

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

FATMA MAROUF, <i>et al.</i> ,)	
)	
Plaintiffs)	
)	
v.)	Civil Action No. 1:18-cv-00378 APM
)	
XAVIER BECERRA, <i>et al.</i> ,)	
)	
Defendants.)	
)	

**DEFENDANT U.S. CONFERENCE OF CATHOLIC BISHOPS' REPLY
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

This dispute has, in truth, already been resolved—and favorably for Plaintiffs. In its motion for summary judgment, the U.S. Conference of Catholic Bishops (“USCCB”) showed that Plaintiffs have already received all the relief they told this Court they wanted. They now have the same opportunity to serve as foster parents within the Unaccompanied Refugee Minor Program (“URM Program”) as any other couple in the Dallas-Fort Worth area. Like all other local prospective foster parents, Plaintiffs need only apply to a private clearinghouse, the U.S. Committee for Refugees and Immigrants (“USCRI”), which will conduct initial intake and direct their application to a provider able to work with them. The government has identified a provider that not only has no objection to placing children with same-sex couples, but also will ensure they receive equal treatment. Accordingly, this Court cannot provide any further relief to Plaintiffs, as the current arrangement satisfies all of the remedial criteria they themselves specified at the pleadings stage. Plaintiffs now refuse to take yes for an answer and improperly demand additional relief that they previously disclaimed. This Court should not allow such gamesmanship.

In any event, Plaintiffs’ arguments on the merits fare no better. They have no answer to the point that, if their position were correct, the Constitution would prohibit the exact remedy the unanimous Supreme Court ordered in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). That is absurd. By allowing USCCB to participate in the URM Program while ensuring Plaintiffs can also participate, the government is not somehow discriminating against Plaintiffs or “establishing” religion. To the contrary, the government has bent over backwards to make the system open and workable for everyone. This is a laudable compromise in accord with “the best of our traditions.” *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). Plaintiffs’ efforts to tear it down should be rejected.

ARGUMENT

I. ON THE UNDISPUTED FACTS, PLAINTIFFS' CLAIMS ARE MOOT.

Plaintiffs concede that they no longer seek relief as to the Unaccompanied Alien Children Program (“UC Program”), as USCCB no longer participates in that program in Texas. Dkt. 114 (“Pls.’ Opp.”) 8 n.6. They insist, however, that their challenge to the URM Program remains alive. Those arguments fail.

A. Plaintiffs Have Received the Relief They Requested.

With respect to the URM Program, Plaintiffs’ claims are moot because they have already obtained all that they requested, and this Court “can no longer provide ... any effectual relief.” *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021). Plaintiffs can now participate in the URM Program on the exact terms they told this Court would “immediately redress” their claims: A third party has now “take[n] over the application process” and “create[d] a screening process” that all prospective foster parents in the Dallas-Fort Worth area “have to go through” and that “determin[es]” the “grantee they ... go to.” Dkt. 80 (“MTD Oral Arg. Tr.”) 57–58, 62, 65. “[N]o obstacles [are] put in front of [same-sex couples] that [a]ren’t put in front of other couples.” *Id.* at 49.

True, same-sex couples will not be referred to a *USCCB* subgrantee, but instead to an alternative provider with no religious objections. That necessarily requires a “screening process,” which Plaintiffs themselves suggested, assuring this Court that it was not their “objective” either to “force USCCB to administer the URM and UC programs in a manner that violates its religious doctrine,” or to remove USCCB from the program. *Id.* at 53, 57, 67–68; Dkt. 38 (“Pls.’ MTD Opp.”) 10–11; *see also* Dkt. 48 (“MTD Op.”) 21 n.2 (noting that Plaintiffs had “backed off” their earlier requests for such relief). Instead, Plaintiffs were “happy to create religious accommodations to ensure that [USCCB] can continue” to participate in the program. MTD Oral

Arg. Tr. at 68. There simply needed to be a uniform, third-party “screening process” and “another provider in the Fort Worth area” that would work with same-sex couples. *Id.* at 57, 68.

The government has since reshaped the URM Program in the image Plaintiffs demanded. There are two inescapable consequences.

First, Plaintiffs are bound by their representations. This Court relied on the narrowed character of the relief that Plaintiffs said they wanted at the pleadings stage to rule in their favor. *See* MTD Op. 20–22. And having “succeeded in persuading [this Court]” that all they wanted was a neutral screening process and an alternative provider, Plaintiffs should be barred from trotting out “a contradictory argument to prevail” now. *New Hampshire v. Maine*, 532 U.S. 742, 749–51 (2001); *see* Dkt. 115 (“USCCB Opp.”) 9–13.

After failing even to *mention* their prior representations in their motion for summary judgment, Plaintiffs relegate the entirety of their response on this point to a footnote, baldly asserting that USCCB “grossly mischaracterizes Plaintiffs’ position.” Pls.’ Opp. 12 n.8. But Plaintiffs’ briefing—and the transcript of the motion-to-dismiss hearing—speaks for itself. *See* Dkt. 106-1 (“USCCB MSJ”) 10–12, 13–14; USCCB Opp. 6–7, 9–13. Plaintiffs specifically requested an alternative provider and a uniform screening process that would allow USCCB to participate in the program while directing their applications to an alternative provider with no objection. Indeed, they told this Court they would be “happy” with a religious accommodation that included a “screening” process and referral system that would allow USCCB to continue to participate in the program as long as they could too. MTD Oral Arg. Tr. 49, 57, 68.¹

¹ THE COURT: So if as government counsel said, say there is, tomorrow, another provider in the Fort Worth area that would not discriminate on the basis of your clients being a same-sex couple, would that satisfy you?

Plaintiffs’ sole rejoinder is to cite to statements their counsel made at a status conference on May 15, 2019. Pls.’ Opp. 12 n.8 (citing Dkt. 114-3 (“May 15, 2019 Hr’g Tr.”) 9, 11). But nothing said at that conference advances their cause. As an initial matter, that conference took place *after* the motion-to-dismiss briefing and oral argument, and statements made at that proceeding cannot be used to walk back Plaintiffs’ earlier commitments. What is more, the cited statements are simply not on point: they involve the government’s efforts to add BCFS as a stand-alone, alternative provider in the UC Program. *See* May 15, 2019 Hr’g Tr. 3–4, 9, 11; *see also* USCCB MSJ 7–8 (describing the government’s efforts to stand up alternative providers). Not only is the UC Program no longer at issue in this litigation, *see supra* p. 2, but standing up BCFS as an alternative provider did not involve the sort of neutral clearinghouse the government has since implemented via the consortium, *see* May 15, 2019 Hr’g Tr. 3–11.

More fundamentally, the transcript of the May 15, 2019, conference reveals that far from abandoning their earlier statements, *Plaintiffs doubled down* on them. When Plaintiffs balked at the notion that the addition of BCFS would moot this litigation, the Court asked if that meant that they were reversing course and once again “seeking ... to have the Catholic Charities affiliate removed” from the program. *Id.* at 12. Not at all, Plaintiffs assured the Court. If the government could “comply with its constitutional obligations” and “simultaneously accommodate [USCCB’s] religious beliefs,” Plaintiffs “would have no objection.” *Id.* at 12–13. When the Court asked “how [that] would ... happen,” Plaintiffs reiterated their clearinghouse proposal: “We propose one way in which that could happen ... would be if there were an alternative service provider in the

[Plaintiffs’ Counsel]: So long as ... there would be seamless treatment of their applications and they could be treated equally, that would not be a problem.

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

MTD Oral Arg. Tr. 68.

geographic area for all of the applications to go through that alternative service provider. And then everyone would be on equal footing. Everyone would be treated equally” *Id.* at 13.

In fact, Plaintiffs repeatedly made clear that if their clearinghouse proposal were implemented, then Plaintiffs “and others like them would not face differential treatment” even if USCCB continued to participate. *Id.* at 13. Specifically, Plaintiffs described their proposal as ensuring the existence of a “second service provider in the geographic area that all ... applicants for the foster parenting opportunities under these programs ... would apply through.” *Id.* at 14. Under that proposal, they said, USCCB’s subgrantees would “still” be able to participate in the program. *Id.* at 13. They would “still be receiving grant monies” and “still be providing services to children”: “the one thing they wouldn’t do is they wouldn’t process foster parenting applications.” *Id.* at 14–15. Plaintiffs’ counsel also assured the Court that USCCB’s subgrantees would still be able to “actively recruit” prospective foster parents, “it would simply be that everyone would be sent to just one door” by submitting their applications through a clearinghouse instead of applying directly to a USCCB sub-grantee. *Id.* at 14.²

Notably, the Court anticipated and asked Plaintiffs about *the very objection* they now make to the consortium model:

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

² The Court recognized that Plaintiffs “concern” was to avoid a situation where “there’s two different doors to even get into the program.” *Id.* at 19. Thus, under Plaintiffs’ proposal, “[a]ll applications would have to go through [a single] storefront ... that does not discriminate based upon a same sex couple[’s] status, in that they will do the initial clearing.” *Id.* In that scenario, “there’s only one door to go through and you can then be put in ... one line or the other ...[o]nce you get through the door.” *Id.*

Id. at 15; *cf.* Pls.’ Opp. 10 (complaining that the consortium “segregate[s] prospective Program foster parents who are married same-sex couples from other applicants, based on their sexual orientation and sex and the same-sex character of their marriages” and “funnel[s]” them “away from” USCCB’s subgrantee). Plaintiffs were unperturbed. Because “all comers would be sent to the alternative service provider and processed without regard to religious consideration,” “everyone would be treated equally.” May 15, 2019 Hr’g Tr. 15. If the government adopted their proposal, Plaintiffs “would not have an objection because they would be entering a system where they were treated like everyone else without regard to religious consideration.” *Id.* at 15–16. That, in fact, was the very reason Plaintiffs “proposed this as a potential solution because it seems like one that would achieve all objectives.” *Id.* at 16. Their only complaint was that, at the time, the “government would not entertain” their proposal “as a potential solution.” *Id.* at 14, 16. Now that the government has not only entertained, but implemented Plaintiffs’ own “solution,” they are estopped from arguing that it fails to provide them adequate relief.³

Second, since Plaintiffs have received everything they said they wanted, Plaintiffs have no further cognizable or redressable injury. The URM Program’s application process is now the same for all prospective foster parents in the Dallas-Fort Worth area, whatever their sexual orientation—apply to USCRI for processing and referral to a provider. And the end result is the same for all

³ To the extent Plaintiffs insist that they are not receiving “fully equal treatment” “from screening through processing, licensure, and placement” because Upbring’s services are somehow inferior to those of a USCCB subgrantee, Pls.’ Opp. 12 n.8, that is simply not true, *see* USCCB Opp. 13–16; *infra* pp. 7–9. And insofar as Plaintiffs now take the position that “fully equal treatment” is only available if a single subgrantee provides services to all prospective foster parents, that is flatly inconsistent with their prior proposal for a screening process (which necessarily assumes the existence of multiple subgrantees), as well as their representations that they were not seeking to defund USCCB or force it to act in violation of its religious beliefs as a condition of participating in the program. MTD Oral Arg. Tr. 53, 67–68; Pls.’ MTD Opp. 10–11; *supra* pp. 2–3.

prospective foster parents in the region—the ability to become eligible to foster an immigrant child.

Nonetheless, Plaintiffs now insist that their injury is *not* redressed by the URM Program as modified to fit their specifications because they continue to suffer a stigmatizing harm: If they applied to USCRI, they will experience “segregation,” as they would know that their application was being “funnel[ed] ... away from” USCCB’s subgrantee and toward an alternative provider that will work with them. Pls.’ Opp. 10. In other words, Plaintiffs’ asserted injury is the awareness that a provider (with whom they will never interact) would not work with them if asked (which it never will be).

Again, the solution that Plaintiffs now call “segregation” is just what they previously requested. *See supra* pp. 3–6. But regardless, there is no segregation because both same-sex and opposite-sex couples may be referred to Upbring, as Plaintiffs acknowledge. *See* Dkt. 118 (“Fed. Defs.’ Opp.”) 4; Pls.’ Opp. 11. And Plaintiffs do not explain how having the option of “one agency as opposed to the two for different-sex couples” constitutes an injury. Pls.’ Opp. 7, 11. While Plaintiffs assert that “it is undisputed that” Upbring will provide “less favorable treatment” than would USCCB’s subgrantee, Plaintiffs offer no evidence whatsoever to support that assertion. *Id.* at 11. Upbring’s operations in the Dallas-Fort Worth area are currently newer and smaller than those of USCCB’s subgrantee, but it is purely “‘conjectural’ or ‘hypothetical’” to say that it offers inferior service. *City of L.A. v. Lyons*, 461 U.S. 95, 102 (1983). Indeed, the evidence shows that, regardless of provider, *all* prospective foster parents apply, are licensed, and become eligible for a placement in the same way. *See* USCCB Opp. 13–15. Likewise, differences in staff size, estimated budgets, and numbers of families licensed or children in care are wholly immaterial to Plaintiffs’ prospects for becoming foster parents. *See id.* In short, there are no “barriers to same-

sex couples becoming foster parents” through the URM Program in the Dallas-Fort Worth area, and “their eligibility [is evaluated] by the same criteria as any heterosexual couple or person.” MTD Op. 22. Thus, Plaintiffs’ injuries are fully remedied.⁴

Further, Plaintiffs’ mere awareness that USCCB’s subgrantee has a (now, from Plaintiffs’ perspective, purely abstract) objection to working with same-sex couples cannot confer standing. A stigmatic injury confers standing “only to ‘those persons who are personally denied equal treatment’ by the challenged discriminatory conduct.” *Allen v. Wright*, 468 U.S. 737, 755 (1984) (quoting *Heckler v. Mathews*, 465 U.S. 728, 740 (1984)), *abrogated on other grounds by Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014); *see also Doe 2 v. Shanahan*, 917 F.3d 694, 739 n.8 (D.C. Cir. 2019) (Williams, J., concurring in the result) (“[W]here, as here, a plaintiff has not been ‘personally denied equal treatment,’ the plaintiff does not ‘have standing to litigate [his] claims based on the stigmatizing injury.’”). But here, Plaintiffs are not experiencing unequal treatment in any of the benefits available to them. And without that, their “mere personal offense” that the consortium arrangement allows a religious entity to participate and work with *other* foster couples is not an Article III injury. *In re Navy Chaplaincy*, 534 F.3d 756, 761, 763, 765 (D.C. Cir. 2008). Plaintiffs invoke this Court’s decision recognizing that they had an injury in fact at the pleadings stage, but this Court identified that injury as stemming from “the ‘lost opportunity to foster a child,’ and ‘the act of shutting the door to same-sex couples’ foster parenting applications[, which] demeans and stigmatizes.’” MTD Op. 16 (quoting Pls.’ MTD Opp. 4). That

⁴ As USCCB has previously argued, *see* USCCB Opp. 16–17, Plaintiffs’ alternative contention that the consortium arrangement may not operate “as intended” and USCRI may mistakenly refer Plaintiffs to USCCB’s subgrantee, instead of Upbring, resulting in “rejection,” is yet more unfounded speculation that is insufficient to ground a constitutional injury, Pls.’ Opp. 11. The same is true of their claims regarding a purported “prospective blanket waiver,” Pls.’ Opp. 12, as Plaintiffs fail to identify any even hypothetical resulting harms, *see* Fed. Defs.’ Opp. 7–8.

alleged injury has now been redressed. Plaintiffs have the opportunity to foster through the URM Program; the same door is open to them as to all other prospective foster parents. The contention that this somehow “exacerbates” Plaintiffs’ asserted injuries, or that the government has done “nothing” to remedy the situation, is baffling. Pls.’ Opp. 5, 7.

B. Plaintiffs’ Voluntary-Cessation Argument Fails.

Plaintiffs alternatively argue that the voluntary-cessation exception prevents mootness because the government could theoretically undo the modifications it has made to the URM Program. But that exception does not apply when “the allegedly wrongful behavior could not reasonably be expected to recur.” *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (emphasis added). That is the situation here. There is no reason to expect the government to suddenly unwind all its efforts to create a program that accommodates Plaintiffs—searching out and funding USCRI, and identifying and awarding a grant to an alternative provider willing to work with same-sex couples. After all, the government itself has no policy against same-sex couples serving as foster parents. It did not select USCCB as a grantee for the purpose of excluding them from the program, nor direct or encourage USCCB to exclude them. Plaintiffs’ baseless assertions notwithstanding, the government did not even know at the time it awarded the grants at issue that USCCB’s subgrantees would not work with same-sex couples. *See* USCCB MSJ 39; USCCB Opp. 32. Once the government learned of the situation, it proceeded to solve Plaintiffs’ dilemma, going to significant lengths to restructure the program. The notion that the government would subsequently reverse those efforts is simply not credible. There is thus no *reasonable* basis for “concern about the recurrence” of the pre-modification URM Program in the Dallas-Fort Worth area. *Citizens for Resp. & Ethics in Wash. v. Wheeler*, 352 F. Supp. 3d 1, 13 (D.D.C. 2019) (explaining that there is less concern where the defendant is a government actor). Plaintiffs’ claims are moot.

II. ON THE UNDISPUTED FACTS, PLAINTIFFS' CLAIMS FAIL EVEN IF NOT MOOT.

Even if Plaintiffs' claims were not moot, they fail on the merits.

A. Plaintiffs' First Amendment Claim Fails.

Plaintiffs argue that the government has violated the Establishment Clause “by repeatedly favoring USCCB’s religious beliefs in the course of administering the URM Program on the government’s behalf.” Pls.’ Opp. 18. That claim fails for three reasons.

1. Plaintiffs Cannot Dodge the Import of *Fulton*.

In *Fulton*, the Supreme Court held that the Free Exercise Clause prohibited Philadelphia from excluding a Catholic agency from its public foster-care program. 141 S. Ct. 1868. That agency’s religious beliefs, like USCCB’s, precluded it from placing children with same-sex couples, prompting Philadelphia to attempt to exclude the agency from the program. *Id.* at 1875–76. The Supreme Court ordered Philadelphia to allow the agency to continue to participate—even though, unlike here, there was no guaranteed alternative provider in *Fulton* that would work with same-sex couples, and no third-party intake process to direct applicants to an appropriate provider. *See id.* at 1875.

Plaintiffs argue that *Fulton* “poses no obstacle” to their suit, because it did not feature an Establishment Clause claim, and because the Court found a Free Exercise violation due to the individualized exemptions available under the antidiscrimination policy there. Pls.’ Opp. 18. But as USCCB has explained, the particular reason for *Fulton*’s remedy does not matter. USCCB Opp. 19. The point is that, under Plaintiffs’ theory of this case, the remedy that the Supreme Court unanimously ordered under the Free Exercise Clause—allowing a Catholic organization to participate in a public foster-care program despite its objections to same-sex foster parenting—violated the Establishment Clause. “But how could that be?” *Kennedy v. Bremerton Sch. Dist.*,

142 S. Ct. 2407, 2426 (2022). The Free Exercise Clause cannot *require* what the Establishment Clause *forbids*. In fact, the Supreme Court has expressly rejected the notion that the “complementary” Religion Clauses can compel inconsistent remedies. *Id.*; *see also Walz v. Tax Comm’n of City of N.Y.*, 397 U.S. 664, 667–72 (1970). Plaintiffs’ position is thus premised on a constitutional impossibility—to say nothing of its reliance on the (dubious) proposition that the Supreme Court unanimously ordered an unconstitutional remedy.

Plaintiffs further contend that it “was central to the Court’s decision” in *Fulton* “that no one had ever been turned away or otherwise harmed” by the Catholic agency. Pls.’ Opp. 19. That is incorrect. Consideration of this issue was entirely absent from the Court’s analysis, not “central” to it. Moreover, the Court flatly rejected Philadelphia’s claim that it had to exclude the Catholic foster provider in that case to ensure “the equal treatment of prospective foster parents,” even though it was obvious that the Catholic provider had a religious objection to placing children with same-sex couples. 141 S. Ct. at 1882. That result makes particular sense because, as here, the *government* was not discriminating against same-sex couples, but only allowing private religious groups to participate in the program along with other service providers that had no objection.

2. There Is No Establishment Clause Violation Because the Government Has Not Delegated a Traditional Government Function to USCCB.

Even apart from *Fulton*, this case does not plausibly involve any unconstitutional “establishment of religion.” Plaintiffs concede that their Establishment Clause claim turns on “historical practices and understandings.” *Kennedy*, 142 S. Ct. at 2428; *see* Pls.’ Opp. 19 & n.15, 23. Accordingly, they must demonstrate that allowing USCCB to receive funds under the URM Program bears the historical “hallmarks of religious establishment[],” *id.* at 2429, such as the “use[] [of an] established church to carry out certain civil functions,” *Shurtleff v. City of Bos.*, 142 S. Ct. 1583, 1609 (2022) (Gorsuch, J., concurring in the judgment). They cannot clear that bar.

First, the provision of adoption and foster-care services (much less the choice of referral criteria for a foster-care consortium, *see* Pls.’ Opp. 12) is not a traditional government function. Plaintiffs point to no examples of the federal government providing such services directly—presumably because there are none. Instead, Plaintiffs try to change the subject by arguing that the *regulation of immigration* is historically a federal function. Pls.’ Opp. 23–25. But there is an obvious difference between the provision of charitable services to immigrant children, and the “right to expel or welcome foreigners, as well as to define the steps for entrance into, and the terms of lawful presence in, the country.” *Id.* at 24. Only the latter involves “traditionally ... governmental task[s]” or “power[s] ordinarily vested in agencies of government.” *See Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 121–22 (1982); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978). And no one contends the government has delegated such duties to USCCB; it has no power to “imprison or deport aliens,” to set “residency requirement[s] for naturalization,” or to exercise in any way the government’s “plenary authority over immigration.” Pls.’ Opp. 23. That the government generally performs these tasks before the children at issue receive foster-care services is neither here nor there. What *USCCB* does is provide foster care, a historically non-governmental and predominantly religious enterprise that, to this day, is largely facilitated by the actions of private organizations. *See* USCCB MSJ 22–24; USCCB Opp. 20–21; *cf. Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019) (explaining that for purposes of a state actor analysis, the function must be “traditionally exclusively reserved to the State”).

That USCCB provides such services to *immigrant* children does not suddenly transform its efforts into a traditional government function. As previously noted, USCCB provided foster-care services for immigrant children before the URM Program existed, *id.*; indeed, private and religious organizations have cared for abandoned or orphaned immigrant children from the Nation’s earliest

days. In 1727, Ursuline nuns established the first American orphanage in New Orleans. *See* USCCB MSJ 22–23. When unaccompanied teenage girls arrived from France, “the Ursulines assumed the total responsibility for them” in addition to “the native orphans that they accepted.” Mary Viatora Schuller, *A History of Catholic Orphan Homes in the United States, 1727 to 1884*, at 15 (June 1954) (Ph.D. dissertation, Loyola University Chicago).

Similar examples are myriad. In the 1820s, the Catholic bishop of Charleston established an orphanage after “yellow fever ‘devastated the homes of many of the immigrants[,] leaving a large number of helpless orphans.’” *Id.* at 231–32 (citation omitted). When “[s]cores” of Irish immigrants “contracted ship fever” while crossing the Atlantic to Baltimore in 1847, dying “shortly after their arrival,” a local parish priest found “‘himself the sole refuge of about forty orphans’” and founded the Orphan’s Home of Baltimore. *Id.* at 155 (citation omitted). Generally, throughout the eighteenth and nineteenth centuries, Catholic orphanages “were commonly established in larger cities where the immigrants of one nationality tended to concentrate in large numbers.” *Id.* at 398.

Nor were Catholics the only religious group to care for immigrant children. For instance, in the 1850s, the Children’s Aid Society, a private Protestant organization, organized “orphan trains,” which transported orphans from New York City to foster homes in the Midwest. Catherine E. Rymph, *Raising Government Children: A History of Foster Care and the American Welfare State* 21 (2017). The children involved in this program were “primarily immigrant[s].” Rebecca S. Trammell, *Orphan Train Myths and Legal Reality*, 5 *Mod. Am.* 3, 3 (2009). In contrast, as Plaintiffs themselves recognize, the federal government established programs to care for immigrant children “only in modern times.” *Pls.’ Opp.* 24–25. The government evidently did not consider private organizations’ care for recently arrived immigrant children an encroachment on

its power to control immigration; the notion that such care is a traditional government function simply finds no home in the historical record.

Plaintiffs also assert that modern foster care did not exist at the Founding and that earlier child welfare programs “concerned placing children in institutions.” *Id.* at 26 & n.18. That is beside the point, as Plaintiffs do not claim that such institutional care was exclusively or even primarily a government function. And with good reason: The “vast majority” of orphanages in the early Republic were religious institutions that “were local undertakings, managed and funded privately.” Rymph, *supra*, at 19; *see also Fulton*, 141 S. Ct. at 1885 (Alito, J., concurring in the judgment); Schuller, *supra*; USCCB MSJ 22–24. To the extent foster care was an innovation developed after the Founding, it was simply a new method for “religious groups” to carry out work they “have performed since time immemorial.” *Fulton*, 141 S. Ct. at 1926 (Alito, J., concurring in the judgment).

To be sure, the government historically has had an interest in child welfare. Pls.’ Opp. 25–27. But that has no bearing on whether the provision of adoption and foster care services is a traditional government function.⁵ As detailed above, it is not. The government has an interest in many things—e.g., public health, child welfare, education—but that does not mean that all means to achieve those ends are reserved to the government. By Plaintiffs’ logic, the government’s interest in child welfare would mean that *parenting itself* would be a traditional government function. But nobody doubts that foster *parents* can receive government funds to care for children, even if they provide religious instruction to the children in their care.

⁵ Plaintiffs themselves appear to doubt the relevance of this general interest in child welfare in this context, describing foster care as a manifestation of that interest, but then distinguishing its history as unrelated to refugee children. *See* Pls.’ Opp. at 26–27 & n.18.

Second, even if foster-care services did constitute a civil function, the government has not delegated it to USCCB. Plaintiffs argue that the government cannot, consistent with the Establishment Clause, delegate the administration of a federal program to a religious organization if the latter will administer it in a manner the government could not, citing *Norwood v. Harrison*, 413 U.S. 455, 463–67 (1973). However, Plaintiffs allow that the government may *fund* organizations that engage in private activities it could not constitutionally carry out itself. Pls.’ Opp. 21. Plaintiffs never explain why USCCB should be thought of as “administering” the URM Program, as opposed to simply receiving funds under that program to carry out charitable activities.

Nor is there any reason to adopt Plaintiffs’ tendentious characterization of USCCB’s conduct. USCCB has long provided foster-care services to immigrant children. The government has simply elected to fund those services, while maintaining exclusive control over the program, its performance benchmarks, and the granting and renewing of funding. *See* USCCB MSJ 25; USCCB Opp. 21–22. USCCB does not determine, for example, whether children are eligible for the program, which other providers may participate, or the conditions on which they may do so—nor, given the presence of USCRI and Upbring, does USCCB have any say in whether same-sex couples may serve as foster parents under the program. USCCB thus lacks any semblance of “a monopoly” over foster-care services in the program. *Shurtleff*, 142 S. Ct. at 1609 (Gorsuch, J., concurring in the judgment). USCCB no more *administers* the URM Program than would Plaintiffs themselves, were they to choose to serve as foster parents and receive a placement. They would then be receiving government assistance to provide private care for children, but they would not be *acting as the government*. So too for USCCB.

Further, the government has gone to great lengths to ensure that USCCB *cannot* exclude same-sex couples from the URM Program, a reality with which Plaintiffs steadfastly refuse to grapple, continuing to make the blinkered argument that the government has “categorically depriv[ed] Plaintiffs ... of an equal opportunity to serve as Program foster parents.” Pls.’ Opp. 21. It has done nothing of the kind. Instead it has gone to great lengths to restructure the operation of the URM Program to accommodate Plaintiffs’ demands and ensure that they can serve as foster parents. That being the case, it cannot seriously be maintained that, by continuing to fund USCCB’s services, the government’s actions have “a significant tendency to facilitate, reinforce, and support private discrimination.” *Norwood*, 413 U.S. at 466.

3. Accommodating USCCB’s Religious Beliefs Imposes No Harms on Anyone.

Plaintiffs briefly reassert that the government may not accommodate religious adherents if doing so “shifts costs, burdens, or harms to nonbeneficiaries.” Pls.’ Opp. 20–21. But again, the program as modified with the consortium does not impose any costs, burdens, or harms either on Plaintiffs or any other same-sex couple. There is an alternative provider ready and willing to work with them, as well as a neutral clearinghouse to conduct intake in an identical way for all applicants. *See* USCCB Opp. 24–25. Moreover, as USCCB has previously detailed, the Supreme Court has repeatedly upheld religious exemptions despite significant third-party burdens—including private discrimination. *See id.* at 25–26 & n.5.⁶

⁶ Moreover, after *Kennedy*, it is doubtful that courts should engage in an “abstract” and “ahistorical” inquiry into whether an accommodation creates excessive third-party harms. 142 S. Ct. at 2427. All the cases on which Plaintiffs rely as the basis of this inquiry apply either the now-defunct *Lemon* test or “its endorsement test offshoot.” *Id.*; *see Est. of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708–10 (1985) (applying *Lemon*); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335–39 (1987) (same); *id.* at 348 (O’Connor, J., concurring in the judgment) (applying the endorsement test); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 17 (1989) (plurality opinion) (same). Instead, courts should rely on “historical practices and understandings” to identify when third-party burdens create an establishment problem—a

B. Plaintiffs' Fifth Amendment Claims Fail.

As an initial matter, government action that allows a religious organization to act consistently with its beliefs while passing muster under the Establishment Clause receives (at most) only rational-basis review under other constitutional provisions. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987); *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004). This is consistent with the principle that courts assess constitutional claims under “an explicit textual source of constitutional protection,” not “more generalized” ones. *Conn v. Gabbert*, 526 U.S. 286, 293 (1999) (citation omitted) (challenges to the reasonableness of government search “clearly fall” under the Fourth Amendment, not the Fourteenth).

In response, Plaintiffs contend that their claims fundamentally rest on the Fifth Amendment, not the Religion Clauses. Pls.’ Opp. 15 n.12. But that assertion runs contrary to virtually all of Plaintiffs’ framing of this case to date, which, until they sought summary judgment, focused on the purported use of “religious doctrine” to “exclude” same-sex couples from serving as foster parents. Dkt. 21 (“Pls.’ Amend. Compl.”) ¶ 1.⁷ Even in the very first paragraph of their opposition, Plaintiffs cannot resist speaking of grants being “administered” and opportunities denied pursuant to “USCCB’s religious beliefs.” Pls.’ Opp. 1. In any event, the “explicit textual source of constitutional protection” on which this case turns is the First Amendment, *Gabbert*, 526

threshold Plaintiffs have not attempted to satisfy. *See Kennedy*, 142 S. Ct. at 2428 (citation omitted); *see also* Fed. Defs.’ Opp. 14; USCCB MSJ 18–19.

⁷ *E.g.*, *id.* at 17 (alleging a violation of the Establishment Clause as “Count I”); Pls.’ MTD Opp. 1 (“Plaintiffs ... are a married same-sex couple who have been denied the opportunity to become foster parents ... because Federal Defendants have authorized and enabled ... USCCB ... to administer its URM and UC grants based on its religious doctrine.”); May 15, 2019 Tr. 8–9 (representing that “Plaintiffs ... fundamental claim[]” rests on their desire “to be able to participate in these government funded administered programs without reference to the religious beliefs of the grantees and subgrantees”); *id.* at 12 (“Ultimately what plaintiffs are seeking is for the government to fund and administer a program that is not based on these extraneous religious beliefs of the grantees and subgrantees.”).

U.S. at 293 (citation omitted), which governs the circumstances in which the government may—or may not—accommodate religious beliefs like USCCB’s. As the government has explained, “The premise of this lawsuit is not any Government policy against foster parenting by same-sex couples,” but “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.” Fed. Defs.’ Opp. 17.

It makes no difference that Plaintiffs base their Establishment Clause claim on the fact that the government is allegedly refusing to prohibit a private entity from discriminating against them. *Amos* also concerned a religious exemption from an antidiscrimination provision: A claimant who lost his job because he was not a co-religionist challenged Title VII’s antidiscrimination exemption for religious employers under the First and Fifth Amendments. 483 U.S. at 330, 338–39. Upon upholding the exemption under the former, *id.* at 334–38, the Court applied rational-basis review to the latter claim, *id.* at 339, consistent with *Gabbert*. The same was true in *Locke*, where the challenger to a public funding program that excluded religious studies brought an equal protection challenge, as well as First Amendment claims. The Court concluded that because the program was “not a violation of the Free Exercise Clause,” it would “apply rational-basis scrutiny to [the challenger’s] equal protection claims.” 540 U.S. at 720 n.3. The same rule should apply here.

Under that rule, it is certainly rational to permit a premier provider responsible for half of the URM Program’s nationwide capacity to continue to participate in the program in light of the government’s legitimate goals of providing foster-care services for immigrant children, as well as avoiding burdening religious practice. But in any event, as USCCB has explained, Plaintiffs’ claims fail under any level of scrutiny for the simple reasons that the *government* is not

discriminating against Plaintiffs or infringing on their liberty interests (however defined), and neither USCCB nor its subgrantee are state actors. *See* USCCB MSJ 36–43; USCCB Opp. 31–37.

1. There Is No Government Action to Ground an Equal Protection or Due Process Claim.

Plaintiffs are emphatic that the government *itself* has discriminated against them and has interfered with their constitutionally protected liberty interests. *See* Pls.’ Opp. 16. But the government has no policy against same-sex couples serving as foster parents. To the contrary, far from interfering with Plaintiffs’ asserted liberty interests, the government has made significant efforts to accommodate them here. Plaintiffs nonetheless offer two theories of government action. Both fail.

First, Plaintiffs insist that the government “knowingly enabl[ed], ratif[ied], and fund[ed] USCCB’s religion-based discrimination.” *Id.* at 16 n.14. But, once again, Plaintiffs have zero evidence that the government even *knew* that USCCB had any objection to placing children with same-sex foster parents at the time it awarded the grants at issue. *See* USCCB MSJ 39; USCCB Opp. 32 n.7. That sets this case apart from one Plaintiffs cite where, at the motion-to-dismiss stage, it was at least alleged that the State had “expressly acknowledg[ed] and accept[ed] that certain faith-based agencies may elect to discriminate on the basis of sexual orientation in carrying out ... state-contracted services.” *Dumont v. Lyon*, 341 F. Supp. 3d 706, 745 (E.D. Mich. 2018).⁸

But even if Plaintiffs had such evidence, the government’s mere knowledge of private discrimination does not constitute *government* discrimination. Instead, Plaintiffs have to show that

⁸ Plaintiffs also cite *Rogers v. United States Department of Health & Human Services*, 466 F. Supp. 3d 625, 642–43 (D.S.C. 2020), but that decision concerned traceability, a component of Article III standing analysis that is distinct from the state-action doctrine, which imposes a substantive limit on the reach of the Fifth and Fourteenth Amendments. *See* Dkt. 110-2 (“Fed. Defs.’ MSJ”) 26.

the government acted or refrained from acting “‘because of’” USCCB’s alleged disfavoring of same-sex couples. *Ashcroft v. Iqbal*, 556 U.S. 662, 675–77 (2009) (citation omitted); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (requiring a “discriminatory purpose”). Plaintiffs have made no effort to satisfy this standard. Nor, as USCCB has explained, could they. *E.g.*, USCCB MSJ 27–30, 38–39; USCCB MSJ Opp. 31–35. There is no evidence that the government continues to work with USCCB because it wants to advance USCCB’s religious views about marriage, as opposed to a desire to retain the bandwidth of a premier provider responsible for half of URM Program capacity. A simple thought experiment demonstrates this point. If the government were funding USCCB “because of” its religious beliefs, one would expect that were USCCB to leave the program tomorrow, the government would limit its search for a replacement to organizations that would similarly decline to license or place children with same-sex foster parents. That, of course, is absurd. Yet that is effectively what Plaintiffs must establish to prevail on their Fifth Amendment claim.

Plaintiffs’ (unfounded) focus on the government’s “knowledge” here is thus entirely beside the point. *See* USCCB MSJ 39. Indeed, the Supreme Court could not have been more clear that the government’s allowing a private, religiously motivated choice does not make that private choice the government’s. “Action taken by private entities with the mere approval or acquiescence of the State is not state action.” *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999). That is true even if the private actor receives government funds. In *Rendell-Baker v. Kohn*, for example, a private school’s firing of employees was not state action, even though “virtually all of the school’s income was derived from government funding.” 457 U.S. 830, 840 (1982); *see also* USCCB MSJ 41–43.

Second, Plaintiffs take issue with the government’s creation of the consortium, claiming that it was “expressly designed to segregate married same-sex couples for unequal treatment.” Pls.’ Opp. 16 n.14. Even putting aside the fact that *Plaintiffs themselves requested* that the program be modified as the government has done, there is no purposeful discrimination here, nor is the government interfering with Plaintiffs’ exercise of fundamental rights. As explained, all prospective foster parents submit to the same application process and receive the same services from interchangeable providers. *See supra* pp. 2–10. The government has guaranteed that both the third-party intake agency and an alternative provider are able to work with same-sex couples. No one is subject to unequal treatment, nor is there any government-imposed obstacle to Plaintiffs’ efforts to foster. It is true that USCCB objects to its subgrantee working with same-sex couples, but given the protections of the modified URM Program, that objection is purely abstract as far as Plaintiffs are concerned. More to the point, it has nothing to do with the government, which has no role in the referral process.⁹

One of Plaintiffs’ authorities provides a telling contrast. In *Barrows v. Becerra*, 24 F.4th 116 (2d Cir. 2022), the government heavily regulated the intake decisions of private hospitals and “extensive[ly] educat[ed]” and “exert[ed] pressure” on them to submit Medicare reimbursement claims “only for inpatient admissions that [the government] would characterize as inpatient admissions.” *Id.* at 137–39. As a result of that governmental pressure, the decision to reclassify patients was attributable to government action. Here, by contrast, the government has no role in the decisions made by USCCB or USCRI with respect to same-sex couples. If USCCB abandoned its religious convictions tomorrow, there is no evidence to suggest that USCRI would not

⁹ Moreover, even assuming Plaintiffs could show some government-imposed obstacle to their ability to foster, they have made no effort to explain how the type of subsidy program at issue here implicates the Due Process Clause. *See* USCCB MSJ 40; USCCB Opp. 34.

immediately begin referring same-sex couples to USCCB without requiring any direction or facing any opposition from the government.

2. Plaintiffs Do Not Contend That USCCB or Its Subgrantee Are State Actors.

The actions of USCCB and its subgrantee are not “fairly attributable” to the government. *Rendell-Baker*, 457 U.S. at 838 (citation omitted). Among other reasons, foster-care services are not a “traditional, exclusive public function.” *Halleck*, 139 S. Ct. at 1928. USCCB thoroughly explained why neither it nor its subgrantee are state actors, USCCB MSJ 40–43, and Plaintiffs make no contrary argument.

III. USCCB IS A PROPER SUMMARY JUDGMENT MOVANT.

Plaintiffs briefly assert that USCCB may not move for summary judgment because Plaintiffs “are not seeking relief against [it].” Pls.’ Opp. 15 n.10. Plaintiffs ground that contention solely in the phrasing of the pre-2010 version of Federal Rule of Civil Procedure 56, which “addressed motions by claiming and defending parties in separate subsections,” 11 Moore’s Fed. Prac. Civ. § 56.03 (2022), and thus referred to “A party claiming relief” and “A party against whom relief is sought.” Even assuming USCCB would not be a “party against whom relief is sought” under the prior iteration of the rule, the current (and governing) version of the rule abolishes this distinction, saying simply: “A party may move for summary judgment”—without excluding what Plaintiffs term “nominal defendants.” Fed. R. Civ. P. 56(a); 11 Moore’s Fed. Prac. Civ. § 56.03 (“Any party may move for summary judgment.”); 10A Wright & Miller Fed. Prac. & Pro. Civ. § 2711 (4th ed. Apr. 2022 update) (“Rule 56 permits any party to a civil action to move for a summary judgment.”). As a named defendant, USCCB is clearly a “party” to these proceedings and thus may move for summary judgment. *Cf. U.S. ex rel. Hindin v. N.Y. Lutheran Med. Ctr.*, No. 00-cv-7499, 2009 WL 366490, at *1 (E.D.N.Y. Feb. 13, 2009) (holding that

“because it is *not* named in the Second Amended Complaint,” the State “therefore, ... has no standing to move for summary judgment,” and collecting cases (emphasis added).¹⁰

Plaintiffs cite no decision or commentary supporting their position, instead pointing to a committee note indicating that “[t]he standard for granting summary judgment remains unchanged” after the 2010 amendments. Fed. R. Civ. P. 56 advisory committee’s note to 2010 amendment. That is a non sequitur. Of course, the “standard” for summary judgment remains the same: “subdivision (a) [of Rule 56] continues to require that there be no genuine dispute as to any material fact and that the movant be entitled to judgment as a matter of law.” *Id.* But that says nothing about the *parties* entitled to seek relief under that standard, any of which “may move for summary judgment.” Fed. R. Civ. P. 56(a).

CONCLUSION

USCCB has demonstrated that, on the undisputed facts, Plaintiffs lack any redressable injury. Even if Plaintiffs’ claims were not moot, they fail, as the amended URM Program passes muster under both the First and Fifth Amendments. For these reasons, USCCB is entitled to summary judgment.

¹⁰ Both before and after the amendment of Rule 56, courts have entertained motions for summary judgment—and responses thereto—from Rule 19 defendants without comment. *E.g.*, *E.E.O.C. v. Peabody W. Coal Co.*, No. 01-cv-01050, 2012 WL 5034276, at *1 (D. Ariz. Oct. 18, 2012); *Dickinson v. Ind. State Election Bd.*, 817 F. Supp. 737, 743 (S.D. Ind. 1992).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2022, I electronically filed the foregoing Reply with the Clerk of the Court using the Court's CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system to the parties indicated on the electronic filing receipt.

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