IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' REPLY IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

When Plaintiffs Fatma Marouf and Bryn Esplin, a married same-sex couple, approached the subgrantee administering the Unaccompanied Refugee Minors ("URM") Program in the Dallas-Fort Worth area on Federal Defendants'[1] behalf to inquire about becoming foster parents to a Program child in Federal Defendants' care, they were turned away because they do not "mirror the Holy Family." That could not have come as a surprise to Federal Defendants, which knew even before they awarded a grant to Defendant United States Conference of Catholic Bishops ("USCCB") that USCCB, through its subgrantees, would discriminate against married same-sex couples like Plaintiffs on the basis of its religious beliefs condemning such couples. Seeking to evade judicial review of the myriad constitutional concerns presented by Federal Defendants' discriminatory administration of the URM Program by reference to USCCB's religious beliefs, Defendants claim this case is moot in light of the recently implemented "Consortium" in the Dallas-Fort Worth area. But, in fact, Federal Defendants' constitutional violations have only taken an even more pernicious form.

Federal Defendants' actions continue to violate the Fifth Amendment's guarantees of equal protection and due process. Defendants cannot hide behind the state action doctrine; there is no dispute that Federal Defendants are governmental actors, and Plaintiffs brought this case against Federal Defendants—with USCCB joined as a nominal defendant only—because it is the Government's conduct that Plaintiffs seek to redress. And it is indisputable that Federal Defendants' actions continue to treat married same-sex couples differently than other couples. Such treatment continues to fail constitutional scrutiny.

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

Federal Defendants also continue to violate the Religion Clauses of the First Amendment, which courts are construed in harmony to ensure governmental neutrality as to religion. Far from such neutrality, Federal Defendants continue to delegate governmental functions to USCCB while failing to maintain adequate safeguards to ensure that such functions are not carried out to serve sectarian ends. And it continues to be the case that such impermissible delegation cannot be saved by recharacterizing it as a religious accommodation.

ARGUMENT

I. FEDERAL DEFENDANTS CONTINUE TO VIOLATE THE EQUAL PROTECTION AND DUE PROCESS GUARANTEES OF THE FIFTH AMENDMENT.

A. The Consortium Does Not Moot Plaintiffs' Fifth Amendment Claims.

The Consortium does not redress Plaintiffs' injuries to their equal protection and due process rights. Plaintiffs continue to seek what they are entitled to by law: fully equal treatment, not just with respect to a common URM Program entrance portal, but indeed in all aspects of their interface with the Program from recruitment and screening through processing, training, licensure, and placement. Defendants' mischaracterizations of the relief that Plaintiffs seek aside, Fed. Defs.' Opp'n to Pls.' Mot. for Summ. J. ("FD Opp'n") at 8 (Dkt. 118), Plaintiffs have made clear, that, at bottom, they seek to foster a child through a system that does not discriminate against them as a married same-sex couple. *See, e.g.*, May 15, 2019 Hr'g Tr. at 9:9-17, 11:5-10 (Dkt. 114-3); Decl. of Fatma Marouf ("Marouf Decl.") ¶ 20 (Dkt. 108-3). For the reasons explained at length in Plaintiffs' prior briefing, the Consortium does not fit the bill. *See* Mem. of Law in Supp. of Pls.' Opp'n to Defs.' Mots. for Summ. J. ("Pls.' Opp'n") at 8-13 (Dkt. 114).

Federal Defendants curiously contend that the "Consortium intake approach does not foster any sort of separation among foster parents on the basis of sexual orientation." FD Opp'n at 4. This is patently untrue and a product of Federal Defendants' disingenuous focus only on the subset

of applicants who are referred to Upbring, as opposed to all applicants, only some of whom may be referred to Catholic Charities of Dallas ("CCD").

Imagine that the USCRI screening process is a literal doorway through which all URM Program foster parent applicants must enter. Once an applicant enters the doorway, there are two booths for licensing foster parents and placing children with them—CCD and Upbring. Above the doorway, there is a sign indicating that married different-sex couples may go to either the Upbring booth *or* the CCD booth, but another sign indicates that all married same-sex couples must go *only* to the Upbring booth. Federal Defendants argue that, because married same-sex couples and married different-sex couples alike may go to the Upbring booth, the Consortium does not "signify any sort of status-based denigration." *Id.* In doing so, Federal Defendants miss the point. Only married same-sex couples are singled out for differential treatment by being denied the opportunity to go to either booth. *See Heckler v. Matthews*, 465 U.S. 728, 739-40 (1984) (dignitary harm from differential treatment stigmatizes members of the disfavored group as inherently inferior). The Consortium's "principal effect is to identify a subset of state-sanctioned marriages and make them unequal." *United States v. Windsor*, 570 U.S. 744, 772 (2013).

Federal Defendants also miss the point when they emphasize that married same-sex couples can now access the URM Program. Through the Consortium, the Program still denies married same-sex couples equal treatment. That married same-sex couples who are referred to Upbring can access the Program does not remedy the stigma stemming from the segregation of such couples for differential treatment in the first instance—which discourages married same-sex couples like Plaintiffs from proceeding at all. *See, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483, 493-95 (1954) (segregation in accessing government programs generates feelings of inferiority,

regardless of whether the tangible factors of the segregated programs are equal, and deprives those segregated of equal protection under the law).

And the discrimination under the Consortium does not end with segregation for differential treatment. As Plaintiffs have previously explained, Upbring does not have the same capacity to process applications as CCD. Pls.' Opp'n at 7. Imagine again the Upbring booth and the CCD booth, and, this time, imagine that the Upbring booth has only one person responsible for training, licensing, and supporting foster parents and ensuring that the needs of foster children are met, but the CCD booth has ten such people. That is the differential circumstance faced by a married same-sex couple who find themselves among the subset of applicants who are referred to Upbring. Thus, contrary to Federal Defendants' incorrect framing of the question as whether Upbring can process Plaintiffs' application in a vacuum, FD Opp'n at 5, the real question is whether Upbring has capacity to train, license, and support foster parents and children in a manner comparable to CCD. The record shows that Upbring cannot.

Federal Defendants indeed admit that the Consortium was specifically designed to segregate married same-sex couples for differential treatment. FD Opp'n at 7-8 ("the only religious belief at issue in this case is that which kept Catholic Charities of Fort Worth . . . from working with Plaintiffs."). It follows that Plaintiffs can access the URM Program only through a system that continues to discriminate against them on the basis of their sexual orientation and sex and the same-sex character of their marriage. Accordingly, Plaintiffs' Fifth Amendment claims are not moot. Plaintiffs continue to suffer unequal treatment under the Consortium, leaving Plaintiffs with constitutional injuries for which the Court must provide relief. *See Ctr. for Food Safety v. Salazar*, 900 F. Supp. 2d 1, 7 (D.D.C. 2012).

B. Federal Defendants' Actions Are Subject to Heightened Scrutiny.

Federal Defendants' actions are subject to heightened scrutiny because they discriminate against married same-sex couples on the bases of sexual orientation, sex, and the exercise of the fundamental right to marry, Mem. of Law in Supp. of Pls.' Mot. for Summ. J. ("Mot.") at 16-20 (Dkt. No. 108), and because they impinge on the exercise of the fundamental right to marry, *id.* at 20-21. Notably, Defendants do not dispute the general proposition that governmental conduct that discriminates on such bases, or impinges on the exercise of such rights, is subject to heightened scrutiny. Rather, they contend only that, here, the conduct is subject to lesser constitutional scrutiny because Plaintiffs separately challenge the conduct under the First Amendment. That is not the law. *See, e.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689-90 (2017) (sex-based classifications trigger heightened scrutiny); *Baskin v. Bogan*, 766 F.3d 648, 654-56 (7th Cir. 2014) (sexual orientation-based classifications trigger heightened scrutiny); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014) (same); *Windsor v. United States*, 699 F.3d 169, 181-85 (2d Cir. 2012) (same), *aff'd*, 570 U.S. 744; *see also Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (classifications that significantly interfere with exercise of fundamental right trigger strict scrutiny); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) ("[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined").

The cases Defendants cite are not to the contrary. In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, the Court applied rational basis review in disposing of an equal protection challenge to a provision in the Civil Rights Act of 1964 that "draw[s] distinctions on religious grounds," which the Court had held did not violate the First Amendment. 483 U.S. 327, 339 (1987). But that is because, in *Amos*, the equal protection claim challenged governmental discrimination based on *religion*. By contrast, here, the equal protection

claim challenges governmental discrimination based on *sex, sexual orientation, and the exercise of the fundamental right to marry, not* religion. *Connecticut v. Gabbert* and *United States v. Lanier* are similarly far afield. In *Gabbert*, the Court merely held that challenges to the reasonableness of a search must be reviewed under the rubric of the Fourth Amendment, not the Fourteenth. 526 U.S. 286, 293 (1999). Likewise, in *Lanier*, the Court simply noted that constitutional claims covered by a specific constitutional provision "must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." 520 U.S. 259, 272 n.7 (1997). Neither *Gabbert* nor *Lanier* suggested, much less required, that equal protection and due process challenges to governmental conduct on bases *independent of religion* (here, discrimination based on sexual orientation, sex, and the exercise of the fundamental right to marry, as well as impingement on the exercise of the fundamental right to marry) are foreclosed where the conduct is separately challenged under the Religion Clauses of the First Amendment.

At bottom, the cases Defendants cite stand only for the unremarkable proposition that Plaintiffs' religion-based claims should be reviewed under First Amendment doctrine, and Plaintiffs' sexual orientation-, sex-, and fundamental right to marry-based claims should be reviewed under Fifth Amendment doctrine. Because the Fifth Amendment demands heightened scrutiny of governmental discrimination on the basis of sexual orientation, sex, and the exercise of the fundamental right to marry, and governmental impingement on the exercise of the fundamental right to marry, the Court must apply heightened scrutiny when assessing Plaintiffs' Fifth Amendment claims.

C. Under Any Level of Scrutiny, Federal Defendants' Actions Impermissibly Infringe Plaintiffs' Equality and Liberty Interests.

Federal Defendants violate the Fifth Amendment even on rational basis review because their actions disadvantage a disfavored group for its own sake, *U.S. Dep't of Agric. v. Moreno*, 413

U.S. 528, 534 (1973), and therefore bear no rational relationship to a legitimate governmental interest, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

Federal Defendants' assertion that they bear no "animosity" toward married same-sex couples again misses the point. FD Opp'n at 18. The constitutional promise of equal protection under the law restricts governmental actors from "bowing to" the discriminatory biases of third parties. *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *Reitman v. Mulkey*, 387 U.S. 369, 378-81 (1967) (government encouragement of, and involvement in, private discrimination held contrary to the Fourteenth Amendment). Accordingly, Federal Defendants continue to violate the Constitution by operationalizing USCCB's private biases against married same-sex couples, to the detriment of such couples, in the administration of Federal Defendants' own program. In so doing, Federal Defendants have taken on USCCB's animus as their own. The case law is clear that such discrimination is no less an impermissible form of discrimination for its own sake, which necessarily fails even rational basis review for want of furthering any legitimate governmental interest.

Defendants assert that Program children would suffer on account of disruption in services if USCCB were to drop out of the Program.[2] Defendants then make a faulty leap of logic, falsely reasoning that it follows from their contention that permitting discrimination against married same-

[2] Notably, Federal Defendants cannot simultaneously claim, on the one hand, that married same-sex couples, who can be referred only to Upbring, enjoy the same level of opportunity as married different-sex couples, who can also be referred to CCD, and, on the other hand, that USCCB is "one of the premier providers," with a "lengthy track record and performance" in administering "a host of programs," that offers "a highly select group of providers with unique programmatic expertise." FD Opp'n at 19, 22 (internal quotation omitted).

sex couples under the Program rationally furthers the Government's interest in the welfare of Program children. This argument has two significant flaws.

First, in contrast to the concrete evidence of harms to children from denying same-sex couples an equal opportunity to be foster parents cited by Plaintiffs, *see, e.g.*, Pls.' Statement of Material Facts ("Pls.' SUMF") ¶¶ 121, 126-28, 139, 200-03, 221 (Dkt. 108), Defendants simply declare that a disruption of services would occur and—without any evidentiary support—baldly ask the Court to draw what they assert are "commonsense conclusion[s]" that the pool of foster parents would diminish if the Government were to cease facilitating USCCB's discrimination. FD Opp'n at 21-22. Defendants had ample opportunity to develop evidence in support of their conjecture as to Program disruption, especially in light of the significant transitions in the URM and Unaccompanied Alien Children ("UAC") Programs in recent years—the departure of the State of Texas from the URM Program, the departure of USCCB from the UAC Program in the Dallas-Fort Worth area, and the transition of the URM Program in the Dallas-Fort Worth area from Catholic Charities of Fort Worth ("CCFW") to CCD. Yet they offered none. "To survive a motion for summary judgment, . . . a party's claims must rely on evidence and not bare allegations." *Footbridge Ltd. Tr. v. Zhang*, 584 F. Supp. 2d 150, 154 (D.D.C. 2008), *aff'd*, 358 F. App'x 189 (D.C. Cir. 2009).

Second, as Plaintiffs have previously explained, permitting such discrimination is inherently irrational, as it harms Program children by depriving them of placements that are in their best interests, in contravention of the very mission of the Program. *See* Mot. at 22-24. This irrationality is underscored by the fact that ensuring equal treatment of married same-sex couples under the Program need not lead to USCCB dropping out of the Program. As Plaintiffs have previously noted, the relief that they ultimately seek is equal treatment. So long as Federal

Defendants implement the Program in a manner that treats all prospective foster parents without segregation and otherwise fully equally—not just as to the doorway through which they enter to start the application process but also as to the rest of the process, from the recruitment, screening, training, licensure, and support of foster parents, to the child placement that follows (the responsibility for which lies with Federal Defendants, FD Opp'n at 2)—the Fifth Amendment can be satisfied.[3]

D. Defendants Cannot Hide Behind the State Action Doctrine.

For the reasons stated in Plaintiffs' Opposition to Defendants' Motions for Summary Judgment, Defendants' invocation of the state action doctrine falls wide of the mark. *See* Pls.' Opp'n at 15-18. In short, there is no dispute that Federal Defendants are state actors, and Plaintiffs' claims are directed solely to Federal Defendants' actions. To argue otherwise, Defendants must necessarily concede that the Government has permitted a religious organization to wield governmental power in a manner that violates the nondelegation requirements of the Establishment Clause.

II. FEDERAL DEFENDANTS CONTINUE TO VIOLATE THE RELIGION CLAUSES OF THE FIRST AMENDMENT.

A. The Consortium Does Not Moot Plaintiffs' First Amendment Claim.

The Consortium not only segregates married same-sex couples for differential treatment but specifically does so by reference to USCCB's religious beliefs. *See* Fed. Defs.' Statement of Undisputed Material Facts ¶¶ 89-91, 93 (Dkt. 110-3). Indeed, Federal Defendants freely acknowledge that the entire point of the Consortium is to ensure that married same-sex couples

[3] This explains not only why permitting discrimination against married same-sex couples under the Program does not *rationally* further the Government's interest in the welfare of Program children but also why, under heightened scrutiny, the challenged conduct cannot be said to be the least restrictive means of furthering any compelling governmental interest.

are not referred to a provider that will reject them on religious grounds. FD Opp'n at 7. And, in the same breath, Federal Defendants concede that "the only religious belief at issue in this case is that which kept Catholic Charities of Fort Worth . . . from working with Plaintiffs." *Id.* at 7. In other words, Federal Defendants acknowledge that, in implementing the Consortium, they adopted USCCB's religious beliefs as a determinant of governmental decision-making, *i.e.*, the provider to which married same-sex couples are referred. Thus, Federal Defendants' assertion that it is now acting "neutral[ly]" with respect to religion rings entirely hollow, FD Opp'n at 12 (internal quotation omitted), and their continuing violation of the First Amendment is even more stark, as set forth below.

B. Defendants' Reliance on *Kennedy* and *Fulton* Does Not Save the Challenged Conduct.

Defendants note that, as clarified by *Kennedy*, the Court's analysis of Plaintiffs' First Amendment claim must "faithfully reflect the understanding of the Founding Fathers." FD Opp'n at 9 (internal quotation omitted). But, as Plaintiffs detailed in their opposition to Defendants' motions for summary judgment, the URM Program is a unique creature of the federal government's plenary authority over immigration, distinct from domestic child welfare programs, which did not exist at the time of our Founding Fathers. As Defendants acknowledge, even the most liberal characterization of the history of the URM Program dates back only to 1948. *See* Fed. Defs.' Mot. for Summ. J. at 4 (Dkt. 109). What is more, as Plaintiffs have previously explained, even domestic foster care programs date back only to the late 1800s. At bottom, there could not have been any understanding of the Founding Fathers as to the URM Program or even domestic foster care programs.

This does not mean that there is no relevant history by which to judge Plaintiffs' First Amendment claims. As Defendants acknowledge, history confirms that the Government may not

delegate an inherently governmental function, and thereby grant a monopoly over, such function to a sectarian institution. *See* USCCB's Mem. of P. & A. in Opp'n to Pls.' Mot. for Summ J. ("USCCB Opp'n") at 21-22 (Dkt. 115). As set forth below, this is precisely what Federal Defendants have done.

Defendants also continue to misapprehend the relevance (or lack thereof) of *Fulton* to this case. For the reasons already stated in Plaintiffs' Motion for Summary Judgment and in Plaintiffs' Opposition to Defendants' Motions for Summary Judgment, *Fulton* has no bearing on this case. *See* Mot. at 35-36 & n.12; Pls.' Opp'n at 18-19. In short, *Fulton* held that, if a city allows standardless individualized exceptions from nondiscrimination requirements, the nondiscrimination requirements are not neutral or generally applicable in the first place. As a result, the city could not, on the facts of that case, withhold an individualized exception from a religious organization without violating the Free Exercise Clause. Nor would ruling for Plaintiffs "condemn the relief" ordered in *Fulton*, as USCCB (but not Federal Defendants) claims. USCCB Opp'n at 17. In *Fulton*, the city refused to renew its foster care contract with Catholic Social Services unless "the agency agrees to certify same-sex couples." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1874 (2021). Nothing in Plaintiffs' proposed order necessarily requires Federal Defendants to draw that line. Moreover, as a formal matter, *Fulton* did not order any relief at all; it merely reversed the Third Circuit's judgment and remanded the case "for further proceedings," without dictating the exact remedy that must be entered on remand. *Id.* at 1882.

C. Federal Defendants Continue to Impermissibly Delegate Inherently Governmental Functions to a Sectarian Institution Without Maintaining Adequate Safeguards to Avoid Discrimination Against Religiously Disfavored Classes.

1. Federal Defendants continue to impermissibly fuse governmental and religious functions.

Defendants assert that governmental and religious functions are not fused because the governmental power delegated to USCCB is (1) not "of the sort" contemplated by the Supreme Court in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), and *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994); (2) the delegation is not made by reference to USCCB's religious identity; and (3) the delegation is not standardless. FD Opp'n at 11-13.[4] All three assertions miss the mark. Indeed, the Consortium only makes more stark that Federal Defendants have impermissibly delegated an inherently governmental function to USCCB with no meaningful oversight or safeguards against improper imposition of religious requirements on Program participants.

As to Defendants' first and second assertions, there is no more inherently governmental function than public policymaking. *See, e.g.*, Federal Acquisition Regulation (FAR), 48 C.F.R. § 7.503(c)(5) (examples of functions considered to be "inherently governmental functions" that may not be delegated under services contracts entered into by the federal government include "[t]he determination of agency policy . . ."). And Federal Defendants concede that USCCB is the arbiter of a key policy determination—the referral criteria applicable to married same-sex couples—and that they delegated this function to USCCB precisely to allow USCCB to discriminate against a

[4] Federal Defendants also question the "currency" of *Larkin* and *Grumet*, FD Opp'n at 11, but nothing in *Kennedy* purports to overrule or limit either case. *See Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1609 (2022) (Gorsuch, J., concurring) (expressly pointing out that *Larkin* was properly analyzed under the Establishment Clause analysis subsequently adopted in *Kennedy*). They remain binding precedent.

religious disfavored class. Again, Federal Defendants acknowledge that the point of the Consortium is to ensure that married same-sex couples are not referred to a provider that will reject them on religious grounds. FD Opp'n at 7. And Federal Defendants recognize that "the only religious belief at issue in this case is that which kept Catholic Charities of Fort Worth . . . from working with Plaintiffs." *Id.* at 7. Accordingly, USCCB has a monopoly over the delegated function, to serve a sectarian end.

As to Defendants' third assertion, the record confirms that Federal Defendants maintain no safeguards to avoid discrimination against religiously disfavored classes. As Plaintiffs have previously explained, Federal Defendants exercise no oversight over, and indeed have blinded themselves to, the referral criteria under the Consortium. *See* Mot. at 24-25 & n.10. Federal Defendants have even gone so far as to grant to USCCB a prospective blanket waiver of any requirement to which USCCB might object. *Id.* at 10-11, 31, 37-38; *see also* Pls.' SUMF ¶ 108.

In sum, contrary to Defendants' assertions, it could not be clearer that, under the Consortium, a *governmental* function has been delegated by specific reference to *religion* in the absence of any *standard* as to the exercise of the delegated function.

2. Federal Defendants continue to impermissibly use government authority and funds to discriminate on the basis of religion.

By failing to maintain adequate safeguards to prevent USCCB from administering Program grants to further its own religious beliefs, Federal Defendants continue to violate the Establishment Clause by preferring one denominational view over others. *Larson v. Valente*, 456 U.S. 228, 255 (1982); *see also* Mot. at 31-32; *Agostini v. Felton*, 521 U.S. 203, 234-35 (1997); *In re Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 933 (S.D. Iowa 2006) (finding First Amendment violation where there were "no adequate safeguards" to ensure that government funds were not directly used to coerce religion), *aff'd in relevant part*, 509

F.3d 406 (8th Cir. 2007). Defendants do not contend otherwise; nor do they attempt to distinguish *Agostini* or *Prison Fellowship Ministries*.

D. Allowing USCCB to Administer Federal Grants in a Religiously Discriminatory Manner Is Not a Permissible Religious Accommodation.

As Plaintiffs have previously explained, Federal Defendants' actions do not constitute a permissible religious accommodation for two reasons: (1) they do not lift a substantial, government-imposed burden on the exercise of religion; and (2) they impose undue burden on third parties. Mot. at 32-33.

Federal Defendants do not dispute that their accommodation of USCCB lifts no substantial, government-imposed burden on the exercise of religion, as Plaintiffs have previously set forth. Instead, Federal Defendants assert that they need not meet that legal standard. FD Opp'n at 13-14. Their attempt to distinguish *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), falls flat. There, in a portion of Justice Blackmun's opinion that was joined by a majority of the Court, the Court criticized Justice Kennedy's separate opinion for characterizing the display of a crèche on government grounds "as an 'accommodation' of religion." 492 U.S. at 613 n.59. The majority explained that "an accommodation of religion, in order to be permitted under the Establishment Clause, must lift 'an identifiable burden on the exercise of religion.' " *Id.* (internal quotation and emphasis omitted). That explanation is bolstered by *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989), in which a plurality of the Court noted that prior cases upholding religious exemptions did so where the exemptions "were designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause." *Id.* The *Texas Monthly* plurality was not fashioning (and, as a plurality, could not fashion) a new constitutional rule. It only described the standards the Court

had long employed; that standard remains the law, *see, e.g.*, *Kaemmerling v. Lappin*, 553 F.3d 669, 677 (D.C. Cir. 2008), and Federal Defendants do not purport to have met that standard in this case.

In any event, Federal Defendants also do not dispute that their accommodation of USCCB imposes undue burden on third parties. Instead, Federal Defendants assert that Plaintiffs have no standing to assert the rights of Program children. In doing so, they again miss the mark. Plaintiffs do not purport to bring a claim on behalf of Program children based on harm to those children; they bring only a claim on behalf of themselves based on their own harm. In prosecuting their claim based on their own harm, Plaintiffs are well within their rights to direct the Court's attention not only to case law teaching that a religious accommodation is impermissible where it imposes undue burden on third parties, but also to the fact that Federal Defendants' accommodation of USCCB imposes undue burden on a range of third parties, including, but not limited to, Plaintiffs themselves. In other words, the question here is not whether Plaintiffs has standing to bring the claim (which the Court has already ruled that they do, Mem. Op. at 16-22 (Dkt. No. 48)), but whether the accommodation is impermissible because it harms third parties (which Federal Defendants effectively concede it does, Mot. at 38 (citing Ltr. to S.C. Gov. Henry McMaster from ACF (Nov. 18, 2021))). Indeed, the doctrinal test expressly asks whether the accommodation harms third parties—*i.e.*, parties not before the Court.[5]

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment should be granted.

[5] Additionally, as discussed above, the harm to children is directly material in analyzing whether the Federal Defendants' actions further even a legitimate governmental interest, let alone the compelling one, as required for purposes of equal protection analysis where the Government admits its overriding interest is providing for the best interests of children in its care.

Dated: October 12, 2022

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CERTIFICATE OF SERVICE

I hereby certify that, on October 12, 2022, a true and correct copy of the foregoing document was filed using the Court's CM/ECF System, which will serve all counsel of record.

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