

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FATMA MAROUF, *et al.*,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity
as Secretary of the United States Department
of Health and Human Services, *et al.*,

Defendants.

Case No. 18-cv-378 (APM)

**FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiffs are not entitled to summary judgment, first and foremost, because their claims are moot. *See* Fed. Defs.’ Statement of Points & Authorities 11–16, ECF No. 110-2 (“Fed. Defs.’ MSJ Mem.”). There is no longer any Unaccompanied Children (“UC”) provider agency in Dallas-Fort Worth, Texas, where Plaintiffs live, and there is now an Unaccompanied Refugee Minor (“URM”) provider agency, Upbring, in that area that will place foster children with same-sex couples. Furthermore, Federal Defendants have instituted a “Consortium” under which a third party performs the intake function, such that no prospective foster parent will be turned away because of their sexual orientation. That Consortium reinforces Federal Defendants’ position that all persons, regardless of family status or sexual orientation, should have the opportunity to be foster parents if they satisfy the applicable requirements of State law. But this point is not the issue in this case, which instead concerns whether a private organization should be cut off in part from serving vulnerable populations in programs in which it has served for decades.

Plaintiffs are wrong that this Consortium is merely “separate but equal” discrimination. Same-sex and heterosexual applicants alike may be referred to Upbring, which negates any possible inference that the Government is segregating disfavored groups, as in *Plessy* or *Brown*. Nor does the Consortium represent the government’s adoption of any religious belief; to the contrary, under the Consortium, religious beliefs about marriage have no bearing on whether a prospective foster parent can get licensed. And once licensed, Plaintiffs would be in no worse position than any other prospective foster parent in seeking a URM placement just because of the provider agency to which they were referred. Plaintiffs no longer have live claims against the UC or URM programs.

On the merits, the Government’s actions pass Establishment Clause muster. Plaintiffs fail to cite the current standard, under which the Court must interpret the Clause by reference to

historical practices and understandings. *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2428 (2022) (citing *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)). The history in this case is clear: The government has long worked with religious organizations, including the United States Conference of Catholic Bishops (“USCCB”), to find foster care placements, given those organizations’ experience and expertise. At no time in that history have Federal Defendants crossed the line of religious neutrality in operating the program, or impermissibly delegated inherently governmental functions to any religious organization. Plaintiffs’ arguments to the contrary are unavailing.

Finally, Plaintiffs’ motion does not address the essential ingredient of state action, which—as Federal Defendants have explained, *see* Fed. Defs.’ MSJ Mem. 20–26—dooms any Fifth Amendment claim. But even if Plaintiffs had cognizable Fifth Amendment claims, those would be subject to rational-basis review (not heightened scrutiny) because the government here has merely taken a neutral action “motivated by a permissible purpose of limiting governmental interference with the exercise of religion.” *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987). So long as such action withstands Establishment Clause review, it should be reviewed under the Fifth Amendment *only* to determine whether there is any rational basis for the action. *Id.* As explained below, Federal Defendants had at least a rational basis for the actions taken here.

For the foregoing reasons and those set forth below, Plaintiffs’ motion for summary judgment and memorandum in support, ECF No. 108 (“Pls.’ MSJ Mem.”), should be denied.

ARGUMENT

Federal Defendants assume the Court’s familiarity with the legal standard and background discussion sections from the Government’s opening brief and incorporate those sections by reference herein. In the interest of brevity, the Government addresses the factual background of

this case below only where necessary to respond to the various arguments Plaintiffs raise in their motion for summary judgment.¹

I. PLAINTIFFS' CLAIMS ARE MOOT.

To begin, Plaintiffs' motion for summary judgment should be denied because Plaintiffs' claims are moot, as explained in Federal Defendants' opening motion. *See* Fed. Defs.' MSJ Mem. 13–15. In summary, any claim as to the UC program has been mooted by the withdrawal of USCCB from providing long-term foster care (“LTFC”) in Dallas-Fort Worth, as well as the establishment of another LTFC provider in that location with no objection to working with same-sex couples. Fed. Defs.' MSJ Mem. 12–13. As for the URM program, those claims are moot as well because (1) there is now a second replacement designee in Texas (Lutheran Immigration and Refugee Service or “LIRS”), which has a subgrantee in Dallas that will work with same-sex foster parents (Upbring); and (2) the two URM provider agencies in Plaintiffs' area have partnered with a third party (U.S. Committee for Refugees and Immigrants or “USCRI”) to ensure that no same-sex couple is denied an opportunity to become licensed and receive a URM placement. Fed. Defs.' MSJ Mem. 13–14. Put another way, Federal Defendants have “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.” *Marouf v. Azar*, 391 F. Supp. 3d 23, 37 (D.D.C. 2019). As the Court recognized at the motion to dismiss stage, this change to the URM program is sufficient to “make Plaintiffs whole.” *See id.*

Although Plaintiffs do not squarely address mootness in their motion, they make several arguments that bear on the question, all of which are without merit.

A. The Consortium is Not “a ‘separate but equal’ scheme.”

Plaintiffs suggest that the Consortium constitutes “separate but equal” treatment. Pls.' MSJ

¹ The Government further addresses with specificity each paragraph of Plaintiffs' Statement of Material Facts in a separate filing submitted herewith.

Mem. 11 (quoting Marouf Decl. ¶ 20, ECF No. 108-3 at 6–7). That term harks, of course, to the infamous *Plessy v. Ferguson* case, overruled by *Brown v. Board of Education*, 347 U.S. 483, 492 (1954). In *Plessy*, the Supreme Court had upheld race-based segregation in railcars on the theory that such accommodations were “separate but equal.” *Id.* at 490–91. In *Brown*, the Court struck down race-based segregation in public classrooms, recognizing that “separate but equal” is a fallacy. *Id.* at 494–95.

The Consortium bears no resemblance to the railcars in *Plessy* or the classrooms in *Brown*. There is no segregation of foster parents in the program under review. An LGBT foster parent in Dallas who was referred to Upbring would find him/herself among many—and likely a majority of—heterosexual parents. Thus, the Consortium does not “segregate same-sex couples from other applicants,” Pls.’ MSJ Mem. 9, 10, 24. Nor, for the same reason, does it signify any sort of status-based denigration; any prospective foster parent might be referred to Upbring, whether single or in an opposite-sex or same-sex relationship. In short, the Consortium intake approach does not foster any sort of separation among foster parents on the basis of sexual orientation.²

Second, the Consortium does not create an unequal system for LGBT prospective foster parents. The first step for any prospective foster parent, whatever child-placing agency they are working with, is to get licensed with the State. Thus, all parents in Dallas-Fort Worth, whether referred to Catholic Charities of Dallas (“CCD”) or Upbring, will take the exact same next step in pursuing licensure through the State of Texas. Moreover, Upbring has already shown itself able to assist parents with getting licensed. Fed. Defs.’ SUMF ¶ 97, ECF No. 110-3.

Nor do Dallas-Fort Worth prospective foster parents in same-sex marriages face an unequal

² Plaintiffs’ suggestion that USCRI receives federal funds “to perform . . . segregation,” Pls.’ MSJ Mem. 10 (citing Pls.’ SUMF ¶¶ 94–95), is thus without merit. USCRI will receive funding to administer USCRI’s “URM Foster Parent Intake” program, *i.e.*, the Consortium. Pls.’ MSJ Ex. 44 at HHS_SUPP_000015. The description of that budget proposal, *id.* at HHS_SUPP_000020, makes clear that there is no mention or description of “segregating” anyone for any reason.

prospect of receiving a URM foster placement once they have achieved State licensure. While there is no guarantee that any licensed foster parent—in any agency’s pool—will receive a placement, those licensed through Upbring are *no less eligible* than their counterparts at CCD to receive a placement. Ex. D, 2d Mullooly 30(b)(6) Dep. 111:23–112:3 (“[Q.] 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.”). Federal Defendants corrected Plaintiffs’ misimpression of this process, and were unequivocal on this point, at the second 30(b)(6) deposition. *See generally id.* at 106:19–112:5.

Plaintiffs nonetheless contend that Upbring is an inferior child placing agency to CCD, asserting that “[a]s a new subgrantee . . . Upbring lacks the capacity to process applicants on the same scale that CCD enjoys and, thus, is not similarly situated to CCD.” Pls.’ MSJ Mem. 9 (citing Pls.’ SUMF ¶ 102). Plaintiffs are mistaken; the evidence at summary judgment does not show any lack of capacity at Upbring going forward. Plaintiffs argue that Upbring “has not yet served any foster children, and is still working to hire staff and license foster parents.” Pls.’ SUMF ¶ 102. Plaintiffs also argue that “CCD’s budgeting, funding, and staffing are more robust than Upbring’s.” *Id.* ¶ 106. But the Government was clear—in testimony that Plaintiffs omitted from their statement and transcript excerpts—that a lower current funding level does not constrain Upbring from hiring more staff or caring for more children. *See* Ex. D, 2d Mullooly 30(b)(6) Dep. 115:18–116:18. That is because Office of Refugee Resettlement (“ORR”) funding levels can rise to meet demand from a grantee, rather than functioning as a cap that constrains the grantee’s activities. For example:

If all of a sudden [Upbring] [is] able to license ten foster families and they get ten kids or they accept ten kids, they may come to us with a new budget estimate with a different figure, a higher figure, saying we actually think we're going to need now this amount of money for this year.

Id. at 114:21–115:3. Moreover, whether or not Upbring’s URM program is ultimately smaller than CCD’s is irrelevant because the only question is whether Upbring can process *Plaintiffs’* applications. If so, then Plaintiffs would be on par with all the licensed parents in CCD’s pool—even if that pool is larger. *See* Ex. D, 2d Mullooly 30(b)(6) Dep. 111:23–112:3. And Upbring has already proved itself capable of getting foster parents licensed. Fed. Defs.’ SUMF ¶ 97; *accord* Pls.’ SUMF ¶ 103.

Upbring offers Plaintiffs every opportunity to foster a URM child that CCD would. Plaintiffs simply have not applied.

B. The Consortium Does Not Cause or Compound Any Constitutional Violation.

For the reasons explained above and at length in the Government’s opening brief, Federal Defendants have “ma[d]e Plaintiffs whole” by “remov[ing] barriers to same-sex couples becoming foster parents,” and seeing to it that Plaintiffs are evaluated “by the same criteria as any heterosexual couple or person,” *Marouf*, 391 F. Supp. 3d at 37. Plaintiffs argue to the contrary, asserting that the Consortium has actually *compounded* the problem. Pls.’ MSJ Mem. 9–11, 24. Those arguments are without merit.

Plaintiffs argue that Federal Defendants “have now adopted USCCB’s religious beliefs as a determinant of government decision-making.” Pls.’ MSJ Mem. 9. But the very existence of the Consortium, which ensures that no applicant will be denied the opportunity to be a foster parent on the ground of sexual orientation, belies any suggestion that religious beliefs are determining who may, and may not, foster a child through the URM program in Dallas-Fort Worth. *See* Fed. Defs.’ SUMF ¶¶ 93–94, 98.

Plaintiffs emphasize that it is still “possible,” by Federal Defendants’ alleged admission, that Plaintiffs would get turned away again. Pls.’ MSJ Mem. 10 (citing Pls.’ SUMF ¶ 107 (citing Pls.’ MSJ Ex. 32, 2d Mullooly 30(b)(6) Dep. 105:17–23)). But even if it were theoretically

possible that a same-sex couple applicant might be mistakenly referred to CCD,³ that does not undermine how the Consortium fundamentally works. In short, the Consortium ensures that being in a same-sex relationship does not prevent a couple from being referred to a URM provider agency; the government is aware of no barriers to same-sex parents fostering URM children in Dallas-Fort Worth; and the government is aware of no barriers pertaining to Plaintiffs, specifically. Ex. D, 2d Mullooly 30(b)(6) Dep. at 117:8–118:3. This description is reinforced by the documents produced. *E.g.*, Fed. Defs.’ SUMF ¶¶ 93–94 (citing Ex. DD, HHS_SUPP_000079 (reflecting that USCRI had “discussed with USCCB and LIRS any restrictions that their sub-recipients may have for working with a prospective foster parent,” and that based on those discussions, USCRI had “not identified any scenario where a prospective foster parent would not have the opportunity to work with a URM provider agency to determine their eligibility to be licensed under state guidelines.”)). And on the speculative chance that a prospective foster parent is referred to an agency that would not work with the parent, he or she would be referred back to USCRI and ultimately to the other provider. Ex. D, 2d Mullooly 30(b)(6) Dep. 87:19–88:5. In short, Plaintiffs’ suggestion that “the Consortium does nothing to alter the landscape,” Pls.’ MSJ Mem. 25 n.10, is wrong. The remote possibility of a glitch in the Consortium’s referral process—which would not ultimately deny anyone the chance to foster a child—does not save Plaintiffs’ URM claims from mootness dismissal.

Finally, Plaintiffs’ suggestion that the Consortium grants “blanket prospective waivers” to its members against taking any action inconsistent with their religious beliefs is unavailing for two reasons. *See* Pls.’ MSJ Mem. 10, 11, 31, 37. First, the only religious belief at issue in this case is that which kept Catholic Charities of Fort Worth (CCFW) from working with Plaintiffs. The

³ Ex. D, 2d Mullooly 30(b)(6) Dep. Tr. 91:23–92:12 (answering repeated inquiries regarding what is “possible” by stating that “I don’t think the Government can say it’s not possible”).

Consortium ensures that that belief will no longer prevent Plaintiffs from fostering a URM child.⁴ Second, Plaintiffs have provided no evidence that any Consortium member has any other religious belief that would prevent any foster parent from fostering a URM child. Plaintiffs have not even suggested what such a belief may be. This is irrelevant speculation.

* * *

Far from perpetuating an unconstitutional scheme, the Consortium is consonant with what Plaintiffs indicated would be an acceptable path forward for this program when pressed at an earlier stage of this litigation. For example, citing a discussion with Plaintiffs’ counsel at the motion to dismiss hearing, the Court explained in its motion to dismiss opinion that Plaintiffs do not seek to strip USCCB of its funding or compel USCCB to place children in a manner contrary to its religious beliefs. *See Marouf*, 391 F. Supp. 3d at 36 n.2. And even more directly, at the motion to dismiss hearing, Plaintiffs’ counsel described as acceptable the creation of a “screening process” for prospective foster parents to which any couple would be directed, regardless of family status. Tr. of Oral Argument at 57:1–4, 58:15–25, 60:12–61:5 (Nov. 30, 2018), ECF No. 80. At that time, Plaintiffs seemed to be of the view that this would obviate the need for USCCB to act contrary to its religious convictions by directly placing children with same-sex couples. *See id.* On this point, the Court should adopt Plaintiffs’ prior position—the Consortium has redressed their alleged injuries and the claims in this lawsuit are therefore moot.

II. PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THE MERITS.

A. Plaintiffs’ Establishment Clause Claim Fails.

Plaintiffs contend that they are entitled to summary judgment on their Establishment Clause claim, contending that the Government has violated the Clause in two ways: by (1)

⁴ In truth, Plaintiffs could have pursued fostering a child *three years* ago, when Federal Defendants apprised them of a UC provider in their area that did not object to working with same-sex foster parents. *See Fed. Defs.’ SUMF ¶¶ 76–78.*

“delegating governmental functions to USCCB without establishing and maintaining adequate safeguards” as to USCCB’s operations and (2) “benefiting religion in a manner that results in significant harms to third parties.” Pls.’ MSJ Mem. 27. Neither argument has merit.

1. Plaintiffs’ arguments are inconsistent with governing standards recently articulated by the Supreme Court.

To begin, Plaintiffs fail to cite the current standard for Establishment Clause claims, which was articulated in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022). As explained in the Government’s motion for summary judgment, that case held that courts “must” interpret the Establishment Clause “by ‘reference to historical practices and understandings,’” with the Court instructing that the line “between the permissible and the impermissible has to accor[d] with history and faithfully reflect the understanding of the Founding Fathers.” *Id.* at 2428 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)). Under that standard, ORR’s longstanding, religiously neutral relationship with USCCB readily passes First Amendment scrutiny. *See* Fed. Defs.’ MSJ Mem. 16–19.

Plaintiffs’ position is incompatible with this test, as shown by the one passage of *Kennedy* that Plaintiffs do cite in their motion, where the Court explained that the Free Exercise and Establishment Clauses “have ‘complementary’ purposes, not warring ones where one Clause is always sure to prevail over the other.” *Id.* at 2426; *see also* Pls.’ MSJ Mem. 25 (quoting same). The problem for Plaintiffs is that their position (that USCCB’s participation in this program violates the Establishment Clause) is in tension with the Supreme Court’s recent Free Exercise jurisprudence. For example, in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Supreme Court held that it violated the Free Exercise Clause for the City of Philadelphia to exclude from its foster care system a Catholic child-placing agency solely on account of the agency’s opposition to certifying same-sex couples as foster parents. *Id.* at 1882. The Court explained that the child-placing agency in question “[did] not seek to impose [its] beliefs on anyone else” even where it

declined to work with same-sex couples as foster parents. *Id.* Similarly here, USCCB does not seek to impose its beliefs but rather seeks only an accommodation to allow it to deliver secular services in a manner consistent with its religious beliefs.

Federal Defendants do not mean to say that the imposition of non-discrimination requirements on a religiously affiliated grantee necessarily violates either the Free Exercise Clause or Religious Freedom Restoration Act—and *Fulton* does not hold otherwise. *See id.* (explaining that the City in that case had failed to “offer[]” any “compelling reason why it ha[d] a particular interest” in enforcing the non-discrimination requirement at issue in that case). Instead, the point is that after *Fulton*, Plaintiffs’ argument that the Government violates the *Establishment* Clause by working with a grantee that declines to work with same-sex couples is severely undermined. *See Locke v. Davey*, 540 U.S. 712, 719 (2004) (explaining that there is “play in the joints” between the Establishment Clause and Free Exercise Clause such that state action may be “permitted by the former but not required by the latter”). Plaintiffs protest that *Fulton* is inapposite, asserting among other things that “there was no evidence in *Fulton* that any person had been excluded, turned away, or otherwise harmed by a child welfare agency.” Pls.’ MSJ Mem. at 35. But although “[n]o same-sex couple ha[d] ever sought certification from [Catholic Social Services],” it was undisputed that the agency would refuse to certify any same-sex married couple that sought licensure and would instead refer such a couple to another agency in the City’s foster system. *Fulton*, 141 S. Ct. at 1875. The Court was well aware of the stakes: that the Catholic agency in that case would not, if allowed to contract with the City, certify same-sex couples for foster parenting.

2. ORR has not caused any impermissible delegation of governmental powers to USCCB.

Plaintiffs argue that ORR’s relationship with USCCB effects an impermissible “fusion of governmental and religious functions” by delegating important governmental powers to USCCB without establishing adequate safeguards to ensure that USCCB “wield[s]” that power “only in a

secular, neutral, and nonideological manner.” Pls.’ MSJ Mem. 28–29. Plaintiffs rely on two principal Supreme Court cases for this argument—*Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116 (1982), and *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994). Plaintiffs’ invocation of this line of authority, whatever its currency in light of *Kennedy*, fails for multiple reasons.

To begin, no governmental power of the sort contemplated by *Larkin* and *Grumet* has in fact been delegated here, where USCCB’s sub-grantees simply exercise the ordinary role of a child-placing agency in recruiting foster parents, rather than some core political or regulatory function. The latter kind of governmental power was the premise for both *Larkin* and *Grumet*. See *Larkin*, 459 U.S. at 122 (explaining that the power to veto liquor license applications is “ordinarily vested in agencies of government” and constitutes a “substantial government power[.]”); *Grumet*, 512 U.S. at 709–10 (statute “delegate[d] a power this Court has said ‘ranks at the very apex of the function of a State’” (citation omitted)). In contrast, the care of unaccompanied and orphaned children has historically been the responsibility of private, including religious, organizations. See Fed. Defs.’ MSJ Mem. 4–6 (recounting the decades-long history of faith-based organizations assisting with resettlement of refugees and refugee children specifically); *Fulton*, 141 S. Ct. at 1885 (Alito, J., concurring) (describing the dominant role played by private groups, and the limited role of state and local governments, in caring for orphaned and foster children until the 20th century).

Plaintiffs in any event interpret *Larkin* and *Grumet* far more expansively than their reasoning permits. As explained by the *Grumet* Court, those cases stand for the proposition that the government may not “deliberately delegate discretionary power to an individual, institution, or community on the ground of religious identity.” *Grumet*, 512 U.S. at 699 (emphasis added). In that circumstance—where in essence a “religious test” is applied to determining whether political

power is wielded by an entity or community—there is an impermissible “fusion” of government and religion. *Id.* at 702; *see also Larkin*, 459 U.S. at 117 (evaluating statute that gave churches and schools authority to veto applications for liquor licenses in their physical vicinity). In contrast, the rule of *Larkin* and *Grumet* is not implicated where religious entities are selected to assist the Government “on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority.” *Grumet*, 512 U.S. at 699; *see also Harkness v. Sec’y of the Navy*, 858 F.3d 437, 450 (6th Cir. 2017) (same). The evidence here shows that ORR selected USCCB as a replacement designee in the URM program and a grantee in the UC program for reasons having nothing to do with religion. Fed. Defs.’ SUMF ¶¶ 46–47, 62–65. USCCB is a grantee of ORR because of its expertise in delivering care to vulnerable children, not because of its religious character.

Moreover, USCCB’s activities as a UC and URM grantee are not remotely “standardless” such that this case would be analogous to *Larkin* or *Grumet*. The rule of those cases applies only where power is delegated to a religious entity in a “standardless” fashion, such that they may use that power to promote “explicitly religious goals.” *Larkin*, 459 U.S. at 125. But here, USCCB’s activities are subject to numerous secular standards. For example, in the URM program, USCCB and its affiliates are required to follow state law regarding licensing and approval of prospective foster parents and to “develop an appropriate plan for the care and supervision of each unaccompanied child.” Fed. Defs.’ MSJ Ex. B at 37, ECF No. 111-2. USCCB is also obligated to follow various terms and conditions of its federal grants, “which govern how a grantee may run its grant program, including limits on allowable costs, eligibility, and reporting requirements.” *Id.* Those terms and conditions include HHS regulations forbidding organizations from using direct federal financial assistance to “engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization).” 45

C.F.R. § 87.3(b). This case is therefore akin to *In re Navy Chaplaincy*, 697 F.3d 1171 (D.C. Cir. 2012), where the Court of Appeals rejected a *Larkin*-based argument for lack of a standardless delegation of authority. The court reasoned, *inter alia*, that a scheme whereby Navy chaplains played a role in making promotion decisions was not standardless where “Congress and the Secretary of the Navy have articulated secular, neutral standards to guide selection board members in evaluating candidates for promotion.” *Id.* at 1179.

3. ORR has not created impermissible religious accommodation.

Plaintiffs further argue that ORR’s relationship with USCCB fails the Establishment Clause’s test for religious accommodations. Pls.’ MSJ Mem. 32–38. Plaintiffs are wrong. The Government “may (and sometimes must) accommodate religious practices” without violating the Establishment Clause, and the limits of permissible state accommodation “are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.” *Amos*, 483 U.S. at 334. “There is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.” *Id.* The Consortium does just that, by accommodating USCCB’s religious beliefs while ensuring that all persons may be considered as prospective foster parents, those beliefs notwithstanding.

Plaintiffs nevertheless argue that any governmental accommodation of religion fails unless it “lift[s] *substantial*, government-imposed burdens on the exercise of religion.” Pls.’ MSJ Mem. 32 (emphasis added). Plaintiffs’ support for this purported rule is *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), which expressly stated that “the concept of accommodation plainly ha[d] no relevance” to the case and which involved the display of a crèche at a government building, not any attempt to lift burdens on religious exercise. *Id.* at 613 n.59. Thus, it can hardly be said that the Court articulated any Establishment Clause rule regarding religious accommodations in *County of Allegheny*. Other cases Plaintiffs cite are even further

afield. Despite Plaintiffs' citation of it, *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985), had nothing to say about whether accommodations of religion may or must involve the lifting of a substantial burden on religious practice. Compare Pls.' MSJ Mem. 33 (citing *Caldor*, 472 U.S. at 709–10) with *Caldor*, 472 U.S. at 709–10. And the *Texas Monthly* opinion cited by Plaintiffs was not an opinion of the Court and thus cannot supersede *Amos* or otherwise establish some new test for evaluation of religious accommodations. See *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (plurality op.). Finally, all of the foregoing is of doubtful currency in light of the Supreme Court's recent decision in *Kennedy*, including its rejection of *Lemon*.

Plaintiffs next argue that an accommodation violates the Religion Clauses if it “would shift costs, harms, or other burdens to nonbeneficiaries.” Pls.' MSJ Mem. 34. But that argument finds no footing in the facts of this case. Federal Defendants largely addressed these points in the section of this brief regarding mootness—explaining, for example, why there is no evidence to support Plaintiffs' contention that USCCB's status as a grantee reduces placement options. Federal Defendants refer the Court to that section except to address two additional points.

First, Plaintiffs erroneously invoke purported harms to URM children in support of their Establishment Clause claim. Pls.' MSJ Mem. 36. Plaintiffs lack standing to assert the legal rights of these unidentified individuals to which they have demonstrated no relationship or any hindrance to these individuals asserting their own rights. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (recognizing a narrow exception permitting parties to invoke the rights of third parties where they can show a “close relationship with the person who possesses the right” and a “hindrance to the possessor's ability to protect his own interests”); *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (general rule is that a party “must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties”).

Second, Plaintiffs are wrong that Federal Defendants “do not contest the significant harm

to Program children” arising from USCCB’s participation in this program. USCCB provides expert services as a grantee in the UC and URM programs and its efforts are beneficial to the populations that ORR serves through these programs. *See, e.g.*, Ex. A, Tota Dep. 256:6–10 (answering “Yes” to question whether “USCCB helped improve the lives of vulnerable children through its role” as replacement designee in Texas). At the same time, Federal Defendants believe that all people, regardless of family status or sexual orientation, should have an opportunity to be foster parents and that it is beneficial for the “pool of potential Program foster parents [to] include[] married same-sex couples.” Pls.’ MSJ Mem. 36. Consistent with those views, ORR has funded both UC and URM providers in Dallas-Fort Worth that have no objection to working with same-sex couples. And ORR has set up an intake screening function through a third-party agency, which further diminishes any burden arising from USCCB’s religious beliefs.

Rather than establishing that religious accommodations cannot impose *any* burdens on third parties, the Supreme Court teaches that religious accommodations must appropriately balance the benefits and burdens of any such accommodations. Thus, a statute or policy that automatically privileges religious concerns over secular interests in all circumstances may run afoul of the Establishment Clause. *See Estate of Thornton*, 472 U.S. at 708–10 (striking down a statute in which “religious concerns automatically control[led] over all secular interests” and that took “no account of the convenience or interests” of third parties). By contrast, a statute that “appropriately balance[s]” religious and secular considerations will be upheld against Establishment Clause challenge. *See Cutter v. Wilkinson*, 544 U.S. 709, 722–23 (2005) (upholding RLUIPA because it treated all religions equally and adopted an “appropriately balanced” test in regard to considerations of religious and secular interests). The current structure of the URM program in Dallas-Fort Worth—including the existence of Upbring as a provider open to all and USCRI as an intake organization to which all are directed—is far from a scenario that fails to appropriately

balance the interests of religious and secular interests.

B. Plaintiffs' Fifth Amendment Claims Fail.

Plaintiffs further argue that they are entitled to summary judgment on their claims pursuant to the Fifth Amendment, because the Government's actions allegedly violate the Amendment's equal protection and due process guarantees, whether analyzed under heightened scrutiny or the rational basis standard. Pls.' MSJ Mem. 16–25. But as an initial matter, Plaintiffs' claim under the Fifth Amendment cannot succeed because, as Federal Defendants have explained in their motion for summary judgment, Plaintiffs do not challenge state action. *See* Fed. Defs.' MSJ Mem. 20–26. Plaintiffs will presumably address that argument in their opposition, and Federal Defendants will reply in turn. If the Court ultimately agrees that USCCB's actions are not state actions, then the Court need not reach the merits of these claims.

Should the Court reach the merits, however, Federal Defendants are still entitled to summary judgment.

1. Plaintiffs' claims are subject to rational-basis review.

Plaintiffs' Fifth Amendment claims are subject to rational-basis review for the basic reason that their claims concern an alleged Government establishment of religion through accommodation of a religious organization's beliefs. In that context, the Supreme Court holds that attendant equal-protection and due-process claims are subject to rational basis review.

First, as to equal protection, the Supreme Court explained in *Amos*, that a neutral government action “motivated by a permissible purpose of limiting governmental interference with the exercise of religion” should be judged under the rational basis test, not strict scrutiny, so long as it withstands Establishment Clause review. 483 U.S. at 339. The Court so held over arguments that Congress had trenched upon a fundamental right by drawing distinctions in law on religious grounds. *See id.* The Court upheld Title VII's exemption of religious organizations from the

prohibition against religious discrimination in employment, reasoning that the Government does not endorse an entity's religious beliefs through such neutral efforts at accommodation. *See id.* at 337 & n.15 (rejecting claim that Title VII exemption “conveys a message of governmental endorsement of religious discrimination” or that the Government had thereby “advanced religion through its own activities and influence”).

The same analysis applies here. The premise of this lawsuit is not any Government policy against foster parenting by same-sex couples; to the contrary, the Government has established a mechanism to ensure that same-sex couples in Dallas-Fort Worth will have an equal opportunity to be foster parents in these programs. Rather, the case is rooted in the Government's decision to retain the assistance of an expert private entity that has decades of experience with the program in question and to accommodate that entity's religious beliefs. The Government's accommodative efforts are subject to the test of the Establishment Clause, a test the Government passes, *see supra*. But *Amos* teaches that the Government is not then subject to strict scrutiny under the Equal Protection Clause by virtue of its neutral efforts at accommodation. Were it otherwise, the plaintiffs in *Amos* should have prevailed in obtaining strict scrutiny review. The Supreme Court nonetheless explained that rational basis review applied. The same is true here.

Similar considerations govern Plaintiffs' substantive due-process claim. The Supreme Court has explained that “if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.” *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997). The specific claim at issue here—an alleged establishment of religion that has resulted in discrimination against the Plaintiffs by a private religious charity—is covered by a “specific constitutional provision”—the First Amendment's Establishment Clause. Plaintiffs' substantive due process claim should therefore be reviewed

under Establishment Clause standards and, otherwise, under rational basis review.

Plaintiffs devote several pages to arguing that heightened scrutiny applies. Pls.’ MSJ Mem. 16–20. But this case does not involve discrimination on the basis of sexual orientation by the Government. Plaintiffs fail to reckon with the particular circumstances presented by this lawsuit, which arises not from a Government policy infringing fundamental rights but, rather, a neutral effort to retain the services of an expert entity—along with others—by accommodating that entity’s private religious beliefs. In such circumstances, only rational basis review applies.

2. Federal Defendants’ actions easily survive rational-basis review.

Plaintiffs argue that Federal Defendants’ actions cannot survive even rational-basis review. Pls.’ MSJ Mem. 21–25. None of their arguments has merit.

First, this case does not involve “discrimination against a disfavored class for its own sake.” Pls.’ MSJ Mem. 22. Plaintiffs adduce no evidence that Federal Defendants selected USCCB *so that* it would discriminate against same-sex couples, or that USCCB’s selection was intended to oppress same-sex foster parents. Federal Defendants have not exhibited any “animosity toward” same-sex parents. *Contra* Pls.’ MSJ Mem. 22 (quoting *Romer v. Evans*, 517 U.S. 620, 631–36 (1996)).⁵ Quite the reverse is true. Fed. Defs.’ SUMF ¶¶ 88–98 (recounting efforts to establish Consortium).

⁵ In *Romer*, an amendment to Colorado’s constitution “made a general announcement that gays and lesbians shall not have any particular protections from the law.” *Id.* at 635. So sweeping a proclamation raised the “inevitable inference that the disadvantage [was] born of animosity toward the class of persons affected. *Id.* at 634. Federal Defendants have done nothing of the sort here.

The Court in *Romer* also noted the “absence of precedent for Amendment 2,” which was relevant because “discriminations of an *unusual* character especially suggest careful consideration...” *Id.* at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37–38 (1928) (emphasis added)). Put another way: “It is not within our constitutional tradition to enact laws of this sort.” *Id.* But as detailed in Federal Defendants’ Establishment Clause argument, there is nothing unusual or non-traditional about providing foster-care grants to Catholic charities or other faith-based organizations. *Supra*. To the contrary, such organizations have served these programs since their inception. *See* Fed. Defs.’ SUMF ¶¶ 22–37.

Second, Federal Defendants have not undermined their interest in child welfare or Congress's intent under the URM or UC programs. *See* Pls.' MSJ Mem. 22–23. Plaintiffs face a heavy burden in making this argument: the rational basis standard dictates that government policy is subject to a “strong presumption of validity” and it must be upheld “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–14 (1993). It is Plaintiffs' burden to show the absence of any such rational basis by “negat[ing] every conceivable basis that might support” the challenged act. *See id.* at 315.

Plaintiffs fall short of meeting their burden. USCCB is “one of the premier providers” among foster-care agencies that work with the government under the URM program, Fed. Defs.' SUMF ¶ 35, and has participated in that program since its inception, *id.* ¶ 33. It is one of only two national resettlement agencies authorized to place unaccompanied refugee minors into URM programs, *id.* ¶ 34, and administers “a host of programs” for ORR, *id.* ¶ 35. Given USCCB's lengthy track record and performance, it was more than rational for ORR to believe that selecting USCCB as one of two replacement designees in Texas would be in the best interests of the URM children themselves. *See* Fed. Defs.' SUMF ¶ 62 (detailing the factors considered by ORR when selecting USCCB as replacement designee in Texas).

Plaintiffs counter that “there is no valid child welfare justification for a scheme that excludes a class of prospective Program foster parents for a reason wholly unrelated to (and in fact destructive of) child welfare.” Pls.' MSJ Mem. 22. But the URM program, whether in Texas or throughout the Nation, does not exclude a class of prospective foster parents in this fashion. Indeed, Plaintiffs fail to acknowledge that LIRS and its subgrantees also participate in the URM program—including where Plaintiffs live—and have no objection to working with same-sex parents. Thus, Federal Defendants' “scheme” does not “exclude[.]” Plaintiffs from the pool of

possible placements for URM children.

And there is a rational reason for allowing USCCB to continue as one of two URM replacement designees in Texas, notwithstanding USCCB’s unwillingness to work with same-sex foster parents: its decades-long experience with providing quality care to thousands of children in need. *See* USCCB App. 2, Canny Decl. ¶ 3, ECF No. 106-3; USCCB App. 237, Kuennen Dep. 31:3–8 (USCCB has served unaccompanied immigrant children for decades); USCCB App. 2, Canny Decl. ¶ 4 (USCCB is one of the largest refugee-resettlement agencies in the world); USCCB App. 150, Peck Dep 132:13–16 (“USCCB is known nationally, and I would say internationally, as being experts on migrating children and really setting a high bar for quality of services.”); *id.* at 136:12–14 (USCCB has more than 225 subcontractors providing services to children across the United States); *id.* at 135:19–23 (Ms. Peck estimates that USCCB served “thousands” of children during her tenure).

Ironically, it is Plaintiffs’ proposal that would undermine child-welfare interests in the URM program.⁶ To exclude USCCB would wreak havoc on the URM system. USCCB is one of only two resettlement agencies that work with the State Department for direct placements of children coming from overseas; removing USCCB from that work would cut “half of the government’s national capacity to serve URM’s.” USCCB App. 151, Peck Dep. 133:7–8. USCCB’s affiliates operate URM provider agencies across the country; any holding that the Constitution requires excluding Catholic grantees would shutter all of those agencies and deprive ORR of “the largest network of placement options for unaccompanied children.” USCCB App. 152, Peck Dep. 134:23–24. USCCB is also “uniquely able” to respond to particular requests from ORR—*e.g.*, to place a particular child with a family member in a certain area of the country. *Id.*

⁶ Federal Defendants stressed in their motion that any injunctive relief should be narrowly tailored to remedy the harms to the Plaintiffs at bar. But as Federal Defendants candidly acknowledged, *any* finding that working with Catholic charities is unconstitutional could have consequences beyond the URM program in Dallas-Fort Worth. Fed. Defs.’ MSJ Mem. 28–29.

at 134:8–15. Moreover, as to existing placements, eliminating USCCB and its affiliates would portend drastic consequences for URM children and the foster parents with whom they have already been placed.⁷ Those families rely on URM funding for medical assistance, educational assistance, training vouchers, and maintenance payments (which covers food, clothing, and other basic essentials).⁸

Plaintiffs’ proffered expert has opined at length on the general harms caused by decreasing the pool of available foster parents. *See generally* Pls.’ SUMF ¶¶ 136–41. Those harms are all predicated on the assumption that there are more placement options when USCCB is *excluded* from the URM program than when it is *included*. That proposition was not supported by any evidence and in particular no evidence specific to the specialized URM and UC foster care programs. Instead, Dr. Brodzinsky merely “suspect[ed]” that wherever a Catholic agency closed, “an agency or consortium of agencies would work with and pick up, you know, the programs.” Ex. C, Brodzinsky Dep. 134:4-7. That was based on two examples—one in Illinois, one in Boston—where Dr. Brodzinsky portrayed a “smooth” transition in the wake of a Catholic agency’s closing. *Id.* at 135:14. This was based on Dr. Brodzinsky’s “own analysis,” which he admitted “is not in the [expert] report.” *Id.* at 135:15–15. And that analysis was of adoption, not foster care—even though Dr. Brodzinsky summarily equated the two with no elaboration. *Id.* at 135:17–19 (“[T]he issue would be parallel in my view.”).

When ultimately pressed on his opinion that excluding USCCB *would not* reduce placement options, Dr. Brodzinsky abandoned that opinion. *See id.* at 136:15–21 (Dr. Brodzinsky

⁷ These children are in the conservatorship of the URM provider agency with which they have been placed. Were that agency excluded from the program, it is not at all certain that the children could be re-placed with a different agency—especially if *all* affiliates of USCCB must withdraw.

⁸ For a complete list of services available to URM children, see ORR, *Unaccompanied Refugee Minors Program*, available at <https://www.acf.hhs.gov/orr/programs/refugees/urm> (last visited Sep. 8, 2022).

admitting, with respect to CCD's hypothetical withdrawal from the Dallas-Fort Worth area, that he "can't opine on something that hasn't happened"); *id.* at 136:23–137:1 (Dr. Brodzinsky admitting that he cannot offer any such opinion on a national scale, should USCCB hypothetically withdraw from the programs writ large). Notwithstanding that Plaintiffs continue to cite the opinion in their Statement of Undisputed Material Facts, *see* Pls.' SUMF ¶ 132, that opinion has been effectively withdrawn by its own proponent. And in any event, the opinions Dr. Brodzinsky offered in 2020 have even less weight today, where significant events such as the creation of the Consortium have substantially changed the factual context of this case.

Absent concrete evidence to the contrary, the Court should reach the commonsense conclusion that eliminating USCCB from the URM program in Dallas-Fort Worth (and the numerous foster parents in CCD's network, to say nothing of the thousands of eligible foster parents in USCCB's networks nationwide) would *reduce* placement options where these unaccompanied immigrant populations are served by a highly select group of providers with unique programmatic expertise in working with such populations. Avoiding those results thus provides more than a rational basis for allowing USCCB to continue as one of two URM replacement designees in Texas.

Finally, Federal Defendants have not "irrationally departed from their own policies." Pls.' MSJ Mem. 23–24. USCCB and other faith-based entities have worked with the Government, including ORR, for decades in providing care and custody to refugees and unaccompanied children. *See* Fed. Defs.' MSJ Mem. 4–6. Moreover, Plaintiffs' argument is inapposite to their claim in light of the applicable standard of review—the rational basis test—which requires Plaintiffs to negate every conceivable basis supporting the Government's actions. Plaintiffs instead appear to be borrowing a concept from Administrative Procedure Act litigation, specifically the rule that where an agency takes action inconsistent with prior policy, it must

demonstrate recognition of the policy change and articulate a rationale for the change. *See, e.g., FCC v. Fox Television Stations*, 556 U.S. 502, 514–15 (2009). This is not APA litigation and Federal Defendants are not subject to record review or procedural requirements imposed by that statute. Instead, under the rational basis test for Constitutional claims, Government action should be upheld if any rational basis could support it, even a hypothetical one not necessarily relied upon by the agency. *Beach Commc'ns*, 508 U.S. at 314–15 (plaintiff has “the burden ‘to negative every conceivable basis which might support’ the challenged action without regard to “whether the conceived reason for the challenged distinction actually motivated the legislature”).

CONCLUSION

For the foregoing reasons, Plaintiffs are not entitled to summary judgment on their claims.

Dated: September 14, 2022

Respectfully submitted,

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Exhibit A

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1 A P P E A R A N C E S: (all via videoconference)

2 (continued)

3

4 ON BEHALF OF THE DEFENDANT U.S. CATHOLIC CONFERENCE
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ALSO PRESENT: DARRAK LIGHTY, VIDEOGRAPHER

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1 submit a proposal for the URM Program in Texas as a
2 replacement designee.

3 Q If you could turn to the second page of
4 this.

5 A Yes.

6 Q In the first full paragraph that says --
7 that starts off with, "USCCB/MRS would also ensure,"
8 the second sentence after that reads, "In addition,
9 USCCB/MRS would ensure that services provided under
10 this application are not contrary to the authentic
11 teaching of the Catholic Church, its moral
12 convictions, and religious beliefs."

13 Do you see that?

14 A Yes.

15 Q Did you notice this language when you
16 first reviewed this letter?

17 MR. LYNCH: Object to form.

18 MR. CELLIER: Object to form.

19 A Uh-huh. Yes.

20 BY MR. QUINN:

21 Q What did you think it meant?

22 MR. LYNCH: Object to form.

23 MR. CELLIER: Object to form.

24 A Our interactions with USCCB, certainly to
25 date, had always expressed -- had expressed language

1 certainly on the religious rights, certainly around
2 right to life, and so that clause was certainly
3 flagged there, certainly their -- their religious
4 conscious -- conscious clause rights and was
5 interpreted certainly specific to right-to-life
6 issues.

7 BY MR. QUINN:

8 Q So are you -- aside from this specific
9 instance of the URM Program in Texas in 2017, are
10 you aware of other grants from ORR where this or
11 similar language was included?

12 MR. LYNCH: Object to scope.

13 MR. CELLIER: Object to scope.

14 THE WITNESS:

15 A I'm sorry. I didn't hear the comments.

16 The objection -- was there an objection
17 or --

18 BY MR. QUINN:

19 Q It was just an objection to scope.

20 A Oh, okay. Okay.

21 Q Please answer my question.

22 A There -- in some of my work prior to --
23 more specific work on the refugee program, on the
24 Unaccompanied Alien Children's Program, USCCB often
25 included this language in their cooperative

1 MR. LYNCH: Object to form.

2 MR. CELLIER: Object to form.

3 A No. No, it would not.

4 BY MR. QUINN:

5 Q Does USCCB have a religious affiliation?

6 A Yes.

7 Q What affiliation is that?

8 A They're a Catholic organization.

9 Q And how do you know that?

10 A It's in their title.

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

13 A Can you repeat that again, Brendan?

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

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

18 Q What was your knowledge of it?

19 A That it was a Catholic organization?

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

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

25 A I do not recall a specific instance, no.

1 Q Were you aware that USCCB's religious
2 beliefs included a belief against same-sex marriage?

3 A Yes.

4 MR. CELLIER: Object to form.

5 MR. LYNCH: Object to form.

6 BY MR. QUINN:

7 Q Were you aware of that religious belief
8 when you worked at USCCB?

9 A Yes.

10 Q Did Catholic teaching regarding same-sex
11 marriage inform your work?

12 A I'm sorry?

13 MR. LYNCH: Object to form.

14 BY MR. QUINN:

15 Q Did Catholic teaching regarding same-sex
16 marriage impact your work?

17 MR. LYNCH: Object to form.

18 MR. CELLIER: Objection to form.

19 MR. LYNCH: Object to scope.

20 MR. CELLIER: And scope.

21 A No, not in the programs that I worked on
22 at the time.

23 BY MR. QUINN:

24 Q Did Catholic teaching regarding same-sex
25 marriage inform USCCB's decision-making regarding

1 BY MR. QUINN:

2 Q So your knowledge of their belief
3 concerning same-sex marriage hasn't changed since
4 you worked at USCCB?

5 A I don't --

6 MR. LYNCH: Object to form.

7 A I don't believe so, no.

8 MR. CELLIER: Object to form.

9 BY MR. QUINN:

10 Q You don't believe so or do you know so?

11 MR. LYNCH: Object to form.

12 A I'm sorry?

13 BY MR. QUINN:

14 Q You said, "Believe." Do you know whether
15 or not, to your knowledge, it's changed?

16 MR. LYNCH: Object to form.

17 MR. CELLIER: Object to form.

18 A I don't -- I don't follow it exactly, but
19 I don't believe that they've changed.

20 BY MR. QUINN:

21 Q Did you know that USCCB's religious
22 beliefs regarding same-sex marriage would prevent
23 USCCB from processing a same-sex couple's foster
24 parent application?

25 A No.

1 MR. LYNCH: Object to form.

2 MR. CELLIER: Object to form.

3 BY MR. QUINN:

4 Q But you just said that you knew USCCB's
5 religious beliefs concerning same-sex marriage?

6 MR. LYNCH: Object to form.

7 MR. CELLIER: Object to form.

8 A I did not -- I did not realize it would
9 impact their decision on acceptable foster care
10 parents.

11 BY MR. QUINN:

12 Q Why didn't you realize that?

13 MR. CELLIER: Object to form.

14 MR. LYNCH: Object to form.

15 A Because we have no role in the processing
16 of foster parents or the selection of foster care
17 parents. It never came up as a consideration.

18 BY MR. QUINN:

19 Q But ORR is reimbursing USCCB to engage in
20 those activities?

21 A Correct.

22 MR. LYNCH: Object to form.

23 A They're carried out at the local level
24 and in -- in -- in coordination with State
25 licensing. It's -- it's never -- it's never -- it

1 MR. CELLIER: Object to form.

2 A Prior -- how do I answer this?

3 USCCB coming forward as a replacement
4 designee presented, I -- I would say, a different
5 and new set of circumstances we had not actually
6 dealt with before because they were a direct
7 recipient of ORR funds to carry out the URM Program.
8 And all other programs they were administered
9 through -- through the State and through State
10 licensing and child -- child welfare. So a lot of
11 the recruitment would happen within the State
12 programs.

13 This was -- this was a unique situation
14 and -- where as a direct recipient -- USCCB was a
15 direct recipient, and there just hadn't been an
16 association that some of their same-sex beliefs or
17 restrictions would have an impact on the selection
18 of foster care parents.

19 It was not in the realm of consideration
20 when the selection was made 'cause it had never
21 occurred before.

22 BY MR. QUINN:

23 Q When ORR was considering USCCB's
24 application to be the replacement designee in Texas,
25 can you tell me about any conversations you had

1 "grant regulations prohibiting discrimination
2 against same-sex couples."

3 This reference to the "Deputy Director of
4 ORR" is you; correct?

5 A Yes.

6 Q So did you anticipate that there was a
7 conflict between the ACF policy on grants to
8 faith-based organizations and HHS's grants
9 regulations prohibiting discrimination to same-sex
10 couples?

11 MR. LYNCH: Object to form.

12 A Did I. Sorry. Did I -- can you rephrase
13 that or --

14 BY MR. QUINN:

15 Q Sure.

16 Did you anticipate it?

17 A Based on that occurrence, yes.

18 Q And so did you elevate this?

19 A Yes.

20 Q It was your choice to elevate it further?

21 A Yes.

22 Q Why was the ACF policy on grants to
23 faith-based organizations not an option here?

24 Well, let me rephrase that, actually.

25 Why was an accommodation under the ACF

1 policy on grants to faith-based organizations not an
2 option here?

3 A Our service provision is always sort of
4 focused on making sure that there's no
5 discrimination based on -- for the clients. There's
6 actually a role in the program, and this was the
7 first time that it was expanded beyond that to
8 possibly be a community member.

9 And we had not had a -- to my knowledge,
10 an occurrence that would have possibly discriminated
11 against someone at that level. So it was really to
12 look at how that would be handled.

13 Q So you -- you said, "Clients," and you
14 said -- you meant it to mean, like, the minors in
15 the program?

16 A Right.

17 Q But I remember earlier today you said
18 that ORR provides funding to replacement designees
19 who then -- or reimburses replacement designees, who
20 reimburse sub-replacement designees, and then those
21 sub-replacement designees pay stipends or something
22 to foster families?

23 A Yes.

24 Q So then isn't a foster family or a
25 potential foster parent a client or encompassed by

1 the -- by these provisions?

2 MR. LYNCH: Object to form.

3 MR. CELLIER: Object to form.

4 A The approach has always been based on the
5 client or the minor referred into the program. So
6 the broader context had not been considered.

7 BY MR. QUINN:

8 Q But that doesn't really answer my
9 question of whether or not the family -- the
10 potential foster family or the foster families in
11 the program are clients of the URM Program.

12 MR. LYNCH: Object to form.

13 MR. CELLIER: Object to form.

14 Object to form.

15 A The focus of the program is it -- of --
16 is the minor itself. I --

17 BY MR. QUINN:

18 Q Isn't placement with a foster family,
19 where appropriate, also an aspect of the URM
20 Program?

21 MR. CELLIER: Object to form.

22 A I would see them as staff to support the
23 minor in that program.

24 BY MR. QUINN:

25 Q Why didn't ORR take responsibility for

1 direct relationship rather than working with the
2 full State bureaucracy.

3 BY MR. CELLIER:

4 Q Has USCCB helped improve the lives of
5 vulnerable children through its role as URD in
6 Texas?

7 MR. QUINN: Object to form.

8 A Yes. The -- the services really help
9 advance certainly URM participated and hopefully
10 succeed.

11 BY MR. CELLIER:

12 Q Is it fair to say that USCCB and its
13 sub-grantees have had a favorable impact on the
14 communities that they serve?

15 MR. QUINN: Object to form.

16 A The -- the -- the programs have very
17 close relate -- working relationships within the
18 communities, especially with State licensing. So we
19 would expect there to be very positive working
20 relationships. So to my knowledge, they are.

21 BY MR. CELLIER:

22 Q Setting aside the incident that's subject
23 of this litigation again, has there been anything
24 about USCCB's performance that would cause you to
25 question its fitness to serve as the URD in Texas?

1 MR. QUINN: Object to form.

2 A I am not aware of that.

3 BY MR. CELLIER:

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

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

10 MR. QUINN: Object to form.

11 A I'm not aware of it.

12 BY MR. CELLIER:

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

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

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

20 A No.

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

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

Exhibit B

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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.

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9 ALSO PRESENT:
10 Mr. Rick Bell, Videographer

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1 Q. Does CCFW employ any LGBT individuals?

2 A. Yes.

3 Q. Did CCFW ever use funds received from the URM
4 or the UAC programs for the purpose of religious
5 proselytizing?

6 A. No.

7 Q. In what, if any ways, could funds through the
8 URM or UAC programs be used for religious purposes?

9 MR. BURNS: Objection; calls for
10 speculation.

11 A. If a child requested materials for a class or a
12 registration fee for something they wanted, no matter
13 what religion, then we would use them.

14 Q. (BY MR. CELLIER) While CCFW was involved in
15 URM and UAC programs, do you recall any complaints from
16 the federal government concerning CCFW's administration
17 of the programs?

18 A. I don't recall any.

19 Q. And other than the facts of this case, do you
20 recall any complaints from foster parents that were
21 denied?

22 A. No.

23 Q. Did CCFW ever experience a shortage of
24 qualified foster parents during its time in the URM and
25 UAC programs?

1 A. Not that I'm aware of.

2 Q. And that includes the February 2017 time
3 period?

4 A. That's correct.

5 Q. So the URM and UAC programs generally had more
6 available foster parents than children available to
7 foster, correct?

8 A. At least as many, if not more.

9 Q. And this was also -- this was true during
10 February of 2017?

11 A. Yes, sir.

12 Q. When placing children with foster parents in
13 the URM and UAC programs, what were CCFW's main goals?

14 A. Provide a safe, loving, nurturing environment.
15 A family that had, you know, time, energy, finances
16 sometimes to care for the child or children properly.
17 Depending upon, you know, the child's history of trauma
18 that they bring with them, finding a placement where the
19 child feels comfortable, feels like, you know, they can
20 flourish and live a life where they're not scared. I
21 would say those would be our biggest things.

22 Q. Earlier you discussed training the foster
23 parents have to go through. Could you describe what
24 those trainings include?

25 A. Oh, my gosh, tons of hours of training, of

Exhibit C

November 20, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CALIFORNIA

FATMA MAROUF,

Plaintiff,

vs.

CASE NO.

1:18-cv-00378-APM

ALEX AZAR, et al.,

Defendants.

VIDEOCONFERENCE DEPOSITION DAVID BRODZINSKY, Ph.D.

APPEARING REMOTELY FROM

LOS ANGELES, CALIFORNIA

November 20, 2020

9:03 a.m.

Reported By:

Brandi Celestino

CSR No. 13640

APPEARING REMOTELY FROM ANAHEIM, CALIFORNIA

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November 20, 2020

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12

KEVIN LAKE, ESQ.

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1 Dallas-Fort Worth area?

2 A That's correct. I'm unaware of any such
3 studies.

4 Q In your report that we've marked as Exhibit 2,
5 did you cite to any peer-reviewed studies that addressed
6 the adverse impact that would result from the elimination
7 of faith-based organizations that are unable to work with
8 same-sex couples based on their religious beliefs?

9 MS. TAYLOR: Objection. Vague. Form.
10 Confusing.

11 BY MR. GOETZ:

12 Q You can answer.

13 A To the best of my knowledge, there are no
14 peer-reviewed studies that address the question that
15 you're asking.

16 Q For example, you don't know, sitting here today,
17 how many foster families or children in need would fail
18 to be recruited if faith-based organizations were
19 eliminated from the foster program?

20 A Well, your question makes an assumption that
21 there would be a failure to recruit families. That's not
22 my understanding of what happens or what has happened in
23 the past when other agencies have closed down.

24 There's been a relatively smooth transition in
25 Illinois and Boston from the, you know, qualitative

1 THE WITNESS: U.S. Conference of Catholic
2 Bishops. I'm not sure that's -- that's not necessarily
3 the specific agency that refused. I can't remember the
4 name of the specific agency. It's -- you know, it may be
5 Catholic Charities or some version of that name.

6 BY MR. GOETZ:

7 Q And if I understand your testimony from before
8 the break, you do not know where else the plaintiffs
9 applied to be foster parents; is that correct?

10 A I can't, off the top of my head, remember. You
11 know, it was in the materials that I did review, but I
12 haven't reviewed them for the deposition, so I don't have
13 a memory of it.

14 Q Have you conducted any research for purposes of
15 your work on this case related to child welfare outcomes
16 of refugee children placed in foster homes through a
17 faith-based organization?

18 A Specific to faith-based organizations, the
19 peer-reviewed research doesn't address at all on those
20 lines. It's outcomes for kids in these programs. It
21 doesn't identify which agencies that they were processed
22 through, so I can't -- I have no memory specifically of
23 any peer-reviewed research that addresses these kids who
24 come from faith-based organizations.

25 Q Apart from the peer-reviewed literature, you,

1 yourself, did not conduct any research on that topic;
2 correct?

3 A That is correct.

4 Q Let me ask you a few follow-up questions on that
5 same topic, if I could.

6 Have you conducted any research for purposes of
7 this case relating to the child welfare outcomes of LGBTQ
8 children placed in homes through a faith-based
9 organization?

10 A I'm not sure I understand the question. Could
11 you repeat it?

12 Q Sure. Sure.

13 For purposes of your work on the case, did you
14 conduct any research relating to the child welfare
15 outcomes of LGBTQ children specifically who were placed
16 in homes through a faith-based organization?

17 A The answer is no. The research doesn't break it
18 down in terms of the children's sexual orientation.

19 Q There's no peer-reviewed studies topics cited in
20 that report, obviously?

21 A There's none in the report, no.

22 Q Let me ask you a subpart to that previous
23 question.

24 Have you conducted any research on the child
25 welfare outcomes of LGBTQ children who were placed in

1 faith-based organizations that are unable to work with
2 same-sex couples?

3 A To the best of my knowledge, there is no
4 research on that topic.

5 Q If I understand your previous testimony, you've
6 not found any research relating to the child welfare
7 outcomes of LGBTQ children placed in the
8 Dallas-Fort Worth area; correct?

9 A Through this program you mean?

10 Q Through this program or any other program.

11 A No. I mean, I have found, not specific to the
12 Dallas-Fort Worth, as I indicated earlier, subsequent to
13 the report I got some information from Texas council that
14 indicated that, you know, from their estimates there are
15 over 11,000 LGBTQ youth in the foster system in Texas,
16 but I didn't address specifically the counties.

17 There was another report that I reviewed that in
18 Harris County one in four homeless children are LGBTQ,
19 and these are kids who often end up in the foster system
20 or have left the foster system, run away.

21 So we know that there's a sizable percentage of
22 LGBTQ in the foster system who are in need of foster care
23 or in need of other services in Texas in general, as in
24 every state.

25 Q The research that you just articulated to me

1 A Let me just see if I can find it quickly. Yes.
2 It's on page 19. It's Footnote 46, Brodzinsky, 2011.
3 Expanding resources for children through research-based
4 best practices and adoption by gays and lesbians.

5 That was provided to you.

6 Q Was that a peer-reviewed publication?

7 A No. That's a technical report for the Adoption
8 Institute.

9 Q And that refers to New York?

10 A No. This was a nationwide survey of LGBTQ
11 families and methodologies in that document. It's not
12 a -- it's not considered a representative sample because,
13 one, it's very hard to do that since many of the
14 database, national database, surveys don't identify
15 individuals as gay or lesbian. Some do; some don't.

16 But this was a study that I developed for the
17 institute looking at some of the unique experiences of
18 LGBTQ individuals compared to heterosexual individuals
19 when they were adopted.

20 Q Did any of the data involve the URM or UAC
21 programs?

22 A I have no idea. We weren't asked -- excuse me.
23 I did not ask them what was the source of your adoption,
24 except to say child welfare, private, or international.

25 Q For purposes of your work in this case, did you

1 investigate whether the UAC program had enough foster
2 families to meet its needs in 2017?

3 A I don't know if it indicated in any of those
4 reports that that was the case.

5 Q But you don't -- you don't know one way or the
6 other.

7 Is that fair?

8 A I think it's fair to say that's the case. I do
9 know that the children who went through this program,
10 some of them were in family foster care, some of them
11 were in group care, some of them were institutions, some
12 of them were in independent living for purposes of
13 emancipation. In other words, there was a lot of
14 different kinds of placements, but that's the best in
15 terms of the data that was provided on these programs.

16 Q Okay.

17 Just so I understand your answer, you did not
18 find any research on whether the UAC program had enough
19 foster families to meet its needs in 2017?

20 A No. I do know -- and I can't remember if I
21 cited it or not, certainly it's in material that I found
22 since then, you know, that generally there's a shortage
23 of foster homes across the country in general. And I
24 can't specifically say what's happening in
25 Dallas-Fort Worth.

1 Q Or the UAC program generally; correct?

2 A Correct. You know, that information wasn't
3 addressed in any of the documents that I reviewed, so the
4 answer is, you know, yes.

5 Q So I asked you about 2017. Let me ask you about
6 2020.

7 Do you know whether the UAC program has enough
8 foster families to meet its needs today in 2020?

9 A I have no idea. I'm not sure any data on 2020
10 is out yet, or if it is, it's, obviously, incomplete
11 since we're still in 2020.

12 Q Okay.

13 How about since 2017 to now, is there any data
14 available on the UAC program?

15 A There's data --

16 MS. TAYLOR: Objection. Vague.

17 MR. GOETZ: All right.

18 Let me -- let me rephrase that so we can resolve
19 counsel's objection.

20 BY MR. GOETZ:

21 Q Did you investigate whether the UAC program had
22 enough foster families to meet its needs during the time
23 period of 2017 up to the present time?

24 A I haven't seen anything that addresses that
25 specific question. I've seen statistics, although I

1 can't cite them to you right now because I don't remember
2 the number of children that have come through the program
3 in the last few years. I do know that since 2012 the
4 number of children going through these programs has gone
5 up significantly.

6 Q Is that all the data that you have on that topic
7 about the number of children that have gone through the
8 program, the UAC program?

9 A I'm not sure what you mean by is that all I
10 have. Ask me something more specific and I --

11 Q Yeah. I'm not sure I understand your answer, so
12 let me ask it again.

13 Do you have any research about whether the UAC
14 program had enough foster families to meet its needs in
15 2017 to the present?

16 A The answer is I don't have any information on
17 that. What I was referring to was that, you know, I've
18 seen data on the number of kids going through the program
19 from before 2012, I think it was, and then following
20 2012. And the numbers went up quite dramatically in the
21 last -- call it the last almost decade.

22 Q Do you have that data cited in your report?

23 A No. I haven't put it in that form.

24 Q Is it part of your file in the case?

25 A It may be in some of the documents that I

1 Q Is that in Footnote 4?

2 A I'm sorry.

3 Q Page 6, Footnote 3. Okay. I understand.

4 A Okay.

5 Let's see where else they might be. On page 21
6 there's another website for the URM program, Footnote 21;
7 Footnote 27, another footnote; 33, another footnote; 34,
8 another footnote. I think that's it.

9 Q If I understand your testimony in these
10 footnotes that you've just been good enough to provide to
11 me, this data reflects the children who enter foster care
12 in the United States and have come through the UAC
13 program and the URM program; correct?

14 A Correct. Some of those footnotes are just about
15 the programs, themselves, their mission that qualifies
16 and so forth. Some of them, I believe, provide the
17 numbers. I think I've -- yeah. I think that will
18 provide the numbers that I'm referring to, that there's
19 been a sizable increase over time in the last decade of
20 the number of kids coming through the programs.

21 Q Understood.

22 I think you testified earlier, none of this data
23 relates to the number of foster families available to
24 meet the needs of those children; correct?

25 A That is correct, to the best of my knowledge.

1 Q Is there any research that you're aware of
2 regarding whether the URM program had enough foster
3 families to meet its needs in 2017?

4 A Again, the answer is, to the best of my
5 knowledge, no. When I answered earlier, I was answering
6 both for the UAC and URM programs.

7 Q Okay.

8 And that's -- your answer would be the same for
9 the time period of 2017 to the present; correct?

10 A I see no data or reports that indicate whether
11 there's enough or not enough families specific for these
12 kids. Again, I've seen reports generally about the
13 foster care housing crisis. Nationally, it's broken down
14 in a report by states or quoted in the report -- that's
15 not in my report.

16 Although, I reference the document quoting the
17 report by the Stakeholders in Texas indicating that there
18 is an insufficient number of foster homes in the state to
19 meet the needs of the children.

20 Q Let me ask you where -- excuse me.

21 I don't want to interrupt you. Go ahead.

22 A That was a 2017 report, so I don't know whether
23 it still applies because we're a couple of years out of
24 it.

25 Q Thank you.

1 standards of excellence of child welfare services
2 promulgated by the Child Welfare League of America.

3 You're familiar with those; correct?

4 A Yes.

5 Q Now, you cited in your report CWLA standards for
6 excellence for foster family and care services;
7 correct?

8 A Correct.

9 Q Do you know, Doctor, whether the contracts
10 between USCCB and the federal government cited those
11 standards?

12 A The specific standards, I don't know. Those are
13 aspirational standards. They are not requirements that
14 people must follow.

15 Q So I take it you don't know whether the contract
16 between USCCB and the USCCB sub-grantee in
17 Dallas-Fort Worth cited -- you don't know whether that
18 contract between those two entities USCCB and USCCB
19 sub-grantee in Dallas-Fort Worth cited the CWLA
20 standards; correct?

21 A I do not know that.

22 Q Okay.

23 And you said a minute ago that CWLA standards
24 are aspirational; is that correct?

25 A That is my understanding, that there is no --

1 what's the appropriate -- I forget the appropriate --
2 there's no specific consequences if agencies don't,
3 except maybe perhaps be dismissed from CWLA as a
4 membership organization.

5 Q Those standards carry no force of law or
6 regulation; correct?

7 A Definitely not.

8 MS. TAYLOR: Objection. Vague.

9 BY MR. GOETZ:

10 Q You can answer.

11 A To the best of my knowledge, that's true.

12 Q That's what the standards say on the very face
13 of the document; isn't that right?

14 A Say that again.

15 Q The CWLA standards state up front that they
16 carry no implication of control or regulation?

17 A Well, I can't say that I remember that wording,
18 but that's my understanding, that -- that's why I called
19 them aspirational guidelines as opposed to guidelines
20 that are somehow enforceable by law.

21 MR. GOETZ: So let me show you Tab 10, that
22 we'll mark as Exhibit 10. Hopefully, our videographer
23 can pull that document up for you.

24 (Exhibit 10 marked.)

25 BY MR. GOETZ:

1 Q So this is a four-page excerpt, Doctor, of the
2 "CWLA Standards of Excellence for Adoption Services."

3 Do you see that?

4 A Yes, I do.

5 Q And it's copyrighted in 2000?

6 A That's correct. That's the -- to the best of my
7 knowledge, the most recent edition.

8 Q I see.

9 If you go back to the last page of my exhibit,
10 XV, 15, right there.

11 A Okay.

12 Q Read the first paragraph that's consistent with
13 your testimony about the standards being aspirational and
14 carrying no implication of control or regulation?

15 A It's consistent with my earlier statements.

16 Q Okay.

17 MR. GOETZ: So let me mark Tab 11 as Deposition
18 Exhibit 11. Then if I could ask the videographer to pull
19 this document up. This is an excerpt, Doctor, from the
20 "CWLA Standards of Excellence for Family Foster Care
21 Services."

22 (Exhibit 11 marked.)

23 BY MR. GOETZ:

24 Q Do you see that?

25 A Yes.

1 the same institution.

2 Q Did you at any point perform a clinical
3 psychological evaluation of either Ms. Marouf or
4 Ms. Esplin in this case?

5 A No. As I said before, I've never met them. And
6 to do so would have been inconsistent with the charge in
7 the case. This was, again, not a case study analysis or
8 a question of harm to an individual, per se, but it was
9 dealing with the broader issues in the case.

10 Q Do you currently have a clinical practice?

11 A I do. It's -- I'm largely retired from my
12 clinical practice at this point. I still have a few
13 clients that I -- you know, that I continue to see. I
14 continue to do my forensic work, and I continue to do
15 training around the country, actually in Europe as
16 well -- pre-COVID, let's put it that way. And I continue
17 to do research.

18 But my -- I largely hold back from ongoing
19 clinical work because I'm getting a year or two away from
20 retirement, and, you know, once you establish a clinical
21 relationship, you know, it's hard to -- you know, for the
22 individuals when you have to pull out.

23 Q Can you give me an estimate of time in 2020 that
24 you've spent with patients?

25 A In 2020?

1 program; right?

2 A Obviously, I think it would. You know, you
3 pointed out how many agencies there are in and around
4 just the Fort Worth-Dallas area. I suspect, like in
5 other geographical areas where a Catholic Charity closes
6 down and either an agency or consortium of agencies would
7 work with and pick up, you know, the programs.

8 And given that there are, by your own, you know,
9 slide, quite a few agencies in the -- just in the
10 Dallas-Fort Worth area who might be interested in doing
11 this work, either a consortium or if there's an agency
12 large enough, that they could perhaps negotiate a
13 contract with the federal government as well.

14 Q I think you said to Mr. Goetz a couple of times,
15 you haven't undertaken any studies to see whether that's
16 actually true or whether that --

17 A You asked about possibilities, and I'm giving
18 you what would be a possibility.

19 Q Right.

20 And your opinion is that you're not aware of
21 evidence that where faith-based organizations have been
22 removed from the equation, that this caused a reduction
23 in the number of families available for children in the
24 foster care system, but you haven't undertaken a study to
25 see whether that would be true in this case; is that

1 right?

2 A I think there were two questions there. So why
3 don't you go back and start with the first part.

4 Q The first one is make sure I understand your
5 opinion correctly, so I'll start there.

6 You say that you are aware of no evidence that
7 where faith-based organizations have ceased participating
8 in the programs that, quote, this caused a reduction in
9 the number of families available for children in the
10 foster care system or otherwise impaired the government's
11 ability to the meet the needs of children in its care.

12 A That is incorrect. In fact, evidence in
13 Illinois and in Boston is quite the opposite, that there
14 was no reduction or that this transition was smooth and
15 in my own analysis -- which is not in the report, but
16 I've referred to before, and I will provide -- in my
17 analysis of numbers of adoption placements -- and I
18 understand we're not talking adoption here, but the issue
19 would be parallel in my view.

20 The number of adoption placements before the
21 Illinois decision and following the Illinois decision
22 shows that, in fact, the number of increases by
23 18 percent from the five-year period up to and including
24 2011 from 2012 to 2016; whereas, the national trend,
25 there was a negligible decline in placements in Illinois.

1 There was a substantial increase in placements.

2 If by the logic that I've heard expressed, you
3 know, by defendants, not only in this case, but
4 elsewhere, that we would lose the capacity to make
5 placements with these children, it's certainly not
6 supported by any known data that I'm aware of, and, in
7 fact, the data that I just referred to speaks to the
8 opposite of what they are suggesting.

9 Q Well, the data that you just referred to is the
10 Illinois example; right?

11 A Yes.

12 Q And what was the agency that withdrew in that
13 case?

14 A Catholic Charities.

15 Q But you haven't assessed whether if Catholic
16 Charities withdrew from participation in the
17 Dallas-Fort Worth area, the smooth transition, as you put
18 it, would occur there as well?

19 A They haven't withdrawn yet, have they? There
20 hasn't been an attempt to make a transition, so I can't
21 opine on something that hasn't occurred.

22 Q Right. Thank you.

23 And you can't opine on removing USCCB nationally
24 from the program would result in a decline in the foster
25 placement options, can you?

1 A I can't. But I can tell you from my own
2 experience over the years, you know, that I've been aware
3 of agencies that have closed for various reasons, and not
4 just because of a court decision, and, generally, there's
5 been a fairly smooth transition moving the caseload from
6 the agency that is closing to other agencies.

7 We have a large number of agencies around the
8 country, and you've already pointed out the large number
9 of agencies that are just in the Dallas/Forth Worth area
10 that are possible. I'm not saying probable. I don't
11 know what their feelings are with their policies, but
12 possible grantees, you know, for this type of program, as
13 well as around the country.

14 Because I know that this is -- the USCCB has
15 agencies around the country that are dealing with this,
16 not just in Texas.

17 MR. LYNCH: Okay. Thank you.

18 I don't have any further questions.

19 THE VIDEOGRAPHER: Counsel, I have about maybe
20 two minutes before I need to go off. So may we as well
21 just go off the record now?

22 MR. GOETZ: Well, I don't have any further
23 questions, so --

24 MS. TAYLOR: No questions for this witness
25 either.

Exhibit D

Anne Mullooly

May 18, 2022

UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

- - -

FATMA MAROUF and BRYN : CASE NO.
ESPLIN, a Married : 1:18-cv-378
Couple, : (APM)
Plaintiffs, :

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.

- - -

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(Whereupon, there was a recess.)

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

BY MS. CULORA:

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

A. Yes.

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

A. That is our understanding.

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

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

1 MULLOOLY

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

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

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

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

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

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

1 MULLOOLY

2 parents, that they need to refer them back to
3 USCRI.

4 Q. And what happens once they are
5 referred back to USCRI?

6 A. USCRI would make a referral to
7 the other URM provider agency. As long as
8 it's clear that the prospective foster
9 parents are still eligible to become
10 licensed.

11 If the prospective foster
12 parents were referred to Catholic Charities
13 of Dallas and there was a determination made
14 that they were actually ineligible to become
15 licensed foster parents, then it wouldn't
16 make sense to refer them back to USCRI to
17 then refer to Upbring if they are ineligible
18 to be licensed.

19 Q. But if they are eligible and
20 they are not accepted for another reason such
21 as their demographics, what happens?

22 A. They would be referred back to
23 USCRI and USCRI would refer them to the other
24 URM provider agency.

25 Q. So, it went from USCCB back to

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USCRI and then it would go to LIRS. Right?

That's the only other provider agency?

A. To their subgrantees providers,
yes.

Q. Is the government notified when
CCD or USCCB or even LIRS and Upbring decline
a referred applicant?

A. That has not happened so we have
not been informed. That's not something that
we ask them to report on in the monthly
report.

Although that could be included
in the future, I guess, if that happened.

Q. If it does happen, you're saying
it could be or it would be, would the
government be notified? Has that been
established?

A. We did not ask them to notify us
however, if the monthly reports that they are
filling out, it could be possibly marked on
there that it was referred to both the
Upbring and Catholic Charities Dallas.

I'm not sure if we would be able
to tell, but if there was some sort of

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don't have any children in care yet and they aren't fully staffed.

Q. I want to go back to the religious accommodation language that USCCB adds or added to the consortium charter.

Do you know the scope of that provision?

MR. RAIMER: Objection. I think we've talked about this. Go ahead.

THE WITNESS: We don't have the specifics of that statement.

MS. CULORA: Let's take maybe a 15-minute break.

THE COURT REPORTER: Off the record at 11:15.

- - -

(Whereupon, there was a recess.)

- - -

THE COURT REPORTER: Back on the record at 11:35.

BY MS. CULORA:

Q. Miss Mullooly, is it possible that a same sex married couple would get referred to USCCB and would get turned back

1 MULLOOLY

2 to USCRI to then get referred to the other
3 program?

4 MR. RAIMER: Object to form. Go
5 ahead.

6 THE WITNESS: Possible. I don't
7 think the government can say it's not
8 possible.

9 BY MS. CULORA:

10 Q. So it could happen is what you
11 mean?

12 A. I think so. It could happen.

13 Q. You mentioned earlier that the
14 consortium program goal was to allow for
15 every PFP to have an opportunity to become a
16 foster parent.

17 Why is it necessary for the
18 third party USCRI to be involved to ensure
19 that that happens?

20 A. The URM provider agencies may
21 have criteria that would not allow them to
22 work with certain individuals, therefore, the
23 consortium allows all prospective foster
24 parents who express an interest in being
25 considered for licensing for them to work

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MR. LYNCH: I think Mr. Raimer and I have questions. I'm happy to go in order, David.

MR. RAIMER: Whichever you prefer. Your witness.

MR. LYNCH: I may narrow what you ask about. I'll reserve the option if you raise anything to do a redirect on that. I'll just go ahead.

- - -

EXAMINATION

- - -

BY MR. LYNCH:

Q. I'm sorry to prolong this, Miss Mullooly, but I do want to ask a couple of questions and verify a couple of points from your direct examination.

Is the placement process of children in the URM program, I think there was a little bit of confusion. I thought it was cleared up, but I wasn't sure during the end. I do want to ask a couple of questions about it.

Plaintiff's counsel early in

1 MULLOOLY

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

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

11 A. No. I mean --

12 Q. What do you mean?

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

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

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

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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

1 MULLOOLY

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

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

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

16 A. There's really two different
17 paths.

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

22 A. Correct.

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

1 MULLOOLY

2 A. Correct.

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

6 A. Correct.

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

13 A. Yes.

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

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

1 MULLOOLY

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

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

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

17 A. Correct.

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

1 MULLOOLY

2 than their counterparts in the CCD pool?

3 A. No.

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

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

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

13 A. Could you rephrase that?

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

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

1 MULLOOLY

2 those costs into their budget estimate, but
3 the program is just smaller in size right now
4 because they are just getting started.

5 And then they are still in the
6 process of hiring and recruiting and
7 licensing.

8 Q. And the estimates that LIRS has
9 submitted for Upbring, do those function as a
10 ceiling or can Upbring spend more than is
11 estimated?

12 A. Upbring -- so, are you --
13 Upbring or LIRS?

14 Q. Upbring specific, if you can be.

15 A. So, we don't get estimates from
16 Upbring. We get estimates from LIRS.

17 And to answer your question,
18 yes, LIRS could end up spending more than
19 what they had initially told us that they
20 needed.

21 If all of a sudden they are able
22 to license ten foster families and they get
23 ten kids or they accept ten kids, they may
24 come to us with a new budget estimate with a
25 different figure, a higher figure, saying we

1 MULLOOLY

2 actually think we're going to need now this
3 amount of money for this year.

4 So, that -- they can submit a
5 new budget estimate at any time throughout
6 the year to signal that they actually think
7 they are going to need more money or they may
8 submit an estimate saying we actually think
9 we'll need less money.

10 We don't typically get revised
11 budget estimates if they think they are going
12 to need less money, unless it's a significant
13 amount of money that would, you know -- like
14 if the difference is significant, they can
15 submit a new budget estimate showing that
16 they are going to need a lot more money or a
17 lot less money.

18 Q. Does the budget estimate
19 operate -- does it constrain Upbring from say
20 hiring more staff or taking more children on
21 board?

22 A. No.

23 Q. Would there be a situation where
24 they refused to do so because their current
25 funding estimate is too low?

1 MULLOOLY

2 A. No. No constraints.

3 Q. Why not?

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

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

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

21 - - -

22 EXAMINATION

23 - - -

24 BY MR. RAIMER:

25 Q. Just very quickly, Ms. Mullooly,

1 MULLOOLY

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

7 A. Correct.

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

14 A. No.

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

21 A. No.

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

1 MULLOOLY

2 doing so?

3 A. No.

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

7 A. The federal government is not
8 aware of that.

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

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

13 - - -

14 EXAMINATION

15 - - -

16 BY MS. CULORA:

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

19 Do you recall that?

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

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

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