**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF SOUTH CAROLINA**
**Greenville Division**

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| **Eden Rogers, et al.,** | ) | |
| | ) | |
| **Plaintiffs,** | ) | |
| | ) | |
| **v.** | ) | **Civil Action No. 6:19-cv-01567-JD** |
| | ) | |
| **United States Department of Health and Human Services, et al.,** | ) | |
| | ) | |
| | ) | |
| **Defendants.** | | |

**BRIEF OF AMICI CURIAE COMMONWEALTH OF VIRGINIA AND 17 OTHER STATES IN SUPPORT OF DEFENDANTS HENRY MCMASTER'S AND MICHAEL LEACH'S MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

When children can no longer live safely with their parents or guardian, state and municipal agencies step in to place these children temporarily in foster care. There are hundreds of thousands of children in foster care in the United States. To facilitate the care of these children, the States and the federal government will sometimes provide funds to private child placing agencies (CPAs). Some of these agencies, including some of the most effective agencies, help children because their religious beliefs prioritize protecting society's most vulnerable members. Other agencies do the same important work because of their non-religious moral views. All of them play a critical role in assisting those most in need of the government's help.

By partnering with, and providing funding for, faith-based CPAs to address the foster-care crisis, the government does not violate the Establishment Clause. Indeed, the Supreme Court has recently made clear that not only does the Establishment Clause permit accommodations of religious foster-care agencies, but that in many circumstances the Free Exercise Clause *requires* such accommodations. A contrary ruling could call into question statutory accommodations for religious people and organizations enacted by States all around the country—including accommodation statutes that facilitate the critical participation of faith-based CPAs in the foster-care process. For example, eleven other States have enacted laws expressly protecting the right of faith-based CPAs to operate consistently with their beliefs, and prohibiting state and local governments from refusing to work with those agencies because of the agencies' beliefs. These States have done so because working with a diversity of CPAs benefits children, and because religious CPAs make especially good partners given that they are motivated by a sense of religious conviction to help children and an obligation to provide services to those in need.

Finally, although the government partners with religious foster-care agencies, the actions

of those agencies cannot violate the First Amendment or the Equal Protection Clause because they are not state action. To establish a First Amendment or equal protection violation, plaintiffs must identify *government* action—not private action—that they believe violated the Constitution. Religious CPAs are not state actors because they do not meet the high bar the Fourth Circuit has erected for finding a private agency is a state actor, given that the South Carolina Constitution does not require the State to provide foster care and foster care is not traditionally the exclusive prerogative of the State. For the reasons stated herein, this Court should grant summary judgment to Defendants.

## IDENTITY AND INTERESTS OF AMICI CURIAE

Amici curiae the Commonwealth of Virginia and 17 other States, represented by their attorneys general, provide child welfare services through state-wide agencies and municipal governments. They contract with private CPAs to find safe and loving foster parents for children under state care. Some of the private child-placing agencies States partner with have religious missions; many do not. Several States have enacted laws to protect the right of religious CPAs to operate consistently with their beliefs while still providing safe and effective services to children in state care and potential parents willing to care for them. The outcome of this litigation, and this Court's answer to the question whether government agencies may contract with private entities to provide foster care services while permitting those private entities to operate consistently with their deeply held religious beliefs, could affect States' work with both religious and nonreligious child-welfare providers. Amici States submit this brief in support of Defendants Henry McMaster and Michael Leach to urge this Court not to enjoin their ability to implement, enforce, or rely on South Carolina Executive Order No. 2018-12.

## BACKGROUND

In South Carolina, both the State and private organizations are involved in the comprehensive foster care system. The South Carolina Department of Social Services (SCDSS) works directly with foster families and prospective foster families, retaining sole authority to license a prospective foster family. See S.C. Code Ann. Regs. §§ 114-4980(A)(2)(d), (A)(3)(b). SCDSS also licenses private entities known as child placing agencies to assist in the fostering process by, for example, "select[ing] the most appropriate home for a child," *id.* § 114-4980(A)(9)(a), and monitoring the child's "growth and development" as well as "relationships between the child and caregivers" while in foster care, *id.* § 114-4980(D)(2). As part of their contract with SCDSS, CPAs receive an "administrative payment" of $20 to $30 per-child per-day while the child lives with a foster family affiliated with that CPA. See, *e.g.*, ECF No. 242-8 at 23.

Other States operate a similar system. Virginia, for example, allows licensed CPAs to "place or negotiate and arrange for the placement of children in any licensed children's residential facility." Va. Code § 63.2-1819. Further, unless its license contains a limitation to the contrary, "a licensed child-placing agency may also place or arrange for the placement of such persons in any suitable foster home or independent living arrangement." *Ibid.* Before placing or arranging for the placement of any child in a foster home, the licensed CPA "shall cause a careful study to be made to determine the suitability of such home or independent living arrangement, and after placement shall cause such home or independent living arrangement and child to be visited as often as necessary to protect the interests of such child." Va. Code § 63.2-904.

The U.S. Department of Health and Human Services (HHS), as authorized by statute, provides States, including South Carolina and Virginia, foster-care reimbursements. To receive those reimbursements, States may not "deny to any person the opportunity to become an adoptive

or a foster parent on the basis of race, color, or national origin of the person . . . ." 42 U.S.C. § 671(a)(18). The agency in 2017 promulgated a rule which amended its regulations to further prohibit "discrimination in the administration of HHS programs and services based on . . . religion [or] . . . sexual orientation." 45 C.F.R. § 75.300(c) (2017).

Miracle Hill Ministries is a Christian nonprofit organization in Greenville, South Carolina, which has served the people of that State in some capacity since 1937. See Miracle Hill Ministries, *Our Origin Story* (2023), https://tinyurl.com/22w35tsz. Recognizing "a *dire* need for foster families in South Carolina," Miracle Hill "is a private foster care provider" or CPA "that helps recruit foster families and provides them with support throughout the licensing process, placements, and beyond." Miracle Hill Ministries, *Foster Care* (2023), https://tinyurl.com/2p8vk92v (emphasis added). "As a faith-based organization, . . . Jesus Christ is the center of all [that Miracle Hill] do[es]." *Ibid.* To that end, Miracle Hill imposes requirements additional to those enforced by South Carolina for foster parents who partner with Miracle Hill: "To be part of Miracle Hill's foster programs, parents must [b]e followers of Jesus Christ and provide a statement of faith[, b]e active in and accountable to a Christian church[, and a]gree in belief and practice with [Miracle Hill's] doctrinal statement." *Ibid.*; see also Miracle Hill Ministries, *What We Believe* (2023), https://tinyurl.com/2p97b22x (providing Miracle Hill's doctrinal statement).

Shortly after the 2017 HHS rule change, SCDSS notified Miracle Hill that it believed Miracle Hill's criteria for foster families violated HHS anti-discrimination regulations and SCDSS policy. See ECF No. 242-12 (citing DSS Human Services Policy and Procedure Manual § 710). As a result, SCDSS could issue Miracle Hill only a temporary six-month license and explained that "[f]ailure to address these concerns w[ould] result in the expiration of Miracle Hill's license

as a Child Placing Agency." *Ibid.*; see also ECF No. 242-15 at 2 (letter from HHS to Governor McMaster stating that "HHS[] understand[s] that this provisional license will be revoked in January 2019 unless Miracle Hill agrees to partner with foster parents in accordance with § 75.300(c), which Miracle Hill cannot do, because Miracle Hill believes those who hold certain positions of spiritual influence and leadership–including foster parents–should share Miracle Hill's religious mission and beliefs." (cleaned up)).

Governor McMaster stepped in. He first wrote to HHS seeking a waiver from the new regulation. ECF No. 242-13. He explained that 45 C.F.R. § 75.300(c) impermissibly "expand[s]" 42 U.S.C. § 671(a)(18) beyond the statutory text by adding religion and sexual orientation as protected anti-discrimination grounds and also "effectively require[s] CPAs to abandon their religious beliefs or forgo the available public licensure and funding, which violates the constitutional rights of faith-based organizations." ECF No. 242-13 at 1–2. On that basis, he formally requested from the agency, on behalf of South Carolina's faith-based organizations serving as CPAs, a waiver from 45 C.F.R. § 75.300(c)'s anti-discrimination provision on the basis of religion. ECF No. 242-13 at 2. Second, he issued Executive Order No. 2018-12 which directed SCDSS to "not deny licensure to faith-based CPAs solely on account of their religious identity or sincerely held religious beliefs" and to "ensure that SCDSS does not directly or indirectly penalize religious identity or activity." ECF No. 242-14 at 3.

HHS responded to Governor McMaster by granting the requested waiver. ECF No. 242-15. It explained that after reviewing the materials, it "determined that subjecting Miracle Hill to the religious nondiscrimination requirement in § 75.300(c) . . . would be inconsistent with [the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb et seq.]"; that "Miracle Hill's sincere religious exercise would be substantially burdened by application of [that regulation's] religious

nondiscrimination requirement"; and that "subjecting Miracle Hill to that requirement, by denying South Carolina's exception request, is not the least restrictive means of advancing a compelling government interest on the part of HHS." ECF No. 242-15 at 3. For those reasons, HHS granted the requested waiver, excepting any CPA using similar religious criteria in selecting among prospective foster parents from 45 C.F.R. § 75.300(c). ECF No. 242-15 at 4 (explaining that the waiver is conditioned on CPAs like Miracle Hill "refer[ring] potential foster parents that do not adhere to the subgrantee's religious beliefs to other subgrantees in the SC Foster Care Program, or [referring] them to the SC Foster Care Program Staff themselves . . ."). HHS also granted waivers to Texas and Michigan; the waivers granted to all three States were rescinded by the Biden Administration. See, *e.g.*, Nathaniel Weizel, *Biden administration reverses Trump-era waivers of nondiscrimination protections*, The Hill (Nov. 18, 2021), https://tinyurl.com/msw9t8y6.

In 2019, Plaintiffs filed a Complaint against numerous defendants, including Defendants Governor McMaster and Michael Leach, alleging violations of the Establishment Clause and the Equal Protection Clause. See ECF No. 1. The Court dismissed Plaintiffs' equal protection claim based on religious discrimination but allowed the equal protection claim based on sexual orientation or same-sex marriage and the Establishment Clause claim to proceed. See ECF No. 81. A few years into the litigation, Miracle Hill notified SCDSS that Miracle Hill would voluntarily decline to receive all government funding for its work as a child-placing agency. See ECF No. 242-1 at 285–86; ECF No. 242-3 at 60–61. Miracle Hill remains licensed by SCDSS and still has a contract with SCDSS, but does not receive any government funding for its services. See ECF No. 242-1 at 285–86.

## ARGUMENT

### I. Religious child-placing agencies play a vital role in providing safe and secure homes for children in need

America is in the midst of a foster-care crisis. "[D]emand for foster parents is 'at an all-time high.'" Rowan Scarborough, *Number of U.S. foster parents declining as need rises with unaccompanied immigrant kids*, Washington Times (Apr. 11, 2021), https://tinyurl.com/3cz93ekc (attributing the high rise in demand for foster care in part due to increase in parental drug usage and substance abuse as well as the influx of unaccompanied minors entering the country); Scott Simon, *The Foster Care System Is Flooded With Children Of The Opioid Epidemic*, NPR (Dec. 23, 2017), https://tinyurl.com/4n8cjfru. In Fiscal Year 2021 alone, over 600,000 children in this country spent time in a foster care system. See Children's Bureau, *Trends in Foster Care and Adoption: FY 2012 – 2021* (Nov. 1, 2022), https://tinyurl.com/4fvtmrsm. Over half that number remained in foster care at the end of the year, with only an estimated 54,200 children having been adopted. *Ibid.* States have struggled mightily to supply the demand: "Recruiting foster parents has become more and more challenging over the years." Dr. John DeGarmo, *The Foster Care Crisis: The Shortage of Foster Parents in America*, American Society for the Positive Care of Children (last visited Feb. 22, 2023), https://tinyurl.com/4umd246w. And that "acute shortage of foster parents has produced a cohort of vulnerable children, many with drug-addicted parents, who are sent away, sometimes out of state, to live in . . . inhospitable institutes [where] . . . their chances of thriving are scant." *The crisis in foster care*, Washington Post (Jan. 11, 2020), https://tinyurl.com/2p8bcy8h.

In Virginia alone, for example, nearly 5,400 children are in the foster-care system, more than 700 of whom are in need of adoption. See Virginia Department of Social Services, *Foster Care & Adoption* (2023), https://tinyurl.com/bdzf2j6p. As in many other States, private CPAs in

Virginia facilitate the placement of children into the State's foster homes. 22 Va. Admin. Code § 40-131-10; see also Va. Code § 63.2-1819. In the 2010s, Virginia had 77 private agencies which facilitated foster care in the State. Anita Kumar, *Virginia adding 'conscience clause' to adoption laws*, Washington Post (Feb. 7, 2012), https://tinyurl.com/3z98k8fy. Faith-based CPAs accounted for about 15 percent of all children in foster care. Ned Oliver, *Virginia lawmakers move to cut state funding for adoption agencies that refuse LGBTQ couples*, Virginia Mercury (Feb. 15, 2021), https://tinyurl.com/4b82en48.

Faith-based CPAs are essential to the provision of foster-care services in Virginia, as in South Carolina. Many of those Virginia faith-based agencies have been around and providing "vital [services]" to Virginia's children "for decades." Kumar, *supra*. The existence of faith-based agencies promotes diversity in the foster-care system in the Commonwealth and increases the number of foster homes available for children. For example, it "allow[s] birth parents to choose an agency—and as a result, adoptive parents—who adhere to their religious beliefs." *Ibid.* Faith-based agencies can also draw foster parents from shared faith communities, increasing the overall number of available foster parents in the State. Natalie Goodnow, *The Role of Faith-Based Agencies in Child Welfare*, The Heritage Foundation (May 22, 2018), https://tinyurl.com/pvwpxjrn. Despite the importance of faith-based CPAs in Virginia, the choice of whether to work with any CPA is in the hands of any individual or couple seeking to foster or adopt a child, like in South Carolina. Where an individual or couple does not agree with a CPA's religious beliefs or requirements, that individual or couple is free to use any other religious or nonreligious CPA to foster or adopt a child—with nonreligious CPAs comprising the vast majority of CPAs in Virginia. See Oliver, *supra*.

## II. The First Amendment *requires* Defendants to accommodate Miracle Hill's religious exercise

When the government operates a public welfare program, it cannot exclude otherwise qualified persons or organizations from participating in that program solely because of their religious beliefs. To do so impermissibly discriminates against religion and violates the Free Exercise Clause of the First Amendment. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022–25 (2017). And when the government creates a public welfare program in which religious entities participate, it does not violate the Establishment Clause of the First Amendment. *Mitchell v. Helms*, 530 U.S. 793, 810–14 (2000) (plurality op.). If there were any doubt about the application of these principles to this case, the Supreme Court put them to rest in two recent cases: *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), and *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022). Those cases make clear that Defendants' actions challenged in this suit were not just constitutionally permissible, but constitutionally required.

Our Constitution carves out a special place for religion. The Religion Clauses of the First Amendment provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. In other words, "religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee v. Weisman*, 505 U.S. 577, 589 (1992) ("[W]hile concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference."). Though courts often refer to the two clauses "as separate units," they "appear in the same sentence of the same Amendment." *Kennedy*, 142 S. Ct. at 2426. They accordingly have "'complementary' purposes, not warring ones." *Ibid.* (quoting *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 13, 15 (1947)) (explaining that one Clause is *not* "always sure to prevail over the others"). And the *Fulton* and *Kennedy* decisions show how these complementary

purposes work together in foster care systems like those in South Carolina and Virginia.

First, *Fulton* makes clear that Defendants' actions were not only constitutionally permissible, but also constitutionally required under the Free Exercise Clause. Pursuant to the Supreme Court's case law, "[n]eutral, generally applicable law[s] do[] not offend the Free Exercise Clause, even if the law has an incidental effect on religious practice." *Hines v. South Carolina Dept. of Corr.*, 148 F.3d 353, 357 (4th Cir. 1998) (citing *Employment Div., Dept. of Human Res. of Ore. v. Smith*, 494 U.S. 872, 876–79 (1990)). Where a law is not neutral or not generally applicable, however, the decision to deny religious accommodation must satisfy strict scrutiny by "advanc[ing] interests of the highest order and [being] narrowly tailored in pursuit of those interests." See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 546 (1993) (cleaned up). Strict scrutiny requires the State to "ha[ve] [more than] a compelling interest in enforcing its non-discrimination policies generally, but [to] . . . ha[ve] such an interest in denying an exception to [the specific entity]." *Fulton*, 141 S. Ct. at 1881–82 (explaining that the State must show how "granting [the entity] an exception will put [the stated] goals at risk").

In *Fulton*, the City of Philadelphia entered standard annual contracts with private foster agencies to place with foster families children who could not remain in their homes and were thus in the custody of the City's Department of Human Services. *Fulton*, 141 S. Ct. at 1874. As part of that process, the agencies would certify each prospective foster family after conducting a home study as required by state law. *Id.* at 1875. In 2018, a spokesman for the Archdiocese of Philadelphia stated that in light of its religious convictions, Catholic Social Services (CSS) would not be able to consider prospective foster parents in same-sex marriages in its role as one of the private foster agencies in the City of Philadelphia. *Ibid.* In response, and after over 50 years of successfully contracting with the City, the Department informed CSS that it would no longer refer

children to the agency. *Ibid.* It specifically explained that "it would not enter a full foster care contract with CSS in the future unless the agency agreed to certify same-sex couples" because CSS's refusal to certify same-sex couples violated a non-discrimination provision in its contract with the City. *Id.* at 1875–76.

The Supreme Court ultimately concluded that the City violated the free-exercise rights of CSS. "As an initial matter," the Court held, the City burdened CSS's religious exercise "by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs." *Id.* at 1876. The Court also held that the contractual provision—prohibiting agencies from rejecting foster or adoptive parents based on their sexual orientation "unless an exception is granted by the [Department's] Commissioner"—"incorporates a system of individual exemptions" and thus was not generally applicable. *Id.* at 1878–79 ("[T]he inclusion of a formal system of entirely discretionary exceptions . . . renders the contractual non-discrimination requirement not generally applicable."). And after explaining that CSS sought "only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs," the Court held that the City's refusal "to contract with CSS for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment." *Id.* at 1882.

Under *Fulton*, Defendants would be obligated to accommodate Miracle Hill's religious exercise. As in *Fulton*, conditioning Miracle Hill's license as a CPA on its compliance with nondiscrimination policies "put[] [Miracle Hill] to the choice of curtailing its mission or approving relationships inconsistent with its beliefs." *Fulton*, 141 S. Ct. at 1876. And like the contractual provision in *Fulton*, the policies here are not generally applicable. The Federal anti-discrimination regulation lays out a general anti-discrimination prohibition "in the administration of HHS

programs and services," 45 C.F.R. § 75.300(c), but provides that "the HHS awarding agency" "may . . . authorize[]" "[e]xceptions [to that requirement] on a case-by-case basis for individual non-Federal entities," *id.* § 75.102(b). Moreover, federal regulations require the agency to accommodate faith-based organizations; they direct that "[t]he HHS awarding agency program or service shall provide [any permissible] accommodation" to a faith-based organization "to participate in any HHS awarding agency program or service for which they are otherwise eligible." 45 C.F.R. § 87.3(a). And the state nondiscrimination requirements either do not apply to Miracle Hill at all, see ECF No. 242 at 16–17, or give SCDSS discretion to make exceptions when doing so "is in the best interest of the child," ECF No. 242-31 at 4. See, *e.g.*, *Fulton*, 141 S. Ct. at 1877 ("A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." (cleaned up)).

And as in *Fulton*, refusing to contract with Miracle Hill unless it complies with nondiscrimination requirements could not survive strict scrutiny. South Carolina has no compelling state interest in denying an exception to Miracle Hill. Indeed, the State has affirmed its interest in accommodating Miracle Hill and other faith-based CPAs. See ECF No. 242-13 at 2 (explaining that South Carolina has a large number of children in foster care and that the State "needs to continue growing [its] CPAs" to serve that need); see also *Fulton*, 141 S. Ct. at 1882 (accommodating CPAs is "likely to increase, not reduce, the number of available foster parents"). South Carolina therefore "*must*" accommodate Miracle Hill. *Id.* at 1881 (emphasis added). *Fulton* thus answers the Establishment Clause question before the Court: the Establishment Clause of course permits Defendants to accommodate Miracle Hill's religious exercise, because the Free Exercise Clause requires Defendants to accommodate Miracle Hill's religious exercise.

The Court's recent Establishment Clause jurisprudence confirms this result. In denying

Defendants' motion to dismiss the Establishment Clause claim, this Court held that "the well-pled allegations in the Complaint clearly set forth a cause of action based on Defendants' alleged violation of the second and third prongs of the *Lemon* [*v. Kurtzman*, 403 U.S. 602 (1971)] test." *Rogers v. United States Dep't of Health & Human Servs.*, 466 F. Supp. 3d 625, 645–46 (D.S.C. 2020). But the Supreme Court recently made explicit that "the 'shortcomings' associated with this ambitious, abstract, and ahistorical approach to the Establishment Clause became so apparent that [the Supreme] Court long ago abandoned *Lemon* and its endorsement test offshoot." *Kennedy*, 142 S. Ct. at 2427. The Fourth Circuit has since confirmed that, although "[t]he Fourth Circuit has long used the three-pronged *Lemon* test," *Kennedy* "upended that approach" and it would do so "no more." *Firewalker-Fields v. Lee*, 58 F.4th 104, 121–22 (4th Cir. 2023). In place of the *Lemon* test, the Supreme Court has instructed "that the Establishment Clause must be interpreted by reference to historical practices and understandings" and the "lines that courts and governments must draw between the permissible and impermissible has to accord with history and faithfully reflect the understanding of the Founding Fathers." *Kennedy*, 142 S. Ct. at 2428; see also *Firewalker-Fields*, 58 F.4th at 122 ("From now on, historical practice and understanding 'must' play a central role in teasing out what counts as an establishment of religion.").

Plaintiffs cannot show that providing accommodations to religious foster care programs is impermissible in light of American history and the understanding of the Founding Fathers. To the contrary, history reveals that religious ministries have long partnered with governments to provide foster care and care for orphans across the United States. See ECF No. 242 at 26–30. While the Supreme Court in *Fulton* traced this tradition in the City of Philadelphia at least as far back as the mid-1700s, see *Fulton*, 141 S. Ct. at 1874–75 (noting that "[t]he Catholic Church has served the needy children of Philadelphia for over two centuries"), the tradition in Virginia began even earlier.

In 1636, fewer than thirty years after the founding of Jamestown Colony, a child named Benjamin Eaton became America's first foster child. See William Joseph Norris, "A Home of Their Own: Past Policies for Foster Care" (2020), *Master Theses* 618, at 9, *available at* https://tinyurl.com/ybrc7bx5. From the early stages, Christian churches primarily handled the foster system: records show that in colonial Virginia "Anglican parishes levied taxes to care for orphans and the poor" and that Christian congregations "took up collections to pay qualified widows to care for other orphaned children." *Ibid.* (quotation marks omitted).

It should come as no surprise then that when Virginia's own Thomas Jefferson—author of the Declaration of Independence and the Virginia Statute for Religious Freedom, and the founder of the University of Virginia—was President of the United States, he assured an order of Ursuline nuns who had operated a convent, orphanage, and school for girls and young women in New Orleans since 1727 that transfer of control of the Louisiana Territory from France to the United States would not only not undermine their ownership of their property, but also that their new government would not violate their religious freedom. See Carl H. Esbeck, *An Extended Essay on Church Autonomy*, 22 Fed. Soc. R. 244, 272 (2021) (quoting letter from President Jefferson to the Ursuline nuns: "the principles of the constitution . . . are a sure guaranty to you that [your property] will be preserved to you sacred and inviolate, and that your institution will be permitted to govern itself according to [its] own voluntary rules, without interference from the civil authority."). This Court should join Mr. Jefferson and conclude that an almost 400-year-old practice does not violate the Constitution.

## III. A contrary ruling would be wildly inconsistent with the views of nearly a dozen States that have laws accommodating the religious beliefs of private child-welfare agencies

Many States have enacted statutory or regulatory protections for faith-based organizations that partner with them to provide child-placing services. The Supreme Court has long recognized

that these types of religious accommodations "follow[] the best of our traditions." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). The "secular goal of exempting religious exercise from regulatory burdens in a neutral fashion, as distinguished from advancing religion in any sense, is indeed permissible under the Establishment Clause." *Madison v. Riter*, 355 F.3d 310, 317 (4th Cir. 2003). Ruling against Defendants in this case would be inconsistent with the laws of these States, which explicitly accommodate religious CPAs.

Many States—including Virginia—provide more robust religious liberty protection than the Supreme Court understands the First Amendment's Free Exercise Clause to provide. Compare *Employment Div.*, 494 U.S. at 879 (holding a neutral and generally applicable law that burdens religious practices does not violate the Free Exercise Clause), *with* Va. Code § 57-2.02 (requiring the government to demonstrate that any substantial burden imposed on religious exercise is essential to further a compelling governmental interest and the least restrictive means of furthering that compelling interest); Ark. Code § 16-123-404 (similar); Fla. Stat. § 761.03 (similar); La. Stat. § 13:5233 (similar); S.C. Code § 1-32-40 (similar); Tex. Civ. Prac. & Rem. Code § 110.003 (similar). Many States modeled these laws after the federal Religious Freedom Restoration Act, which requires federal agencies to afford greater protection for religious exercise than is available under the Supreme Court's current understanding of the federal Free Exercise Clause. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760–61 (2014).

In light of the critical role played by religious CPAs in the foster-care system, several state legislatures, including those of several Amici States, enacted laws to protect the religious liberty of child-placing agencies who work under state government contracts to help find safe, loving homes for children. Virginia law, for instance, provides that "no private child-placing agency shall be required to perform, assist, counsel, recommend, consent to, refer, or participate in any

placement of a child for foster care or adoption when the proposed placement would violate the agency's written religious or moral convictions or policies." Va. Code § 63.2-1709.3(A). Similarly, the Commissioner of Social Services "shall not deny an application for an initial license or renewal of a license or revoke the license of a private child-placing agency"—nor may a "state or local government entity" deny a private CPA "any grant, contract, or participation in a government program"—because of "the agency's objection to performing, assisting, counseling, recommending, consenting to, referring, or participating in a placement that violates the agency's written religious or moral convictions or policies." Va. Code § 63.2-1709.3(B)–(C). And, finally, "[r]efusal of a private child-placing agency to perform, assist, counsel, recommend, consent to, refer, or participate in a placement that violates the agency's written religious or moral convictions or policies shall not form the basis of any claim for damages." Va. Code § 63.2-1709.3(D). Virginia is joined by ten other States that expressly protect the right of religious CPAs to operate consistently with their religious beliefs—Alabama, Arizona, Kansas, Michigan, Mississippi, North Dakota, Oklahoma, South Dakota, Tennessee, and Texas.[1]

[1] See Ala. Code § 26-10D-5 ("The state may not refuse to license or otherwise discriminate or take an adverse action against any [CPA] that is licensed by or required to be licensed by the state for child placing services on the basis that the [CPA] declines to make, provide, facilitate, or refer for a placement in a manner that conflicts with, or under circumstances that conflict with, the sincerely held religious beliefs of the [CPA]."); Ariz. St. § 8-921(A) (prohibiting adverse action against CPAs that "provided or decline[d] to provide adoption or adoption services or foster care . . . in a manner consistent with the person's religious belief or exercise of religion"); Kan. Stat. § 60-5322 (providing that no CPA "shall be required to perform, assist, counsel, recommend, consent to, refer or otherwise participate in any placement of a child for foster care or adoption when the proposed placement of such child would violate such agency's sincerely held religious beliefs"); Mich. Comp. Laws § 722.124e(3) (permitting CPA to decline "to provide [services not subject to a contract with the State] that conflict with, or provide [services not subject to a contract with the State] under circumstances that conflict with, the [CPA's] sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the [CPA]"); Miss. Code § 11-62-5(2) (permitting a "religious organization that advertises, provides or facilitates adoption or foster care" to "decline[] to provide any adoption or foster care service, or

This Court's decision in this case obviously will not be binding in the other States that protect the religious liberty of CPAs, but it could be treated as "persuasive authority entitled to substantial deference" in other district courts. *E.g.*, *Nat'l Union Fire Ins. v. Allfirst Bank*, 282 F. Supp. 2d 339, 351 (D. Md. 2003). The effect of this Court's decision could thus be felt beyond the particular facts of this case and could threaten these protections for hundreds of religious CPAs providing vital services for vulnerable children across the country.

## IV. Miracle Hill's religious exercise does not involve state action and therefore did not violate the Constitution

This Court should also reject both the Establishment Clause and Equal Protection Clause challenges because Miracle Hill's exercise of religion does not involve state action. The First Amendment prohibits only state action, not private conduct. See *White Coat Waste Project v. Greater Richmond Transp Co.*, 35 F.4th 179, 189 (4th Cir. 2022) ("[C]ourts must ensure that constitutional standards such as the First Amendment are only enforced when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." (cleaned up)).

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related service, based upon or in a manner consistent with a sincerely held religious belief or moral conviction"); N.D. Cent. Code § 50-12-07.1 (providing that CPAs may refuse to place a child in a placement that "violates the agency's written religious or moral convictions or policies"); Okla. Stat. § 1-8-112 (providing that no CPA "shall be required to perform, assist, counsel, recommend, consent to, refer, or participate in any placement of a child for foster care or adoption when the proposed placement would violate the agency's written religious or moral convictions or policies"); S.D. Codified Laws § 26-6-38 (providing that no CPA "may be required to provide any service that conflicts with, or provide any service under circumstances that conflict with any sincerely-held religious belief or moral conviction of the [CPA] that shall be contained in a written policy, statement of faith, or other document adhered to by a [CPA]"); Tenn. Code § 36-1-147 (providing that "no private licensed [CPA] shall be required to perform, assist, counsel, recommend, consent to, refer, or participate in any placement of a child for foster care or adoption when the proposed placement would violate the agency's written religious or moral convictions or policies"); Tex. Hum. Res. Code § 45.004(1) (permitting child welfare services providers to decline to provide services to or to refer a person for child welfare services under "circumstances that conflict with[] the provider's sincerely held religious beliefs").

Similarly, the Equal Protection Clause establishes an "essential dichotomy between discriminatory action by the State, which is prohibited by the Equal Protection Clause, and private conduct, 'however discriminatory or wrongful,' against which that clause 'erects no shield.'" *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972). Here, Plaintiffs challenge the conduct of Miracle Hill, not the State of South Carolina. See, *e.g.*, ECF No. 1 at ¶¶ 129–30. Accordingly, Plaintiffs can succeed on their claims only if they show that Miracle Hill's actions are state action. This they cannot do.

The Fourth Circuit has consistently concluded that private parties providing foster care services are not state actors. See, *e.g.*, *Milburn v. Anne Arundel Cty. Dep't of Soc. Servs.*, 871 F.2d 474, 479 (4th Cir. 1989). This should settle the matter. But Plaintiffs contend that the Fourth Circuit's recent en banc decision in *Peltier v. Charter Day School*, 37 F.4th 104 (4th Cir. 2022), altered the landscape and transformed these historically private entities into state actors. See ECF No. 243 at 26. Even if *Peltier* remains the law,[2] it is readily distinguishable. *Peltier* held a public charter school to be a state actor because North Carolina was "required under its constitution to provide free, universal elementary and secondary schooling to the state's residents," fulfilled that duty "in part by creating and funding the public charter school system," and "exercised its sovereign prerogative to treat these state-created and state-funded schools as public institutions that perform the traditionally exclusive government function of operating the state's public schools." 37 F.4th at 122. It does not convert private entities into state actors anytime a private entity "contract[s] with" the State. ECF No. 243 at 26.

[2] The Supreme Court is considering a petition for a writ of certiorari in *Peltier*, see Petition for Writ of Certiorari, *Charter Day Sch., Inc. v. Peltier* (No. 22-238), *available at* https://tinyurl.com/bdh3d29u, and several of the Amici States argued in a brief in support of that petition that *Peltier* was wrongly decided, see Brief for State of Texas, *et al.*, *Charter Day Sch., Inc. v. Peltier* (No. 22-238), *available at* https://tinyurl.com/3sef3mme.

Indeed, the foster care system in South Carolina shares little in common with the public charter school at issue in *Peltier*. No South Carolina constitutional provision requires the State to provide foster care services, and the "care of foster children is not traditionally the exclusive prerogative of the State." *Milburn*, 871 F.2d at 479. South Carolina thus also stands in stark contrast to Michigan, a State where the Sixth Circuit held that private foster care agencies were state actors. See *Brent v. Wayne Cnty. Dep't of Hum. Servs.*, 901 F.3d 656, 676–77 (6th Cir. 2018). In Michigan, the State is "*constitutionally required* to protect children who are wards of the state from the infliction of unnecessary harm" and "contracted with [private foster care agencies] to fulfill [the State's] duties." *Ibid.* (citation and quotation marks omitted; emphasis added). Miracle Hill does not fit into the narrow set of circumstances in which the Fourth Circuit has held that a private entity becomes a state actor.

## CONCLUSION

For the foregoing reasons, this Court should grant Defendants' motion for summary judgment.

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Respectfully submitted,

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