

January 9, 2019

The Honorable Alex M. Azar II
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, SC 20201
VIA FedEx and email to Secretary@HHS.gov

Dear Secretary Azar:

We, the undersigned child welfare, civil rights, religious liberty and other organizations concerned about the wellbeing of children in our nation's child welfare system, write in strong opposition to South Carolina's request for exemptions for faith-based, government-funded child welfare providers from federal nondiscrimination regulations. We ask that the Department of Health and Human Services ("HHS") deny South Carolina's request to permit faith-based agencies like Miracle Hill Ministries ("Miracle Hill") to engage in taxpayer-funded discrimination against prospective families who come forward to care for children in need in violation of federal law and regulations. HHS, via the Administration for Children and Families' Children's Bureau, oversees a system that requires each state to ensure the safety, permanency and wellbeing of children in its care and to develop a plan for the care of children which comports with professional standards, including protecting the civil rights of children.¹ Granting South Carolina's request would upend HHS's responsibility to ensure that states are properly caring for the nation's children by explicitly permitting a provider to put its own interests ahead of the best interests and explicit rights of the children in its care. In addition, an exemption would sanction taxpayer-funded discrimination by organizations providing a government service, violating a host of constitutional and statutory protections.

Granting South Carolina's exemption request would violate the rights of children in foster care. All children in care have a statutory right to permanency. Using any non-objective criteria to determine who may provide homes for children in need reduces the number of potential families available for these young people. The State of South Carolina is requesting an exemption to allow one of their state-contracted agencies to do just that. Miracle Hill's criteria,²

¹ Social Security Act § 471, 42 U.S.C. § 671(a)(10); *see also* LAMBDA LEGAL, CHILDREN'S RIGHTS & CTR. FOR THE STUDY OF SOC. POLICY, *Safe Havens: Closing the Gap Between Recommended Practice and Reality for Transgender and Gender-Expansive Youth in Out-of-Home Care*, at 7 (Apr. 2017), https://www.lambdalegal.org/sites/default/files/publications/downloads/tgnc-policy-report_2017_final-web_05-02-17.pdf [hereinafter "Save Havens"].

² *See Miracle Hill Foster Home Program*, MIRACLE HILL MINISTRIES (Sept. 2014), <https://miraclehill.org/wp-content/uploads/2016/11/Foster-Care-MHM-req.pdf> (stating that foster parents must "be a born-again believer in the

in particular, are extraordinarily particular and exclude a wide variety of South Carolinians from the ability to provide a short-term or permanent home to the 4,518 children currently in the State's foster care system.³ Miracle Hill's criteria would even deem family members such as a Catholic grandparent, an unmarried cohabitating cousin, or a lesbian aunt⁴ as unacceptable foster or adoptive parents. In fact, Miracle Hill explicitly states on its website that it will only work with families who are active participants of a Protestant church and who unequivocally agree with its own doctrinal statement, thereby excluding all non-Protestants and non-churchgoers and a huge swath of the faith community.⁵ In March 2018, it was reported that Miracle Hill refused to allow a Jewish couple to serve as mentors to foster children because of their religion.⁶ This practice violates the right to permanency of all children.

Miracle Hill's policy also violates children's right to wellbeing. Miracle Hill currently excludes potential mentors and families for children solely because those individuals' beliefs do not match its own. Social science is unequivocal: children, especially children in foster care, benefit from as many supportive adults in their life as possible. Miracle Hill's determination that the wellbeing of children in government care is only promoted by contact with individuals who share its beliefs or, conversely, negatively impacted by exposure to a person of another faith, while using taxpayer funds, is a violation of those children's rights.

An exemption for faith-based agencies not only poses serious implications for the right to safety, permanency and wellbeing, but also to the constitutional rights, of sexual-, gender-, and religious minority children in the child welfare system. A host of constitutional and statutory rights protect youth in government custody from mistreatment and discrimination.⁷ The U.S. Constitution requires that youth in state custody be free from unreasonable risk of physical and emotional harm and provides all youth with the freedom of speech and expression, freedom of religion, and protection from unequal treatment under the law.⁸ Titles IV-E and IV-B of the Social Security Act, the foundation of the federal child welfare system, include statutory protections for children

Lord Jesus Christ", "an active participant in, and in good standing with, a Protestant church", and "have a lifestyle that is free of sexual sin (to include pornographic materials, homosexuality, and extramarital relationships)").

³ S.C. DEP'T OF SOC. SERVS., *Total Children in Foster Care on June 30, 2018-Office of Case Management* <https://dss.sc.gov/media/1828/total-children-in-foster-care-on-june-30-2018.pdf>.

⁴ Miracle Hill has refused to work with same-sex couples. See Jesse Naranjo, *LGBT advocates considering lawsuit over faith-related foster care denials*, THE POST & COURIER (July 28, 2018), https://www.postandcourier.com/news/lgbt-advocates-considering-lawsuit-over-faith-related-foster-care-denials/article_b9649194-8b82-11e8-9833-fb6cf1fe45b6.html.

⁵ It has been reported that Miracle Hill has turned away both Jewish and Catholic individuals seeking to volunteer with foster children. Akela Lacy, *South Carolina is Lobbying to Allow Discrimination Against Jewish Parents*, THE INTERCEPT (Oct. 149, 2018), <https://theintercept.com/2018/10/19/south-carolina-foster-parent-discrimination-miracle-hill-ministries/>.

⁶ Angelia Davis, *Scrutiny of Miracle Hill's faith-based approach reaches new level*, GREENVILLE NEWS (Mar. 1, 2018, 6:30 AM), <https://www.greenvilleonline.com/story/news/2018/03/01/miracle-hill-foster-care/362560002/>.

⁷ *Safe Havens*, at 7-9.

⁸ *Id.* at 7-8 nn. 39-52.

in care by requiring states receiving federal funding to plan for the safety, permanency, and wellbeing of children and comport with professional standards.⁹

In addition, the HHS Grants Rule expressly prohibits federally funded providers from engaging in discrimination against children and families, including on the basis of religion, sex, sexual orientation, or gender identity.¹⁰ Furthermore, the Equal Treatment regulations bar discrimination against program beneficiaries on the basis of religion or religious belief.¹¹ If HHS were to grant the requested exemption, LGBTQ youth, who are significantly overrepresented in the child welfare system,¹² would receive a government-sanctioned message that they are second-class citizens who are not deserving of protection or families. Additionally, children of minority faiths could be compelled to participate in religious activities different from their own, in violation of their constitutional rights and prohibitions against proselytization in federal law.¹³

An exemption would violate the First and Fourteenth Amendments to the U.S.

Constitution.¹⁴ The Establishment Clause of the First Amendment bars the government from providing or refusing to provide government services based on religious criteria. Just as the government cannot perform government functions pursuant to religious criteria, the Establishment Clause prohibits the government from allowing taxpayer-funded religious organizations from doing so and from delegating or sharing “important, discretionary government powers” with religious institutions.¹⁵ Miracle Hill receives taxpayer funds to perform a government function pursuant to a contract with the government. Thus, granting the

⁹ Social Security Act § 471, 42 U.S.C. § 671(a)(10); *see also* LAMBDA LEGAL, CHILDREN’S RIGHTS & CTR. FOR THE STUDY OF SOC. POLICY, *Safe Havens: Closing the Gap Between Recommended Practice and Reality for Transgender and Gender-Expansive Youth in Out-of-Home Care*, at 7 (Apr. 2017), https://www.lambdalegal.org/sites/default/files/publications/downloads/tgnc-policy-report_2017_final-web_05-02-17.pdf [hereinafter “*Save Havens*”].

¹⁰ HHS Grants Rule, 45 C.F.R. § 75.300 (2016) (“(c) It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subject to discrimination in the administration of HHS programs and services based on non-merit factors such as age, disability, race, color, national origin, religion, gender, identity, or sexual orientation. Recipients must comply with the public policy requirement in the administration of programs supported by HHS awards.”), *available at*: <https://www.gpo.gov/fdsys/pkg/FR-2016-07-13/pdf/2016-15014.pdf>.

¹¹ 45 C.F.R. §87.3(d) (“An organization that participates in any programs funded by financial assistance from an HHS awarding agency shall not, in providing services or in outreach activities related to such services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to participate in a religious practice.”).

¹² Bianca D.M. Wilson et al., *New Report: Sexual and Gender Minority Youth in Foster Care*, WILLIAMS INST., at 6 (Aug. 2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_report_final-aug-2014.pdf.

¹³ 45 C.F.R. § 87.3(b).

¹⁴ Contrary to the arguments of some proponents of religious exemptions, the Supreme Court’s recent decision in *Trinity Lutheran* does not provide constitutional cover for religion-based discrimination. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 n. 3 (2017) (“This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.”).

¹⁵ *See Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 125-27 (1982); *id.* at 126 (quoting *Sch. Dist. of Abington Twp. V. Schempp*, 374 U.S. 203, 222 (1963) (“the core rationale underlying the Establishment Clause is preventing a fusion of governmental and religious functions.”); *Bd. of Educ. Of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 704 (1994) (“civil power must be exercised in a manner neutral to religion”).

requested exemption would permit Miracle Hill and other religiously-affiliated agencies to use religious criteria in the performance of a taxpayer-funded government service, in violation of the Constitution.

Furthermore, the Establishment Clause prohibits the government from granting religious exemptions that would detrimentally affect any third party.¹⁶ It requires the government to “take adequate account of the burdens” that a religious exemption “may impose on nonbeneficiaries” and must ensure that any exemption is “measured so that it does not override other significant interests.”¹⁷ If the requested exemption were granted, it would harm not only prospective families who are turned away, but the very children the system was created to serve.

In addition, the requested exemption violates the guarantees of Equal Protection and Due Process of the Fourteenth Amendment. Permitting Miracle Hill, or any other provider of public child welfare services, to turn away individuals or families who do not share their religious beliefs denies those individuals equal protection on the basis of characteristics like their religion, sexual orientation, or sex, and is presumptively unconstitutional. Additionally, due process protects individuals’ substantive rights to make decisions central to autonomy, integrity, self-definition, intimacy, and personhood. By permitting discrimination based on the exercise of these rights, the requested exemption would constitute government action burdening the due process rights of couples seeking to foster and adopt.

As you are no doubt aware, three federal lawsuits are currently pending involving religious exemptions for faith-based child welfare providers, the very same issue at stake in South Carolina’s request—*Dumont v. Lyon*,¹⁸ *Fulton v. City of Philadelphia*,¹⁹ and *Marouf v. Azar*.²⁰ While no ruling has yet been made in *Marouf*,²¹ the courts in both *Dumont* and *Fulton* have held that permitting taxpayer-funded faith-based discrimination would likely violate the Constitution and that requiring compliance with generally applicable nondiscrimination policy does not violate the Free Exercise rights of religious providers.²² In *Dumont*, a federal district court in

¹⁶ *E.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014) (citing *Cutter*, 544 U.S. at 720); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring); *Cutter*, 544 U.S. at 726 (may not “impose unjustified burdens on other[s]”); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (may not “impose substantial burdens on nonbeneficiaries”); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708-09 (1985) (striking down a statute requiring “those who observe a Sabbath . . . must be relieved of the duty to work on that day, no matter what burden or inconvenience this imposes on the employer or fellow workers.”).

¹⁷ *Cutter v. Wilkinson*, 544 U.S. 544, 720, 722 (2005); *see also Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985).

¹⁸ *See Dumont v. Lyon*, ACLU, <https://www.aclu.org/cases/dumont-v-lyon> (last visited Oct. 29, 2018).

¹⁹ *See Fulton v. City of Philadelphia*, ACLU PENN., <https://www.aclupa.org/our-work/legal/legaldocket/fulton-v-city-philadelphia> (last visited Oct. 29, 2018).

²⁰ *See Complaint, Marouf v. Azar*, Case No. 1:18-cv-378 (filed D.D.C. Feb. 20, 2018), https://www.lambdalegal.org/in-court/legal-docs/marouf_dc_20180220_complaint.

²¹ *Marouf* involves a same-sex couple who were excluded from consideration to foster a refugee child because of the government-contracted agency’s religious beliefs.

²² *See generally Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661 (E.D. Pa. 2018); *Dumont v. Lyon*, No. 17-cv-13080, 2018 WL 4385667 (E.D. Mich. Sept. 14, 2018).

Michigan held that a challenge to the State’s law permitting state-contracted child placing agencies to use religious criteria to exclude same-sex couple states a claim for a violation for the Establishment Clause and allowed the case to move forward.²³ In *Fulton*, a federal district court in Pennsylvania rejected the claim asserted by a government-contracted child placing agency that the City’s enforcement of its nondiscrimination policy violated its Free Exercise rights.²⁴ The court noted that among other government interests furthered by the City’s enforcement of its nondiscrimination policy, the City had an “interest in avoiding likely Equal Protection Clause and Establishment Clause claims that would result if it allowed its government contractors” to discriminate.²⁵

An exemption would violate HHS’s legal obligation to ensure state child welfare systems comply with professional standards. The Social Security Act requires agencies receiving child welfare funds to develop standards for foster family homes and child care institutions that are “reasonably in accord with the recommended standards of national organizations concerned with [such] standards.”²⁶ Many national professional organizations that are concerned with the treatment of youth in foster care have explicitly denounced efforts to exempt faith-based providers from nondiscrimination requirements. In the *Fulton* case, the Child Welfare League of America, the National Association of Social Workers, Voice for Adoption, and the North American Council on Adoptable Children—leading voices on foster care and adoption policy—filed an amicus brief in support of the City, writing that “a diversity of foster and adoptive families is needed to help ensure that all children find permanent, loving families, and [amici] further believe that gay and lesbian parents are essential partners in this effort.”²⁷

The United States is currently experiencing a foster care crisis, with more and more children entering the child welfare system due to the opioid epidemic. It is estimated that around 20,000 children “age out” of foster care across the country each year without ever finding a permanent home, leaving them vulnerable to higher rates of poverty, homelessness, incarceration, and early parenthood.²⁸ HHS should be working to eliminate the use of non-objective criteria by taxpayer-funded providers and encourage recruitment from as wide a community constituency as possible. Inviting and inclusive environments pose the most promise for expanding resources to children who need to have as many options for loving homes as possible.

²³ *Dumont v. Lyon*, No. 17-cv-13080, 2018 WL 4385667 (E.D. Mich. Sept. 14, 2018).

²⁴ *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661 (E.D. Pa. 2018).

²⁵ *Id.* at 685.

²⁶ 42 U.S.C. § 671(a)(10).

²⁷ Brief for Voice for Adoption et al. as Amici Curiae Supporting Affirmance in Favor of Defendants-Appellees at 1, *Fulton v. City of Philadelphia*, No. 18-2574 (3d. Cir. appeal filed July 16, 2018) (No. 0031130527546), 2018 WL 4862582.

²⁸ *ECDF Act Facts*, FAMILY EQUALITY COUNCIL (2017), https://www.familyequality.org/get_informed/advocacy/ecdf/ecdf-facts/.

For the above reasons, we strongly urge you to deny South Carolina's request for an exemption from HHS's nondiscrimination requirements.

Sincerely,



Lambda Legal
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National Organizations

Advocates for Youth
American Atheists
American Civil Liberties Union
Americans United for Separation of Church and State
Anti-Defamation League
Bend the Arc
Center for American Progress
Center for Inquiry
CenterLink: The Community of LGBT Centers
Child Welfare League of America
Children's Rights
COLAGE
DignityUSA
Equality Federation
Family Equality Council
FosterClub
Freedom for All Americans
GLBTQ Legal Advocates & Defenders
Human Rights Campaign
Impact Fund
Interfaith Alliance
Lambda Legal
Movement Advancement Project
National Association of Social Workers
National Center on Adoption and Permanency
National Center for Lesbian Rights
National Center for Transgender Equality
National Council of Jewish Women
National LGBTQ Task Force

National Partnership for Women & Families
National Women's Law Center
Partnership for America's Children
PFLAG National
Population Connection Action Fund
Second Nurture: Every Child Deserves a Family—and a Community
The Trevor Project
Union for Reform Judaism
Unitarian Universalist Association

State and Local Organizations

SC Equality (South Carolina)
ACLU of Nevada (Nevada)
Amara (Washington)
Center on Halsted (Illinois)
Children's Action Alliance Arizona (Arizona)
Children's Home of Northern Kentucky (Kentucky)
Children's Law Center of California (California)
Congregation B'nai Israel of St. Petersburg (Florida)
Divine Sisters (Arizona)
Equality California (California)
Equality Florida (Florida)
Equality New Mexico (New Mexico)
Equality North Carolina (North Carolina)
Equality Texas (Texas)
Fair Wisconsin (Wisconsin)
Fairness Alliance and Information Resources of New York, Inc. (New York)
Florida's Children First (Florida)
FreeState Justice (Maryland)
Garden State Equality (New Jersey)
Georgia Equality (Georgia)
GLBT Community Center of Colorado (Colorado)
The Harbour (Illinois)
Legal Voice (Washington)
LGBTQ Child Welfare Work Group, Brevard (Florida)
L.I.N.K. of Brevard (Florida)
Los Angeles LGBT Center (California)
Maine Children's Alliance (Maine)
Marion County Commission on Youth, Inc. (Indiana)
National Organization for Women, Columbia Area (Missouri)
One Colorado (Colorado)

One Iowa (Iowa)
Project Jigsaw (Arizona)
Public Justice Center (Maryland)
RESOLVE New England (Massachusetts)
Resource Center (Texas)
Sacramento LGBT Community Center (California)
Safe Schools South Florida (Florida)
Specialized Alternatives for Families and Youth of Nevada (Nevada)
Tennessee Equality Project (Tennessee)
Transgender Education Network of Texas (Texas)
Whitman-Walker Health (District of Columbia)
Women's Law Project (Pennsylvania)

cc: Roger Severino, Director of the Office for Civil Rights, U.S. Department of Health and Human Services; Stephen Wagner, Acting Assistant Secretary, Administration for Children and Families, U.S. Department of Health and Human Services