UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FATMA MAROUF, *et al.*, Plaintiffs v. ALEX AZAR, *et al.*, Defendants.	Civil Action No. 1:18-cv-00378 APM

REPLY IN SUPPORT OF
DEFENDANT U.S. CONFERENCE OF CATHOLIC BISHOPS'
MOTION TO DISMISS

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INTRODUCTION

In its motion to dismiss, Defendant USCCB explained the related reasons that Plaintiffs cannot establish Article III standing. They do not have taxpayer standing because they do not allege that Congress itself violated the Establishment Clause through any exercise of its Taxing and Spending Power. And they do not have personal standing because they do not allege that the federal government itself is the source of their alleged injury. The only concrete injury they allege—having their foster application denied, along with various derivative harms—is traceable to the action of a private party that is not before the court, Catholic Charities FW. Plaintiffs do not allege that the government itself played any role in rejecting their foster application, nor do they allege that the government directed or encouraged Catholic Charities FW to do so. All they allege is that the government established a neutral program that gives grants to secular and religious groups alike to help provide foster care to children in need. Because the government's own conduct in establishing that program is not the source of any alleged discrimination against Plaintiffs, they do not have standing to sue the government. Moreover, Plaintiffs' injuries are not redressable because even if they were to prevail, the sole likely result would be to cut off funding for religious service providers—an outcome that would have no tangible benefit for Plaintiffs, but would have a devastating impact on thousands of children.

In response, Plaintiffs make two basic points. *First*, they say that they have taxpayer standing because when Congress appropriated funds for the Unaccompanied Refugee Minor and Unaccompanied Alien Children programs, it knew that federal funds would flow to religious organizations. But that is not enough to establish standing, because Plaintiffs do not allege that merely providing funds to religious organizations violates the Establishment Clause. To the contrary, Plaintiffs admit that it would be perfectly permissible for USCCB and Catholic Charities FW to continue receiving federal grants, if only the Executive Branch *administered* the grants

differently by adding new funding conditions. For that reason, it is clear that Plaintiffs are challenging the conduct of the Executive Branch, not any exercise of Congress's Taxing and Spending Power.

Second, Plaintiffs argue that their injury is fairly traceable to the government because even though the government itself did not do anything to *cause* their alleged injury, it failed to take active measures to *prevent* that injury at the hands of a private party. This argument is squarely foreclosed by the precedent of both the Supreme Court and the D.C. Circuit. When the government provides funding to a private entity that allegedly injures a third party through its own unfettered discretion, the third party does not have standing to sue the government. That the government might have been able to *prevent* the alleged injury by imposing funding conditions does not make the harm fairly traceable to the government.

ARGUMENT

I. PLAINTIFFS LACK TAXPAYER STANDING BECAUSE THEY DO NOT CHALLENGE ANY EXERCISE OF CONGRESS'S TAXING AND SPENDING POWER

As USCCB explained in its motion to dismiss, Plaintiffs cannot establish taxpayer standing because they do not claim that Congress itself violated the Establishment Clause through any exercise of its Taxing and Spending Power. USCCB Br. 11–14. Under binding precedent, Plaintiffs must challenge a "legislative enactment" that "authorizes or appropriates funds" in a way that they claim violates the Constitution. *In re Navy Chaplaincy*, 534 F.3d 756, 762 (D.C. Cir. 2008) (emphasis added). They fail to do so here. Plaintiffs do not claim that Congress itself violated the Establishment Clause through any legislative enactment. Instead, they allege that *the Executive Branch* caused the violation by improperly *administering* a grant program that would otherwise be constitutional. Their assertion of taxpayer standing thus fails because "the challenged action [is] executive rather than legislative." *Id*. at 761.

The D.C. Circuit's decision in *Navy Chaplaincy* squarely controls this case. The plaintiffs there claimed that the Navy violated the Establishment Clause by "favor[ing] Catholic chaplains" when making payments under its "retirement system." *Id*. at 762. The court held that the plaintiffs did not have taxpayer standing because they did not allege that Congress *itself* violated the Establishment Clause through the exercise of its Spending Power. There was "[n]o legislative enactment [that] expressly authorize[d] or appropriate[d] funds for the Navy to favor Catholic chaplains in its retirement system." *Id*. Although Congress had enacted "statutes establishing the Navy Chaplain Corps," which authorized the Navy to make payments to religious "chaplains," *id*., that did not confer standing for a simple reason: the plaintiffs did "not contend" that Congress's provision of funds to "establish[] the Navy Chaplaincy *itself* violate[d] the Establishment Clause; they merely want[ed] the Navy to *operate* the Chaplain Corps differently." *Id*. (emphases added).

The same is true here: Plaintiffs do not challenge the legislation establishing the Unaccompanied Refugee Minor and Unaccompanied Alien Children programs, but merely want the federal government to *operate* those programs differently. Indeed, they admit that USCCB and other religious groups would be entitled to receive federal funds under these programs, if only the grants were administered differently by executive officials. *See* Pls. Br. 2 ("Plaintiffs would have no objection if, in administering the URM and UC programs, Federal Defendants were to accommodate USCCB's religious doctrine *so long as* they were to do so in a [different] manner . . . ."). This admission is fatal to Plaintiffs' argument. It demonstrates that they are not challenging any congressional appropriation of funds for religious groups. Instead they are challenging the Executive Branch's discretionary *administration* of those grant funds.

Plaintiffs try to analogize this case to *Flast* and *Bowen*, Pls. Br. 13–17, but the analogy fails because the Plaintiffs in those cases alleged that Congress *itself* had violated the Establishment

Clause by enacting an appropriations bill pursuant to its Taxing and Spending Power. As the Supreme Court has made clear, "*Flast* limited taxpayer standing to challenges directed only [at] *exercises of congressional power* under the Taxing and Spending Clause." *Hein v. Freedom From Religion Found., Inc*., 551 U.S. 587, 604 (2007) (plurality op.) (emphasis added) (internal quotation marks omitted)); *see also Navy Chaplaincy*, 534 F.3d at 761 (same). Here, Plaintiffs do not challenge any "exercise of congressional power," 551 U.S. at 608, and thus they cannot establish taxpayer standing.

That simple rule explains why standing was present in *Flast* and *Bowen*, but is lacking here. In *Bowen*, the plaintiffs claimed that Congress itself violated the Establishment Clause by enacting a statute providing funds for religious groups. *See Bowen v. Kendrick*, 487 U.S. 589, 595–96 (1988); *see also Navy Chaplaincy*, 534 F.3d at 761 (noting that the allegedly unconstitutional religious funding in *Bowen* was "expressly authorized by Congress"). Thus, the "key" to taxpayer standing in *Bowen* was that the plaintiffs were challenging the "*statutory mandate*" that Congress itself enacted. *Hein*, 551 U.S. at 607 (quoting *Bowen*, 487 U.S. at 619–20).

Likewise in *Flast*, the plaintiffs claimed that Congress itself had violated the Establishment Clause by deliberately providing a particular type of funding to aid religious schools, which the plaintiffs claimed was by itself unconstitutional. *See Flast v. Cohen*, 392 U.S. 83, 103 (1968) ("[The] constitutional challenge is made to *an exercise by Congress of its power* under Art. I, § 8, to spend for the general welfare." (emphasis added)). Although the provision of this funding to religious schools was not expressly mentioned in the statute, it was nonetheless clearly contemplated by Congress, which "understood that much of the aid mandated by the statute would find its way to religious schools." *Hein*, 551 U.S. at 643 n.3. Thus, the *Flast* plaintiffs had taxpayer standing only because they alleged that Congress *itself* had violated the Establishment Clause by

intentionally using its Taxing and Spending Power to impermissibly advance religion. *Flast* has subsequently been "confined to its facts" by the Supreme Court, which means that plaintiffs cannot establish taxpayer standing unless they challenge congressional *legislation*. *Hein*, 550 U.S. at 609. The D.C. Circuit has made this point explicit: "[A]ccording to *Flast*, taxpayers may bring an Establishment Clause challenge *only when they challenge legislation* passed pursuant to the Taxing and Spending Clause," not when they challenge "an exercise of executive authority." *Navy Chaplaincy*, 534 F.3d at 761 (emphasis added).

Here, Plaintiffs make clear that they are not challenging any legislation enacted by Congress, but are instead attacking the exercise of executive authority by the named "Federal Defendants," who are Executive Branch officials. *See* Pls. Br. 1. Specifically, Plaintiffs contend that the Federal Defendants violated the Establishment Clause in two distinct ways: They (1) "awarded the grants to USCCB without establishing adequate safeguards to prevent USCCB's use of the funds to further sectarian precepts"; and then (2) "did precisely nothing to remedy USCCB's administration of the grants based on its religious doctrine." *Id*. These arguments make clear that Plaintiffs are not challenging any legislation enacted by Congress, and thus they do not have taxpayer standing.

Plaintiffs try to liken this case to *Flast* by saying that in both cases, "Congress understood that [the] funds might be distributed to religious organizations." Pls. Br. 17. But unlike in *Flast*, Plaintiffs here concede that the mere provision of grant funds to religious organizations does not violate the Establishment Clause. *See* Pls. Br. 2, 11. For that reason, even if Congress here did contemplate that funding might flow to religious entities, that by itself does not establish any "link between congressional action and [the alleged] constitutional violation." *Hein*, 551 U.S. at 605. The sole violation Plaintiffs allege is that *Executive Branch officials* have improperly *administered*

the otherwise lawful funding grants that Congress authorized. Plaintiffs do not even try to attribute the alleged Establishment Clause violation to any act of Congress.

Finally, Plaintiffs insist that taxpayer standing must be stretched to include them, because otherwise "Establishment Clause violations uniquely could go unchecked in many instances." Pls. Br. 21. Both the Supreme Court and the D.C. Circuit have considered and rejected this argument. Indeed, in *Navy Chaplaincy*, the court expressly "assumed" that the government's conduct violated "the clearest command of the Establishment Clause," but nonetheless held that the plaintiffs lacked standing to challenge it. 534 F.3d at 760 (internal quotation marks omitted). Courts play a limited role in our constitutional system under Article III, and they are not empowered to resolve every alleged constitutional violation under the sun. "As the Supreme Court has repeatedly held, a taxpayer's interest in ensuring that appropriated funds are spent in accordance with the Constitution does not suffice to confer Article III standing." *Id* at 761 (citing *Hein*, 127 S. Ct. at 2563). Thus, if Plaintiffs want to establish standing, they must show that they have personally suffered a concrete injury that is both "traceable" to government action and "redressable" through judicial relief.

II. PLAINTIFFS FAIL TO ALLEGE ANY PERSONAL INJURY THAT IS TRACEABLE TO THE GOVERNMENT OR REDRESSABLE BY THE COURT

In the First Amended Complaint, the Individual Plaintiffs alleged that they suffered a personal injury when "organizations receiving federal funds denied them the opportunity to be foster parents." FAC ¶ 6. Plaintiffs now say that they have suffered several other injuries, including "distress[]" about "the plight of the children in Federal Defendants' care" and various other stigmatic and dignitary harms. Pls. Br. 4–7. But even if those harms qualified as sufficiently "concrete" for purposes of Article III, they do not suffice to establish standing for the same two reasons that USCCB explained in its motion to dismiss. First, all of Plaintiffs' alleged injuries are

traceable to the private entity that denied their foster application—Catholic Charities FW—and not to the government. And second, it is entirely speculative whether any judicial relief ordered against the government would redress their injuries by altering the behavior of Catholic Charities FW in a way that would benefit Plaintiffs.

A. Plaintiffs' Alleged Injury Is Not Traceable to the Government

As USCCB explained in its motion to dismiss, Plaintiffs' alleged injuries are not "traceable" to any government action but instead to the private decision of Catholic Charities FW to deny their foster application. USCCB Br. 7–9. While Plaintiffs' opposition brief asserts various new injuries, all of them suffer from the same traceability problem. For example, Plaintiffs allege that they received a "deeply hurtful message" and were "demean[ed]" and "stigmatize[d]" by the "act of shutting the door to same-sex couples' foster parenting applications." Pls. Br. 4–5. But all of these secondary harms derive from the same "act of shutting the door," which was carried out solely by Catholic Charities FW—not by the government. After all, if Catholic Charities FW had *granted* their application instead of denying it, then none of the harms that Plaintiffs allege would have occurred, even though the government's conduct would be entirely unchanged. This demonstrates that Plaintiffs' alleged injuries flow from the private conduct of Catholic Charities FW—not from any act of the government.

While Plaintiffs could certainly sue the government if they alleged that the government *itself* took some action to discriminate against them, they do not make any such allegation here. To the contrary, they appear to concede that the government was entirely indifferent as to whether they and other same-sex couples could serve as foster parents. They certainly do not plead any *facts* suggesting otherwise. They do not allege that the government itself denied their application, nor do they allege that the government directed or encouraged Catholic Charities FW to do so. Indeed, they do not even allege that they were the "object of [any] governmental action" at all.

Lujan v. Defs. of Wildlife, 504 U.S. 555, 562 (1992). Quite the opposite, they acknowledge that the government played *no role whatsoever* in making foster placement decisions, and that Catholic Charities FW denied their application "based on *its* religious doctrine" without any input from the government. Pls. Br. 1 (emphasis added). That makes their alleged injury traceable to "the independent action of" Catholic Charities FW rather than "the challenged action of" the government itself. *Lujan*, 504 U.S. at 560.

Plaintiffs respond that their injuries are traceable to the government in two different ways. First, they say that the government awarded grant funds to USCCB "without implementing adequate safeguards to prevent USCCB or its sub-grantees from administering the grants on the basis of religious considerations." Pls. Br. 8. And second, they argue that the government "fail[ed] to take remedial measures following Fatma and Bryn's petition for redress." Pls. Br. 9. In other words, Plaintiffs argue that their injuries are traceable to the government because the government failed to adopt practices that might have stopped the injuries from happening and failed to fix them afterward.

The problem with these arguments is that they run squarely into the D.C. Circuit's decision in *Freedom Republicans, Inc. v. FEC*, 13 F.3d 412 (D.C. Cir. 1994). There, the plaintiffs sought to challenge the FEC's provision of federal funds to a political party's nominating process. Just like Plaintiffs here, the plaintiffs there argued that the government should have taken steps to prevent the political party from discriminating in the nominating process, or else cut off federal funds. But the court rejected that argument, explaining that "the injury alleged in [the] complaint is not fairly traceable to any encouragement on the part of the government, but appears instead to be the result of decisions made by the Party without regard to funding implications." *Id.* at 419. Even though the FEC could have imposed "adequate safeguards" to prevent discrimination when

it disbursed the funds, or taken "remedial measures" after finding out about the alleged discrimination, that was not enough to make the discrimination *fairly traceable* to the government. After all, the government did not engage in discrimination itself, nor did it direct or encourage the discrimination. It simply provided funds without taking steps to *prohibit* discrimination. On those facts, "[t]he links in the chain of causation between the challenged Government conduct and the asserted injury [were] far too weak for the chain as a whole to sustain [the plaintiffs'] standing." *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 759 (1984)). The same is true here.

Plaintiffs' arguments also collide with the Supreme Court's decision in *Simon v. East Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). There, the Court held that the plaintiffs lacked standing to challenge IRS tax rules that allegedly "encouraged" nonprofit hospitals to deny service to the plaintiffs. Again like the plaintiffs here, the plaintiffs there argued that the IRS should have imposed "a requirement that all hospitals serve indigents as a condition to favorable tax treatment," which "would 'discourage' hospitals from denying their services [the plaintiffs]." *Id.* at 42. But the Court held that just because the government failed to take active steps to *prevent* the alleged injury, "it does not follow . . . that the denial of access to hospital services in fact *results from*" the government's conduct. *Id.* (emphasis added). Simply put, the "denials of service" by the hospital could not "fairly . . . be traced to [the IRS's action]," but instead "result[ed] from decisions made by the hospitals." *Id.* at 42–43. Again, the same is true here.

Remarkably, Plaintiffs do not even attempt to distinguish *Simon* and *Freedom Republicans*. Together, these two cases establish that when the government provides funding to a grant recipient, and that grant recipient subsequently uses the funding to engage in conduct that injures a third party, that does not give the third party standing to sue *the government*. That the government could

have taken action to *prevent* or *remedy* the injury does not make the injury "traceable" to the government. *Lujan*, 504 U.S. at 560.

Plaintiffs' contrary position would have astounding implications. Under their view, if the government were to place a child with a religiously-based foster organization—or even with a private, religiously observant couple—the government could then be sued in federal court over the independent religious activities of the new foster custodian. That reflects a radically incorrect view of the limits of Article III jurisdiction and of the proper relationship between church and state.

B. Plaintiffs' Alleged Injury Is Not Redressable by the Court

Independent of the reasons discussed above, Plaintiffs also cannot establish standing because it is entirely speculative whether their injuries would be redressed by any judicial relief against the government. As the Supreme Court has explained, a plaintiff must show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation marks omitted). But here, it is highly doubtful that judicial relief against *the government* would have any impact on Plaintiffs' "opportunity to be foster parents," FAC ¶ 6, or on any of the other derivative harms they allege from having their application denied by Catholic Charities FW.

Plaintiffs now appear to concede that the court does not have any power to order Catholic Charities FW to approve their foster application, because Catholic Charities is not before the court and is not alleged to have violated any law. Moreover, Plaintiffs tacitly concede that ordering the government to require religious groups like Catholic Charities FW to violate their religious beliefs as a condition of federal funding would likely have no impact other than cutting off grant funds that are vital to provide foster care to thousands of immigrant and refugee children—an outcome that would inflict significant harm on the affected children without helping Plaintiffs at all. Remarkably, Plaintiffs themselves affirmatively argue that it is "speculati[ve]" and "uncertain[]"

whether their injuries could be redressed through some unspecified relief that the court *might* be able to fashion. Pls. Br. 9–12. But under binding precedent, it is *their* burden to show that it is *not* speculative that judicial relief would redress their injuries. *See Lujan*, 504 U.S. at 561.

Plaintiffs also suggest that cutting off federal funding would spare them from facing "religious discrimination and [the] additional material and dignitary burdens" that they suffer as a result of being "religiously disfavored" by Catholic Charities FW. Pls. Br. 10. That is incorrect. In a diverse and pluralistic society, private religious groups have a right to make their own moral and religious judgments about same-sex marriage, and to conduct their operations accordingly as long as they comply with state and federal law. Indeed, many Catholic and other religious organizations engage in foster-care services that take into account traditional marital status. Cutting off federal funding to these organizations would not put an end to such private religious practices, and thus would not remedy any "injury" that Plaintiffs may face from this type of private conduct. To be sure, cutting off federal funds could stop such practices from being "federally funded." Pls. Br. 10. But whether private groups receive federal funds is not something that has any concrete impact on Plaintiffs, aside from their abstract concern for how taxpayer dollars are spent. *Cf. Freedom Republicans*, 13 F.3d at 419–20 (no Article III standing to claim that federal funding should be withdrawn from private organization allegedly engaged in discrimination).

Finally, Plaintiffs suggest that the court should fashion relief that allows the government to "administer the URM and UC programs in a constitutionally compliant manner while *also* accommodating the religious views of URM and UC grantees." Pls. Br. 11. This proposal would not resolve the traceability problems discussed above, nor would it be appropriate for the Court to engage in this type of free-wheeling policy exercise without any judicially administrable standards. But as USCCB explained in its opening brief, it would not have any objection to Plaintiffs

"foster[ing] a child through one of the other participating organizations, or through an alternative arrangement with the government that would not require Catholic Charities FW to violate its religious beliefs." USCCB Br. 11. Such a solution "would have the advantage of allowing Plaintiffs *and* Catholic service providers to participate in the federal programs at issue." *Id*.

CONCLUSION

For the foregoing reasons, Plaintiffs' claims should be dismissed for lack of standing.

Dated: July 9, 2018

Respectfully submitted,

/s/ David T. Raimer.

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2018 a true and correct copy of the foregoing Motion to Dismiss and accompanying papers was filed using the Court's CM/ECF system, which will serve all counsel of record.

/s/ David T. Raimer

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