

**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' REPLY IN SUPPORT OF THEIR MOTION
FOR SUMMARY JUDGMENT**

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INTRODUCTION

There is no longer a live dispute before the Court. Indeed, as to the UC¹ program, Plaintiffs concede that their claims are moot. Pls.’ Mem. in Opp’n to Defs.’ Mots. for Summ. J. 8 n.6, ECF No. 113-1 (“Pls.’ MSJ Opp’n”). But even as to the URM Program, events have transpired that leave the Court with no basis or need to provide Plaintiffs any effective relief. Plaintiffs previously claimed they brought this lawsuit not to strip USCCB of its funding or compel USCCB to place children in a manner contrary to its religious beliefs, but rather to cause the development of 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.” *See Marouf v. Azar*, 391 F. Supp. 3d 23, 36 n.2, 37 (D.D.C. 2019). Plaintiffs’ counsel described as acceptable and consistent with these goals 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 57:1–4, 58:15–25, 60:12–61:5 (Nov. 30, 2018), ECF No. 80. Federal Defendants have created exactly that kind of “screening process” in Dallas-Fort Worth, Texas, which will ensure that same-sex couples in that location will be evaluated as prospective URM foster parents according to the same criteria as any other couple or person. Plaintiffs have obtained the only relief they could appropriately seek, and this case should accordingly be dismissed as moot.

Although the value of the relief Plaintiffs *now* seek—apparently the exclusion of USCCB from the program in Dallas-Fort Worth—is extinguished, the harm that such relief could do to the URM program very much remains. USCCB has long been a central part of the Federal Government’s efforts to provide services to some of the most vulnerable populations in this country—unaccompanied minor migrants and refugees. USCCB has done this work for decades

¹ Specialized terms used but not otherwise defined herein shall have the same meaning as in the Federal Defendants’ prior summary judgment briefs. Fed. Defs.’ Statement of Points & Authorities, ECF No. 110-2 (“Fed. Defs.’ MSJ Mem.”); Fed. Defs.’ Opp’n to Pls.’ Mot. for Summ. J., ECF No. 118 (“Fed. Defs.’ MSJ Opp’n”).

and is one of the preeminent institutions providing these services. Any equitable order from this Court that would prevent the Government from relying on USCCB’s expertise would do real harm. Additionally, neither the First nor the Fifth Amendments, nor principles of equitable jurisdiction, dictate that result. Federal Defendants are accordingly entitled to summary judgment. Plaintiffs’ memorandum in opposition does not demonstrate otherwise.

ARGUMENT

I. PLAINTIFFS’ CLAIMS ARE MOOT.

Plaintiffs’ claims should be dismissed because they are moot. Federal Defendants have “develop[ed] a system”—the URM consortium—“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*, 391 F. Supp. 3d at 37. *See also* Fed. Defs.’ MSJ Mem. 13–15; Fed. Defs.’ MSJ Opp’n 3–8. Plaintiffs do not dispute that their UC Program claims are moot, *see* Pls.’ MSJ Opp’n 8 n.6, but maintain that their URM Program claims are live, *see id.* at 9–14. Plaintiffs’ arguments are unavailing.

A. Federal Defendants Have Carried Their Burden to Establish Mootness.

Plaintiffs’ foremost argument is that the voluntary cessation exception to the mootness doctrine applies. To begin, that exception does not apply where, as here, Federal Defendants have not ceased unlawful conduct but, rather, have taken “corrective action” that provides the relief that Plaintiffs have sought. *See Ctr. for Biological Diversity v. Zinke*, 369 F. Supp. 3d 164, 174 (D.D.C. 2019) (“corrective action by an agency is one type of subsequent development that can moot a previously justiciable case” and it is “more appropriately characterized as the provision of appropriate relief . . . than as the cessation of illegal conduct” (quoting *Natural Resources Defense Council, Inc. v. U.S. Nuclear Regulatory Comm’n*, 680 F.2d 810, 814 & n.8 (D.C. Cir. 1982))). The hallmark of voluntary cessation is “opportunism, on the part of the defendant,” *see Am. Fed’n*

of Gov't Employees v. Office of Special Counsel, 1 F.4th 180, 188 (4th Cir. 2021), but action by a government agency that is corrective and provides a plaintiff with the relief it has sought bears no resemblance to such opportunism. Indeed, “where the defendant is a government actor—and not a private litigant—there is less concern about the recurrence of objectionable behavior.” *Citizens for Responsibility & Ethics in Wash. v. U.S. SEC*, 858 F. Supp. 2d 51, 61 (D.D.C. 2012). The voluntary cessation exception does not apply.

But even assuming *arguendo* that it did, Plaintiffs’ URM claims are moot. Cobbling together language from two different cases, Plaintiffs argue that “[i]t is not ‘absolutely’ clear that the Consortium ‘completely’ eradicates the constitutional deficiencies of Federal Defendants’ Program administration.” Pls.’ MSJ Opp’n 9 (citing *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000); *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). But the relevant test, articulated in *Friends of the Earth*, is whether the defendant’s conduct “made it absolutely clear that [the harm] could not *reasonably be expected* to recur.” 528 U.S. at 193 (emphasis added). The touchstone of mootness, even in a case of voluntary cessation, is reasonable expectation—not absolute certainty.

Under the Consortium, Plaintiffs’ alleged harms cannot reasonably be expected to recur and the alleged effects of the program as it previously operated have been eradicated. Plaintiffs raise two primary responses. First, they point to the Government’s recognition that it is “possible” for a same-sex foster parent to be initially inadvertently referred to Catholic Charities of Dallas (“CCD”), but that hardly rises to a reasonable expectation that the harms alleged in the Complaint will recur. *See* Fed. Defs.’ MSJ Opp’n 6–7 & n.3. “When injunctive relief is sought, ‘the necessary determination [to avoid a mootness dismissal] is that there exists some cognizable danger of recurrent violation, *something more than the mere possibility* which serves to keep the case alive.’” *Jud. Watch, Inc. v. United States Dep’t of Homeland Sec.*, 895 F.3d 770, 783 (D.C. Cir.

2018) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (emphasis added)); *Air Line Pilots Ass'n, Int'l v. Nw. Airlines, Inc.*, 199 F.3d 477, 486 (D.C. Cir. 1999), *reinstated as en banc opinion*, 211 F.3d 1312 (D.C. Cir. 2000). Even if a same-sex couple were erroneously referred to CCD, they would be referred back to USCRI and ultimately to Upbring, and thus be given an equal opportunity to foster a child through the URM program. Fed. Defs.' MSJ Opp'n 6–7.²

Second, Plaintiffs contend that the Federal Defendants could abandon the consortium at any time. Pls.' MSJ Opp'n 13. But USCRI's role in the consortium has been formally incorporated into USCRI's grant from the government. *See, e.g.*, Pls.' MSJ Ex. 44 (ORR-1 Budget Justification) (reflecting that USCRI's grant has been increased to cover URM program administration). While that change could conceivably be undone through future grant awards or modifications, that does not save the case from a mootness dismissal. Plaintiffs cite no case in which a court applied the term “irrevocably” as Plaintiffs read that term. *See* Pls.' MSJ Opp'n 9 (quoting *Davis*, 440 U.S. at 631; *Ctr. for Biological Diversity v. Kempthorne*, 498 F. Supp. 2d 293, 296 (D.D.C. 2007)). Indeed, the courts in *Davis* and *Center for Biological Diversity* held that the cases *were* moot. In *Davis*, the municipal fire department had since changed the means by which it ranked its applicants; therefore, the prior, violative practice was “unlikely to recur.” 440 U.S. at 632. In *Center for Biological Diversity*, the federal agency had issued a letter in response to the plaintiff's petition for rulemaking. 498 F. Supp. 2d at 296–97. Neither decision was “irrevocabl[e]” in the sense that Plaintiffs urge: that it could never be reversed or revisited. Rather, in both cases, the defendants “retain[ed] authority” (Pls.' MSJ Opp'n 9) to do so. Yet the cases were nonetheless

² Moreover, this hypothetical is virtually impossible to imagine occurring in Plaintiffs' case, which is the only relevant question for mootness purposes. If Plaintiffs underwent USCRI's intake process, and were referred to CCD, Plaintiffs would already know not to show up at CCD's offices. Thus, whatever *de minimis* risk persists generally, it is inconceivable that *Plaintiffs* could be turned away again.

dismissed as moot, because it could “be said with assurance that there is no *reasonable expectation* that the alleged violation w[ould] recur.” *Davis*, 440 U.S. at 631 (quoting *W.T. Grant*, 345 U.S. at 633) (emphasis added). The same is true of this case.

Plaintiffs also cite *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam stay opinion) and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017), to argue that this controversy remains live. Pls.’ MSJ Opp’n 13. But Plaintiffs cannot realistically argue that they “‘remain under a constant threat’ that government officials will use their power to reinstate the challenged [program],” as in *Tandon*, 141 S. Ct. at 1297, or that Federal Defendants have merely “announced” a “direct[ive]” to “begin” modifying the URM program, as in *Trinity Lutheran*, 137 S. Ct. at 2019 n.1. Federal Defendants spent the better part of a year overseeing the Consortium’s implementation and satisfying themselves that the Consortium will pose no barriers to any same-sex couple’s efforts to foster a child through the URM program. Federal Defendants have modified their grant to USCRI and are funding its intake function with hundreds of thousands of dollars. The notion that Federal Defendants would suddenly walk away is pure speculation, not a “reasonable expectation.” *Davis*, 440 U.S. at 631.³

Finally, Plaintiffs argue that they can still obtain effective additional relief and therefore

³ Plaintiffs misplace emphasis on cases where “defendants continue[d] to defend the legality of the challenged policy.” Pls.’ MSJ Opp’n 14 (citing *Reeve Aleutian Airways, Inc. v. United States*, 889 F.2d 1139, 1143 (D.C. Cir. 1989); *In re Ctr. for Auto Safety*, 793 F.2d 1346, 1351–53 (D.C. Cir. 1986)). Because the URM program has been modified in material ways, Federal Defendants have no occasion to defend the program as it operated in February 2017. But the cited cases are also inapposite, for mootness purposes, because neither involved a change to the underlying *program*. In *Reeve Aleutian Airways*, the Department of Defense had reinstated an air carrier, but the regime under which the carrier had been suspended was unchanged. 889 F.2d at 1142–43. In other words, DoD was not defending the legality of *past* regulations while arguing that *new* regulations had mooted the case; it was defending unchanged regulations. The *Center for Auto Safety* case is less apt still: the agency’s “pattern of delay,” in violation of the Energy Policy and Conservation Act, *persisted* even as the agency was arguing mootness. 793 F.2d at 1351–53. The court’s discussion of “voluntary cessation” was dicta, because the agency had not “turned over a new leaf.” *Id.* at 1352.

the case is not moot. Pls.’ MSJ Opp’n 13 (quoting *Ctr. for Food Safety v. Salazar*, 900 F. Supp. 2d 1, 7 (D.D.C. 2012)). But they have obtained through the Consortium exactly what they asked for at the beginning of this case: a “screening process” for prospective foster parents that would assure none is turned away because of her or his sexual orientation. Fed. Defs.’ MSJ Opp’n 8 (citing Tr. of Oral Argument 57:1–4, 58:15–25, 60:12–61:5 (Nov. 30, 2018), ECF No. 80). Plaintiffs have disclaimed any effort to strip USCCB of its funding or to compel USCCB to place children in a manner contrary to its religious beliefs. *Id.* (citing *Marouf*, 391 F. Supp. 3d at 36 n.2). There is no relief left to grant.

B. The Consortium Does Not Perpetuate Plaintiffs’ URM Claims.

Plaintiffs argue that the Consortium model, far from remedying any constitutional harm, actually *exacerbates* the harm. Pls.’ MSJ Opp’n 9–13. That argument lacks merit.

First, Plaintiffs argue that the Consortium represents *government* discrimination on the basis of sex and is, therefore, unconstitutional. Pls.’ MSJ Opp’n 10–11. But Federal Defendants have already demonstrated why USCCB’s actions are not state action amenable to Fifth Amendment claims. Plaintiffs also suggest that the government has adopted and is now implementing USCCB’s religious views. *Id.* at 11–12. But the Consortium ensures that no applicant will be denied the opportunity to be a foster parent on the ground of sexual orientation, which 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, ECF No. 110-3.

Second, Plaintiffs argue that they will be treated unequally under the Consortium model.⁴ Federal Defendants have already rebutted that argument. *See* Fed. Defs.’ MSJ Opp’n 4–6. Upbring, the URM provider agency to which Plaintiffs would likely be referred, has already shown

⁴ Plaintiffs claim that this proposition is “undisputed,” but that is not so. *See, e.g.*, Fed. Defs.’ MSJ Opp’n 3–6.

itself able to assist parents in getting licensed. *Id.* at 4 (citing Fed. Defs.’ SUMF ¶ 97). Upbring can ask for additional funds at any time and is, therefore, not constrained by its current budget estimate. *Id.* at 5–6 & Ex. D, 2d Mullooly 30(b)(6) Dep. 111:23–112:3, 114:21–115:3, 115:18–116:18. And no licensed parent is less likely to receive a URM placement by virtue of being in Upbring’s (versus CCD’s) pool of foster parents. *Id.* at 4–5 & Ex. D, 2d Mullooly 30(b)(6) Dep. 111:23–112:3.

II. ALTERNATIVELY, FEDERAL DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON THE MERITS.

A. Plaintiffs’ Establishment Clause Claim Fails.

Federal Defendants are entitled to summary judgment as to Plaintiffs’ Establishment Clause claim for at least three reasons. First, the decades-long relationship between the Federal Government and religiously affiliated organizations with respect to refugee aid and care for unaccompanied children shows that the Government’s relationship with USCCB challenged here is consistent with “historical practices and understandings.” *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2428 (2022). Second, ORR has not partnered with USCCB to fund USCCB’s religious teaching or to otherwise advance its religion but, rather, to best care for children in the URM program by employing USCCB’s extensive experience as a provider in this area. *See* Fed. Defs.’ SUMF ¶¶ 33–35. Third, ORR has minimized the burdens associated with USCCB’s participation in the program in Dallas-Fort Worth by establishing an intake consortium that will ensure same-sex couples there have the same opportunity to be URM foster parents as anyone else. In sum, the evidence in the record shows that the Government is not partnering with USCCB to advance USCCB’s religious beliefs, much less to impose them on anyone else, and that inclusion of USCCB in the program—along with other entities in the Consortium—merely provides USCCB “an accommodation that will allow it to continue serving” children “in a manner consistent with its religious beliefs.” *Cf. Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882

(2021). Such an accommodation is permissible under the Religion Clauses.

Plaintiffs raise a series of objections to the foregoing Establishment Clause analysis, none of which have merit.

1. Plaintiffs' application of *Kennedy's* history and tradition test is mistaken.

Much of Plaintiffs' argument focuses on the *Kennedy* "history and tradition" test, to no avail.

First, Plaintiffs contend that history and tradition establish that the Federal Government has had plenary authority over immigration since the Founding-era and that, accordingly, the *Kennedy* test favors Plaintiffs' position. Although it is certainly true that persons may not enter the United States generally, or the URM program specifically, except through the legal authority of the Government, that does not speak to the subsequent question of what happens to those persons after they arrive. And since the inception of the United States' efforts to assist refugees and other displaced persons in the late 1940s, faith-based entities have played an essential role in resettling and assisting refugees to this country, including unaccompanied refugee children. Fed. Defs.' MSJ Mem. 4–6. Plaintiffs' inapposite discussion of Congress's undisputed authority over the immigration system does nothing to undermine this lengthy history of public-private partnerships in the resettlement of refugees.

Plaintiffs also contend that the Government has had a historic responsibility for the welfare of children and that this history also favors their claim. Pls.' MSJ Opp'n 25–27. This too is an inapposite historical lesson. Plaintiffs cite various legal authorities for the proposition that state governments have long exercised the authority to see to the welfare of children in their jurisdictions. But Plaintiffs do not dispute that private, often faith-based, entities have principally carried out the work of caring for orphaned children going back to the Founding era (whether or not state governments had legal responsibility or authority to see that care was rendered in the best

interests of the child). Fed. Defs.’ MSJ Mem. 25; Fed. Defs.’ MSJ Opp’n 11. And under *Kennedy*, it is that piece of historical data that is relevant to answering whether it is consistent with the Establishment Clause for ORR to work with USCCB as a provider in the URM program.

Plaintiffs also dispute the relevance of *American Legion v. American Humanist Association*, 139 S. Ct. 2067 (2019), which established that “[t]he passage of time gives rise to a strong presumption of constitutionality” as to “established, religiously expressive monuments, symbols, and practices.” *Id.* at 2085. Plaintiffs interpret *American Legion* to establish a rule that the “passage of time without incident . . . creates a presumption . . . that unconstitutional conduct can never happen in the future” and that *American Legion* does not apply if “unconstitutional conduct is ongoing.” Pls.’ MSJ Opp’n 22. Plaintiffs’ understanding of that case is mistaken.

The *American Legion* Court held that the presence on public land of a longstanding Latin cross memorializing fallen soldiers in World War I was consistent with the Religion Clauses, even though the “cross is undoubtedly” a religious symbol. 139 S. Ct. at 2074, 2090. The premise of the plaintiff’s claims in *American Legion* was that the continuing presence of the cross amounted to an ongoing violation of the Establishment Clause. The Court nonetheless rejected that argument because of, *inter alia*, the lengthy period that the cross stood. *See id.* (stating that for many in the community, “destroying or defacing the Cross [at issue] that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment”). Similarly here, faith-based entities, including Catholic entities, have participated in the resettlement of refugees and refugee children for nearly 75 years. Fed. Defs.’ MSJ Mem. 4–6. *American Legion*, like *Kennedy*, teaches that this historical practice is relevant to assessing whether the Establishment Clause permits these entities to provide secular services in a manner consistent with their religious beliefs. *American Legion* further demonstrates that historical practice need not extend back to the Founding era to be relevant to the Establishment

Clause analysis. *Contra* Pls.’ MSJ Opp’n 23 (asserting that history extending back to 1948 is not “relevant” to the analysis). The monument in *American Legion* was erected only in 1925 and yet, the passage of time was relevant to the Establishment Clause analysis, giving rise to a strong presumption of constitutionality. *See Am. Legion*, 139 S. Ct. at 2074, 2090.

2. Plaintiffs’ remaining Establishment Clause arguments fail.

Plaintiffs make a number of other arguments regarding the Establishment Clause analysis, which also fail to establish any right to relief.

To begin, Plaintiffs reiterate two arguments from their opening motion for summary judgment, contending that ORR has impermissibly delegated governmental functions to USCCB without establishing and maintaining adequate safeguards and that ORR has improperly shifted burdens to third parties through its efforts to accommodate USCCB’s religious beliefs. Pls.’ MSJ Opp’n 21, 27. Federal Defendants have extensively addressed these arguments in their opposition to Plaintiffs’ motion for summary judgment. Fed. Defs.’ MSJ Opp’n 10–16. Put simply, Plaintiffs are mistaken that ORR has caused any kind of impermissible delegation of government functions or that neutral accommodations of religion are inappropriate where they sensibly balance the burdens on non-beneficiaries of the accommodation. *See id.*

Second, Plaintiffs dispute the applicability of the principle that religious organizations may participate as providers of secular services even where their work “happen[s] to coincide with the [grantee’s] religious views.” *See Bowen v. Kendrick*, 487 U.S. 589, 609, 621 (1988). Plaintiffs argue that rather than “neutral[ly]” accommodating USCCB’s religious beliefs, Federal Defendants are “enabling and ratifying USCCB’s administration of a government program (and use of taxpayer funds) to discriminate against prospective Program foster parents.” Pls.’ MSJ Opp’n 19–21. These arguments, however, appear premised on Plaintiffs’ erroneous conclusion that USCCB’s participation in the URM program in Dallas-Fort Worth “categorically depriv[es]

Plaintiffs and similarly situated married same-sex couples of an equal opportunity to serve as Program foster parents.” Pls.’ MSJ Opp’n 21. That conclusion has no foundation in the evidence before this Court, which shows that Upbring, an ORR-funded URM child placing agency, now operates in the city where Plaintiffs live; an intake Consortium has been established that ensures Plaintiffs need not interact with USCCB or CCD to be approved as foster parents; and couples working with either Upbring or CCD have the same opportunity to serve as foster parents to a URM. Fed. Defs.’ MSJ Mem. 13–15; Fed. Defs.’ MSJ Opp’n 3–8. There is simply no evidence to show that ORR is “enabling” discrimination or “categorically depriving” same-sex couples in Dallas-Fort Worth of the opportunity to serve as URM foster parents. Nor have Plaintiffs established that USCCB is somehow failing to fulfill the objectives of the URM program. *See* Pls.’ MSJ Opp’n 20. To the contrary, USCCB is an expert provider of high-quality care to URM children. *See, e.g.*, Fed. Defs.’ MSJ Opp’n 15, 20.⁵

Finally, Plaintiffs argue that “Defendants wrongly suggest that *Fulton* disposes of Plaintiffs’ First Amendment claim” and that, to the contrary, *Fulton* “poses no obstacle to relief here.” Pls.’ MSJ Opp’n 18. Plaintiffs are mistaken both about Federal Defendants’ position with respect to *Fulton* and about the proper interpretation of that case. First, Federal Defendants have not argued that *Fulton* is controlling with respect to Plaintiffs’ claim such that its disposition *requires* entry of summary judgment for the United States. Second, Plaintiffs are mistaken in their attempts to characterize *Fulton* as wholly irrelevant to the Court’s decision here.

Plaintiffs contend that *Fulton* may be disregarded because it did not involve an

⁵ Plaintiffs also argue that “Federal Defendants must not acquiesce[] to USCCB’s religion-based discriminatory treatment of married same-sex couples.” Pls.’ MSJ Opp’n 20. But as Federal Defendants have explained, they are not adopting USCCB’s beliefs merely by including USCCB in the URM program, and Federal Defendants’ development of the Consortium underscores that this is so. Plaintiffs’ state action argument is erroneous for the additional reasons set forth *infra* in Argument Section II(B) of this brief, as well as Federal Defendants’ motion for summary judgment. Fed. Defs.’ MSJ Mem. 20–26.

Establishment Clause claim. While *Fulton* did not involve an Establishment Clause claim, Plaintiffs’ argument ignores the Supreme Court’s recent admonition that the Establishment Clause and Free Exercise Clause have “complementary purposes, not warring ones where one Clause is always sure to prevail over the others.” *Kennedy*, 142 S. Ct. at 2426. The Court’s Free Exercise jurisprudence is therefore instructive even where it is not controlling. And here, Plaintiffs’ position—that the Government causes an establishment of religion by working with a faith-based child placing agency that objects to licensing same-sex couples (along with another agency that has no such objection)—is difficult to square with the Supreme Court’s conclusion in *Fulton* that, in some circumstances, refusing to work with such an entity would violate the Free Exercise Clause. Plaintiffs also distinguish *Fulton* on the ground that “no one had ever been turned away or otherwise harmed by the child welfare agency” in that case and that this fact was “central to the Court’s decision.” Pls.’ MSJ Opp’n 19. Plaintiffs are, again, mistaken in their interpretation. The *Fulton* Court took as a given that the faith-based agency would turn away any same-sex couple that sought licensure through the agency. *See Fulton*, 141 S. Ct. at 1875. In this respect, the stakes were no different from this case and yet, the Supreme Court ruled in favor of the faith-based agency.

B. Plaintiffs’ Fifth Amendment Claims Fail Because Plaintiffs Have Not Challenged State Action.

Plaintiffs’ claims under the equal-protection and due-process components of the Fifth Amendment fail for a threshold reason: they do not challenge state action. Fed. Defs.’ MSJ Mem. 20–26.⁶ Plaintiffs’ only response is to emphasize repeatedly that they have sued *Federal Defendants*, not USCCB, and that it is *Federal Defendants*’ actions that harmed them. Pls. MSJ

⁶ As explained in Federal Defendants’ Opposition to Plaintiffs’ Motion for Summary Judgment, even if state action is present here, the Federal Defendants’ actions are subject to rational basis scrutiny and easily hurdle the low bar of that standard of review. *See* Fed. Defs.’ MSJ Opp’n 16–23.

Opp'n 16–18. That argument is unavailing for two reasons.

First, Plaintiffs understate USCCB's role as a defendant in this case. *Id.* at 16 (“USCCB is joined as a nominal defendant only”). Plaintiffs named USCCB as a *required party* under Rule 19(a)(1), because “in [USCCB's] absence, the court cannot accord complete relief among the existing parties.” Fed. R. Civ. P. 19(a)(1); *see* Am. Compl. ¶ 15, ECF No. 21. Thus, while Plaintiffs continue to move the goalposts of the relief they seek, they named USCCB as a defendant in this case because they felt relief *had* to be entered against it. USCCB is thus more than a “nominal defendant.” Pls.' MSJ Opp'n 16.

Second, the points that Plaintiffs emphasize about this case were true in many of the cases that Federal Defendants cited. In *Village of Bensenville*, for example, the plaintiffs had sued *the Federal Aviation Administration*, not the City of Chicago, whose reconfiguration plan would have relocated plaintiffs' cemeteries. 457 F.3d 52 (D.C. Cir. 2006). That was not dispositive, however, because harm to the plaintiffs flowed from the City's plan, not the FAA's approval of it. *Id.* at 65. Likewise in *American Manufacturers Mutual Insurance Company v. Sullivan*, 526 U.S. 40 (1999), the plaintiffs had sued Pennsylvania state officials over actions that private insurers had taken. And in the seminal case, *Blum v. Yaretsky*, 457 U.S. 991 (1982), the plaintiffs had sued commissioners of the New York Departments of Health and Social Services, not the private “utilization review committee” that had downgraded the plaintiffs' level of care. Yet the Court found no state action in either case. The fact that “Plaintiffs brought this lawsuit against *Federal Defendants*,” Pls.' MSJ Opp'n 16 (emphasis in original) does not distinguish *Blum*, *American Manufacturers Mutual*, *Village of Bensenville*, or the logic on which those cases rest. And for good reason: if merely suing the government were enough to convert private conduct into state action, that doctrine would be a dead letter.

Plaintiffs only meaningfully address one case: *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

See Pls.’ MSJ Opp’n 16. In *Shelley*, the Court held that it was “state action” for State courts to enforce private restrictive covenants against the ownership of real property by persons of certain races. *Id.* at 4. The Court’s essential reasoning was that the private covenants, without judicial enforcement, could not have precluded minority purchasers from taking ownership. *Id.* at 19 (“The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.”). That is not true here: USCCB’s religious beliefs prevent it from working with same-sex couples, regardless of whether that belief is enforced through the power of the state. Indeed, the *Shelley* Court expressly distinguished cases “in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit.” *Id.* In short, *Shelley* is inapt.

These purported distinctions aside, Plaintiffs do not challenge the substance of Federal Defendants’ state-action argument. There are two approaches under which the Supreme Court has found state action: (1) where the *action* resulted from the state’s “coercive power,” *i.e.*, was the result of “significant encouragement, either overt or covert” (*see* Fed. Defs.’ MSJ Mem. 20–21 (collecting cases)); or (2) where the *actor* was controlled by, or entwined with, a state agency (*see id.* at 21 (collecting cases)). Neither approach finds traction here, for reasons that Plaintiffs do not dispute. *See id.* at 21–26.

III. THE COURT SHOULD EXERCISE ITS EQUITABLE DISCRETION TO DECLINE TO ISSUE EQUITABLE RELIEF.

In any event, the Court should exercise its equitable discretion to refrain from entering Plaintiffs’ proposed injunctive or declaratory relief. Fed. Defs.’ MSJ Mem. 27–29. Plaintiffs’ only response, in a footnote, is to speculate that relief that could ultimately result in excluding USCCB and its sub-grantees from the URM program would *not* “cause a reduction in the number

of available foster families or otherwise impair the government’s ability to meet the needs of children in its care.” Pls.’ MSJ Opp’n 14 n.9 (citing Dr. Brodzinsky’s opinion, Pls.’ SUMF ¶¶ 133–51).

Federal Defendants have adduced ample evidence to contradict this notion. *See generally* Fed. Defs.’ MSJ Opp’n 19–22. Moreover, Plaintiffs’ expert opinion was not predicated on any evidence; rather, 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.” Fed. Defs.’ MSJ Opp’n Ex. C, Brodzinsky Dep. 134:4-7. And 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 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).⁷

USCCB has decades of experience providing quality care to thousands of children in need. *See* Fed. Defs.’ MSJ Opp’n 20 (collecting sources). To exclude USCCB would harm the URM system in ways that neither Plaintiffs nor their expert has addressed. *See id.* at 20–21.

The equities strongly disfavor the relief that Plaintiffs seek.

CONCLUSION

For the foregoing reasons, Federal Defendants are entitled to summary judgment.⁸

⁷ For a paragraph-by-paragraph refutation of Dr. Brodzinsky’s opinions, *see* Federal Defendants’ RSMF ¶¶ 126–28, 132–51, ECF No. 119-1. *See also* USCCB’s Mem. in Supp. of Mot. to Exclude Expert Report and Testimony of Dr. Brodzinsky, ECF No. 117-1 (explaining further why Dr. Brodzinsky’s opinions are irrelevant and unreliable).

⁸ Federal Defendants have attached Summary Judgment Exhibits J, M, and T to this reply, which were inadvertently omitted from Federal Defendants’ initial summary judgment filings. These

Dated: October 12, 2022

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

MICHELLE BENNETT
Assistant Branch Director

/s/ James Powers
JAMES R. POWERS (TX Bar No. 24092989)
JASON LYNCH
Trial Attorneys
Federal Programs Branch
U.S. Department of Justice, Civil Division
1100 L Street, NW
Washington, DC 20005
Telephone: (202) 353-0543
Email: james.r.powers@usdoj.gov

Counsel for Federal Defendants

documents were provided to all parties during discovery and were previously identified with specificity in the Federal Defendants' Statement of Undisputed Material Facts.

Exhibit J

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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FATMA MAROUF and BRYN ESPLIN,
a Married Couple,

PLAINTIFFS,

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

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

DEFENDANT.

-----X

DATE: December 7, 2020

TIME: 9:05 A.M

REMOTE VIDEOTAPED DEPOSITION of
KATHRYN KUENNEN, taken by the Plaintiffs,
pursuant to a notice and to the Federal
Rules of Civil Procedure, held remotely via
Zoom Videoconference, before Suzanne
Pastor, a Notary Public of the State of New
York.

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

2
3 HOGAN LOVELLS U.S., LLP
Attorneys for the Plaintiffs
4 609 Main Street, Suite 4200
Houston, Texas 77002
5 BY: RUSSELL WELCH, ESQ.
713.632.1437
6 russell.welch@hoganlovells.com
AND: MIKE GENDALL, ESQ. (D.C. Office)
7 202.637.6458
mike.gendall@hoganlovells.com
8 AND: KATHERINE CULORA, ESQ. (D.C. Office)
202.804.7890
9 katherine.culora@hoganlovells.com

10 -and-

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

15 -and-

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

20
21 U.S. DEPARTMENT OF JUSTICE - CIVIL DIVISION
Attorneys for the Federal Defendants and
the Witness
22 1100 L Street, N.W.
Washington, D.C. 20005
23 BY: JASON LYNCH, ESQ.
202.514.1359
24 jason.lynch@usdoj.gov

25

1 APPEARANCES OF COUNSEL (Continued)

2

JONES DAY, LLP

3

Attorneys for the Defendant

UNITED STATES CONFERENCE OF CATHOLIC

4

BISHOPS

500 Grant Street, Suite 4500

5

Pittsburgh, Pennsylvania 15219-2514

BY: JOHN D. GOETZ, ESQ.

6

412.394.7911

jdgoetz@jonesday.com

7

AND: JOSHUA R. SALLMEN, ESQ.

412.394.7978

8

jsallmen@jonesday.com

AND: JASON E. CELLIER, ESQ. (Columbus Office)

9

614.281.381

jcellier@jonesday.com

10

AND: DAVID T. RAIMER, ESQ. (D.C. Office)

202.879.3890

11

dtraimer@jonesday.com

12

13

14

15 ALSO PRESENT:

16

KEVIN LAKE, ESQ., HHS

17

DARRAK LIGHTY, Videographer,

US LEGAL SUPPORT

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1 A. None. No.

2 Q. When did USCCB first get
3 involved in facilitating foster parenting
4 under the UAC or URM program?

5 A. In approximately 2002 or 2003
6 when ORR took on the role of care and
7 custody, providing care and custody for
8 unaccompanied children.

9 Q. And that was for the UAC
10 program at that time, right?

11 A. Yes, that's correct.

12 Q. Okay --

13 A. Did you --

14 Q. Sorry, I think there might be a
15 slight delay, but that's okay, I didn't
16 have another question.

17 So USCCB later became involved
18 in the URM program, right?

19 A. So to clarify, USCCB was
20 involved actually in the URM program prior.
21 So we have been one of the two national
22 agencies partnering to provide URM program
23 services since the 1980s. The UAC program
24 came later in early 2000s.

25 Q. I see, got it, okay.

Exhibit M

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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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REMOTE APPEARANCES

FOR THE PLAINTIFFS:

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

-AND-

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

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

FOR THE FEDERAL DEFENDANTS:

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

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

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

1 (Appearances continued)

2

3 FOR THE DEPONENT DANA SPRINGER:

4 MR. SID LANGE
5 Vitek Lange
6 300 Throckmorton Street
7 Suite 650
8 Fort Worth, Texas 76102
9 817.885.5610
10 slange@viteklange.com

8

9 ALSO PRESENT:
10 Mr. Rick Bell, Videographer

10

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1 Q. I mean, not being the queen but the news that
2 you are sharing?

3 A. Yeah, this is awesome. Probably, I assume --
4 I'm thinking the news of not being able to be a foster
5 parent with us.

6 Q. And specific to same-sex couples or just
7 generally?

8 A. I would say generally.

9 Q. Okay. And in the subsequent sentence where you
10 say until I shared our qualifications for licensing
11 foster parents based on our CST and Catholic doctrine,
12 is it accurate to say that CST is Catholic social
13 teachings?

14 A. It is.

15 Q. And which qualifications were you referring to?

16 A. All of them.

17 Q. Would it -- okay. I assume you would have
18 mentioned about -- did you mention about the marriage
19 requirement being between one man and one woman?

20 A. Yes.

21 Q. Do you recall whether you mentioned the
22 requirement that foster parents mirror the Holy Family?

23 A. I did.

24 Q. Do you remember what you said specifically?

25 A. Exactly that.

Exhibit T

Message

From: Crawford,Kara (HHSC) [Kara.Crawford@hhsc.state.tx.us]
Sent: 11/30/2016 10:36:00 PM
To: Tota, Kenneth (ACF) [kenneth.tota@acf.hhs.gov]
Subject: RE: RD Notification

Hi Ken, thanks for your email. I appreciate you sharing details regarding your selection process and timeline. Do you have any updates on selecting finalists for the replacement designees? Thank you again for your continued communication, much appreciated.

KC

Kara Crawford | Chief of Staff
Health and Human Services Commission | 4900 N. Lamar Blvd | Austin, TX 78751
Office: (512) 424-6649 | Cell: (512) 460-9048 | kara.crawford@hhsc.state.tx.us

From: Tota, Kenneth (ACF) [mailto:kenneth.tota@acf.hhs.gov]
Sent: Monday, November 14, 2016 5:58 PM
To: Crawford,Kara (HHSC) <Kara.Crawford@hhsc.state.tx.us>
Cc: Randall,Patrick (HHSC) <Patrick.Randall@hhsc.state.tx.us>; Rubenstein, Carl (ACF) <carl.rubenstein@acf.hhs.gov>; Colon, Mr. Ramon L (ACF) <ramon.colon@acf.hhs.gov>; Mahar-Piersma, Colleen (ACF) <Colleen.Mahar-Piersma@acf.hhs.gov>
Subject: RD Notification

Hello Kara,

We wanted to provide an update on the agencies we will be working with to continue services in Texas and the criteria considered in their selection. _

The ORR regulations at 45 CFR 400.301 allow the Director of ORR to authorize a replacement designee or designees to administer the provision of assistance and services to refugees when a state withdraws from all or part of the refugee resettlement program. ORR plans to designate six Replacement Designees (RDs) in Texas: one medical RD, one RD to administer the Unaccompanied Refugee Minors (URM) Program, and four regional RDs.

ORR considered the following criteria in identifying agencies to invite to apply as RDs:

- Interest in serving as a RD
- Capacity to serve as a RD
- Input from the state of Texas
- Expertise in administering and implementing ORR programs
- Expertise in applicable subject areas
- Caseload of ORR-eligible populations served in fiscal year (FY)2016 and projection for FY 2017
- Participation in the Department of Homeland Security's Cuban Haitian Entrant Program (CHEP)
- Ensuring that a variety of national resettlement agencies are represented
- Number of sites in the region

The following agencies have been identified as suitable candidates for an RD role as identified below. Each will be submitting an application for ORR review and approval before they will assume responsibilities in their respective subject area or region.

1. **Medical RD: U.S. Committee for Refugees and Immigrants (USCRI)**
2. **URM RD: United States Conference of Catholic Bishops (USCCB)**
3. **Regional RD, Region 1 (Abilene, Amarillo, El Paso, and Midland): International Rescue Committee (IRC), Abilene**
4. **Regional RD, Region 2 (Dallas, Ft. Worth): Catholic Charities, Fort Worth**
5. **Regional RD, Region 3 (Austin, Corpus Christi, San Antonio): Refugee Services of Texas (RST), Austin**
6. **Regional RD, Region 4 (Houston): YMCA, Houston**

We look forward to working with them and with the State to ensure the continuation of services starting February 1, 2017.

Thank you. Ken