UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DISTRICT

EDEN ROGERS and
BRANDY WELCH,

Plaintiffs,

-against-

HENRY MCMASTER, in his official capacity as Governor of the STATE OF SOUTH CAROLINA; and

MICHAEL LEACH, in his official capacity as State Director of the SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES,

Defendants.

Case No.: 6:19-cv-01567-JD

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiffs' opening brief sets forth the material facts requiring a grant of summary judgment in Plaintiffs' favor: (i) Governor McMaster issued an Executive Order permitting state-contracted Child Placing Agencies ("CPAs") to use religious criteria to discriminate against prospective foster families; (ii) as a result, DSS stopped enforcing its non-discrimination requirements against Miracle Hill Ministries ("Miracle Hill") and renewed its license even though Defendants were aware Miracle Hill discriminates based on sexual orientation and religion; and (iii) Miracle Hill has discriminated against approximately 25 families, including Plaintiffs, based on their religion or sexual orientation and/or religion. (Dkt. 243, Statement of Undisputed Facts § IV.) While these facts sufficiently establish Equal Protection and Establishment Clause violations, Plaintiffs also presented evidence that three additional CPAs also discriminate based on religion and/or sexual orientation. (*See id.* § VI.)

Defendants do not dispute any of these material facts. Rather, they posit that when CPAs take up the State's invitation to discriminate against prospective foster parents, that discrimination is not the State's responsibility but is, instead, purely private activity for which the State cannot be held liable. (*See* Dkt. 257 at 7-14.) This argument ignores the contracts and regulations governing the relationship between DSS and CPAs. While Defendants devote many pages to argue CPAs are not "state actors", that fundamentally misconstrues this case. Plaintiffs are not suing Miracle Hill or trying to hold Defendants liable for its actions. Defendants *themselves* are indisputably state actors, and this suit is about *their* unlawful actions.

Defendants' attempt to evade equal protection liability by claiming a lack of evidence of discriminatory purpose cannot be squared with the law or the evidence. Knowing that Miracle Hill discriminates based on sexual orientation, Defendants stopped enforcing non-discrimination

requirements against them and issued a renewal license, enabling Miracle Hill to continue to engage in exactly the discrimination that Plaintiffs experienced here. This is unconstitutional. Furthermore, Defendants' arguments against heightened scrutiny are unavailing, their asserted interest in accommodating CPAs' religious beliefs does not justify the unequal treatment of Plaintiffs and their speculation that permitting discrimination results in more foster families is unsupported. (*See infra*, Argument § II.B.)

Nor can Defendants overcome Plaintiffs' Establishment Clause claim by recasting the longstanding principles of third-party harm and coercion—which were not overruled in *Kennedy v. Bremerton*, 142 S. Ct. 2407 (2022)—as somehow revolutionary. Their argument that preferential treatment of some religious beliefs does not violate the Establishment Clause unless it cuts off all opportunity for non-adherents has no basis in law. And as this Court has ruled, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), does not govern this case. Defendants' opposition is baseless and Plaintiffs' motion for summary judgment should be granted.

RESPONSE TO COUNTERSTATEMENT OF MATERIAL FACTS

I. ASSERTED DISPUTE ABOUT WHETHER CPAS' RECRUITMENT AND SCREENING OF PROSPECTIVE FOSTER FAMILIES IS PRIVATE ACTIVITY

Defendants dispute that recruiting and screening prospective foster parents by state-contracted CPAs is part of the public foster care program, characterizing that work as private activity. (*See* Dkt. 257 at 4.) This is the core factual premise of much of their defense. To support this, they say that CPA contracts do not require CPAs to recruit families. (*See id.*) Even were that so, regulations explicitly delegate the role of screening foster parents to CPAs. S.C. Code Regs. § 114-4980. In any case, the contracts require CPAs to "make foster families available" and there is no way to accomplish this without recruiting and screening prospective foster parents. (*See* Dkt. 256-5, Emergency Contract; *see also* Dkt. 256 at 8-9.)

II. ASSERTED DISPUTES RELATED TO THE EXTENT AND HARM OF DISCRIMINATION IN THE FOSTER CARE SYSTEM

Defendants dispute the extent and harm of the discrimination that exists within the foster care system as a result of their actions. (*See* Dkt. 257 at 5-7.) This is immaterial because they do not dispute that there is state-sanctioned discrimination. And Defendants do not refute Plaintiffs' showing that multiple CPAs discriminate and that the CPA options available to families like Plaintiffs' are not comparable to the options available to heterosexual Christians.

With respect to other discriminating CPAs, Defendants ask the Court to "strike or ignore" the Declaration of David Wood showing that CPAs other than Miracle Hill discriminate. They devote much of their opposition to attacking the declaration, but their rationales for striking it are all baseless. *First*, Defendants claim the declarant was never disclosed as a potential witness, but Plaintiffs disclosed him over two months ago. (*See* Ex. 1, Disclosures.) *Second*, Defendants argue the declaration should be ignored because it was not made under penalty of perjury. That was mere oversight, and the amended declaration—changed only to add the requisite statutory language and to update the ages of Mr. Wood's children—resolves the issue. (*See* Ex. 2, Am. Wood Decl.)[1] *Third*, Defendants claim the declaration and attached emails contain hearsay, by which they apparently refer to emails sent by Amber Peeples, the Statewide Foster Parent Liaison for DSS. Ms. Peeples's statements are admissions by a party opponent and thus are not hearsay under Federal Rule of Evidence 801(d)(2)(D).[2] The Wood Declaration puts the lie to Defendants' repeated claims that DSS is unaware of any other discriminatory CPAs, and

[1] Defendants have no basis to object as they are in no way prejudiced by the correction.

[2] A statement "offered against a party" is not hearsay if it was "made by the party's agent or servant concerning a matter within the scope of the agency or employment" during the existence of the relationship. *McCallum v. CSX Transp., Inc.*, 149 F.R.D. 104, 111 (M.D.N.C. 1993). Ms. Peeples's discussion of which CPAs accept same-sex couples was within her job function as a liaison between foster parents and DSS.

Defendants' efforts to hide this fact from the Court should be rejected. Nevertheless, this declaration is not needed to establish that CPAs besides Miracle Hill discriminate because Defendants have not contested other evidence showing as much.

Defendants also attempt to dispute that the CPA options for families like Plaintiffs' are not comparable to the CPA options from which heterosexual Christians can choose. They take issue with Plaintiffs' calculation of the percentage of foster children placed with Miracle Hill families and with the evidence showing that Miracle Hill provides greater support to prospective foster parents than other CPAs in the Upstate Region. (*See* Dkt. 257 at 3, 5.) But the record speaks for itself: during the relevant period, of the 12 nontherapeutic CPAs with an office upstate, Miracle Hill served the largest number of families (338—nearly twice as many as the CPA with the next largest share) and Miracle Hill families cared for the largest number of children (1,278, compared to 288 for the CPA with the next largest share). (*See* Dkt. 243 at 8, 7 n.6.) Because Plaintiffs seek to provide non-kinship, nontherapeutic foster care in the Upstate Region, it is not appropriate to include DSS families and placements in the denominator, as Defendants did, since DSS provides services only for kinship foster parents. (*See* Dkt. 256, Factual Background § I.B.) And Defendants failed to refute evidence about the support Miracle Hill provides to families (*see* Dkt. 243-13, Betts Dep. Tr. 55:15-21, 56:9-16, 56:22-57:8), Miracle Hill's reputation in the community (Dkt. 243-10, Rogers Dep. Tr. 58:20-59:5; Dkt. 243-11, Welch Dep. Tr. 10:6-17) and that prior to January 2019, Miracle Hill was the only nontherapeutic CPA to receive administrative fees from DSS, which totaled over $3,000,000 before Miracle Hill opted to stop receiving those fees. (Dkt. 243-14, 10545-G0001; *see also* Dkt. 243-7, Roben Dep. Tr. 59:20-60:20, 92:21-93:2.)

The extent and harm of state-sanctioned discrimination in the South Carolina foster care

system is more significant than the Defendants assert—it is not simply discrimination by one CPA that is interchangeable with many others. But whether Miracle Hill is the only CPA that discriminates or the highest-serving or best-resourced CPA is immaterial to Plaintiffs' entitlement to summary judgment because, regardless, Plaintiffs are denied access to the same array of options as heterosexual Christian couples. (*See* Dkt. 256 at 2-4, 20.)[3]

III. ASSERTED DISPUTE OF FACT RELATED TO THE GOVERNOR'S ROLE IN ISSUING A NEW LICENSE TO MIRACLE HILL

Defendants try to downplay the Governor's culpability in sanctioning and facilitating discrimination by suggesting that his only involvement with DSS's renewal of Miracle Hill's license was in seeking the waiver from HHS and issuing the Executive Order. (*See* Dkt. 257 at 18 n.3.) While those interventions alone would suffice, the evidence shows far greater involvement. Jacqueline Lowe, DSS Director of Child Welfare and Licensing, testified plainly and repeatedly that DSS was prepared to end its relationship with Miracle Hill as a licensed CPA for failing to remedy violations of non-discrimination requirements until the Governor intervened, and that the Governor directed DSS to issue Miracle Hill both temporary and permanent licenses. (Ex. 3, Lowe Dep. Tr. 113:8-10, 115:21-116:8, 150:6-20, 172:20-173:3.) Furthermore, Miracle Hill reached out to the Governor directly for aid, when DSS was enforcing its non-discrimination requirements against it. (*See* Ex. 4, Lehman Dep. Tr. 125:4-12.) In any case, this fact is not material because even if the Governor had not been directly involved, it would not change the fact that DSS renewed Miracle Hill's contract while knowing that it discriminates.

IV. ASSERTED DISPUTE OF FACT RELATED TO ESTIMATES OF THE

[3] This factual dispute is, however, material to Defendants' own motion for summary judgment, as one of their central claims is that Plaintiffs have not been disadvantaged by being turned away by Miracle Hill. (*See* Dkt. 242 at 1.)

NUMBER OF FOSTER FAMILIES IF CPAS WERE NOT ALLOWED TO DISCRIMINATE

Defendants quarrel with Plaintiffs' characterization of the testimony of Dawn Barton regarding the expectation that if Miracle Hill were to close, most Miracle Hill families would continue fostering. (*See* Dkt. 257 at 4.) But Ms. Barton was clear she would not expect there to be a gap in service if Miracle Hill closed, noting that families can transfer to different CPAs. (Dkt. 256-8, Barton Dep. Tr. 159:9-161:9.) Defendants' only response is to point to pure conjecture from Miracle Hill employees—hardly a disinterested perspective. (*See* Dkt. 257 at 4; *see also* Dkt. 256 at 10.) Defendants also ignore evidence undermining this speculation. As Ms. Lowe testified, when another South Carolina CPA closed, families continued fostering with DSS or other CPAs. (Ex. 3, Lowe Dep. Tr. 73:13-75:14.)

ARGUMENT

I. SOUTH CAROLINA IS RESPONSIBLE FOR STATE-SANCTIONED DISCRIMINATION IN THE PUBLIC FOSTER CARE SYSTEM.

A. Defendants' State Action Argument Misconstrues the Law.

Defendants mischaracterize the claims at issue here. Their insistence that Miracle Hill is not a "state actor" and thus the State cannot be held responsible for its actions misunderstands the law. Plaintiffs are neither suing Miracle Hill nor trying to hold Defendants liable for its actions. Plaintiffs are suing state officials—Governor McMaster and DSS Director Michael Leach—for sanctioning and enabling discrimination in the public foster care system. No "state actor" analysis is necessary or appropriate. When a party sues government officials in their official capacities, the actions of those officials "constitute state action for purposes of the Fourteenth Amendment." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982). Defendants' argument is thus misplaced, and the cases they cite—most of which concern whether a private

entity can be sued under § 1983 for a constitutional violation—are inapposite.[4]

As discussed in Plaintiffs' opening brief, it was Defendants' own conduct that unconstitutionally facilitated and enabled discrimination against prospective foster parents who are same-sex couples and/or non-Christian. (*See* Dkt. 243 at 21-22.) "[S]tate officials . . . entering into contracts for the provision of state-contracted services, expressly acknowledging and accepting that certain faith-based agencies may elect to discriminate on the basis of sexual orientation in carrying out those state-contracted services" is discriminatory government action. *Dumont v. Lyon*, 341 F. Supp. 3d 706, 745 (E.D. Mich. 2018); *see also R.I. Chapter, Associated Gen. Contractors of Am., Inc. v. Kreps*, 450 F. Supp. 338, 349 (D.R.I. 1978) (concluding the state is a "joint participant" in discrimination if it contracts with discriminatory firms). Defendants' delegation of government functions to CPAs known to discriminate—"plac[ing] [the government's] power . . . and prestige behind the admitted discrimination"—is state action by state actors for which Defendants can and should be held responsible. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 723-25 (1961).

B. CPAs' Recruitment and Screening of Prospective Foster Parents Is Not Private Activity for Which DSS Has No Responsibility.

Defendants are wrong to portray CPAs' recruitment and screening of foster parents as

[4] *See, e.g.*, *Mentavlos v. Anderson*, 249 F.3d 301, 310 (4th Cir. 2001) (rejecting § 1983 claim against military college cadets for lack of state action); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 302 (2001) (permitting § 1983 claim against private association because entwinement of school officials rendered it a state actor); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (rejecting § 1983 claim against private non-profit school for lack of state action); *Milburn v. Anne Arundel Cnty. Dep't of Soc. Servs.*, 871 F.2d 474, 479 (4th Cir. 1989) (same, for private foster parents); *Pullings v. Jackson*, No. 07-0912, 2007 WL 1726528, at *3 (D.S.C. June 13, 2007) (same). Only one case Defendants cite—*Weller v. Department of Social Services*, 901 F.2d 387 (4th Cir. 1990)—concerns the conduct of state officials. There, the court held that because the State is not "the permanent guarantor" of a child's safety after transferring him to his grandmother's custody, the State could not be held liable for harm inflicted while in her care. *Id.* at 392. That holding is inapposite here.

private actions for which DSS has no responsibility. No private entity can screen prospective foster parents without the State's imprimatur and oversight. The fact that DSS's contract with CPAs does not say the specific words "recruitment" or "screening" is irrelevant—state regulations delineate the role CPAs play in the foster care system, which includes screening families, S.C. Regs. § 114-4980, and the CPA contracts require them to "make foster homes available" (*see* Dkt. 256-5, Emergency Contract), which necessitates recruitment and screening.

Defendants argue that the State has no responsibility for how contracted CPAs screen prospective foster parents for wards of the State, but the State both decides the CPAs to which it will delegate this government function and is required by law to oversee their work. S.C. Code Regs. § 114-4920(E). CPAs are governed by state law and must operate in accordance with DSS's requirements and state regulations when carrying out State-contracted work. *Id.* § 114-4930(E). And regulations explicitly require DSS to ensure that contracted agencies do not discriminate. *Id.* § 114-210(B)(2). This delegation of government functions to CPAs makes this case utterly distinct from those cited by Defendants in which "[m]ere government permission or authorization" is involved. (*See* Dkt. 257 at 13.)[5]

The implication of Defendants' suggestion that the State has no responsibility for how state-contracted CPAs screen prospective foster parents is staggering. The logical conclusion of Defendants' argument is that if *all CPAs* excluded same-sex couples or non-Christians, leaving them with no opportunity to foster, that would not be the State's responsibility. Ultimately,

[5] *See Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 182 (4th Cir. 2009) (addressing whether a private hospital's firing decisions were state action based on county's board appointments); *Buchanan v. JumpStart S.C.*, No. 21-cv-00385, 2022 WL 3754732, at *8 (D.S.C. Aug. 30, 2022) (considering whether a private entity was a state actor, not whether state actors themselves had violated the Equal Protection Clause); *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982) (holding state defendants could not be liable for nursing home's discharge decisions as the home was not exercising powers delegated by the state).

Defendants are constitutionally obligated to ensure that the public child welfare system operates on equal terms for all, and that includes ensuring that entities acting on its behalf do so in a non-discriminatory manner. "[N]o State may effectively abdicate its responsibilities [under the Fourteenth Amendment] by either ignoring them or by merely failing to discharge them . . . ." *Burton*, 365 U.S. at 725.

C. Plaintiffs Have Standing to Bring Their Claims.

Defendants' incorrect claim that Plaintiffs lack standing largely turns on the same erroneous assertion that CPAs' screening of prospective foster parents is private activity over which Defendants have no control. Defendants are not innocent bystanders here. The Governor directed DSS to stop enforcing non-discrimination requirements against CPAs like Miracle Hill and, instead, to issue them a new license, and DSS complied. This directly enabled the discrimination that Plaintiffs experienced, and Plaintiffs' injuries are thus *traceable* to the State. Defendants' actions in the face of Miracle Hill's known discrimination are enough to "link the . . . Defendants to [Plaintiffs'] injuries." *Dumont*, 341 F. Supp. 3d at 723.[6]

Plaintiffs' injuries are also *redressable*. Defendants argue that if Plaintiffs prevail, they still will not be "guarantee[d] . . . the opportunity to work with Miracle Hill." (Dkt. 257 at 16.) But the relief Plaintiffs actually seek is to be able to pursue fostering without fear of further discrimination and to stand on "equal footing" regarding CPA options with all other prospective foster parents, regardless of whether Miracle Hill is one of them. *Ne. Fla. Chapter of Associated*

[6] Defendants' reliance on *Disability Rights S.C. v. McMaster*, 24 F.4th 893 (4th Cir. 2022), is misplaced. There, plaintiffs sued the Governor for signing an appropriations bill that included a provision barring mask mandates in schools. *Id.* at 897. The court held that plaintiffs lacked standing because they did not "allege that McMaster has any duty to enforce the Proviso or that he has attempted to enforce it in a matter that directly affects them." *Id.* at 902. Here, Governor McMaster affirmatively issued an Executive Order and directed DSS's actions, which affected Plaintiffs' ability to have the same opportunities to foster as other families.

Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993).

II. PLAINTIFFS' EQUAL PROTECTION CLAIM IS BASED ON LONGSTANDING EQUAL PROTECTION PRINCIPLES.

A. Plaintiffs Have Established That Defendants' Actions Intentionally Disadvantage Same-Sex Couples.

Defendants accuse Plaintiffs of "creating a *new* form of Equal Protection liability." (Dkt. 257 at 2.) But there is nothing unusual about Plaintiffs' equal protection claim. Defendants' actions "treat[] [same-sex couples] differently from others with whom [they are] similarly situated" by denying same-sex couples the same opportunities to foster as different-sex couples. *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001). And "that unequal treatment was the result of intentional or purposeful discrimination", *id.*—at the Governor's behest, DSS stopped enforcing its non-discrimination requirements against a CPA known to discriminate against same-sex couples and instead issued a renewal license, allowing it to continue discriminating against prospective foster parents.

In arguing that there was no intentional discrimination, Defendants focus only on the Governor's purported lack of discriminatory intent in issuing the Executive Order. (Dkt. 257 at 20-21.) To prevail on Plaintiffs' equal protection claim, it would be enough to show intent on the part of DSS, which Defendants do not dispute. But the chronology shows that both the Governor and DSS acted intentionally to permit discrimination against same-sex couples.

By 2018, it was public knowledge that Miracle Hill discriminated on the basis of sexual orientation and religion (*see* Ex. 5, News Articles), and the Governor and DSS were also aware of the situation. Miracle Hill's 2017 license renewal packet stated so explicitly, requiring foster parents wishing to work with Miracle Hill to "[h]ave a lifestyle that is free . . . of homosexuality." (Dkt. 243-24, Staudt Dep. Tr. 159:7-165:14; Dkt. 243-25, Staudt Ex. 18 at -964.) DSS thus issued Miracle Hill a warning and ordered it to prepare a plan of compliance

with DSS's non-discrimination requirements. (Dkt. 243-23, Lowe Ex. 7.) Miracle Hill understood that this meant they would no longer be able to discriminate against potential foster parents on the bases of both sexual orientation and religion, but instead of complying, Miracle Hill reached out to the Governor (Ex. 4, Lehman Dep. Tr. 123:4-8, 125:4-12, 180:17-24), who sought a waiver from HHS and issued the Executive Order to shield them from these non-discrimination requirements (Dk. 243-3, Lowe Ex. 17 at -024-025; Dkt. 243-29, Rogers_McMaster_000010 at -013-15).[7] All the while, the Governor "assured" Miracle Hill it could continue to discriminate. (*See* Dkt. 243-27, MIRACLE_HILL_SUBP_000641.) Finally, the Governor's office directed DSS to issue Miracle Hill a new standard CPA license, even though the Governor and DSS knew that Miracle Hill would continue to discriminate based on sexual orientation and religion. (Dkt. 243-30, MIRACLE_HILL_SUBP_003817; Ex. 3, Lowe Dep. Tr. 150:6-11; Dkt. 243-8, Barton Tr. 219:22-220:2.) The collective actions of the Governor and DSS therefore intentionally exclude all same-sex couples from having an equal opportunity to participate in the State's public child welfare system.

Although in the course of authorizing discrimination, Defendants did not mention the words "same-sex couple" or "sexual orientation," that does not make their actions to allow discrimination against same-sex couples any less intentional. *See, e.g.*, *Bassett v. Snyder*, 951 F. Supp. 2d 939, 963 (E.D. Mich. 2013) (holding that a law limiting family medical benefits to spouses when same-sex couples were unable to marry "dr[ew] a classification based on sexual orientation," even though the policy did "not use the term 'sexual orientation,'" because it denied

[7] Under both federal and state requirements, CPAs would otherwise be required not to discriminate based on sexual orientation. *See* 45 C.F.R. § 75.300; S.C. Code Regs. §§ 114-210(B)(2), 114-550(G)(3); DSS Policy and Procedure Manual, Ch. 7 § 710.

equal benefits to same-sex couples). For that reason, the cases Defendants cited are inapposite.[8]

That the stated purpose for allowing this discrimination was to accommodate Miracle Hill's religious beliefs does not make Defendants' actions any less intentional. "'[I]ntentional discrimination' need not be motivated by 'ill will, enmity, or hostility'" to contravene the Equal Protection Clause." *Hassan v. City of New York*, 804 F.3d 277, 298 (3d Cir. 2015) (quoting *Floyd v. City of New York*, 959 F. Supp. 2d 540, 662 (S.D.N.Y. 2013)).

At bottom, in granting a license to Miracle Hill while knowing that they exclude same-sex couples, the State has administered its child welfare system in a way that grants different-sex couples access to all CPAs in order to pursue becoming foster parents and excludes same-sex couples from that same menu of options. This intentional discrimination is a plain violation of the Equal Protection Clause.

B. Heightened Scrutiny Applies to Plaintiffs' Equal Protection Claim, and Defendants Cannot Justify Their Actions Under Any Level of Scrutiny.

Plaintiffs have properly raised equal protection claims based on both sex and sexual

[8] *See, e.g.*, *Crawford v. Bd. of Educ.*, 458 U.S. 527 (1982) (provision barring mandatory pupil assignment or transportation); *Pers. Adm'r v. Feeney*, 442 U.S. 256 (1979) (veterans' preference statute); *Washington v. Davis*, 426 U.S. 229 (1976) (written personnel tests); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (multi-family zoning); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (death sentencing process). And in any event, even if these "disparate impact" cases were applicable here, Plaintiffs have readily shown that Defendants acted for discriminatory purposes. The facts and circumstances of Defendants' conduct—including the many "[d]epartures from the normal procedural sequence"—show that discriminatory purposes "play[ed] a role" in their decisions. *See Arlington Heights*, 429 U.S. at 267; *see also Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982) (holding an initiative that purported to regulate school busing through neutral language but operated to enable school districts to bus students for any reason other than ensuring racial integration was "effectively drawn for racial purposes" and thereby violated the Equal Protection Clause, even though the initiative "nowhere mention[ed] 'race' or 'integration'"). Their references to "religious accommodations" notwithstanding, the Governor and DSS have crafted a foster care system that was designed to narrow the choices available to same-sex couples. This is an equal protection violation under any framing of the law.

orientation discrimination. Contrary to Defendants' claim (Dkt. 257 at 22), Plaintiffs' reliance on *Bostock v. Clayton County*, 140 S. Ct. 1731, 1747 (2020), is entirely apt. *Bostock*'s reasoning was not cabined to Title VII. *See id.* at 1741. Rather, its logic applies equally in the constitutional context, as several courts have held in subjecting sexual orientation discrimination to heightened scrutiny. *See, e.g.*, *Bos. All. of Gay, Lesbian, Bisexual & Transgender Youth v. U.S. Dep't of Health & Hum. Servs*., 557 F. Supp. 3d 224, 244 (D. Mass. 2021); *Harris v. Jackson*, No. 19-cv-5849, 2022 WL 4596343 at *6 n.6 (N.D. Ga. Sept. 30, 2022).[9]

Defendants' insistence that the State's actions are justified as an accommodation of CPAs' religious beliefs[10] fails because this case does not concern Miracle Hill's *private* religious exercise. It concerns Defendants permitting and facilitating a religious organization's carrying out of a government program in a discriminatory way. (Dkt. 256 at 27-28.) The Equal Protection Clause does not permit discrimination in carrying out government functions.[11]

Defendants reiterate their purported interest in increasing available foster families, but they have failed to show that allowing CPAs to discriminate will result in more foster families, and there is no basis, even under rational basis, to believe that. (*See* Dkt. 256 at 9-10, 16-17.)

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[9] Defendants also fail to confront Plaintiffs' argument about the scrutiny applied in *United States v. Windsor*, 570 U.S. 744 (2013), or the conclusions of the many courts that have held that sexual orientation discrimination itself must survive heightened scrutiny. (*See* Dkt. 243 at 24 & n. 17.)

[10] Defendants emphasize *Obergefell*'s reference to religious objections to the marriages of same-sex couples as "decent and honorable" (Dkt. 257 at 22), suggesting that accommodating religiously motivated discrimination is permissible. But *Obergefell* held precisely the opposite. *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015).

[11] For the same reason, Defendants' reliance on an alleged interest in "avoiding liability from litigation by foster care providers" fails. (Dkt. 257 at 24.) Defendants' only counterargument relies on *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020), which says nothing about whether hypothetical concerns about a hypothetical RFRA-based lawsuit are sufficiently compelling to justify discriminatory *governmental* actions.

And Defendants' purported concerns about foster children's relationships with their caseworkers is pretext, as each foster child is assigned a DSS caseworker independent of their CPA. (*See* Dkt. 243-8, Barton Dep. Tr. 290:9-14.) Defendants' justifications fail any level of scrutiny.

III. DEFENDANTS' ACTIONS VIOLATE THE ESTABLISHMENT CLAUSE.

Sanctioning and enabling religious organizations that provide public foster care services to impose religious criteria on prospective foster parents (i) harms families that do not meet those criteria and (ii) coerces families to abide by the tenets of a faith to which they do not subscribe. In both of these ways, the Defendants' actions violate the Establishment Clause. *See Est. of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985). *Kennedy* did not overrule this earlier case law, and it did not hold that the history test is the only way to identify an Establishment Clause violation. Indeed, the Court in *Kennedy* reaffirmed that coercion was "among the foremost hallmarks of religious establishments the framers sought to prohibit." 142 S. Ct. at 2428-29.

Defendants insist that Plaintiffs are not sufficiently burdened because they are not *entirely* excluded from serving as foster parents. (Dkt. 257 at 27-28.) This is a standard of their own invention, as even an accommodation that makes it more expensive for others to obtain a government benefit is harm that triggers Establishment Clause protection. *See Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989); *Est. of Thornton*, 472 U.S. at 710. The harm to Plaintiffs from being held to a CPA's religious test in a way that denies them the full set of CPA options available to Christian heterosexual families has been well-established. (*See* Dkt. 243 at 36-37); *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2022 (2017).

In addition, the claim that no one has been coerced to believe anything to become a foster parent (Dkt. 257 at 29) ignores that by authorizing CPAs to impose religious criteria, prospective foster parents wishing to work with those CPAs are forced to conform to those religious

requirements.[12] This is coercion. *See Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 589 (6th Cir. 2015) ("Coercion . . . includes imposing public pressure.").

Defendants argue that they are merely "lifting a burden" on religious CPAs, but this is no answer when doing so results in the use of a religious test to screen participants in a government program. Allowing religious DSS employees to use their own religious criteria in vetting families might also "lift a burden," but would not lessen the Establishment Clause violation. The same is true when CPAs are performing the government function.

Defendants' attempt to rely on history to bless their authorization of a religious test in the foster care system also has no basis. The history discussed by Defendants, which concerned religious organizations' private charitable activities, does not show that the Framers would have accepted the use of religious criteria in a government program like State foster care, something that was unknown at the time of the Founding.[13] Moreover, if the history of what 18th century private social welfare programs did were to determine what is acceptable when religious organizations carry out government programs, that would open the door to a public foster care system in which faith-based government contractors could limit services to white children, proselytize to them and subject them to indentured servitude. (*See* Dkt. 256 at 25-26.)

CONCLUSION

For the foregoing reasons, Plaintiffs are entitled to summary judgment on all claims.

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[12] Miracle Hill's website states: "[W]e require that foster parents who partner with us be followers of Jesus Christ, be active in and accountable to a Christian church, and agree in belief and practice with our doctrinal statement." (Dkt. 243-38, Shutt Decl., Ex. G.)

[13] This analysis is consistent with the Fourth Circuit's recent application of *Kennedy* in *Firewalker-Fields v. Lee*, No. 19-7497 (4th Cir. Jan. 17, 2023). That court noted that the history approach "define[s] a category of activity that was historically understood as acceptable" under the Establishment Clause and applies those principles. *Id.* at *24 n.6. Defendants' assertion that the activity at issue here would have been acceptable to the Framers has no support.

February 7, 2023

/s/ Nekki Shutt

South Carolina Equality Coalition, Inc.
Nekki Shutt (Federal Bar No. 6530)
BURNETTE SHUTT & MCDANIEL, PA
912 Lady Street, 2nd floor
P.O. Box 1929
Columbia, SC 29202
(803) 904-7912
nshutt@burnetteshutt.law

Peter T. Barbur (admitted *pro hac vice*)
Rebecca Schindel (admitted *pro hac vice*)
Mika Madgavkar (admitted *pro hac vice*)
Cristopher W. Ray (admitted *pro hac vice*)
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
pbarbur@cravath.com
rschindel@cravath.com
mmadgavkar@cravath.com
cray@cravath.com

Leslie Cooper (admitted *pro hac vice*)
Jon Davidson (admitted *pro hac vice*)
(admitted only in California)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2633
lcooper@aclu.org

Daniel Mach (admitted *pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street NW
Washington, DC 20005
(202) 675-2330

dmach@aclu.org

M. Currey Cook (admitted *pro hac vice*)
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, NY 10005
(212) 809-8585
ccook@lambdalegal.org

Karen L. Loewy (admitted *pro hac vice*)
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
1776 K Street NW, 8th Fl.
Washington, DC 20006
(202) 804-6245
kloewy@lambdalegal.org

ATTORNEYS FOR PLAINTIFFS