IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FATMA MAROUF, *et al.*, Plaintiffs, v. ALEX AZAR, in his official capacity as Secretary of the United States Department of Health and Human Services, *et al.*, Defendants.	Case No. 18-cv-378 (APM)

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

Federal Defendants' Motion to Dismiss, ECF No. 28, established that Plaintiffs' Amended Complaint should be dismissed for lack of subject matter jurisdiction. Plaintiffs lack standing on the basis of their status as taxpayers to bring their expansive programmatic challenge to the Federal Defendants' administration of URM and UAC grants to Defendant USCCB.[1] Taxpayers are categorically barred from pursuing claims on the basis of that status and Plaintiffs are unable to invoke the narrow exception for certain Establishment Clause claims recognized in *Flast v. Cohen*, 392 U.S. 83 (1968) and *Bowen v. Kendrick*, 487 U.S. 589 (1988). That exception only covers challenges to congressional action, not executive discretion, and it is undisputed that no statute authorizing the URM or UAC programs or appropriating funds for those programs expressly contemplates grants to religious entities. That should be the end of the matter so far as Plaintiffs' claims to taxpayer standing are concerned. *See Hein v. Freedom from Religion Found.*, 551 U.S. 587 (2007); *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008).

Individual Plaintiffs Fatma Marouf and Bryn Esplin also lack standing to pursue their claims against the Government premised on the alleged denial of an opportunity to serve as foster parents to unaccompanied youth by a private party not before the Court, Catholic Charities of Fort Worth ("CCFW"). Individual Plaintiffs have failed to plead the "substantial" basis required by Circuit precedent to show that their alleged injury is traceable to the Government or that it is likely, as opposed to speculative, that the relief requested against the Government would redress the injury of a denial of opportunity caused by CCFW. The Court cannot control that non-party and can only speculate about how CCFW would respond to a judicial order against the Government requiring it

[1] Specialized terms used but not otherwise defined herein shall have the same meaning as in the Federal Defendants' Statement of Points and Authorities in Support of Their Motion to Dismiss, ECF No. 28-1 ("Mem.").

to attempt to force CCFW to work with the individual Plaintiffs while receiving federal funding. Plaintiffs have not pled and have no way of knowing whether CCFW would acquiesce in any such effort or would instead choose to cease accepting federal funds and participating in these programs, leaving individual Plaintiffs no closer to redress for their asserted injury.

Ultimately, Plaintiffs' lawsuit puts at risk the enormous good done for unaccompanied youth by USCCB with no proper Article III case or controversy at its foundation. The Amended Complaint should accordingly be dismissed.

ARGUMENT

I. Plaintiffs Cannot Invoke the Narrow Taxpayer Standing Exception.

Federal Defendants' opening brief, Mem. at 9, showed that Plaintiffs' broad programmatic challenge to HHS's administration of the UAC and URM programs should be dismissed for lack of standing because Plaintiffs impermissibly rely on their status as federal taxpayers to allege injury relating to the expenditure of federal funds, a generalized grievance that the Supreme Court has categorically held cannot form the basis of an Article III case or controversy. While the Supreme Court has recognized a narrow exception to that general rule against taxpayer standing in certain Establishment Clause cases, this case does not fit within that exception. *See* Mem. at 9–15.

As explained in the opening brief, Plaintiffs do not meet the requirements of the taxpayer-standing exception because they challenge "executive discretion, not congressional action." *Hein*, 551 U.S. at 605; Mem. at 12–14. In directing HHS to provide care and custody for UACs, Congress did not require the use of grants; it did not specify any intended grantees; it did not identify any faith-based terms and conditions for grants; nor, of course, did it expressly authorize funding for any religious organization. *See* 8 U.S.C. § 1232(b)(1), (i). Similarly, Congress did

not even require that HHS provide services for URMs, instead only authorizing HHS to make grants to unspecified grantees to assist in providing services to these youths. *Id.* § 1522(d)(2)(A). Lacking a basis to contest congressional action, Plaintiffs' programmatic challenge to administration of the URM and UAC programs unavoidably takes issue with the exercise of executive discretion. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 479 (1982) (denying taxpayer standing where the source of the complaint was not congressional action). By challenging the exercise of agency discretion to award grants to religious and non-religious organizations, rather than congressional action, Plaintiffs fail to qualify for taxpayer standing.

This dispositive lack of congressional action is shown by the fact that Congress, either through a statutory mandate or an appropriation bill, did not "authorize, direct, or even mention," the specific use of funds that Plaintiffs challenge. *Hein*, 551 U.S. at 605. Rather, Congress provided for the care and custody of unaccompanied youths, potentially through grants and cooperative agreements. But there is no statutory mandate or appropriation expressly contemplating the conduct about which Plaintiffs complain, namely, issuance of grants to a religious charity and its subsequent refusal to use those funds in a manner inconsistent with its religious beliefs. D.C. Circuit precedent shows that this is dispositive of the attempt to invoke the taxpayer-standing exception. *See Navy Chaplaincy*, 534 F.3d at 762 (rejecting standing based on claim that Navy was allegedly operating its chaplaincy program in a religiously discriminatory manner because "[n]o legislative enactment expressly authorizes or appropriates funds for the Navy *to favor Catholic chaplains* in its retirement system") (emphasis added); *see also Hein*, 551 U.S. at 607 (denying taxpayer standing because the challenged expenditures "were not

expressly authorized or mandated by any specific congressional enactment"). Plaintiffs' challenge is too attenuated from congressional action to permit taxpayer standing.

A. Plaintiffs' Theory of Taxpayer Standing is Foreclosed by Binding Precedent.

In response to these arguments, Plaintiffs propose a general rule that it is "legally immaterial" to the standing inquiry "whether executive discretion determines" the recipients of federal funds, so long as Congress specifically appropriated funds for the program at issue, the program was enacted with the "purpose" of disbursing funds, and Congress understood those funds might go to religious organizations. *See* Pls.' Mem. of P. & A. in Supp. of Pls.' Opp'n to Defs.' Mots. To Dismiss at 17 ("Opp'n"), ECF No. 34. But contrary to Plaintiffs' assertion that executive discretion is "legally immaterial," *id.*, the Supreme Court has "never found taxpayer standing" when "[the challenged] expenditures resulted from executive discretion, not congressional action." *Hein*, 551 U.S. at 605. The D.C. Circuit recently confirmed that the taxpayer-standing exception does not "encompass [challenges to] discretionary Executive Branch spending." *Navy Chaplaincy*, 534 F.3d at 762.

Navy Chaplaincy also expressly forecloses Plaintiffs' argument that the statutory text is irrelevant to the standing inquiry if Congress understood that authorized grants or appropriated funds could possibly go to religious entities. In reviewing Establishment Clause claims of discrimination in favor of Catholic chaplains, the *Navy Chaplaincy* court looked for a congressional enactment contemplating that *specific* conduct, namely a "legislative enactment expressly authoriz[ing] or appropriat[ing] funds for the Navy *to favor Catholic chaplains* in its retirement system." 534 F.3d at 762 (emphasis added). No such enactment existed and plaintiffs' invocation of taxpayer standing failed on that basis, even though the court recognized there were statutes establishing the Navy Chaplain Corps. *Id.* Those statutes "ma[de] no reference to

denominational category, only to chaplains generally" and they provided no basis to find the *Flast* exception met. *Id.* Similarly here, although statutes direct HHS to provide care and custody for UACs and authorize it to assist in providing care to URMs, potentially through grants and cooperative agreements, those statutes contain no reference to faith-based organizations or religious conditions. *See* 8 U.S.C. § 1232(b)(1), (i); *id.* § 1522(d)(2)(A). Neither do any of the statutes appropriating money to carry out these functions. *See* Mem. at 5–6.

Plaintiffs attempt to bolster their expansive interpretation of the taxpayer-standing exception through reliance on *ACLU of Massachusetts v. Sebelius*, 697 F. Supp. 2d 200 (D. Mass. 2010), a case challenging grants made under the Trafficking Victims Protection Act. *ACLU* provides minimal support to Plaintiffs. To begin, Plaintiffs fail to mention that the district court's decision was vacated. *See ACLU of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 57–58 (1st Cir. 2013) (vacating the district court judgment on mootness grounds). *ACLU* is, in any event, an outlier among post-*Hein* precedent, *see* Mem. at 12, and was wrongly decided for two reasons relevant here. First, the court applied a flawed framework to the taxpayer standing analysis, reducing it to a game of legal horseshoes by attempting to determine whether the challenged expenditures were closer to *Flast* and *Kendrick* than to *Hein* and *Valley Forge*. *See ACLU*, 697 F. Supp. 2d at 209 ("Navigating between these poles, the TVPA expenditures at issue here appear more like the funds disbursed under the AFLA [at issue in *Kendrick*] than those spent to support the activities of the OFBCI [at issue in *Hein*]."). That approach contravenes the fundamental principle that taxpayer standing is an exception, and to qualify for that exception, a taxpayer must be *within* the bounds of *Flast* and *Kendrick*, and not simply *closer* to *Flast* and *Kendrick* than to *Hein*. *See Navy Chaplaincy*, 534 F.3d at 760–61 (rejecting taxpayer standing where "plaintiffs' claim does not fit within the narrow confines of Establishment Clause taxpayer

standing permitted by *Flast*"). Second, the *ACLU* court placed undue reliance on the fact that the statute at issue in *Kendrick* had "intended beneficiaries" akin to the "intended beneficiaries" of the human trafficking statute at issue in *ACLU*; the essential fact of *Kendrick* was not that the statute had intended beneficiaries but that the statute expressly contemplated funding religious groups to provide services to those beneficiaries. *Compare ACLU*, 697 F. Supp. 2d at 209 *with Hein*, 551 U.S. at 607 & n.6.

B. Plaintiffs' Claim Does Not Fit within the Taxpayer Standing Exception of *Flast* and *Kendrick*.

Beyond proposing the expansive and erroneous theory of taxpayer standing noted above, Plaintiffs more modestly argue that they fit within the taxpayer standing exception recognized by *Flast*, 392 U.S. 83, and *Kendrick*, 487 U.S. 589. Plaintiffs' argument goes far beyond what those cases, and their specific facts, permit. *Hein*, 551 U.S. at 609, 615 (*Flast* has "largely been confined to its facts" and should not be "expanded to the limit of its logic").

In *Flast*, taxpayers were permitted to challenge federal grants on Establishment Clause grounds, but that was so because the statute specified the *intended beneficiaries* of the grants as including "private elementary and secondary schools," which were understood to include religious schools. *See Flast*, 392 U.S. at 86–87 (quoting the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, Tit. II, § 203(a), 79 Stat. 27, 36 (previously codified at 20 U.S.C. § 821)); *see also Hein*, 551 U.S. at 604 n.3 (recognizing that at the time of the *Flast* decision, "the great majority of nonpublic elementary and secondary schools in the United States were associated with a church"). Plaintiffs' challenge does not fit into that narrow exception because Plaintiffs do not claim that the provision of federal funds for care and custody of the intended and identified statutory beneficiaries—unaccompanied youths—violates the Establishment Clause. *See* 8 U.S.C. § 1232(b)(1) (vesting HHS with responsibility for the "care and custody of all unaccompanied

alien children"); *id.* § 1522(d)(2)(A) (authorizing ORR to "provide assistance" and make grants and enter contracts for provision of "child welfare services . . . furnished to any refugee child"). And it is undisputed that no "direct and unambiguous congressional mandate" prescribes disbursement to religiously affiliated entities to provide such care and custody. *See Hein*, 551 U.S. at 604. HHS has issued grants for these programs to USCCB solely as a matter of executive discretion. That takes this case outside of *Flast*'s narrow purview.

Plaintiffs nonetheless attempt to extend *Flast* to cover this case because the text of the relevant statute in *Flast* did not expressly authorize federal funding for religious schools, only "private" schools. From this, Plaintiffs extrapolate that they can invoke *Flast*'s exception because Members of Congress may have been aware, when Congress later appropriated money for the URM and UAC programs, that HHS has issued grants to USCCB, by virtue of annual reports submitted to Congress. Opp'n at 17. This point is irrelevant first and foremost because, again, *Flast* involved a distribution of funds to private schools that was *expressly* ordained *in the statute*. *See* Elementary and Secondary Education Act of 1965, 79 Stat. at 36 ("The Commissioner *shall* carry out . . . a program for making grants . . . in public and private elementary and secondary schools." (emphasis added)). No similar statutory provision exists here requiring the payment of federal funds to a particular category of grantee. At most, the statutes authorize (without requiring) the Secretary to issue grants to "voluntary agencies" or "public and private nonprofit agencies." *See* 8 U.S.C. §§ 1232(i), 1522(d)(2)(A). While the fact that the recipients of federal funding in *Flast* would be predominantly religious institutions was not specifically reflected in the statute, the fact that they would include private schools was statutorily determined, unlike here. In fact, the statutes here do not specify *any* intended grantees, and HHS is at liberty to use the appropriations to provide care and custody to unaccompanied youths itself, instead of using federal

grants. *See id.* § 1232(i); § 1522(d)(2)(A). *Hein* makes clear that expenditures fall within *Flast* only when funded "pursuant to an express congressional mandate *and* a specific congressional appropriation." *Hein*, 551 U.S. at 603 (emphasis added).

Moreover, Plaintiffs seek to extend *Flast* beyond its facts by speculating about Congressional intent based on information Members of Congress may have had—the aforesaid reports—when passing the relevant URM and UAC appropriations. Opp'n at 17. Plaintiffs cite no authority for the proposition that a court may impute to Congress an intent to specifically authorize payments of federal funds to particular types of organizations nowhere mentioned in the statutory text based on information that Congress may have had at hand when passing subsequent appropriations bills. To the contrary, the Supreme Court has indicated that courts should give little, if any, weight to such extra-textual materials. *See TVA v. Hill*, 437 U.S. 153, 191 (1978) ("Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress."); *see also Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986) (declining to afford any weight to statements at congressional hearings that were not made by a Member of Congress or included in the official reports). Moreover, Plaintiffs' novel argument is foreclosed by the result in *Hein*; there, Congress had knowledge of the expenditures challenged by taxpayers, such as the creation of the Office of Faith-Based and Community Initiatives, as evidenced by congressional testimony from the director of that office. *See* Community and Faith-Based Organizations: Hearing on "The Role of Community & Faith-Based Organizations in Providing Effective Social Services" Before the Subcomm. on Criminal Justice, Drug Policy and Human Resources of the H. Comm. on Government Reform, 117th Cong. 17-43 (2001) (testimony of John J. Diiulo, Jr., Director, White House Office of Faith-Based and Community Initiatives) (available at 2001 WL 438649); *see also* Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001) (creating

the White House Office of Faith-Based & Community Initiatives); Exec. Order No. 13,198, 66 Fed. Reg. 8497 (Jan. 29, 2001) (creating five Centers for Faith-Based & Community Initiatives). In sum, Plaintiffs' proposed extension of *Flast* is untenable.

Plaintiffs' challenge likewise does not fit the facts of *Kendrick*. The *Kendrick* Court permitted taxpayers to bring an Establishment Clause challenge because the statute in question specifically mentioned religious organizations as intended grantees for the provision of services to the intended beneficiaries, who were adolescent children. *See Kendrick*, 487 U.S. at 593–95. The statute at issue in *Kendrick* further emphasized the provision of support by religious organizations and required grant applicants to describe how they would involve religious organizations in their projects. *See id.* at 595; *see also Hein*, 551 U.S. at 607 n.6. But unlike *Kendrick*, the statutes here do not define intended grantees by reference to their religious character, or impose any requirement that grantees involve religious organizations in the services provided. *See* 8 U.S.C. § 1232(b)(1), (i); *id.* § 1522(d)(2)(A).

C. Plaintiffs Fail to Distinguish *Hein* and *Navy Chaplaincy*.

Plaintiffs also argue that their claim to taxpayer standing is valid on the asserted basis that this case may be distinguished from *Hein* and *Navy Chaplaincy*. Opp'n at 18. As an initial matter, Plaintiffs' argument here gets the inquiry backwards. The general rule is that taxpayers cannot establish standing on the basis of their taxpayer status. Whether there are ways to distinguish two cases applying this rule says little about whether Plaintiffs can meet their burden to show a basis to hurdle the high bar to taxpayer standing. In other words, the question is not whether Plaintiffs' challenge fits within the facts of *Hein* or *Navy Chaplaincy*, but rather whether it fits within the facts of *Flast* and *Kendrick*. Plaintiffs' affirmative case on that point fails, as set forth above.

That said, Plaintiffs overstate the distinctions they attempt to draw between this case and *Hein* and *Navy Chaplaincy*. First, Plaintiffs attempt to distinguish *Hein* because that case involved faith-based initiatives not "specifically authorized" by statute and funded through "general Executive Branch appropriations," whereas here, Congress specifically authorized issuance of grants to care for unaccompanied youths and appropriated funds mentioning that statutory authority. *See* Opp'n at 18. But the fact that Congress has expressly contemplated the expenditure of federal funds in caring for unaccompanied youths does not erase the dispositive similarity between this case and *Hein*: that Congress did not "authorize, direct, or even mention" the expenditures criticized as unlawful in that case, just as Congress has not "even mention[ed]" federal spending on religiously-affiliated organizations here. *See Hein*, 551 U.S. at 605. And as the *Hein* Court's discussion of *Flast* shows, the absence of such a mention is dispositive. *See id.*

Plaintiffs' attempt at distinguishing *Navy Chaplaincy* has even less force. Plaintiffs argue that *Navy Chaplaincy* does not control here because there was "*no* appropriation specific to the Navy Chaplain Corps" in relevant appropriations bills. Opp'n at 19. But the D.C. Circuit's decision made clear that the plaintiffs could not fit within the narrow *Flast* exception for *two* reasons. There was neither a statute authorizing, nor a statute appropriating, "funds for the Navy to favor Catholic chaplains in its retirement system." 534 F.3d at 762. It was not enough that there were "statutes establishing the Navy Chaplain Corps," 10 U.S.C. §§ 5142, 5150, because Congress had not authorized the specific conduct complained of, namely the Navy allegedly "favor[ing] Catholic chaplains." 534 F.3d at 762. So too, here, Congress has neither mandated nor expressly authorized the conduct complained of: providing URM and UAC grants to faith-based organizations. In that essential respect, *Navy Chaplaincy* is indistinguishable from this case.

Plaintiffs also argue that *Hein* and *Navy Chaplaincy* are distinguishable because they involved "lump sum" appropriations. Opp'n at 18–19. Plaintiffs' argument is unavailing because the appropriations at issue here are also "lump sum." Each of the relevant statutes cited in the opening brief appropriates a sum of money to HHS to carry out the functions authorized under a number of different laws, Mem. at 5–6, including, but not limited to, care for UACs and URMs. Those appropriations statutes leave to executive discretion the determination of how to allocate those funds among the various functions that Congress has authorized. *See id.* This is the essence of a lump sum appropriation. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) (Scalia, J.) ("A lump-sum appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit."). Once again, Plaintiffs cannot escape the fact that their challenge is impermissibly directed against executive discretion.

Plaintiffs make one last attempt to salvage their taxpayer-standing claim by simply appealing to the policy rationales they identify as underlying the Establishment Clause and the taxpayer standing exception. Opp'n at 21–22. In effect, their argument seems to be: "If not us, then who?" But the *Hein* Court heard just such a "parade of horribles" argument and rejected it, noting that Congress always exists as a check on executive behavior, as do plaintiffs with claims to standing other than as taxpayers. *See* 551 U.S. at 614. The Supreme Court has also more broadly rejected arguments predicated on the idea that standing must be found in any given case in order to ensure that someone has standing to litigate the particular issue raised. "Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."

Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420 (2013).

For the foregoing reasons, Plaintiffs' taxpayer-standing claim fails. Plaintiff National LGBT Bar Association should be dismissed as a party entirely, and the individual Plaintiffs' Establishment Clause claim should also be dismissed, to the extent it seeks relief unrelated to CCFW's alleged denial of opportunity to the individual Plaintiffs to foster a UAC or URM.

II. Individual Plaintiffs Fail to Establish Traceability and Redressability with Regard to Injuries Arising from CCFW's Alleged Conduct.

Federal Defendants' opening brief, Mem. at 15–20, also established that the individual Plaintiffs' remaining claims—those arising out of CCFW's alleged denial of an opportunity to apply to serve as foster parents—fail the traceability and redressability prongs of the standing analysis and should be dismissed. Those claims arise from the alleged actions of a private third party not before the Court, applying its own criteria to determine who may serve as foster parents. Federal Defendants demonstrated that individual Plaintiffs have not made the "substantial" showing required to establish a causal relationship between CCFW's alleged actions and the Government, nor established that the relief requested against the Government will likely redress the alleged denial of opportunity.

The individual Plaintiffs protest that their claims are not premised on CCFW's conduct, but instead on governmental conduct. Specifically, the individual Plaintiffs point to (1) Federal Defendants' decision to fund grants for USCCB and (2) Federal Defendants' alleged "failure to remedy USCCB's improper administration of the grant funds to further sectarian precepts." Opp'n at 4. The individual Plaintiffs argue that Federal Defendants' motion failed to apprehend that their claims are based on these allegations of governmental conduct. They proceed to lay out multiple characterizations of the Federal Defendants' actions and their theories of injury, many of

which it should be noted are asserted in conclusory fashion unsupported by concrete allegations in the Amended Complaint. *See* Opp'n at 4–6 (stating, e.g., that Federal Defendants have "distressed" individual Plaintiffs over the level of care provided to unaccompanied youth and "coerce[d]" them to support CCFW's religious views).

But even more important, no matter how many ways the individual Plaintiffs attempt to restate and re-characterize their injury, they cannot dispute that the independent action of CCFW is the immediate cause of the injuries they allege, all of which are premised on CCFW's alleged decision not to consider them as foster parents. *See* Am. Compl. ¶ 6, ECF No. 21 ("Individual Plaintiffs suffered the additional harms alleged in this Complaint when organizations receiving federal funds denied them the opportunity to be foster parents . . . ."); *see also* Opp'n at 4–6. While individual Plaintiffs, Opp'n at 4–5, attempt to disassociate their injuries from CCFW by pointing to broader "distress" and "stigma" caused by the Government's administration of grants to USCCB, the Supreme Court has held that stigma and "value interests" alone are not judicially cognizable injuries when they are not tied to a personal denial of equal protection. *Allen v. Wright*, 468 U.S. 737, 755–56 (1984) ("If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members" of particular groups.), *abrogated in part on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014); *see also Moore v. Bryant*, 853 F.3d 245, 249, 251–52 (5th Cir. 2017); *In re U.S. Catholic Conference*, 885 F.2d 1020, 1026 (2d Cir. 1989).[2] Thus, the only concrete, particularized injury that individual Plaintiffs have

[2] Plaintiffs cite *Heckler v. Matthews*, 465 U.S. 728, 739–40 (1984), for the proposition that stigma is itself a cognizable injury. Opp'n at 5. To the contrary, the Supreme Court subsequently construed *Heckler* as standing for the proposition that stigmatic injury "accords a basis for standing only to 'those persons who are personally denied equal treatment.'" *Allen*, 468 U.S. at 755 (citing *Heckler*, 465 U.S. at 739–40). Plaintiffs' alleged injuries are thus necessarily tied to CCFW.

alleged would not have occurred if not for CCFW's alleged action. All of the individual Plaintiffs' traceability arguments are accordingly premised on this underlying denial of opportunity, seeking to tie the Government to that alleged denial by CCFW. *See* Opp'n at 7–9 (asserting a link between CCFW's injury-causing actions and governmental conduct).

Contrary to individual Plaintiffs' assertion, Federal Defendants' motion is not based on a misapprehension of their claims but rather the application of binding Circuit precedent to those claims. This is shown once again by the D.C. Circuit's decision in *Freedom Republicans, Inc. v. Federal Election Commission*, 13 F.3d 412 (D.C. Cir. 1994), highlighted in the Government's opening brief, Mem. at 18–19, but entirely ignored by Plaintiffs' response. Individual Plaintiffs' failure to account for or distinguish *Freedom Republicans* is a telling omission, as the decision involved the same theory of the case articulated by individual Plaintiffs here: the scenario where a "plaintiffs' claim hinges on the failure of the government to prevent another party's injurious behavior" and on the government's decision to continue funding that third party's activities allegedly in violation of federal law. *See* 13 F.3d at 418. Specifically, the plaintiff in *Freedom Republicans* sought to enjoin the Federal Election Commission's funding of the Republican National Convention as violating civil rights law on the basis "that the Republican Party's delegate-selection processes and system of minority 'auxiliaries' combine to discriminate against minority groups." *Id.* at 413. In reviewing plaintiff's standing to sue, the court evaluated whether there was a sufficient "causal connection" between the Government's funding decision and the underlying alleged injury of a dilution of voting power at the party convention, an injury caused by the Republican Party's decision to adopt a particular delegate-selection method. *Id.* at 416, 418. The *Freedom Republicans* court held that traceability and redressability both failed and its reasoning controls this case.

The D.C. Circuit explained that traceability "turns on the causal nexus between the agency action and the asserted injury." *Id.* at 418. The court concluded that plaintiff there failed to show traceability because the Republican Party's delegate-allocation method was not motivated by any concern over federal funding or any other government encouragement, but rather by other historical factors particular to the party's political interests. *Id.* Similarly here, Plaintiffs allege no facts indicating that HHS has encouraged or required CCFW's conduct. Instead, they have alleged only that CCFW was motivated by its own religious beliefs, *see* Am. Compl. ¶ 6; in other words, that CCFW's actions are "the result of decisions made by [CCFW] without regard to funding implications." *Freedom Republicans*, 13 F.3d at 419; *see also Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42–43 (1976) (holding plaintiffs did not have standing to challenge the government's favorable tax treatment of nonprofit hospitals on theory that it encouraged hospitals to deny full services to indigent patients, where it was "purely speculative whether the denials of service specified in the complaint fairly can be traced to [the Government's] 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications").

For similar reasons, plaintiff in *Freedom Republicans* also could not show redressability because the court "would ventur[e] into the realm of pure speculation" to predict how the Republican Party would respond to the loss of government funding on a matter so "vital" to the party's interests—even though the funding was "substantial." 13 F.3d at 419. This Court would similarly be venturing into the realm of speculation to predict that relief against the Government here would ultimately cause CCFW to work with the individual Plaintiffs, particularly in light of how "vital" CCFW's religious motivation is. *See, e.g.*, Am. Compl. ¶¶ 48, 60. At best, individual Plaintiffs can only speculate that CCFW might compromise its religious beliefs to continue participating in the URM and UAC programs. They certainly plead no facts permitting this Court

to "confidently predict" that CCFW would do so. *Freedom Republicans*, 13 F.3d at 419; *see also* USCCB Mot. to Dismiss at 11, ECF No. 29 ("the relief requested by Plaintiffs in the present case would simply force Catholic service providers out of the grant program altogether"). Even if the Court were to enjoin the Government from, in the words of Plaintiffs' Amended Complaint, "enabling" grantees' "use of religious . . . criteria" in the administration of services to unaccompanied youth, Am. Compl. Prayer for Relief ¶ D, it is "purely speculative" that these Fort Worth resident plaintiffs will obtain the opportunity they seek to foster an unaccompanied youth (as opposed to, for example, persons in other cities or states). Speculation about future government decision making in administering services to URMs and UACs cannot form the basis of a redressability finding. *See* Mem. at 19–20.

Individual Plaintiffs' various other arguments are unavailing. As for traceability, they contend that they have adequately pled that the "intervening choices of third parties are not truly independent of government policy" and their injuries are thus traceable to the Government. Opp'n at 7 (quoting *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 940–41 (D.C. Cir. 2004) and citing *Tel. & Data Sys., Inc. v. FCC*, 19 F.3d 42, 47 (D.C. Cir. 1994)). But individual Plaintiffs cite the wrong standard of review. In cases like this one, where a challenge to government action is premised on injury directly caused by a third party, the D.C. Circuit has recognized "two categories of cases where standing exists to challenge government action." *Renal Physicians Ass'n v. U.S. Dep't of Health & Human Servs.*, 489 F.3d 1267, 1275 (D.C. Cir. 2007). Individual Plaintiffs have cited the standard of review that applies in the first category of cases, which arises where the government authorizes conduct that would otherwise be illegal through, for example, a regulation. *See Nat'l Wrestling Coaches Ass'n*, 366 F.3d at 940–41 (distinguishing the "'causation by authorization' theory" as inapplicable to appellants' claim of standing); *see also*

Tel. & Data Sys., 19 F.3d at 47 (stating that the court was not "attempt[ing] any broad explication of the justiciability of indirect injury" because traceability was met where the government had "authorized the conduct" at issue "or established its legality"). In that first category, traceability and redressability are more readily satisfied because the third party's conduct is "not truly independent of government policy" that authorizes the conduct. This case does not fall into the first category because Plaintiffs have pled no basis, regulatory or otherwise, to say that the Federal Defendants expressly authorized CCFW's alleged actions. *See* Mem. at 16 n.5; *cf. Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 440–44 (D.C. Cir. 1998) (*en banc*) (holding that a party had standing to challenge government regulations that permitted zoos to hold primates in allegedly inhumane conditions).

The individual Plaintiffs must instead meet the burden imposed in the second category of indirect injury cases recognized in this Circuit, where no such government authorization is present. In that second category, the plaintiff must make a "substantial" showing of a "causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and the likelihood of redress." *Renal Physicians Ass'n*, 489 F.3d at 1275; *see also id.* at 1273 (characterizing the requirement as a "heightened showing"). Plaintiffs' brief fails to apply that standard and in any event they cannot meet it, as set forth above.

Individual Plaintiffs' redressability arguments fare no better. As the Federal Defendants have shown, the individual Plaintiffs cannot meet the redressability requirement of standing because it is speculative whether CCFW will continue providing services under the URM and UAC programs if the Government were required to attempt to force the organization to act contrary to its religious beliefs. Individual Plaintiffs contend that this reasoning "fails to draw all reasonable inferences in Plaintiffs' favor." Opp'n at 10. They baldly assert that relief in this case could be

obtained by simply requiring USCCB or CCFW to "initiate the URM and UC foster parent application process" and obligating the government to find some other, unidentified way to work with these individual Plaintiffs. *See* Opp'n at 11. In other words, individual Plaintiffs claim that for purposes of a motion to dismiss, the Court must *assume* that somehow, it could force the Federal Defendants to force USCCB or CCFW to consider individual Plaintiffs' application.

But individual Plaintiffs' argument again ignores the relevant D.C. Circuit precedents, which impose on individual Plaintiffs the burden of pleading a "substantial likelihood" that the judicial relief they seek against the Government will actually remedy the alleged injury caused by non-party CCFW. *See Renal Physicians* Ass'n, 489 F.3d at 1275 ("In other words, to establish redressability at the pleading stage, we required more than a bald allegation; we required that the facts alleged be sufficient to demonstrate a substantial likelihood that the third party directly injuring the plaintiff would cease doing so as a result of the relief the plaintiff sought.").

Even at the motion to dismiss stage, to support standing, plaintiffs must do more than supply "mere conclusory statements." *Abulhawa v. United States Dep't of the Treasury*, 239 F. Supp. 3d 24, 31 (D.D.C. 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (granting motion to dismiss because the plaintiffs failed adequately to allege causation or redressability). Yet individual Plaintiffs plead no basis to say that their relief requested would likely lead CCFW to continue participating in the URM and UAC programs or that URM or UAC foster care functions would continue to be carried out in Dallas-Fort Worth. And individual Plaintiffs cannot cure this defect by abstractly positing that the Government could be directed to "administer the URM and UC programs in a constitutionally compliant manner" that "accomodat[es] the religious views of URM and UC grantees," Opp'n at 11, without explaining how this result is to be achieved in a way that is likely to result in the redress of the specific injury they complain of. Individual

Plaintiffs' failure to articulate how this Court could effectuate a "causal connection between a possible judicial response and the redress of [their] injury" fatally undermines their claims. *Freedom Republicans*, 13 F.3d at 419.

The individual Plaintiffs fail to meet the traceability and redressability prongs of standing and their claims should be dismissed accordingly.

III. Plaintiffs Concede That They Cannot Sue the Federal Government for Damages.

Federal Defendants' opening brief, Mem. at 20–21, showed that Plaintiffs' claim for nominal damages against the United States should be dismissed because that claim is barred by sovereign immunity. Plaintiffs concede that their damages claim cannot stand in its current form and that they only seek damages as to claims that they may at some unspecified future date bring against non-party individual capacity defendants. *See* Opp'n at 22 & n.5 ("acknowledg[ing] the need to sue these officials in their individual capacities" to pursue damages relief). Plaintiffs cannot amend their complaint in response to a motion to dismiss (nor do they apparently intend to do so). *Arbitraje Casa de Cambio, S.A. de C.V. v. U.S. Postal Serv.*, 297 F. Supp. 2d 165, 170 (D.D.C. 2003). Plaintiffs' arguments are thus necessarily premised on damages claims they have not brought against parties they have not sued or served. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (official capacity suit is "*not* a suit against the official personally, for the real party in interest is the entity"); *see also* Fed. R. Civ. P. 4(i)(2), (3); 12(a)(2), (3) (providing separate standards for service and response timing for complaints against government officials sued in individual and official capacities). Thus, all of Plaintiffs' arguments do not concern the pending pleadings but hypothetical future pleadings, *see* Opp'n at 22–25, and are irrelevant to deciding Federal Defendants' Motion. The Court should dismiss Plaintiffs' claim for damages against the Federal Defendants.

CONCLUSION

For the foregoing reasons and those stated in their Motion to Dismiss, ECF No. 28, Federal Defendants respectfully request the Court dismiss the Amended Complaint for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1).

Dated: July 9, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing with the Clerk of the Court through the ECF system on July 9, 2018. This system provided a copy to and effected service of this document on all parties.

/s/ *James Powers*
JAMES R. POWERS