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## INTRODUCTION

As in their summary judgment briefing, Plaintiffs steadfastly refuse to acknowledge that the facts on the ground have overtaken their case. With the implementation of the consortium, all qualified same-sex couples in the Dallas-Fort Worth area have the opportunity to serve as foster parents via the Unaccompanied Refugee Minor Program (“URM Program”). This renders irrelevant Dr. Brodzinsky’s testimony, which concerns the effects of excluding same-sex couples. Moreover, in discussing these effects, Dr. Brodzinsky assumes both that there is a shortage of foster parents and that allowing USCCB to participate in the URM program somehow will cut off children from families that would best serve their needs. Because both premises are indisputably false, Dr. Brodzinsky’s opinions are irrelevant for this reason also.

Dr. Brodzinsky’s opinions are also unreliable. In its motion, USCCB identified four opinions that were unsupported, contradictory, and inconsistent with the facts of the case. Plaintiffs do not even attempt to defend three of them. That leaves only Dr. Brodzinsky’s claim that forcing USCCB out of the programs will not reduce the number of foster families available. As the Supreme Court has recognized, this claim is facially implausible. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021). And Plaintiffs’ efforts to defend it only underscore its lack of support. Unable to find any supporting evidence in Dr. Brodzinsky’s report—which was expressly based on the *absence* of evidence—Plaintiffs rely solely on his deposition testimony. That is procedurally improper, and even if it were not, the “evidence” involved is largely anecdotal.

Finally, Plaintiffs are unable to show that Dr. Brodzinsky is qualified to testify on the effect of forcing USCCB out of the URM Program. Plaintiffs go to great lengths to establish Dr. Brodzinsky’s credentials generally as a psychologist, but they make no effort to show he has

expertise on the social-scientific question of how the URM Program would absorb the blow of losing half its foster-placement infrastructure overnight.

## **BACKGROUND**

Dr. Brodzinsky's Expert Report, Dkt. 108-38 ("Report"), contains five primary opinions:

- Opinion "A": "Professional child welfare standards provide for the inclusion of all qualified foster and adoptive families so as to best serve the needs of children." Report at 6.
- Opinion "B": "Children in the foster care system are harmed when there are not enough families to meet their needs." Report at 12.
- Opinion "C": "Permitting private child placement agencies, funded by and acting on behalf of the federal government, to turn away same-sex couples can reduce family placement options for children in the child welfare system, thereby undermining their long-term well-being." Report at 16.
- Opinion "D": "Permitting private agencies that administer federal foster care programs to turn away same-sex couples could result in additional negative consequences for LGBTQ youth in the foster care system." Report at 21.
- Opinion "E": "Enforcing nondiscrimination provisions in Federally-funded contracts with or grants to private child placement agencies would not reduce the availability of families for children in the foster care system." Report at 23.

USCCB has moved for exclusion of all five opinions under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and applicable case law.

## **ARGUMENT**

### **I. DR. BRODZINSKY'S OPINIONS ARE IRRELEVANT.**

Dr. Brodzinsky's opinions are irrelevant both because of the implementation of the consortium and because they rest on factual assumptions that conflict with the undisputed facts of this case.

**A. The Adoption of the Consortium Makes Dr. Brodzinsky’s Opinions Irrelevant.**

As USCCB explained, the fact pattern at issue in this litigation no longer bears any resemblance to the scenario Dr. Brodzinsky was retained to address. Dkt. 117-1 (“MTE”) 9–10. Specifically, Dr. Brodzinsky’s opinions concern the effects and consequences of excluding same-sex couples from foster-care programs. *See id.* But with the implementation of the consortium, “all prospective foster parents in the Dallas-Fort Worth area have the opportunity to work with a URM provider.” Dkt. 106-2 (“USCCB SUMF”) ¶ 60; MTE 5–6, 9–10; Dkt. 106-1 (“USCCB MSJ”) 7–9, 12–16; Dkt. 126 (“USCCB MSJ Reply”) 2–9.<sup>1</sup> That being the case, Dr. Brodzinsky’s opinions no longer have any bearing on any live issue in the case.

In response, Plaintiffs cast about for ways in which Dr. Brodzinsky’s opinions might still be relevant in light of the consortium. None are persuasive.

*First*, Plaintiffs claim Dr. Brodzinsky’s opinions are relevant because the consortium imposes a cognizable stigmatic injury on them. Dkt. 128 (“Pls.’ Opp.”) 9–10. As USCCB explained in its summary judgment briefing, it does not. Dkt. 115 (“USCCB Opp. to Pls.’ MSJ”) 9–17; USCCB MSJ Reply 2–9. But even if it did, that would not make Dr. Brodzinsky’s opinions relevant. Plaintiffs may object (despite their earlier representations) to the *manner* in which the consortium guarantees same-sex couples the opportunity to foster, but it still guarantees them the opportunity to foster. Thus, Dr. Brodzinsky’s opinions on the effect of excluding same-sex couples cannot be relevant.

*Second*, Plaintiffs claim that Dr. Brodzinsky’s opinions are relevant because they speak to Federal Defendants’ supposed “failure to adhere to generally applicable and accepted child welfare

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<sup>1</sup> Any opinion related to the Unaccompanied Alien Children Program (“UC Program”), is also irrelevant, as Plaintiffs no longer seek relief as to that program. *See* USCCB MSJ Reply 2.

standards, and disregard for the best interests of the children in its care.” Opp. 11. But that begs the question. Even under Dr. Brodzinsky’s own definition, Federal Defendants would violate child welfare standards only if they excluded prospective same sex foster parents or denied children access to families that would best serve their needs. But as USCCB has explained, both the consortium model and the national placement network discussed below ensure neither scenario comes to pass. MTE 5–6, 9–10, 12–13.

*Finally*, in a footnote, Plaintiffs pile hypothetical upon hypothetical to assert that Dr. Brodzinsky’s opinions are relevant because some children who belatedly identify as LGBT supposedly might have difficulty being placed with a same-sex couple if they are first placed through a USCCB subgrantee. Pls.’ Opp. 10 n.1. As an initial matter, Plaintiffs do not have standing to assert the claims of children in the program. USCCB Opp. to Pls.’ MSJ 11 n.2. And even assuming the accuracy of the outdated declaration on which Plaintiffs base this assertion, Dkt. 116-1 (“USCCB Resp. to Pls.’ SUMF”) ¶ 152 & n.6, it is undisputed that if a child requests a service that USCCB or its subgrantees cannot provide (*e.g.*, placement with a same-sex couple), the case will be referred to the government. Dkt. 110-3 (“Fed. Defs.’ SUMF”) ¶¶ 71–72. Regardless, Dr. Brodzinsky’s Report does not provide a reliable basis for concluding that children who consider themselves LGBT are somehow harmed when they are placed with opposite-sex foster parents. MTE 23–24.

**B. Dr. Brodzinsky’s Opinions Are Irrelevant Because They Rest on False Premises.**

Opinions A–D are also independently irrelevant because they rest on two false factual premises about the operation of the URM Program. First, relying on national statistics about foster care generally, Dr. Brodzinsky assumes that USCCB’s refusal to recruit same-sex couples contributes to a “dramatic shortage” of available foster parents. Report at 9–10. But this is

contrary to unrebutted testimony that no such shortage exists in the program at issue. MTE 11–12. Second, Dr. Brodzinsky assumes that “children in the care of” USCCB’s subgrantees may be denied access to the family that would have best served their needs because of USCCB’s refusal to accept same-sex couples. Report at 16. This assumption fails to account for the consortium and the government’s national network of URM providers. Any provider across the country can identify a suitable family for a child, and the provider takes custody only after identifying a family and receiving the government’s approval. MTE 12–13.

As an initial matter, Plaintiffs do not contest that the consortium and the government’s national placement system undermine Dr. Brodzinsky’s assumption that children will be denied access to the family that would best serve their needs. Plaintiffs do insist that there is a shortage of qualified foster parents in the URM Program, Pls.’ Opp. 16, but their efforts to substantiate that claim rest on a single, ambiguous answer from the deposition of Kenneth Tota, a deputy director of the Office of Refugee Resettlement (“ORR”). Specifically, after Mr. Tota testified that he had “never had an indication that we did not have enough foster care families available” for the URM Program, Plaintiffs’ counsel asked, “But it *could* just as equally also be the case where you *would* not have enough foster families available; correct?” MTE Ex. I, Transcript of Deposition of Kenneth Tota (Sept. 28, 2020) (“Tota Dep.”) at 179:2–7 (emphases added). Mr. Tota responded, “It’s possible.” *Id.* at 179:11. That noncommittal response to a poorly-worded question is far too slender a reed to show that the URM Program is facing a “dramatic shortage” of foster parents. Report at 9–10, 12–16.<sup>2</sup>

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<sup>2</sup> “MTE Ex.” citations are to exhibits filed with the Declaration of David T. Raimer, Dkt. No. 117-2, and the supplemental declaration filed with this Reply.

To begin, the wording of this follow-up question was ambiguous: it is unclear whether counsel was asking if there might *in fact* be a shortage of families presently or in the recent past or whether he was asking if it was *in principle* possible that there could be a shortage someday. If anything, the use of the term “would” suggests the latter. *See Would, Merriam-Webster’s Collegiate Dictionary* (11th ed. 2003) (“used in auxiliary function ... to express a contingency or possibility”). Counsel for the Federal Defendants and USCCB promptly objected to the form of this question, but Plaintiffs’ counsel did not reword it. Tota Dep. at 179:8–10.

More importantly, later in the deposition, Mr. Tota made clear that he was “not aware of a shortage of foster care parents” in the URM program or the state of Texas, and he affirmatively testified that “we have appropriate capacity for the referrals we’re seeking at this time.” *Id.* at 270:13–25. That testimony is corroborated by that of Krystin Peck, who oversaw USCCB’s foster-care programs at the time of the incident that gave rise to this suit. She likewise testified that she was unaware of any shortage of qualified foster parents in the URM program during her time at USCCB. MTE Ex. D, Transcript of Deposition of Krystin Peck (Oct. 2, 2020) (“Peck Dep.”) at 138:7–23. And while the UC Program is no longer at issue in this litigation, given the often overlapping pools of foster parents in the URM and UC programs, it strains credulity to suggest that the URM Program would be experiencing a shortage in foster parents at the same time the UC Program had “more capacity for foster placement than ... children that need ... long-term foster placement.” MTE Ex. B, Transcript of Deposition of Jallyn Sualog (Aug. 26, 2020) (“Sualog Dep.”) at 56:6–13. Plaintiffs’ citation to evidence that is either inapplicable or outside the relevant time period for this litigation does not alter this conclusion. *Compare* Pls.’ Opp. 16 (citing HHS13133, HHS03493, and Devlin Decl.), *with* USCCB Resp. to Pls.’ SUMF ¶¶ 14, 152 & n.6.

**C. Dr. Brodzinsky’s Opinions on the Merits of Same-Sex Parenting Are Irrelevant.**

USCCB also explained that Dr. Brodzinsky’s discussion of the merits of same-sex parenting are irrelevant because neither USCCB nor the Federal Defendants have put that subject at issue. *See* MTE 13–14. Plaintiffs do not contest this point, thus conceding these opinions are inadmissible. *See Day v. D.C. Dep’t of Consumer & Regul. Affs.*, 191 F. Supp. 2d 154, 159 (D.D.C. 2002).

**II. DR. BRODZINSKY’S OPINIONS ARE UNRELIABLE.**

Dr. Brodzinsky’s opinions are unreliable as a general matter because they are wholly divorced from the facts of the case. His individual opinions are also unreliable because they are unsupported, contradictory, and inconsistent with the facts of the case.

**A. Dr. Brodzinsky’s Opinions Are Wholly Divorced from the Facts of the Case.**

To be admissible, expert testimony must be “the product of reliable principles and methods.” Fed. R. Evid. 702(c). But that is not all. As USCCB explained, the expert must also have “reliably applied the principles and methods to the facts of the case.” *Id.* 702(d). Here, Dr. Brodzinsky did not even purport to apply his methodology to the facts. He appears to be entirely unfamiliar with the operation of the URM Program and with USCCB’s role within it. Worse still, he produced his Report before the creation of the consortium, meaning his analysis has nothing at all to say on this critical development. MTE 15–18. His opinions must therefore be excluded.

In response, Plaintiffs emphasize that Dr. Brodzinsky’s methodology is reliable and that disagreement with an expert’s conclusions is not a basis for excluding his testimony. Pls.’ Opp. 14–15. But those arguments omit the critical intermediate step—application. Rule 702 “specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the

facts of the case.” Fed. R. Evid. 702 advisory committee’s note to 2000 amendment. Indeed, “any step that renders the analysis unreliable ... renders the expert’s testimony inadmissible,” including a step that “*merely misapplies [a reliable] methodology.*” *Id.* (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994)). Even testimony “on general principles” must “‘fit’ the facts of the case.” *Id.* Dr. Brodzinsky’s opinions manifestly do not. They analyze the impact of excluding same-sex couples from the foster care system, but the exclusion of same-sex couples is no longer an issue in this litigation.

Plaintiffs also argue that, unlike a lay witness, “an expert may offer testimony relevant to whether the government has satisfied a legal standard without evaluating particular litigants.” Pls.’ Opp. 15. That is of course true. If Plaintiffs asked Dr. Brodzinsky to opine, for example, on the psychological impact of the consortium on same-sex couples, he would not be barred from doing so just because he lacks direct personal experience of its operations. But that is not in fact the subject of Dr. Brodzinsky’s report. Dr. Brodzinsky has instead opined on issues that are either uncontested or unrelated to how the URM Program actually operates.<sup>3</sup>

#### **B. Dr. Brodzinsky’s Individual Opinions Are Unreliable.**

In its motion to exclude, USCCB challenged four of Dr. Brodzinsky’s individual opinions as unreliable. MTE 18–29. For the most part, Plaintiffs do not even try to defend three of them, and its defense of the fourth falls short on several levels.

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<sup>3</sup> Plaintiffs further argue that USCCB cannot contest the use of nationwide generalizations when USCCB itself relies on nationwide generalizations. Pls.’ Opp. 11–12. Although USCCB did rely on nationwide factual assertions to attack the reliability of Dr. Brodzinsky’s opinions, it did so explicitly in the alternative, asserting as its primary objection that such generalizations divorced from the facts of the case are irrelevant. *See* MTE 25 n.5 (“As USCCB has explained, the scope of this case is limited to the Dallas-Fort Worth area. USCCB raises these facts because Dr. Brodzinsky frames his Report at a national level.” (citations omitted)).

**1. Plaintiffs Largely Concede That Three of Dr. Brodzinsky's Opinions Are Unreliable.**

Plaintiffs largely do not respond to USCCB's challenges to the reliability of three of Dr. Brodzinsky's opinions. Again, "[i]f a party fails to counter an argument that the opposing party makes in a motion, the court may treat that argument as conceded." *Day*, 191 F. Supp. 2d at 159; see *Harris v. CitiMortgage, Inc.*, 878 F. Supp. 2d 154, 163 (D.D.C. 2012) (collecting cases). To the extent Plaintiffs fail to respond, they have conceded that these opinions are inadmissible.

*First* is Dr. Brodzinsky's claim that accommodating USCCB's religious beliefs will harm children because it will either contribute to a shortage of available foster families or prevent certain children from being placed with the best family for them. Report at 9–10, 16–21. As explained above, there is no shortage of available foster parents in the URM Program. *Supra* pp. 4–6. Moreover, Dr. Brodzinsky provides no evidence that merely allowing USCCB to participate in the programs somehow deters significant numbers of same-sex couples from participating through other providers. MTE 19. And he fails to consider the loss of foster families that would result from excluding USCCB from the program. *Id.* at 20. Plaintiffs do not contest the latter two points.

*Second* is Dr. Brodzinsky's opinion that same-sex couples will be deterred from participating or unable to find alternate providers. Report at 18–20. Again, Dr. Brodzinsky cited no evidence for his deterrence theory. MTE 21. He was entirely unaware that there are two alternative providers in the Dallas-Fort Worth area—BCFS and Upbring—willing to place children with same-sex couples. *Id.* at 21–22. And naturally, he did not take into account the consortium, which postdates his Report. *Id.* at 22. Plaintiffs offer no response to these points.

*Third* is Dr. Brodzinsky's view that accommodating USCCB "could result in additional negative consequences for LGBTQ youth." Report at 21–23. Dr. Brodzinsky provided no evidence that children who identify as LGBTQ are overrepresented *in the URM Program*. MTE

22. He provided no basis for concluding that USCCB would fail to meet the needs of *children* who identify as LGBTQ, whom USCCB are committed to serving, just because it objects to placing children with same-sex *parents*. *Id.* at 23. And he offered no evidence to support his claim that opposite-sex couples are worse equipped than same-sex couples to care for children who identify as LGBTQ. *Id.* at 23–24. Here too, Plaintiffs do not contest any of USCCB’s arguments.

**2. Dr. Brodzinsky’s Opinion That Forcing USCCB Out of the Programs Will Not Reduce the Availability of Foster Families Is Unreliable.**

Dr. Brodzinsky claims that excluding USCCB would not reduce the number of families available to foster. Report at 23–24. But he did not consider that removing USCCB would eliminate half the capacity of the URM Program overnight, as well the USCCB’s unique expertise and historical knowledge. MTE 25. He based his opinion solely on the *absence* of contrary evidence, not the existence of affirmative evidence. *Id.* at 25–27. He had no knowledge of the capabilities of the possible alternative providers that could replace USCCB. *Id.* at 27–28. And he did not identify any expert methodology by which he came to his opinion. *Id.* at 28–29.

For their part, Plaintiffs can find nothing in Dr. Brodzinsky’s report to substantiate his opinion, instead relying on snippets from his deposition and “other evidence” from another witness’s deposition testimony. Pls.’ 17–18. This will not do. An expert witness’s “*report* must contain ... the basis and reasons for” his opinions as well as “the facts or data considered ... in forming them.” Fed. R. Civ. P. 26(a)(2)(B)(i)–(ii) (emphasis added). A party may not use expert testimony that does not comply with these requirements. *Id.* 37(c)(1). A “primary goal” of Rule 26(a)(2) is “to shorten or decrease the need for expert depositions.” *Ciomber v. Coop. Plus, Inc.*, 527 F.3d 635, 642 (7th Cir. 2008). When expert depositions are needed, the Rule ensures that the opposing party has the “notice” needed to adequately “prepare for the deposition.” *Moore v. GNC, Holdings, Inc.*, No. 12-61703-CIV, 2014 WL 12684287, at \*3 (S.D. Fla. Jan. 24, 2014). Hence

“Rule 26(a)(2) does not allow parties to cure deficient expert reports by supplementing them with later deposition testimony.” *Ciomber*, 527 F.3d at 642; *accord R.C. Olmstead, Inc. v. CU Interface, LLC*, 606 F.3d 262, 271 (6th Cir. 2010). To admit Dr. Brodzinsky’s testimony, Plaintiffs must be able to establish its reliability from the contents of his expert report. This, they cannot do.

As an initial matter, none of the “evidence” Plaintiffs cite from Dr. Brodzinsky’s deposition formed the basis of his opinion for the simple reason that his report was expressly based on the *absence* of evidence. MTE 25. Plaintiffs now claim the opinion rests on Dr. Brodzinsky’s supposed research on the closure of Catholic Charities-affiliated adoption agencies in Illinois, Boston, and Washington, D.C. Pls.’ Opp. 17–18. But Dr. Brodzinsky was explicit that he had not conducted “*any* research regarding any Catholic Charities organization” until “after” he had completed his “work on this case.” MTE Ex. J, Transcript of Deposition of David Brodzinsky (Nov. 20, 2020) (“Dep.”) 34:22–25 (emphasis added). Nor was his deposition testimony an attempt to amend his report to provide support for his opinion: Dr. Brodzinsky was clear that, with one unrelated exception, he had no “corrections” to make and nothing “else to add or change to [his] report or [his] opinions.” *Id.* at 9:18–20, 10:5–8.

In any event, even it had formed the basis of Dr. Brodzinsky’s opinion, none of the evidence Plaintiffs cite renders it reliable. Specifically Plaintiffs point to five supposed bases for the opinion.

*First*, Plaintiffs claim Dr. Brodzinsky “reviewed qualitative literature and research” on the Illinois, Boston, and D.C. closures. Pls.’ Opp. 17. But although Dr. Brodzinsky apparently “review[ed]” some “documents” and “qualitative information” about the Illinois, Boston, and D.C. closures, he did not identify what these documents were or what they said that informed his opinion. Dep. 34:25–35:6, 39:24–40:3.

*Second*, Plaintiffs claim Dr. Brodzinsky “drew upon his own experience working with agencies that had ceased providing services.” Pls.’ Opp. 17. But Dr. Brodzinsky mentions no such experience. At most, he mentions that, in his “own experience,” he has “been aware of agencies that have closed for various reasons” and that “generally” a smooth transition has followed. Dep. 137:1–5. The relevant “experience” appears to be nothing more than having heard news from time to time. And in any event, this brief statement falls far short of what is required to base an expert opinion on experience—namely, an explanation of “how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.” Fed. R. Evid. 702 advisory committee’s notes to 2000 amendment.

*Third*, Plaintiffs claim Dr. Brodzinsky “consulted scholars ..., including Professors Nelson Tebbe ... and Netta Barack-Corren.” Pls.’ Opp. 17. But Dr. Brodzinsky never said he consulted these two professors or any other scholars or even that he had read their work. Instead, he said that an unnamed “colleague” provided him some “information ... having to do with” the research of Professors Tebbe and Barack-Corren and that this “information” cited something related to Catholic Charities. Dep. 35:7–15. As to what this “information” was and what it said, the record is silent.

*Fourth*, Plaintiffs claim Dr. Brodzinsky “consulted with” child agency workers in Boston, Illinois, and D.C. Pls.’ Opp. 17. But Dr. Brodzinsky never conducted a formal or systematic “consultation.” He testified only that he “stayed pretty much in connection with” agency workers in Illinois and is “very connected with the professionals around the country.” Dep. 40:11–41:1. In other words, he “heard” anecdotes from friends. *Id.* at 40:22. That is hardly “scientific, technical, or other specialized knowledge.” Fed. R. Evid. 702(a). But even if it were, Dr.

Brodzinsky again failed to provide the detail necessary to show that these anecdotes were a sufficient basis for his opinion.

*Finally*, Plaintiffs note that Dr. Brodzinsky reviewed data from Illinois, which he claimed showed no decrease in placements after Catholic Charities ceased to perform adoption placements.<sup>4</sup> Pls.' Opp. 17–18. But the sum total of Dr. Brodzinsky's analysis is that the number of placements did not go down. Dep. 135:12–136:8. He did not consider what other factors may have affected the number of placements, what efforts Illinois undertook to replace Catholic Charities, and how readily available alternative providers were. Nor did he consider whether similar conditions would obtain in Dallas-Fort Worth or whether there were any relevant differences between foster placement and adoption placement. His opinion was not the product of a rigorous application of expertise to data, but a crude inference of *post hoc ergo propter hoc*.

Thus, even if it were proper to consider Dr. Brodzinsky's deposition testimony, his opinion would still be unreliable. And given the facially implausible nature of Dr. Brodzinsky's opinion, the dearth of supporting evidence and analysis is particularly unacceptable. *See Fulton*, 141 S. Ct. at 1882 (“If anything, including [Catholic Social Services] in the program seems likely to increase, not reduce, the number of available foster parents.”).

Additionally, to the extent Dr. Brodzinsky did rely on concrete evidence, his analysis did not meaningfully differ from a layperson's. Dr. Brodzinsky read some documents (although he does not say what they were), heard some anecdotes, and saw some numbers from Illinois allegedly showing that placements in that one location did not decrease after Catholic Charities ceased operations there. But any layperson could draw inferences from those purported facts. And where

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<sup>4</sup> Plaintiffs also claim Dr. Brodzinsky reviewed data from Boston, but he never cited any statistics from Boston in his deposition testimony.

the jury is “just as well qualified to draw the necessary conclusions” from the evidence as the expert witness, “it is improper to use opinion evidence for the purpose.” *Gilmore v. Palestinian Interim Self-Gov’t Auth.*, 843 F.3d 958, 973 (D.C. Cir. 2016) (quoting *Henkel v. Varner*, 138 F.2d 934, 935 (D.C. Cir. 1943)).

### **III. DR. BRODZINSKY IS UNQUALIFIED TO OPINE ON THE EFFECTS OF EXCLUDING USCCB.**

Dr. Brodzinsky is not qualified to testify on the likely effect of forcing religious foster care agencies to choose between dropping out of the program or violating their religious convictions regarding same-sex foster couples. Expert testimony “must be grounded in an accepted body of learning or experience *in the expert’s field*.” Fed. R. Evid. 702 advisory committee’s note to 2000 amendment (emphasis added). The expert may not testify on matters outside “the scope of [his] expertise.” *Dome Pat., L.P. v. Rea*, 59 F. Supp. 3d 52, 57 n.5 (D.D.C. 2014). Although Dr. Brodzinsky is a psychologist, the effect of forcing USCCB out of the URM Program is not a question of psychology. It is a question of social science requiring analysis of the ability of alternative providers to transfer or replace families presently in the USCCB network and to operate in the absence of the decades of experience provided by USCCB. Nothing in the record indicates Dr. Brodzinsky has this kind of expertise.

Plaintiffs go to great lengths to show that Dr. Brodzinsky is a qualified psychologist. Pls.’ Opp. 4–7. Fair enough, but they make no effort to show that psychology provides any useful tools to predict how barring USCCB from the URM Program would affect the number of available foster providers. Likewise, Plaintiffs cite a string of cases where courts have permitted Dr. Brodzinsky to testify, but all of them involved testimony on the psychological effect of some policy or practice on children or parents. *Id.* at 7–9. Despite their voluminous citations, Plaintiffs do not identify a single case where Dr. Brodzinsky has testified even generally on how the number of foster

providers would be affected by excluding a subset of providers, much less what would happen in the unique context of the URM Program.

### CONCLUSION

For the foregoing reasons, the expert testimony and report of Dr. David M. Brodzinsky should be excluded.

Dated: November 2, 2022

Respectfully submitted,

*/s/ David T. Raimer.*

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 2, 2022, I electronically filed the foregoing Reply and supporting documents with the Clerk of the Court using the Court's CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system to the parties indicated on the electronic filing receipt.

*/s/ David T. Raimer* \_\_\_\_\_  
David T Raimer

*Counsel for Defendant United States  
Conference of Catholic Bishops*

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

**SUPPLEMENTAL DECLARATION OF DAVID T. RAIMER IN SUPPORT OF  
DEFENDANT U.S. CONFERENCE OF CATHOLIC BISHOPS’ MOTION TO  
EXCLUDE EXPERT REPORT AND TESTIMONY OF DR. DAVID M. BRODZINSKY**

I, David T. Raimer, declare that I am over 18 years of age and otherwise competent to testify as to the matters herein, which are based on my personal knowledge.

1. Along with my colleagues at the law firm Jones Day, I am counsel for Defendant United States Conference of Catholic Bishops (USCCB) in the above-referenced matter. I make this declaration in support of USCCB’s Motion to Exclude Expert Report and Testimony of Dr. David M. Brodzinsky.

2. Attached as Exhibit I is a true and correct excerpt of pages from the deposition of Kenneth Tota. Mr. Tota was deposed on September 28, 2020 via remote video conference with counsel for all parties present.

3. Attached as Exhibit J is a true and correct excerpt of pages from the deposition of Dr. David Brodzinsky. Dr. Brodzinsky was deposed on November 20, 2020 via remote video conference with counsel for all parties present.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 2nd day of November 2022 in Washington D.C.

/s/ David T. Raimer

David T. Raimer

JONES DAY

51 Louisiana Ave. NW

Washington, DC, 20001-2113

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# **Exhibit I**



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

2 ON BEHALF OF THE PLAINTIFFS:

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4 MICHAEL GENDALL, ESQ.  
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22  
23  
24  
25 ON BEHALF OF THE FEDERAL DEFENDANTS:

15 JASON LYNCH, ESQ.  
16 JIM POWERS, ESQ.  
17 U.S. DEPARTMENT OF JUSTICE  
18 Civil Division  
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21 jason.lynch@usdoj.gov

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

2 (continued)

3

4 ON BEHALF OF THE DEFENDANT U.S. CATHOLIC CONFERENCE  
5 OF BISHOPS:

6

JASON CELLIER, ESQ.

7

DAVID RAIMER, ESQ.

8

JOHN GOETZ, ESQ.

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17

18

ALSO PRESENT: DARRAK LIGHTY, VIDEOGRAPHER

19

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1 Worth was categorically excluding classes of  
2 potential foster parents, would ORR want to know  
3 about that?

4 MR. CELLIER: Object to form.

5 A Yes.

6 BY MR. QUINN:

7 Q And would that directly affect ORR's goal  
8 of placing unaccompanied refugee minors with foster  
9 parents where those -- where it's in their best  
10 interest?

11 MR. LYNCH: Object to form.

12 MR. CELLIER: Object to form.

13 A I'm not sure I understand the question.

14 BY MR. QUINN:

15 Q Sure.

16 Is one of the goals of the URM Program  
17 placement with foster families where that is in the  
18 URM's best interest?

19 A Yes.

20 Q So if that's the goal, how does ORR  
21 achieve that goal?

22 A By having the available capacity within  
23 our foster care providers.

24 Q And does that -- is that capacity  
25 affected by increasing the number of available

1 foster families?

2 A There -- it could be, but we've -- I've  
3 never had an indication that we did not have enough  
4 foster care families available.

5 Q But it could just as equally also be the  
6 case where you would not have enough foster families  
7 available; correct?

8 MR. LYNCH: Object to form.

9 MR. CELLIER: Object to form as  
10 well.

11 A It's possible.

12 BY MR. QUINN:

13 Q So hadn't CCF been -- CCFW been a URM  
14 provider prior to 2017 as well?

15 A They were in direct --

16 MR. LYNCH: Object to form.

17 THE WITNESS: I'm sorry.

18 A -- in direct contact with the State.

19 BY MR. QUINN:

20 Q Okay.

21 And then this continuity of services was  
22 one of the reasons ORR picked USCCB as the  
23 replacement designee for Texas?

24 A Yes.

25 Q But ORR did not know, before receiving

1 MR. QUINN: Object to form.

2 A I am not aware of that.

3 BY MR. CELLIER:

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

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

10 MR. QUINN: Object to form.

11 A I'm not aware of it.

12 BY MR. CELLIER:

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

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

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

20 A No.

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

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

# **Exhibit J**

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CALIFORNIA

FATMA MAROUF,

Plaintiff,

vs.

CASE NO.  
1:18-cv-00378-APM

ALEX AZAR, et al.,

Defendants.

---

VIDEOCONFERENCE DEPOSITION DAVID BRODZINSKY, Ph.D.

APPEARING REMOTELY FROM

LOS ANGELES, CALIFORNIA

November 20, 2020

9:03 a.m.

Reported By:  
Brandi Celestino  
CSR No. 13640  
APPEARING REMOTELY FROM ANAHEIM, CALIFORNIA

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9 ALSO APPEARING:

10 MICHAEL SPADE, VIDEOGRAPHER  
JASON CELLIER, ESQ.  
11 JOSHUA SALLMEN, ESQ.  
KEVIN LAKE, ESQ.

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INDEX TO EXAMINATION

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By Mr. Lynch	120

WITNESS INSTRUCTED NOT TO ANSWER

PAGE	LINE
102	22
103	16

1 of the page that was poorly worded in the original  
2 document. Originally, it reads "In Texas between 2013 to  
3 2017, nearly 68 percent of youth who entered foster care  
4 beyond the age of 12 years exited foster care through  
5 emancipation or aging out."

6 That really misrepresents what I meant to say.  
7 What I meant to say is what's in the corrected version is  
8 that "Of those who exited foster care through  
9 emancipation or aging out, 68 percent of those have been  
10 placed at 12 years or beyond 12 years."

11 So that's what I meant to say when I worded it.  
12 It was worded poorly. I didn't catch that until I was  
13 reviewing the report again, if not yesterday, the day  
14 before. And then I brought the error of wording to the  
15 attorneys' attention yesterday, and we agreed to submit a  
16 -- before today, to submit the correction.

17 Q Got it. Thank you.

18 Are there any other corrections that you made in  
19 your report?

20 A No.

21 Q Does the correction affect any of your opinions  
22 as stated in your report?

23 A I'm sorry. I'm not hearing you clearly enough.  
24 Your voice seems low to me.

25 Q I'll try to do better.

1 Does that change, as you've described on the  
2 record a couple of minutes ago, affect any of your  
3 opinions in the case?

4 A No.

5 Q Other than the one change that we received and  
6 you've just testified to, do you have anything else to  
7 add or change to your report or your opinions?

8 A No. My opinions remain the same.

9 Q Okay.

10 The original report that we received back in  
11 August is a full and accurate statement of your findings  
12 in support of your opinions in this case; correct?

13 A Correct. I have since releasing the report,  
14 obviously, done ongoing research, as any scholar does, to  
15 look and see if there's any other information that either  
16 would be in conflict with or bolster my opinion. So I  
17 found other information that perhaps I will share or if  
18 asked about, I will.

19 Q Can you be more specific for me?

20 A Yes. I mean, I've reviewed other articles.  
21 I've done some analysis of AFCARS data with regard to the  
22 number of adoption placements in the five-year period  
23 before the Illinois decision and in the five years  
24 afterwards. I focused on Illinois because I was involved  
25 in this case back in 2011.

1 Q Have you cited any peer-reviewed literature  
2 regarding the USCCB URM program?

3 A I cited research that draws upon those children  
4 or children like them, and I certainly have cited  
5 information from the Office of Refugee -- Resettlement  
6 Offices having to do with the nature of those programs  
7 and so forth. Those aren't peer reviewed, but they are,  
8 you know, documents that reflect, you know, the mission  
9 statement and other information having to do with numbers  
10 of children and so forth.

11 Q Did they refer to USCCB's program specifically?

12 A No. That was the first part of the program.  
13 You asked two questions, and my thought was -- my  
14 interpretation of your second question had to do with  
15 peer-reviewed research on the UAC or URM programs.

16 Q Generally. Generally, you mean?

17 A Yeah. Generally, I mean, you know, there are --  
18 I referred to online documents from the Office of  
19 Refugees Settlements specifically around the UAC and URM  
20 programs and some of the research that has been done and  
21 is cited comes from that general population of children.

22 Q In connection with your work on this case, have  
23 you conducted any research regarding any Catholic  
24 Charities organization?

25 A Only after the fact. Research is more library

1 research, so to speak, or reviewing documents that  
2 provided a little bit more detail about what happened  
3 either in Illinois, Boston, or Washington D.C., after the  
4 decision by Catholic Charities to close their fostering  
5 or adoption programs. Some of that was cited in the ACLU  
6 brief in Fulton or the State's Amicus in Fulton.

7           It was also cited in information that was  
8 provided to me by a colleague having to do with emerging  
9 scholarly research by the two legal scholars who I  
10 referred to before, Nelson Tebbe, T-e-b-b-e; and  
11 Netta Barack-Corren, N-e-t-t-a, hyphenated last name is  
12 Barack-Corren, B-a-r-a-c-k, hyphen, Corren, C-o-r-r-e-n.  
13 And Professor Tebbe is at Cornell Law School and  
14 Professor Barack-Corren is at Hebrew University in  
15 Israel.

16           Q     In your report that we've marked as Exhibit 2,  
17 have you cited any peer-reviewed literature regarding  
18 Catholic Charities' foster care programs?

19           A     No.

20           Q     In connection with your work on this case, have  
21 you conducted any research regarding Catholic Charities  
22 of Fort Worth?

23           A     No.

24           Q     Have you cited any peer-reviewed literature  
25 regarding Catholic Charities of Fort Worth's foster care

1 Dallas-Fort Worth area?

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

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

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

11 BY MR. GOETZ:

12 Q You can answer.

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

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

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

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

1 information that I've received and that's written about.  
2 So your question makes an assumption that I think, you  
3 know, what we know is inconsistent with.

4 Q Do you know whether any type of smooth  
5 transition, as you've testified to, occurred in the  
6 Dallas-Fort Worth area at any time?

7 A Transition for what?

8 Q A smooth transition when a faith-based  
9 organization was eliminated because of its inability to  
10 work with same-sex couples based on religious beliefs?

11 A Well, there's no shutting down of a program  
12 requiring transition. I don't think there has been, to  
13 the best of my knowledge, in relationship to the issues  
14 in this case in Texas. So I can't answer anything about  
15 the so-called smooth transition or lack of smooth  
16 transition.

17 What I'm referring to is what happened in  
18 Illinois with a case I was involved in, and I stayed  
19 pretty much in connection with the professionals there.  
20 And then Boston, much earlier, 2006, and D.C., I think,  
21 2010 or something like that.

22 So the reports that I've -- that I've heard  
23 from, my colleagues around the country, and I'm very  
24 connected with the professionals around the country, and  
25 I've seen, you know, qualitative reviews of those

1 histories.

2           Apparently, other agencies stepped in, received  
3 contracts, and there was a relatively smooth transition.  
4 Often the caseworkers from the agencies like Catholic  
5 Charities went on to work for some of these other  
6 agencies.

7           Q     I understand.

8           Did any of those transitions that you've just  
9 testified to involve the geographic areas of Dallas and  
10 Fort Worth?

11          A     No.

12          Q     Have you conducted any research for purposes of  
13 this case regarding the Baptist Child and Family Services  
14 or BCFS?

15          A     Say that name again. I missed at least one  
16 word.

17          Q     Baptist Child and Family Services or BCFS?

18          A     No, I have not.

19          Q     Do you know whether BCFS began operating a UAC  
20 program in the Dallas-Fort Worth area in the last year?

21          A     I'm unaware of that.

22          Q     Do you know whether BCFS has indicated that it  
23 does not object to placing children with same-sex foster  
24 parents?

25          A     This is a Baptist organization?

1 right?

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

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

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

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

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

1 There was a substantial increase in placements.

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

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

11 A Yes.

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

14 A Catholic Charities.

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

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

22 Q Right. Thank you.

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

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

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

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

17                   MR. LYNCH: Okay. Thank you.

18                    I don't have any further questions.

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

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

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