 397 U.S. at 673. "[T]here is room for play in the joints" between what the Establishment Clause "permit[s]" and the Free Exercise Clause "require[s]." *Locke v. Davey*, 540 U.S. 712, 718–19 (2004). Accordingly, it is clear that the government may craft religious exemptions even in the absence of a "substantial" burden on religious exercise. *Compare Walz*, 397 U.S. at 673–76 (upholding, against an Establishment Clause challenge, a state-law exemption from a general property tax that "spar[ed] the exercise of religion from the burden of property taxation levied on private profit institutions"), *with Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 384, 391–92 (1990) (concluding that a general sales tax did

[5] The government's accommodation of USCCB here is nothing like the religious *preferences* the Supreme Court has struck down in the cases Plaintiffs invoke, where the government, for example, compelled the public to "act in the name of … religion" by imposing an "unyielding" obligation to "conform their business practices" to employees' Sabbatarian convictions. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708–09 (1985); *see also Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005) (cautioning against "overrid[ing] other significant interests"). Nor is this like a case where the government effectively subsidized *exclusively* religious publications. *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989). Instead, the government has permitted USCCB to serve as one of several organizations (religious and secular) that provides foster-care services, while ensuring that Plaintiffs have an opportunity to participate through alternative providers.

not impose a substantial burden necessitating an exemption for religious materials). This is all the more so where, as here, doing so also serves the effectiveness of the government's program by retaining a critical provider. *See Amos*, 483 U.S. at 334–35 (explaining that "[t]here is ample room under the Establishment Clause" for the government to accommodate religious exercise).

Plaintiffs' cited authorities do not support their claim that religious exemptions are constitutional *only* where they lift substantial burdens on religious exercise. *County of Allegheny* simply defined "an accommodation of religion" as an action that "lift[s] an identifiable burden on the exercise of religion"; it did not purport to limit the government to *constitutionally required* accommodations. *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 613 n.59 (1989), *abrogated by Town of Greece v. Galloway*, 572 U.S. 565 (2014). Justice O'Connor's concurrence in *Amos*, similarly, simply defined an accommodation as an action that lifts some burden on religious exercise. 483 U.S. at 348 (O'Connor, J., concurring).

In any event, it clearly *would* impose a substantial burden on religious exercise if the government were to exclude USCCB from participating in the URM Program (or if the government forced USCCB to place foster children with same-sex children as a condition of participating). As the Supreme Court held in *Fulton*, "it is plain that the [government's] actions have burdened [the Catholic foster agency's] religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs." 141 S. Ct. at 1876; *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (substantial burden exists where "government action puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs'"). That is precisely what Plaintiffs ask the government to do here. But it is by now well established that the government may not put religious groups to the choice between

"participat[ing] in an otherwise available benefit program or remain[ing] a religious institution." *Trinity Lutheran Ch. of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021–22 (2017); *Sherbert v. Verner*, 374 U.S. 398 (1963) (explaining that pressure resulting from the denial of government benefits can impose a substantial burden); *cf. McDaniel*, 435 U.S. at 626, 629 (prohibiting clergy from holding public office unconstitutionally "punish[es] a religious profession").

Plaintiffs nonetheless insist that because "USCCB's faith does not specifically prescribe Program participation," "[c]onditioning the award of a Program grant on a nondiscrimination obligation does not cognizably burden USCCB's religious exercise." Pls.' MSJ 33–34. But "'[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.'" *Trinity Lutheran*, 137 S. Ct. at 2022 (quoting *Sherbert*, 374 U.S. at 404) (rejecting argument that there was no "meaningful[] burden on [a] Church's free exercise rights" where it was denied access to a grant program for rubber playground surfaces). "The 'proposition—that [a] law does not interfere with free exercise because it does not directly prohibit religious activity, but merely conditions [a benefit] on its abandonment—is . . . squarely rejected by precedent.'" *Id.* (quoting *McDaniel*, 435 U.S. at 333 (Brennan, J., concurring)). And to the extent there is any doubt that all "religiously motivated" conduct is eligible for protection, *Employment Div. v. Smith*, 494 U.S. 872, 881 (1990), both Congress and the Supreme Court have made clear that a substantial burden can exist *regardless* of whether the activity at issue is "'compelled by, or central to, a system of religious belief.'" *Burwell*

v. Hobby Lobby Stores, Inc., 573 U.S. 682, 696 (2014) (quoting 42 U.S.C. § 2000cc-5(7)(A)). "[A]ny exercise of religion'" is protected. *Id.*[6]

Third, although this Court need not decide whether a religious accommodation would be affirmatively *required* to avoid the substantial burden of excluding USCCB from the URM Program, the answer is plainly yes. When a substantial burden exists, the government is required to provide an accommodation unless denying one is "the least restrictive means of furthering [a] compelling government interest." *Id*. at 705; *cf. New Hope Fam. Servs., Inc. v. Poole*, No. 18-CV-01419, 2022 WL 4094540, at *6–7 (N.D.N.Y. Sept. 6, 2022) (enjoining the government from compelling a religious adoption agency "to process applications from, or place children for adoption with, same-sex couples or unmarried cohabitating couples," in part because the agency's practice of referring such individuals to other providers was "a more narrowly tailored means of avoiding discrimination than the closure of [its] adoption operation"). But here, the current arrangement is a readily available means of allowing USCCB to participate while serving all of the government's interests.

[6] To be sure, *Hobby Lobby* was decided under the Religious Freedom Restoration Act. But so were cases cited by Plaintiffs. *See* Pls.' MSJ 34 (citing *Henderson v. Kennedy*, 253 F.3d 12, 16–17 (D.C. Cir. 2001); *Kaemmerling*, 553 F.3d at 678). In any event, the Supreme Court has clarified that courts are not to assess the relative import or significance of the religious belief at issue when conducting the substantial burden inquiry. *See Hobby Lobby*, 573 U.S. at 725 ("[I]t is not for [courts] to say [whether] religious beliefs are mistaken *or insubstantial*." (emphasis added)). Indeed, *Kaemmerling* itself acknowledged this point. 553 F.3d at 678 ("Because the burdened practice need not be compelled by the adherent's religion to merit statutory protection, we focus not on the centrality of the particular activity to the adherent's religion but rather on whether the adherent's sincere religious exercise is substantially burdened."). Regardless, the provision of foster care to unaccompanied immigrant children is not "unimportant" to USCCB. *See* USCCB SUMF ¶¶ 14–16.

B. Plaintiffs' Equal Protection and Due Process Claims Fail.

Plaintiffs' Fifth Amendment due process and equal protection claims hinge on the baffling premise that *the government* has excluded them from participating in the URM and UC programs—a claim they repeat multiple times. *E.g.*, Pls.' MSJ 1 (government has "denied Plaintiffs th[e] opportunity" "to provide a Program child a safe, loving, home"); *id.* at 6 (government has "'reject[ed]'" Plaintiffs); *id.* at 18 (government's "actions exclude lesbian, gay, and bisexual people … from Program participation"); *id.* at 20 (government has "exclud[ed] same-sex spouses from participation in federal child welfare programs"). But the government has done no such thing; it has gone out of its way to *include* Plaintiffs in the programs by making sure they can apply to be foster parents. Plaintiffs' bald assertions to the contrary do not make it so. Plaintiffs point to no evidence that *the government itself* is discriminating against Plaintiffs or interfering with any constitutionally protected liberty interests. And while USCCB's subgrantee refused to license Plaintiffs, that private religious action is not fairly attributable to the government.

1. The Government Is Not Discriminating Against Plaintiffs.

Because allowing a religious group to participate in a neutral funding program does not violate the Religion Clauses, only rational-basis review applies to Plaintiffs' equal protection and due process challenges. *Amos*, 483 U.S. at 330, 338–39 (upholding Title VII's religious exemption under the First Amendment and then applying only rational-basis review to equal protection claim). That comports with the rule that courts analyze constitutional claims under the appropriate "explicit provision"—the one that deals with religion directly—and not "more generalized notion[s] of substantive due process." *Connecticut v. Gabbert*, 526 U.S. 286, 293 (1999). The government's conduct easily passes that test. Allowing USCCB to participate in the URM and UC

programs is rationally related to the legitimate ends of providing foster services for immigrant and refugee children and ensuring that religious groups may compete for government grants without violating their faith. USCCB MSJ 36–38.

Regardless, Plaintiffs' claims fail under any level of scrutiny. *See* USCCB MSJ 36–43.

First, to state the obvious yet again, Plaintiffs *can* participate in the government programs at issue. The government has given Plaintiffs what they requested, arranging for an alternative provider that does not object to working with same-sex couples, and establishing a neutral clearinghouse to screen *all* prospective foster parents on the understanding that *all* will have an opportunity to work with a provider. As explained, Plaintiffs have no evidence they—or any other same-sex couple—would receive materially different service should they apply, nor is there any non-speculative possibility that USCCB's subgrantee would ever be in a position to refuse to work with them. *Supra* pp. 13–16; *cf. New Hope*, 2022 WL 4094540, at *6 (noting that the government had identified no "actual evidence" that the same-sex couples a religious adoption agency referred to other agencies "were unable to adopt" or "suffered increased wait times or costs"). As such, there is no disadvantage or interference with Plaintiffs' fundamental rights in this case.

Second, Plaintiffs' claims fail because the *government itself* is not the one allegedly discriminating against them or denying their fundamental rights. It is a "time-honored principle" that the Constitution "prohibits only state action," not "private conduct." *United States v. Morrison*, 529 U.S. 598, 621 (2000). Thus, Plaintiffs must show that the government has intentionally discriminated against them, *Washington v. Davis*, 426 U.S. 229, 239 (1976), or interfered with their constitutionally protected liberty interests, *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S.*

Dep't of Treasury, 638 F.3d 794, 800–01 (D.C. Cir. 2011). But the *government* has never intentionally discriminated against Plaintiffs or interfered with their constitutionally protected interests. There is no government policy against same-sex couples serving as foster parents. Quite the opposite, the government has bent over backwards to arrange providers for the URM and UC programs that will work with Plaintiffs. The government did not select USCCB as a grantee for the *purpose* of excluding same-sex couples, nor direct or encourage USCCB to discriminate against them. Fed. Defs.' SUMF ¶¶ 65–67; USCCB SUMF ¶ 11; USCCB MSJ App. 59–60, 220–21, 270–71. Indeed, the government could not have done so, as it did not even *know* at the time of the grant awards that USCCB and its subgrantees had a religious objection to working with same-sex couples. USCCB SUMF ¶¶ 42–50.[7]

Of course, the government now knows that USCCB's subgrantees will not place foster children with same-sex couples, but merely allowing USCCB to make that private choice based on its religious faith does not somehow convert USCCB's action into *the government's* action. "Action taken by private entities with the mere approval or acquiescence of the State is not state action." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999). And here, the case even for government "acquiescence" is weaker than cases in which the Supreme Court has found no state action. In *American Manufacturers*, for example, the Court held that a "State's decision to provide

[7] Plaintiffs contend that the government did know of USCCB's religious beliefs concerning foster placements with same-sex couples. Pls.' MSJ 4–5 (citing Pls.' SUMF ¶¶ 15–24). But the evidence they offer responsive to that contention is comprised of (1) USCCB webpages that there is no indication any government employee saw, and (2) the testimony of two government employees to the effect that they were aware of USCCB's religious views regarding same-sex marriage—but who did not testify that they were aware that USCCB would not fund foster placements with same-sex couples. Pls.' SUMF ¶¶ 17, 18, 21.

insurers" "the option" to request state administrative review of disputed workers' compensation benefits, and defer payment pending review, did not constitute state action. The State codified that option, *expressly authorizing* insurers to exercise it and creating a procedure to do so, but the Court deemed it too "subtle [an] encouragement" to "make the State responsible for" the insurers' choice. *Id.* at 45, 53.

Similarly, in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 354–57 (1974), the Court held that a public utility's decision to cancel a customer's service for nonpayment was not state action, although the utility had informed the government of its right to terminate service for that reason, and the government had not objected. The Court concluded that the State's "failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was *authorized to employ such a practice if it so desired*"—and that did not make the utility's choice state action. *Id.* at 357 (emphasis added); *see also Vill. of Bensenville v. FAA*, 457 F.3d 52, 66 (D.C. Cir. 2006) (no federal action where government carefully reviewed, approved, and partly funded city's plan for airport, but it was the city's "independent judgment" in designing plan "that allegedly resulted in a constitutional deprivation").

Nor does the fact that the government provides funding to a private entity convert the private entity's conduct into government action. In *Rendell-Baker v. Kohn*, for example, a private school's firing of employees was not state action, even though "virtually all of the school's income was derived from government funding." 457 U.S. 830, 840 (1982). The firings were private actions because they were the decisions of "private management," not "even influenced by any state regulation," and the government "showed relatively little interest" in personnel matters. Exactly the same is true here.

Further, even were the government's knowledge or acquiescence sufficient to make private action attributable to the government, it would not suffice for a showing of discriminatory purpose. "[P]urposeful discrimination requires more than intent as volition or intent as awareness of consequences." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). Plaintiffs must show, and have not shown here, that the government acted or refused to act "'because of,' not merely 'in spite of,'" USCCB's "disfavoring" of same-sex couples. *Id.* at 676–77. There is no evidence here that the government continues to work with USCCB *because* it wants to advance USCCB's religious views about marriage, as opposed to wishing to retain the bandwidth of a premier provider responsible for half of program capacity. To the contrary, the government went to significant lengths to ensure that Plaintiffs could serve as foster parents in both the URM and UC programs. Thus, even if the ability to foster children within a particular government program in a specific metropolitan area *did* implicate a fundamental right, and even if the government's decision not to facilitate that right's exercise constituted interference with it, *but see Rust v. Sullivan*, 500 U.S. 173 (1991); *Harris v. McRae*, 448 U.S. 297 (1980), all the government has done here is protect that right on the terms that Plaintiffs outlined, while preserving program capacity by retaining USCCB in a way that does not affect Plaintiffs. To the extent Plaintiffs fault the government for an apparent desire to accommodate religious exercise, that is a "proper purpose," not invidious discrimination. *Amos*, 483 U.S. at 338; *Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church*, 846 F.2d 260, 263–64 (4th Cir. 1988) ("statute's singular exemption of religious groups" did not "render its purpose suspect").

Plaintiffs contend that it would be consistent with the government's interest in child welfare to *defund* USCCB, Pls.' MSJ 22–23, but that does not prove discriminatory intent. It also

contradicts their representations to the Court regarding their requested relief, as well as their own apparent preference to work with USCCB subgrantees over alternatives. *Id.* at 24 (asserting that Upbring is "less established, with fewer staff and resources" than USCCB's subgrantee); Pls.' Mot. for Summ. J. 3 (requesting injunction requiring government to ensure that Plaintiffs may apply to be foster parents through USCCB). Moreover, USCCB's continued participation in the program does not negatively affect child welfare in any way, much less in the manner outlined by Plaintiffs. Given the operation of the consortium—and the national placement system employed by the government for these programs generally, *supra* pp. 3–4—"[e]very Program child" has access to "the full set of placement options" to "ensure that [they] can be placed with families that are well-matched to meet their specific needs.'" Pls.' MSJ 36–37 (emphasis omitted). To be sure, some placement options may not be available through USCCB subgrantees, but the government has arranged for other providers to offer precisely those alternatives. On the other hand, were USCCB to be forced to withdraw, the government's nationwide URM capacity would "shrink immediately" by half, and USCCB's deep "expertise" and "historical knowledge," which are not easily replicated, would be lost. USCCB MSJ App. 62, 133–35, 151–53. To say the least, it is hard to understand how such an approach would be in the interest of child welfare.

2. USCCB And Its Subgrantee Are Not State Actors.

Plaintiffs do not contend that USCCB and its subgrantee are state actors, such that their conduct in refusing to license Plaintiffs could be "fairly attributable to the State." *Rendell-Baker*, 457 U.S. at 838 (quotation marks omitted). Any such argument would fail. "[A] private entity can qualify as a state actor in a few limited circumstances," such when it "performs a traditional, exclusive public function"—a "power[] traditionally exclusively reserved to the State."

Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019) (quotation marks omitted). "[V]ery few" activities fall in the category. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978) (giving "the conduct of … elections" as an example of an exclusively public function). For example, that an activity "serves the public good or the public interest" or that it simply is or was once performed by the government is insufficient for it to qualify as a public function. *Halleck*, 139 S. Ct. at 1928–29. Here, again, foster-care services are not a traditional public function, and to this day not an "exclusive" one. Instead, foster-care services have long been performed by private entities, and USCCB's participation in this area predates the existence of the URM and UC programs. *See supra* pp. 19–20.

Moreover, the government has never "compel[led]" USCCB's subgrantee to refuse to license Plaintiffs. *Halleck*, 139 S. Ct. at 1928–29. Nor has the government acted "jointly with" any of USCCB's subgrantees to exclude same-sex couples. *Id.* To the contrary, the government's only action directed at same-sex couples has been to ensure the presence of alternative providers willing to work with Plaintiffs. Certainly, the government, via USCCB, has provided funding for subgrantees' foster-care services, but, as noted above, the Supreme Court has held that government funding is not enough to transform their private actions into state action. *See Rendell-Baker*, 457 U.S. at 840. The actions of private entities providing services for the government "do not become acts of the government by reason of their significant or even total engagement in performing public contracts." *Id.* at 841; *accord Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982) (government-subsidized nursing homes are not state actors though government paid the expenses of vast majority of patients); *Lown*, 393 F. Supp. 2d at 228, 243–44 (the Salvation Army is not a state actor though it derived vast majority of its budget from government contracts).

Finally, the fact that the government permits USCCB to use program funds on the terms its faith requires does not transform USCCB's actions pursuant to that accommodation into government action. Religious accommodations permit *religious organizations*, not "the government itself," "to advance religion." *Amos*, 483 U.S. at 337 & n.15 (church's firing of an employee pursuant to a challenged antidiscrimination exemption was not state action).

CONCLUSION

The government has gone to great lengths to ensure that Plaintiffs have an equal opportunity to foster a child under the URM or UC programs, while allowing USCCB to continue participating in the programs by serving vulnerable children in a manner consistent with its faith, just as it has done for decades. In light of the accommodation devised by the government, the facts have simply overtaken Plaintiffs' case: they now have all of the relief they said they were seeking, leaving no remedy for the Court to give. And even if that were not so, Plaintiffs have not established entitlement to summary judgment on their claims. The Constitution finds no fault with the arrangement the government has set up, which is "in line with our happy tradition of avoiding unnecessary clashes with the dictates of conscience." *Gillette*, 401 U.S. at 453. Accordingly, this Court should deny Plaintiffs' motion for summary judgment.

Dated: September 14, 2022

Respectfully submitted,

/s/ David T. Raimer.

David T. Raimer (DC ID #994558)
Anthony J. Dick (DC ID #1015585)
JONES DAY
51 Louisiana Ave. NW
Washington, DC, 20001-2113
Tel.: 202-879-3939
Fax: 202-626-1700
dtraimer@jonesday.com
ajdick@jonesday.com

*Leon F. DeJulius, Jr. (PA ID #90383)
*John D. Goetz (PA ID #47759)
*Joshua R. Sallmen (PA ID #325948)
JONES DAY
500 Grant Street, Suite 4500
Pittsburgh, PA 15219-2514
Tel.: 412-391-3939
Fax: 412-394-7959
lfdejulius@jonesday.com
jdgoetz@jonesday.com
jsallmen@jonesday.com

Attorneys for Defendant United States Conference of Catholic Bishops

**Admitted pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2022, I electronically filed the foregoing Opposition and accompanying documents with the Clerk of the Court using the Court's CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system to the parties indicated on the electronic filing receipt.

/s/ David T. Raimer
David T Raimer

Counsel for Defendant United States Conference of Catholic Bishops

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FATMA MAROUF, *et al.*, Plaintiffs v. XAVIER BECERRA, *et al.*, Defendants.	Civil Action No. 1:18-cv-00378 APM

[PROPOSED] ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Before the Court is Plaintiffs' Motion for Summary Judgment. Upon consideration of the Motion and supporting papers, as well as any responses or replies thereto, that Motion is hereby DENIED. Plaintiffs' Amended Complaint is therefore DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Dated:_____

_____
THE HONORABLE AMIT P. MEHTA
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FATMA MAROUF, *et al.*, Plaintiffs v. XAVIER BECERRA, *et al.*, Defendants.	Civil Action No. 1:18-cv-00378 APM

DEFENDANT UNITED STATES CONFERENCE OF CATHOLIC BISHOPS' SUPPLEMENTAL APPENDIX OF CITED MATERIAL

Exhibit 41

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

- - - - - - - - - - - - - - - - - -X

FATMA MAROUF, et al., :

Plaintiffs, : Case No.

vs. : 1:18-cv-378 (APM)

ALEX AZAR, in his official :

capacity as Secretary of the :

UNITED STATES DEPARTMENT OF :

HEALTH AND HUMAN SERVICES, :

et al., :

Defendants. :

- - - - - - - - - - - - - - - - - -X

Remote Videotape Deposition Of JALLYN N. SUALOG

Wednesday, August 26, 2020

9:05 a.m. (EDT)

Job No. 314851

Pages: 1 - 269

Reported by: Dana C. Ryan, RPR, CRR

assuming that is the case sometimes so that foster placement -- a grantee has already, you know, sufficient amount of foster homes and need not recruit any more or -- but I -- I don't know specifically.

Q Are there more foster -- more available foster families than there are children in need of a foster family?

A Speaking specifically for the UAC program only, I will say that we have -- we have more capacity for foster placement than we have children that need foster -- long-term foster placement.

Q Has that always been the case?

A Historically, probably not.

Q Do you know when that changed?

A It probably changed about five, six years ago when -- when ORR's UAC program increased our capacity for foster placements.

Q How did ORR increase its capacity for foster placements?

A ORR just bought more foster home -- foster care place -- capacity. We increased the funding and increased the number of providers for -- for -- specific to foster placements.

Page

THE WITNESS: Grantees do not make placement decisions. Placement of children into their program, that is ORR's decision.

BY MR. GENDALL:

Q Sorry. I meant do -- is the nondiscrimination policy applicable to grantees making decisions about where to place -- strike that.

Grantees make decisions about which foster homes to place unaccompanied alien children into; correct?

A Grantees determine that they have a foster placement appropriate for that child -- particular child, and then ORR makes the placement into that program.

Q So does ORR's nondiscrimination policy apply to grantees' determination regarding foster placement?

MR. POWERS: Object to form.

MR. CELLIER: Object to form.

THE WITNESS: I don't quite understand the question.

BY MR. GENDALL:

Q Are grantees allowed to discriminate when determining foster placement?

Page

documents -- assessment documents and summaries of the child's case with -- you know, highlight what the specific factors are for consideration for that -- that's needed for that particular child's placement.

And that goes out into the long-term foster care referral network, and each provider will look at it and make the determination whether they have an appropriate home, a very appropriate specific home -- foster home that meets that particular child's needs.

And then the -- and then the team -- the ultimate decision-making regarding where that child should be placed will -- is ORR's decision. Specifically, it's the decision of the federal field specialist with recommendations from all those other players.

Q Thank you for clarifying that.

So the grantee, to be clear, is not making the actual placement decision?

A They're not. They are just identifying appropriate placement within their network.

Q So does the grantee recommend a particular foster home as a good fit?

A They just will identify it. So they'll

Page

let me test my understanding.

There's a particular unaccompanied alien child in need of foster placement.

A Uh-huh.

Q Might it be the case that USCCB comes forward and says, here's one possible foster family and Lutheran Services comes forward and says here's another possible foster family?

A Uh-huh.

Q That's correct?

A Yeah.

Q That happens?

MR. CELLIER: Object to form.

BY MR. GENDALL:

Q And then how does ORR make a determination about which foster family to place the child with?

A So there might be other considerations including if the child has any relatives closer to one home versus the other, if the child has any medical needs and one home is located in a place that is -- or more, you know, medical care for that specific child is available, whether -- if they have educational needs and whether the school system in one area has more to offer than the

Page

MR. CELLIER: Object to scope. Objection to form.

THE WITNESS: If they are the provider.

BY MR. GENDALL:

Q So if USCCB was the provider in the area, do you think it was proper to refer these inquirers to USCCB?

MR. POWERS: Objection to form.

MR. CELLIER: Objection to scope; calls for speculation.

THE WITNESS: We don't have programs in all areas, and likely -- I think there was a Tennessee program. I don't know when it started. And, so, it could be very well that these folks could get a reply if they were, you know, from the UAC program that says, you know, unfortunately, we do not have any providers in your area, but they would be referred to our two national providers which would have been USCCB and LIRS.

BY MR. GENDALL:

Q And what would have happened if any of these individuals reached out to USCCB?

MR. POWERS: Objection: lacks foundation. Objection: scope.

MR. CELLIER: Objection to scope.

Page

THE WITNESS: I -- I -- I don't know. I mean . . .

BY MR. GENDALL:

Q What is your understanding of USCCB's religious beliefs regarding same-sex marriage?

MR. CELLIER: Objection.

MR. POWERS: Objection: asked and answered. Objection to form.

THE WITNESS: My understanding is same-sex marriage is contrary to the Catholic faith.

BY MR. GENDALL:

Q Did you have that understanding in 2016?

MR. CELLIER: Objection to form.

THE WITNESS: That same-sex marriage was contrary to the Catholic teachings or belief? Yes.

BY MR. GENDALL:

Q When Fatma sent that email that we looked at in February 2017, it notified ORR that CCFW would not accept Fatma and Bryn's foster parent application based on its religious beliefs.

Could ORR have processed their application -- foster care application instead?

Exhibit 42

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

Videotaped deposition of KENNETH TOTA taken via videoconference before Clifford Edwards, Certified Shorthand Reporter and Notary Public, on September 28, 2020, at 9:12 a.m.

MR. LYNCH: Object to form.

MR. CELLIER: Object to form.

A No. No, it would not.

BY MR. QUINN:

Q Does USCCB have a religious affiliation?

A Yes.

Q What affiliation is that?

A They're a Catholic organization.

Q And how do you know that?

A It's in their title.

Q Okay. What was your experience with USCCB's religious affiliation when you worked there?

A Can you repeat that again, Brendan?

Q What was your experience with USCCB's religious affiliation when you worked at USCCB?

A What do you mean by "experience"? I guess --

Q What was your knowledge of it?

A That it was a Catholic organization?

Yes, I was aware that it was a Catholic organization.

Q Did USCCB's religious beliefs regarding same-sex marriage ever come up during your time at USCCB?

A I do not recall a specific instance, no.

experiences are?

A Good -- I would say good working relationships with ORR, always very responsive to request, submits well-developed proposals or State plan requests, has pretty sophisticated systems to collect data and -- and reporting. So those kind of things.

Q Is it fair to say that if USCCB were excluded as a provider in the URM Program, there would be a substantial loss in experience for the program?

MR. QUINN: Object to form.

A Yes, given their longstanding history with the program.

BY MR. CELLIER:

Q Would there be a substantial loss in terms of resources?

A Yeah, our -- yes, our capacity would be probably cut in half.

Q If USCCB were excluded from the URM Program, would the program be able to operate in the same manner it does with USCCB's participation?

MR. QUINN: Object to form.

A We would -- we would need to look at alternative models to basically replace that

capacity.

BY MR. CELLIER:

Q Is it fair to say that if USCCB were excluded, there would be a substantial loss in family placement options by eliminating USCCB's foster family pool?

MR. QUINN: Object to form.

A I would say that's fair to say.

BY MR. CELLIER:

Q Are you aware of what percent of foster -- foster parent applications in the URM Program are from same-sex couples?

A No.

Q Other than the incident that is the subject of this litigation, are you aware of any other case in which willing same-sex foster parents were excluded from being foster parents through the URM Program basis on the basis of a grantee or a sub-grantee's religious beliefs?

A This was the first case that was brought to our attention.

Q Are you aware of any case in the URM Program where opposite-sex foster parents have failed to provide an adequate home for an LGBTQ child?

MR. QUINN: Object to form.

A I am not aware of that.

BY MR. CELLIER:

Q Are you aware of any case in the URM Program where USCC -- or -- sorry.

Are you aware of any case in the URM Program where USCCB declined to serve or otherwise discriminated against an LGBTQ child on the basis of their sexual orientation or gender identity?

MR. QUINN: Object to form.

A I'm not aware of it.

BY MR. CELLIER:

Q Is the URM Program currently experiencing a shortage of qualified foster parents for the URM program?

A I am not aware of a shortage of foster care parents.

Q Are you aware of any shortage in the State of Texas?

A No.

Q Does the URM Program currently have more capacity for placement with foster parents than children in need of placement?

A We -- we have appropriate capacity for the referrals we're seeking at this time.

Q And are you aware of any instances in which USCCB or its sub-grantees struggled to place children with foster parents because of a shortage of available parents in the URM Program?

A No.

Q Do you know whether USCCB C or sub-grantees generally had difficulty in identifying and retaining foster families?

A Not to my knowledge, no.

MR. CELLIER: I don't have any more questions. Thanks.

THE WITNESS: Thank you.

MR. LYNCH: If I could propose what I hope might be our last break of the day, could we come back at, say, 6:25, and I'll know whether federal defendants want to do any examination?

MR. QUINN: Sure. That works for us.

MR. LYNCH: That work?

MR. CELLIER: Sounds good.

THE VIDEOGRAPHER: Okay. I'll take you guys off.

Going off the record. The time is 6:15 p.m. New York time.

Exhibit 43

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
----------X
FATMA MAROUF, et al.,
Case No.
Plaintiffs, 1:18-CV-378(APM)

- v. -

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

Defendants.
----------X

DEPOSITION VIA ZOOM VIDEOCONFERENCING

OF

KRYSTIN PECK

Friday, October 2, 2020

Reported By:

LINDA J. GREENSTEIN

JOB NO. 319575

KRYSTIN PECK

MR. GENDALL: Object to the form.

A. That's correct.

Q. Pardon me. You can answer, Ms. Peck.

A. Yes, the children were the clients of USCCB and its subrecipients.

Q. During your time at USCCB, did the URM or UAC programs experience a shortage of qualified foster parents?

A. Not to my knowledge.

Often what I recall is that we at USCCB were aware of -- of populations of more unaccompanied refugee minor populations or more unaccompanied migrating children, that we believed that our programs and our country could serve and support, and that we were consistently advocating for more.

So we believed that we could always serve more, and that there were certainly many more children in need who were not referred for the services than we have capacity to serve. We certainly had more capacity than kids being referred.

Q. That was going to be my next question.

Exhibit 44

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.

ethnic communities where the predominant religion was not Catholic?

MR. CELLIER: Object to scope.

A. I don't know.

Q. (BY MR. BURNS) Did CCFW staff ever engage in conversation -- internal conversations about recruiting foster parents who subscribe to other religions?

MR. CELLIER: Object to scope.

A. Sorry. Could you ask it again?

Q. (BY MR. BURNS) Sure. Did CCFW staff ever engage in internal conversations about recruiting foster parents with -- who subscribe to other religions?

MR. LANGE: Object to form and object to scope.

A. Yes.

Q. (BY MR. BURNS) Would you describe those conversations?

MR. CELLIER: Object to scope.

A. Well, I answered yes because as director of the program it came back to me that hey, we had a discussion about X, Y, Z but I was not privy to the discussions, per se, so I can't -- I don't know the specifics of the discussions.

Q. (BY MR. BURNS) What was the discussion about generally?

MR. CELLIER: Object to scope.

A. I know that there was discussion about licensing other religions.

Q. (BY MR. BURNS) Who had that discussion?

MR. CELLIER: Object to scope.

A. Employees working within the program.

Q. (BY MR. BURNS) Did CCFW license foster parents with other religious affiliations?

MR. CELLIER: Object to scope.

A. Yes.

Q. (BY MR. BURNS) Which religious affiliations?

MR. CELLIER: Object to scope.

A. I don't know.

Q. (BY MR. BURNS) Did the Diocese ever instruct CCFW to focus foster parent recruitment on Catholic communities?

MR. CELLIER: Object to scope.

A. I don't know.

Q. (BY MR. BURNS) Did the Diocese ever instruct CCFW to limit foster parent recruitment in communities with other religious affiliations?

MR. CELLIER: Object to scope.

A. I don't know.

Q. (BY MR. BURNS) Did USCCB ever instruct CCFW to limit foster parent recruitment in nonCatholic

communities?

MR. CELLIER: Object to scope.

A. I don't know.

Q. (BY MR. BURNS) Did USCCB ever instruct CCFW to refuse same-sex couples from applying to be foster parents?

MR. LANGE: Object to form.

MR. CELLIER: Object to form.

A. I don't know.

(Exhibit No. 9 was marked.)

Q. (BY MR. BURNS) I just added tab nine to the chat which I will mark as Exhibit 9. Ms. Springer, are you familiar with Exhibit 9?

A. Yes.

Q. What is it?

A. It's our recruitment and retention of foster parents policy.

Q. And by "our" you mean CCFW, correct?

A. Yes, sir.

Q. And can you read the review date in the top right-hand corner?

A. Sure. January 25th, 2012.

Q. Do you recall the date of the recruitment and retention of foster parents policy we looked at earlier that is Exhibit 10?

MR. CELLIER: Object to form.

A. I would think so.

Q. (BY MR. BURNS) The second-to-last question in that email, ORR question, has Catholic Charities of Fort Worth dealt with this in the past. The answer is, this has been Catholic Charities of Fort Worth's practice for as long as it has been in business.

Can you first, does that accurately reflect the answer that you and/or Heather Reynolds gave Ms. Peck?

A. I don't recall. I don't recall ever saying that and I don't recall hearing Heather say that but that doesn't mean that she didn't.

Q. Did Ms. Peck share this email with you before -- with CCFW before sending it to ACF?

A. Not to my knowledge.

Q. Is it an accurate statement to say that this has been Catholic Charities Fort Worth practice for as long as it has been in existence?

MR. LANGE: Object to form.

MR. CELLIER: Object to form.

A. I don't know.

Q. (BY MR. BURNS) What procedure does CCFW follow when it receives interest from an individual in becoming a foster parent but that individual does not meet CCFW's

religious belief requirements?

MR. CELLIER: Object to scope.

A. It would be a phone call, you know, between at that time, myself and the interested party.

Q. (BY MR. BURNS) And in that situation would it be similar to what you described earlier where you would potentially refer them to other agencies?

A. Uh-huh. Yes.

MR. BURNS: Adding tab 16 to the chat and marking it Exhibit 16.

(Exhibit No. 16 was marked.)

Q. (BY MR. BURNS) Do you recognize this document, Ms. Springer?

A. Yeah.

Q. What is it?

A. Instruction from our then CEO, Heather, about the recent press coverage.

Q. Did that press coverage concern my -- the plaintiffs here?

A. Could you please make it bigger?

Q. Yeah, of course.

A. Thank you.

Q. Of course. Please let me know if you would like for me to scroll down.

A. Yes, it does.

like just recreational-type things, park, volleyball, big BBQ, as much as we could get the kids together to kind of bond and have someone who is going through or has gone through similar experience of being a refugee into the United States. We always encouraged that.

Q. Let me show you another document. This is going to be marked plaintiff's or USCCB Exhibit 3.

(USCCB Exhibit No. 3 was marked.)

Q. (BY MR. CELLIER) And this is an October 21, 2020, statement from Bishop Olson and I want to go through a couple questions with you quickly.

The second paragraph -- second line states that marriage is an indissoluble bond between one man and one woman and then at the bottom of paragraph two it states that the church's teachings on marriage has not changed and cannot change. Do you see that?

A. I do.

Q. I read that correctly?

A. You did.

Q. Is it accurate to say that CCFW's sincerely-held religious belief on marriage is that it must be between one man and one woman?

A. It is.

Q. Has that been CCFW's sincerely-held belief on marriage at all times during your time at CCFW?

A. During my time, yes.

Q. And has CCFW's sincerely-held belief consistent with the view of Bishop Olson that we just read?

A. It is.

Q. And was CCFW's decision not to allow plaintiffs to apply to be foster parents based on that sincerely-held religious belief?

A. It was.

Q. I'll show you a document that you have seen previously today but I will mark it still as USCCB Exhibit 4.

(Exhibit USCCB No. 4 was marked.)

Q. (BY MR. CELLIER) And this is the previous email that you went through between Krystin Peck and Mimi from ACF; do you recall that?

A. I do.

Q. This last question on the top of page two or at the bottom, last question on page two here. It says that does USCCB concur with Catholic Charities of Fort Worth decision. And the answer is, as a Catholic organization, USCCB also believes that marriage is between one man and one woman. Do you see that?

A. I do.

Q. Did I read that correctly?

A. You did.

Exhibit 45

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.

couples to apply to be foster parents under the URM program, correct?

MR. POWERS: Object to form.

MR. SALLMEN: Object to form.

A. Well, we know what happened in 2016. Or I'm sorry, early 2017 when the plaintiffs wanted to -- wanted the opportunity to foster. I don't know if we can assume that the same would have happened if this individual contacted Catholic Charities Ft. Worth in 2019.

Q. Did the government discuss with USCCB at any time after 2017 -- strike that.

Did USCCB ever inform the government that its religious belief regarding same sex marriage had changed?

A. No.

Q. Did the government have any reason to believe as of April 3rd, 2019 that USCCB's religious belief that marriage is only between a man and a woman had changed?

A. No.

Q. Do you know whether Marissa did

Exhibit 46

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

objection on both deliberative process grounds and attorney-client privilege grounds regarding the decision to implement the consortium in the first place.

BY MS. CULORA:

Q. Is there a document that describes the consortium model and the role of each organization?

A. Yes.

Q. What are those documents?

A. There is a consortium flow chart that was created prior to the development and implementation and then there's the charter that was developed -- drafted by the consortium members that outlines each consortium member and their role and responsibilities.

Q. Are there any other documents?

A. I mean there are other documents circulated to the implementation of the consortium such as the conflict of interest plan, the intake procedures and then there is mention of the consortium in USCRI's FY '22 state plan and the new rule that they were

going to take on as well as their ORR one budget estimate.

Q. So, you've generally described the changes. I want to go through each consortium member's role.

What is USCRI's role in the consortium?

A. USCRI's role is to receive all inquiries from prospective foster parents in the Dallas-Fort Worth area who are interested in fostering unaccompanied refugee minors. They created inquiry form or intake form that they direct prospective foster parents to. And then based on intake and information collected, USCRI makes a determination to refer the interested individual or couple to either Upbring or Catholic Charities of Dallas.

Q. We'll go into the details of those. But is USCRI responsible for maintaining any communication or mechanism for prospective foster parents?

A. Do you mean like advertising that they are doing intakes? What do you

to confer and then we can perhaps wrap this up.

THE COURT REPORTER: Going off the record. 11:52.

- - -

(Whereupon, there was a recess.)

- - -

THE COURT REPORTER: Going back on the record. 12:12.

BY MS. CULORA:

Q. Miss Mullooly, it's the government's position that it is unaware of the criteria used by USCRI to refer applicants; right?

A. Correct.

Q. If the plaintiffs were to apply again to be foster parents today, is it possible that USCRI would refer plaintiffs to CCD where they would be turned away again?

MR. LYNCH: Objection. Asked and answered. Go ahead.

THE WITNESS: It's possible.

MS. CULORA: No further questions.

your deposition in reference to Upbring, described them as having no children to offer. I think that was in response to your testimony that CCD had approximately 50 children as -- in its custody.

I'd like you to clarify, when you say CCD has 50 children in its custody, do you mean children that are there waiting for foster parents to come and take them in?

A. No. I mean --

Q. What do you mean?

A. These are children that are already placed in foster homes and supervised independent living. They've been accepted into the program and placed with -- they already have a placement. They are already placed with a foster family or another foster care placement.

Q. Is that what you mean when you refer to custody of URM provider agencies generally?

A. Yes. So there's a federal requirement for legal responsibility to be established after the child's arrival to the

program. And in Texas, legal -- that legal responsibility arrangement is a private conservatorship where the URM provider goes to court to petition for conservatorship or custody, if you want to call it that, of the children that have been approved to be placed there.

Q. So, while one might characterize Upbring has having no children to offer, is that generally true of all URM provider agencies?

A. Correct. They -- how it works is ORR or the state department, if you are also talking about the other referral pipeline, they refer the children to the national network of URM providers and then the providers submit what's called a placement assurance memo, signaling that they have a foster family that's licensed or another placement that is available for that child, that can meet the child's needs and then the child, if the child is referred by ORR, we would submit or issue an approval letter approving that child to enter that URM

program. And then the child arrives to the program and is placed into the proposed foster home or proposed foster placement.

So, a program doesn't have a pool of children that are just waiting to be placed. It's the other way, where they are licensing foster parents and then those foster parents are able to review referrals of children who are in need of placement.

Q. And if we back up just a little bit further, I think you said what you just described is the second of two paths through which children enter the URM program. Is that right?

A. There's really two different paths.

Q. And the first has to do with children that actually come directly from abroad through the state department. Is that right?

A. Correct.

Q. And the second is children that are already in the United States but would become eligible for the URM program?

A. Correct.

Q. And they enter the URM program and get placed with a foster family through the process that you are just now describing?

A. Correct.

Q. And when you refer to the placement assurance memos that come from the URM provider agencies, when are referrals made, can such a replacement memo come from any URM provider agency from around the country?

A. Yes.

Q. And does that mean that in effect every licensed foster parents in any pool of any URM provider agency is eligible to receive a replacement?

A. In theory, yes. It's possible that not all providers would receive a referral. There are times when a child asks to be placed in a particular geographic location because they may have extended relatives in that area. For example, they may have an aunt and uncle that lives in Richmond, Virginia. They'd like to live

close to them, but the aunt and uncle are not able to provide care. Therefore, we may just refer the child to the Richmond, Virginia program to ensure that that child can be placed close to their relatives.

So, there might be a geographic restriction, but in general, referrals are sent out. We cast a wide net. They are sent out to all URM provider agencies for consideration.

Q. So, absent those sort of case specific restrictions that you just mentioned, it's a case that any referral could go to any licensed foster parent in any pool of any URM provider agency?

A. Correct.

Q. Okay. So, with that broader process in mind, if we zoom back in on the Dallas-Fort Worth area and stipulate for the moment that say Upbring has one foster family in it's pool and CCD has say 50 families in its pool. Is the sole family in the Upbring pool any less likely to receive a placement simply because they are in a smaller pool

than their counterparts in the CCD pool?

A. No.

Q. Thank you. That clears up the first topic I wanted to address.

The second has to do with funding which you were discussing with plaintiff's counsel towards the end there.

At the outset, I want to ask, does the funding drive a URM provider agencies resource expenditures or do the resource expenditures drive the department?

A. Could you rephrase that?

Q. Sure. Sure. I'll back up. When you were discussing comparative funding levels say between Upbring and CCD, what figures are you referring to?

A. Well, there's kind of two sets of figures. USCCB and LIRS submit a budget estimate to ORR every year that signals to ORR how much money they think they are going to need to operate the URM program. That includes costs associated with the direct care of the children, foster care maintenance payments that would go to the foster parents,

MULLOOLY

A. No. No constraints.

Q. Why not?

A. LIRS and USCCB administer the program. So they are responsible for the financial oversight. They keep track of their subgrantees in terms of staffing, children in care, costs associated with providing the required services and then they would communicate to ORR, USCCB and LIRS would communicate to us that we actually need more money because our provider is doing a great job with recruiting and we accepted all these kids into care.

So, there's no -- the initial budget estimate or any budget estimate is not a constraint. At any time they can tell us that they need more money.

MR. LYNCH: Thank you. That's all the questions that I have for you.

- - -

EXAMINATION

- - -

BY MR. RAIMER:

Q. Just very quickly, Ms. Mullooly,

MULLOOLY

I believe you testified that the consortium seeks to ensure that all prospective foster parents in the Dallas-Fort Worth area have the opportunity to work with an URM provider. Is that correct?

A. Correct.

Q. Okay. So, if a same sex couple in the Dallas-Fort Worth area now sought to foster a child through the consortium, would the fact that they are in a same sex relationship preclude them from being referred to a URM provider?

A. No.

Q. As you sit here today, are you aware of anything that precludes a couple in a same sex relationship in the Dallas-Fort Worth area from having their application to serve as a foster parent processed by the consortium?

A. No.

Q. So, if the plaintiffs in this case now sought to foster a child through the consortium, would the fact that they are in a same sex relationship preclude them from

MULLOOLY

doing so?

A. No.

Q. Have plaintiffs in this case sought to foster a child through the consortium?

A. The federal government is not aware of that.

MR. RAIMER: Okay. Thanks. That's all I have.

MS. CULORA: I just have two questions on the budget.

- - -

EXAMINATION

- - -

BY MS. CULORA:

Q. Earlier you testified about the budget estimates from LIRS and USCCB.

Do you recall that?

A. Can you repeat that? I didn't quite hear the whole question.

Q. Earlier you testified about the budgets from LIRS and USCCB. Do you recall?

A. Yes. When you asked me about it or when Mr. Lynch just asked?

Exhibit 47

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FATMA MAROUF AND BRYN ESPLIN, *Plaintiffs*, v. ALEX AZAR, 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)

DEFENDANT U.S. CONFERENCE OF CATHOLIC BISHOPS' SUPPLEMENTAL OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure and Local Civil Rule 26.2(d) of the United States District Court for the District of Columbia, Defendant United States Conference of Catholic Bishops ("USCCB") provides the following supplemental objections and responses to Plaintiffs Fatma Marouf and Bryn Esplin's First Set of Interrogatories.

PRELIMINARY STATEMENT

This case involves a legal dispute about whether USCCB, a nonprofit organization added as a nominal defendant to Plaintiffs' underlying challenge to the Federal Defendants' actions, can receive federal grants to help fund the provision of specified social services during a specific time period without taking certain actions in violation of its sincerely held religious beliefs. Because the essential facts of this case are undisputed, USCCB has proposed factual stipulations at the outset of discovery that would obviate the need for the interrogatories below. USCCB has crafted the proposed stipulations in neutral terms without resort to controversial legal characterizations, and has accepted revisions and additions from Plaintiffs. (*See* Ex. A to

indirectly receives funding from Federal Defendants[.]" By way of example only, USCCB may not have knowledge of entities that indirectly receive funding from Federal Defendants through Program grants. Accordingly, USCCB will respond to Plaintiffs' requests only to the extent that the terms "grantee" and "sub-grantee" are interpreted to mean organizations that directly receive funding from Federal Defendants or from USCCB under the Programs.

7. USCCB objects to Plaintiff's proposed definitions of "describe" (Definition 10), "identify" (Definition 11), and "document" (Definition 12) on the grounds that they are overbroad, unduly burdensome, and purport to require USCCB to assume obligations beyond those set forth in the Federal Rules of Civil Procedure and/or this Court's Local Rules. USCCB will respond pursuant to its obligations under the Federal Rules of Civil Procedure and this Court's Local Rules.

8. USCCB objects to Plaintiffs' proposed definition of the relevant time period (Instruction 16) as overly broad, in that it purports to include "the time period … from the date of the first action taken by Federal Defendants to implement or administer the URM or UAC Program, respectively, with respect to the first grant period under such program for which USCCB applied or was otherwise considered, successfully or unsuccessfully, for a grant … through the present." So defined, Plaintiffs' requests cover a time period of many years, whereas Plaintiffs' claims in this lawsuit are confined to a single grant period during Fiscal Year 2017. Such a definition is not relevant or proportional to the needs of this case. Accordingly, USCCB will respond to Plaintiffs' requests only to the extent that the applicable time period is the grant period during Fiscal Year 2017.

9. USCCB objects to Plaintiff's proposed Instruction 20 to the extent it purports to require USCCB to assume obligations beyond those set forth in the Federal Rules of Civil