IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FATMA MAROUF AND BRYN ESPLIN, a married couple; and NATIONAL LGBT BAR ASSOCIATION, a non-profit membership organization, *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. 1:18-cv-378 (APM)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' OPPOSITION TO FEDERAL DEFENDANTS' AND DEFENDANT UNITED STATES CONFERENCE OF CATHOLIC BISHOPS' MOTIONS TO DISMISS

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INTRODUCTION

Plaintiffs Fatma Marouf and Bryn Esplin are a married same-sex couple who have been denied the opportunity to become foster parents to a child under the Unaccompanied Refugee Minor (URM) program or the Unaccompanied Alien Children (UC) program because Federal Defendants have authorized and enabled URM and UC grantee Defendant United States Conference of Catholic Bishops (USCCB) to administer its URM and UC grants based on its religious doctrine. *First*, notwithstanding USCCB's express statements in its grant applications that it would administer the grants in accordance with its religious doctrine, Federal Defendants awarded the grants to USCCB without establishing adequate safeguards to prevent USCCB's use of the funds to further sectarian precepts. *Second*, after Fatma and Bryn apprised Federal Defendants of the discrimination that they suffered at the hands of USCCB's sub-grantee in its adherence to USCCB's religious doctrine regarding same-sex relationships, Federal Defendants did precisely nothing to remedy USCCB's administration of the grants based on its religious doctrine. As a result of Federal Defendants' actions, children in need have been denied a possible placement option, solely on account of USCCB's religious doctrine regarding same-sex relationships, and not on account of Fatma and Bryn's capacity to provide a loving and stable home or any other child welfare consideration.

In moving to dismiss for lack of standing based on individual harm, Defendants fundamentally misapprehend Plaintiffs' claims. It is the actions of *Federal Defendants* in administering the URM and UC programs, *not* the actions of USCCB's sub-grantee, that Plaintiffs challenge. As set forth below, there can be no doubt that Federal Defendants' actions harmed Fatma and Bryn in a manner that satisfies article III standing requirements.

Moreover, in moving to dismiss for lack of standing based on taxpayer harm, Defendants fundamentally misapprehend the case law. The authorizing and appropriating legislation at issue here is entirely comparable to that in *Flast v. Cohen*, 392 U.S. 83 (1968), and *Bowen v. Kendrick*, 487 U.S. 589 (1988), and patently distinguishable from that in *Hein v. Freedom from Religion Foundation*, 551 U.S. 587 (2007), and *In re Navy Chaplaincy*, 534 F.3d 756 (2008). Thus, as explained below, the nexus between the challenged actions and Congress's article I section 8 taxing and spending power is more than sufficient to support taxpayer standing.

Finally, in seeking nominal damages only from federal officials, in their individual capacities[1], and only in the alternative to the other requested relief, Plaintiffs have properly requested such relief, as set forth below.

Despite Defendants' attempts to frame this case as an attack on USCCB's religious inspiration and a threat to critical services for vulnerable children, Plaintiffs seek only that Federal Defendants, as required by the Constitution, administer the URM and UC programs in a manner that ensures that these children have options for placement consistent with their best interests *without* non-child welfare-based restrictions placed on those options based solely on the religious beliefs of the URM or UC grantee, such as USCCB's religious doctrine regarding same-sex relationships. 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 manner that does not restrict placement options based on religious considerations unrelated to child welfare, or stigmatize and demean lesbian, gay, bisexual, or transgender ("LGBT") applicants or youth in federal care. Ultimately, it is *Defendants'* apparent position, *not* Plaintiffs', that radically threatens both the welfare of the children in Federal

[1] *See* n.5 *infra* (acknowledging the need to amend the complaint to sue the officials in their individual capacities).

Defendants' care and the fundamental limitations on governmental power set forth in the Constitution. If Plaintiffs cannot vindicate their constitutional rights here, the children in Federal Defendants' care will continue to be denied possible placement options that might serve their best interests as a result of Federal Defendants' actions enabling USCCB to use taxpayer dollars to advance religious doctrine.

ARGUMENT

In considering a motion to dismiss for lack of subject matter jurisdiction, the court must accept the non-movant's factual allegations as true. *Brady Campaign to Prevent Gun Violence United with the Million Mom March v. Ashcroft*, 339 F. Supp. 2d 68, 72–73 (D.D.C. 2004) (citing *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993)). The court may also consider material beyond the allegations in the plaintiff's complaint. *See, e.g.*, *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624–25, 625 n.3 (D.C. Cir. 1997); *Herbert v. Nat'l Academy of Sciences,* 974 F.2d 192, 197 (D.C. Cir. 1992).

I. INDIVIDUAL PLAINTIFFS PROPERLY PLED STANDING BASED ON INDIVIDUAL HARM.

Fatma and Bryn have standing to sue Federal Defendants[2], not only as federal taxpayers, but also on account of individual harm suffered. Defendants' assertions to the contrary rest in a basic misapprehension of Plaintiffs' claims. Defendants argue that the injury of relevance suffered by Fatma and Bryn was an injury at the hands of USCCB's sub-grantee, a non-party to this litigation, and therefore the requirements of causation and traceability are not satisfied. *See* Def. USCCB's Mot. to Dismiss at 9–10, *Marouf and Esplin, et al., v. Azar, et al.*, No. 1:18-cv-00378 (D.D.C. May 21, 2018), ECF No. 29 [hereinafter "USCCB's MTD"]; Fed. Defs.' Mot. to

[2] USCCB has been joined to this action as a necessary party to effectuate relief. *See* Fed. R. Civ. Pro. 19(a)(1).

Dismiss at 15, *Marouf and Esplin, et al., v. Azar, et al.*, No. 1:18-cv-00378 (D.D.C. May 21, 2018), ECF No. 28 [hereinafter "Fed. Defs.' MTD"]. In doing so, Defendants fail to acknowledge the *governmental conduct* that Plaintiffs allege injured Fatma and Bryn. Plaintiffs challenge two discrete acts—and neither is an act of USCCB's sub-grantee. *First*, Plaintiffs challenge Federal Defendants' award of the URM and UC grant funds to USCCB—which Federal Defendants improperly awarded without adequate safeguards against the use of those funds for religious purposes despite being put on notice by USCCB that it would administer those funds based on its religious doctrine. *Second*, Plaintiffs' challenge Federal Defendants' failure to remedy USCCB's improper administration of the grant funds to further sectarian precepts—which Defendants failed to remedy despite being put on notice by Fatma and Bryn that USCCB's sub-grantee had discriminated against them in accordance with USCCB's religious doctrine.

These two challenged instances of *governmental conduct* harmed Fatma and Bryn in multiple ways, each independently affording them standing for reasons unrelated to their status as taxpayers. *First*, Federal Defendants' exclusion of Fatma and Bryn from participation in a federal program not only harmed them on account of their lost opportunity to foster a child, but also distressed them in light of the plight of the children in Federal Defendants' care. Under Federal Defendant's administration of the grants, LGBT children in particular suffer as their needs and best interests go unrecognized and ignored in service of Federal Defendants' advancement and endorsement of USCCB's religious doctrine. This foreclosed opportunity for Fatma and Bryn is more than sufficient on its own for standing.

Second, the act of shutting the door to same-sex couples' foster parenting applications demeans and stigmatizes these families. This harm is about more than just a foreclosed

opportunity. Federal Defendants, by authorizing, enabling, funding, and ratifying the exclusion of such couples have sent an impermissible governmental message to these families: namely, that they are innately inferior, unworthy of participation in a federal program, and less deserving of respect than others. This illegitimate, unequal treatment and the stigma it creates are themselves a cognizable injury. *See e.g.*, *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984) (right to equal treatment guaranteed by the Constitution is not co-extensive with any substantive rights to the benefits denied the party discriminated against, as discrimination itself, by stigmatizing members of the disfavored group as innately inferior, can cause serious non-economic cognizable injuries). As the Supreme Court has recognized on multiple occasions, governmental condemnation of the relationships of same-sex couples sends a deeply hurtful message to the couples themselves, in addition to the children they may bring into their families. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600, 2606 (2015). Even "decent and honorable religious or philosophical premises" that deem "same-sex marriage to be wrong," when affirmed as "law and public policy," result in "the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Id.* at 2606. In light of this dignitary injury, religious beliefs cannot justify denial of respect to such families, *id.* at 2602, or exemption from non-discrimination requirements. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, __ S. Ct. __, 2018 WL 2465172, at *7 (2018) (religious and philosophical objections to marriages of same-sex couples as a general rule "do not allow business owners and other actors in the economy and in society to deny protected persons access to goods and services under a neutral and generally applicable" non-discrimination requirement).

Third, Federal Defendants have advanced and endorsed USCCB's religious beliefs over beliefs held by others in authorizing and enabling USCCB to use a religiously based litmus test

in determining eligibility for participation in a federal child welfare program. This is coercive and hurtful to non-adherents, and imposes a distinct harm long recognized as cognizable under Establishment Clause jurisprudence: the Government may not coerce members of the public into supporting certain religious activity or beliefs as a condition of participation in a federal program. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316 (2000) (challenge to policy permitting student-delivered prayer at high school football games was ripe and students had standing to bring suit despite students filing suit before any such prayer was delivered where policy coerced potentially dissenting students into participating, and constituted both perceived and actual endorsement of a particular religious belief); *Lee v. Weisman* 505 U.S. 577 (1992) (noting that a "live and justiciable controversy" existed where student, a religious dissenter, felt coerced to participate in prayer as a condition of attending voluntary graduation ceremony, and student therefore was left in position of having to choose whether to participate or protest). Indeed, public programs must not give members of the public otherwise eligible to participate in the program "any incentive to modify their religious beliefs or practices" or "to undertake religious indoctrination." *Agostini v. Felton*, 521 U.S. 203, 231–32 (1997).

Here, Federal Defendants have endorsed USCCB's religious doctrine over Plaintiffs', and subjected Fatma and Bryn and all others who would like to participate in the program to impermissible coercion, by authorizing and enabling the use of a religiously based litmus test for considering an applicant to be a foster parent to a child in federal care. And, unlike the plaintiffs in *In re Navy Chaplaincy*, Fatma and Bryn were subjected to the discriminatory behavior that they challenge. *Cf. In re Navy Chaplaincy*, 534 F.3d at 764 (finding that a general government "message," where plaintiffs were not subjected to the discriminatory behavior that they challenged, was not sufficient to confer standing). This harm is redressed when Federal

Defendants cease the coercive endorsement through the declaratory and injunctive relief sought by Plaintiffs.

A. Fatma and Bryn's Injuries Are Fairly Traceable to Federal Defendants' Actions.

A plaintiff has standing where her injury is "fairly traceable to the defendant's allegedly unlawful conduct." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). At the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice." *Id.* at 561. And, as the D.C. Circuit has recognized, "mere indirectness of causation is no barrier to standing, and thus, an injury worked on one party by another through a third party intermediary may suffice." *Tel. & Data Sys., Inc. v. FCC,* 19 F.3d 42, 47 (D.C. Cir. 1994) (quoting *Nat'l Wildlife Fed'n v. Hodel,* 839 F.2d 694, 705 (D.C. Cir. 1988)). In such cases, an injury is traceable to government action where the injury is directly caused by a third party, but there is a sufficient causal connection between the government action and the third party's action such that "the intervening choices of third parties are not truly independent of government policy." *See Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 940–41 (D.C. Cir. 2004). Here, Plaintiffs have sufficiently alleged that the actions of Federal Defendants are fairly traceable to Fatma and Bryn's injuries.

First, Federal Defendants' award of the URM and UC grants to USCCB is sufficiently linked to USCCB's sub-grantee's discrimination against Fatma and Bryn based on religious objections to same-sex relationships. Federal Defendants administer the URM and UC programs. *See* First Am. Compl. for Declaratory and Injunctive Relief and Monetary Damages ¶¶ 17–18 *Marouf, et al, v. Azar, et al.*, No. 1:18-cv-00378 (D.D.C. Mar. 22, 2018), ECF No. 21. These programs are administered through grants that Federal Defendants award to provide child welfare services on their behalf. *Id.* ¶¶ 19–20. USCCB is a URM and UC grantee. *Id.* ¶¶ 27–29.

In its URM and UC grant applications for the relevant period, USCCB informed Federal Defendants that it would certainly not provide services under any grants that are contrary to its religious doctrine, and that it would certainly require its sub-grantees to do the same. *Id.* ¶¶ 30–32. Indeed, USCCB readily concedes that it has put Federal Defendants on notice of its refusal to sub-grant to entities that license same-sex couples as foster parents. USCCB's MTD at 4. Federal Defendants nevertheless awarded the grants to USCCB, without implementing adequate safeguards to prevent USCCB or its sub-grantees from administering the grants on the basis of religious considerations, including based on USCCB's religious objection to same-sex relationships. *Id.* ¶¶ 33–37. Because Federal Defendants awarded the grants to USCCB, knowing that it would certainly use the funds to further its religious doctrine, and, despite knowing this, failed to establish adequate safeguards to prevent it from doing so, there is a sufficient link between Federal Defendants' actions and Fatma and Bryn's injuries. Moreover, the federally funded religious discrimination against Fatma and Bryn by USCCB's sub-grantee was not independent of government policy in light of Federal Defendants' failure to establish adequate safeguards to deter USCCB from using the funds to further its religious doctrine, as it explicitly stated it would do. Thus, Fatma and Bryn's injuries are fairly traceable to Federal Defendants' actions.[3]

[3] Federal Defendants and USCCB wish to have it both ways. First, they argue that the injury caused to Fatma and Bryn was caused by an independent and uncontrollable third-party sub-grantee of USCCB. Fed. Defs.' MTD at 18. *See also* USCCB's MTD at 10. But, in the same breath, they also argue that USCCB would cease providing federal child welfare services altogether if its sub-grantees were required to license same-sex couples on non-discriminatory terms. *Id.* Clearly, USCCB's explicit grant administration policy, which the Federal Defendants ratified, constrains USCCB's sub-grantees as a practical matter to such an extent that such entities would lose federal funding through USCCB if they were to violate USCCB's religious doctrine in the administration of the grant. As a consequence, it is impossible to view the decisions of these entities to refuse to consider same-sex couples as foster parents as in any way independent of USCCB's religious doctrine.

Second, there is a direct link between Federal Defendants' actions and Fatma and Bryn's injuries on account of Federal Defendants' failure to take remedial measures following Fatma and Bryn's petition for redress. In carrying out their responsibility to administer the URM and UC programs, Federal Defendants failed to take any remedial measures to protect married same-sex couples like Fatma and Bryn from federally funded religious discrimination after they were directly informed that USCCB was administering the grants based on religious objections to same-sex relationships. *See id.* ¶ 53. This, too, confirms a direct link between the Federal Defendants' actions (or inaction) and Fatma and Bryn's injuries: Federal Defendants knew about the discrimination against Fatma and Bryn, yet failed to fulfill their responsibility to administer the URM and UC programs in a manner that ensures that the children in their care are not denied possible placement options as a result of the use of URM and UC funds to advance religious doctrine.

B. Fatma and Bryn's Injuries Are Redressable.

Defendants similarly misunderstand that Fatma and Bryn's injuries also satisfy the other "side[] of a causation coin:" redressability. *Microwave Acquisition Corp. v. F.C.C.*, 145 F.3d 1410, 1412–13 (D.C. Cir. 1998) (quoting *Dynalantic Corp v. U.S. Dep't of Def.*, 115 F.3d 1012, 1017 (D.C. Cir. 1997)). Redressability is satisfied when a plaintiff's requested relief would "help alleviate th[e] harm" that the plaintiff has suffered. *Natural Res. Def. Council v. EPA*, 749 F.3d. 1055, 1062 (D.C. Cir. 2014); *see also Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (noting that the favorable decision need not relieve *every* injury the plaintiff suffered).

Defendants' attempt to disavow the redressability of Fatma and Bryn's injuries by speculating that USCCB is "more likely to withdraw from providing services under the URM and [UC] programs than to" cease using federal funds to discriminate based on its religious doctrine regarding same-sex couples. Fed. Defs.' MTD at 18. *See also* USCCB's MTD at

10. Defendants' redressability argument fails because it mischaracterizes the injury suffered by Fatma and Bryn, misapprehends the relief that Plaintiffs are seeking, and thereby misapplies the redressability analysis. *See In re Thornburgh*, 869 F.2d 1503, 1511 (D.C. Cir. 1989) (redressability analysis is based on the relief that a plaintiff has requested).

Fatma and Bryn have a right to go to any URM or UC grantee and have their foster parent application be considered without being subject to federally funded religious discrimination and additional material and dignitary burdens simply because they are religiously disfavored. This right was injured because Federal Defendants enabled USCCB, and its sub-grantee, to deny Fatma and Bryn the opportunity to apply to be foster parents in accordance with USCCB's religious objections to same-sex relationships, and not for a child welfare-based reason. This injury is ongoing because Federal Defendants never took action to redress this wrong even after they were made aware of the use of federal funds for such religious discrimination.

Defendants assert that Plaintiffs are requesting an order for USCCB to process Fatma and Bryn's foster parenting application over its religious objections and that redressability, therefore, is impossible because USCCB would rather abandon the URM and UC programs than cease using federal funds to discriminate based on its religious doctrine against Fatma and Bryn. But this assertion rests in little more than Defendants' speculation and fails to draw all reasonable inferences in Plaintiffs' favor, as is required when evaluating standing. *See Thomas v. Principi*, 394 F.3d 970, 972 (D.C. Cir. 2005). Putting aside the uncertainty of whether USCCB would simply abandon charitable programs that they have helped administer for over thirty years, Defendants' argument more fundamentally rests on erroneous speculation as to the requested relief that this Court may ultimately fashion: Defendants incorrectly assert that the relief that

Plaintiffs are requesting would *necessarily* force USCCB to administer the URM and UC programs in a manner that violates its religious doctrine. This is not Plaintiffs' objective.

Plaintiffs request that Fatma and Bryn be able to *go to* USCCB (or its sub-grantee) to initiate the URM and UC foster parent application process without having their application denied—and therefore without having the possible placement options of the children in the care of USCCB (or its sub-grantee) restricted—on account of federally funded religious discrimination. Indeed, Fatma and Bryan have *already gone to* USCCB; it is now incumbent on *Federal Defendants* to ensure that their application is not denied—and therefore the children's possible placement options restricted—on account of such discrimination.

In other words, Plaintiffs do *not* demand that USCCB necessarily render the determination as to Fatma and Bryn's eligibility to be foster parents, or make the decision to place a child with Fatma and Bryn. If Federal Defendants can administer the URM and UC programs in a constitutionally compliant manner while *also* accommodating the religious views of URM and UC grantees—and relief can be fashioned to accomplish this—Plaintiffs do not object. Federal Defendants may accommodate USCCB's religious objections to fulfilling the terms of the grants *so long as* they do so in a manner that does not ultimately restrict placement options based solely on USCCB's religious doctrine and does not impose materially unequal burdens, stigma, or indignity on religiously disfavored applicants relative to favored ones.

At this stage of the litigation, it is at best speculative to suggest that no such relief could be fashioned. Conjecture about how a precise remedy should be crafted is outside of the scope of the redressability inquiry. *See generally Hassan v. City of New York*, 804 F.3d 277, 293–94 (3d Cir. 2015) (noting that a determination of redressability does not require a prediction of the "exact nature of possible relief . . . [prior to] full development of the facts").") (omission in

original) (quoting *Smith v. Meese*, 821 F.2d 1484, 1494 (11th Cir. 1987)). To the contrary, claims challenging government regulation of third parties survive unless "it is *purely speculative* that a requested change in government policy will alter the behavior of regulated third parties that are the direct cause of the plaintiff's injuries . . . [or otherwise] result in the availability to [the plaintiff] of" a remedy to his or her injury. *Nat'l Wrestling Coaches*, 366 F.3d at 938 (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 28, 43 (1976)) (emphasis added). This standard is readily met. If anything, where an "'alleged injury arises from [] identifiable discriminatory [conduct],'" it is not speculative to assert that "policy [changes to prevent and correct such discrimination] . . . would redress the injury" caused by that discrimination.[4] *Hassan*, 804 F.3d at 293 (quoting *Smith*, 821 F.2d at 1494). As Federal Defendants themselves acknowledge, "[w]here a third party engages in conduct permitted by a challenged government rule, an order setting aside the rule would redress the plaintiff's injury because the government authorization of the conduct would be ended and the third party would no longer be able to engage in the injurious conduct." Fed. Defs.' MTD at 16 n.5.

II. PLAINTIFFS PROPERLY PLED TAXPAYER STANDING.

Plaintiffs' taxpayer standing centers on the statutory schemes underlying the URM and UC grant programs set forth in the Refugee Act of 1980, 8 U.S.C. § 1522 ("Section 1522"), and the William Wilberforce Trafficking Victims Protection Act of 2008, 8 U.S.C. § 1232 ("Section 1232"), two statutes establishing "at heart a program of disbursement of funds" under Congress's article I section 8 powers. *Bowen*, 487 U.S. at 619. Federal Defendants' administration of the

[4] This outcome is unchanged by the fact that USCCB is a federal grantee rather than a federal agency. It is well-established that the federal government can police the conduct of its grantees, and can take corrective actions if such grantees fail to comply with federal law or other conditions of the grant award. *See* 2 C.F.R. § 200.338.

UC and URM programs is contingent upon congressional appropriations for those statutory schemes.

The crux of Defendants' arguments is that congressional appropriations for these grant programs are, in their mistaken view, general, lump sum, and discretionary, which Defendants argue do not meet what they mischaracterize as the "express congressional mandate and . . . specific congressional appropriation" requirement for taxpayer standing in *Hein*, and *In re Navy Chaplaincy*. *See* Fed. Defs.' MTD at 13–14; USCCB's MTD at 13–14. This argument fails for three reasons. First, the statutory schemes here align with those at issue in *Flast* and *Bowen*, cases that Defendants acknowledge are established Supreme Court precedent articulating the exception to the general bar on taxpayer standing. Second, Plaintiffs' claims are factually distinguishable from those in *Hein* and *In re Navy Chaplaincy*, where the Executive's disbursement of congressional appropriations was not tied to any specific statute, let alone a statutory scheme that specifically contemplated the administration of a grant program. Third, the administration of congressionally authorized and funded grant programs in a manner that advances USCCB's religious doctrine, as alleged, is exactly the type of infringement of the Establishment Clause that taxpayer standing is meant to vindicate. *Flast*, 392 U.S. at 104.

A. This Case Fits Neatly into the *Flast* Exception to the General Bar on Taxpayer Standing.

Defendants correctly identify the *Flast* exception to the general bar on taxpayer standing: it exists only for Establishment Clause claims challenging expenditures that "exceed[] specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power." *Flast*, 392 U.S. at 102–03. The exception applies where expenditures are "expressly authorized or mandated by specific congressional enactment" such that a taxpayer can establish "a logical link between that status and the type of legislative enactment attacked . . . [and] a

nexus between that status and the precise nature of the constitutional infringement alleged." *Id.* at 102; *Hein*, 551 U.S. at 591. *See also Bowen*, 487 U.S. at 596–98, 619 ("[W]e do not think that . . . appellees' claim that AFLA funds are being used improperly by individual grantees is any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary.").

The Supreme Court has twice upheld this exception to the general bar on taxpayer standing. *See Flast* 392 U.S. at 104 (finding taxpayer standing to challenge grants awarded under Titles I and II of the Elementary and Second Education Act); *Bowen*, 487 U.S. at 620 (finding taxpayer standing to challenge grants awarded under the Adolescent Family Life Act). These cases are strikingly similar. Both involved statutes that created grant programs. *See generally id.* A primary purpose of these statutes was to make congressionally appropriated funds available to schools. *See generally id.* Neither statute required that the Executive make funds available to *religious* schools: the funds could have gone to *either* parochial *or* non-parochial schools. *Hein*, 551 U.S. at 606–07 (quoting *Bowen*, 487 U.S. at 619, 620); *Flast*, 392 U.S. at 86–87. Congress earmarked funds for these statutory programs to ensure their statutory purposes were fulfilled. *Bowen*, 487 U.S. at 619; *Flast*, 392 U.S. at 86.

The Executive then exercised discretion to determine where the funds should go, ultimately to both parochial and non-parochial schools. *Bowen*, at 619–20; *Flast*, 392 U.S. at 86–87. As Defendants point out, it was "plainly understood" that the statutes authorized federal funding of religiously affiliated schools, even though explicit confirmation was not always found in the statutory text. *See Hein*, 551 U.S. at 604 n.3 (reviewing the history of *Flast*); *see also id.* at 606–07 (noting that the statute at issue in *Bowen* expressly contemplated that funds might go to religious organizations); Fed. Defs.' MTD at 10. The Executive's disbursement of these funds

to the parochial schools raised Establishment Clause concerns, and the Supreme Court found in both instances that taxpayers had standing to bring suit challenging the Executive's disbursement. *Bowen*, 487 U.S. at 596–98, 619 ("[w]e do not think that . . . appellees' claim that AFLA funds are being used improperly by individual grantees is any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary.").

The rule is clear: taxpayer standing exists in cases where Congress specifically appropriated funds for programs enacted under statutory schemes with a purpose of disbursing those funds, understanding that those funds might be distributed to religious organizations, and the disbursement of those funds is alleged to inappropriately favor or disfavor religion. Other courts have faithfully applied this rule. *Laskowski v. Spellings*, 546 F.3d 822, 827 (7th Cir. 2008) ("The import of the plurality opinion [in *Hein*] is that the reach of *Flast* is now strictly confined to the *result* in *Flast.* And the result in *Flast* was that the taxpayers had standing to seek an injunction to halt a specific congressional appropriation alleged to violate the Establishment Clause.") (emphasis in original); *Am. Civil Liberties Union of Mass. v. Sebelius*, 697 F. Supp. 2d 200, 208–09 (D. Mass. 2010) ("It would also seem that *Flast* and [*Bowen*] remain (at least for now) the controlling law on taxpayer standing when the expenditure being challenged is not a lump-sum Congressional budget appropriation[] for the general use of the Executive Branch.") (internal quotations omitted) (omission in original); *Murray v. Geithner*, 624 F. Supp. 2d 667, 674 (E.D. Mich. 2009) ("The *Hein* Court left *Flast* as it found it.").

Notably, another district court recently analyzed Section 1232 and determined that its "mechanism . . . is . . . like the one created in *Flast.*" *Am. Civil Liberties Union of Mass.*, 697 F. Supp. 2d at 205. In holding that the plaintiffs had taxpayer standing, the court stated:

> [Section 1232] simply directs HHS to provide social services to victims of human trafficking. It does not order HHS to include religious organizations among the service providers (nor does it exclude them), nor does it specify the exact nature of the social services that are to be provided. Instead, these matters are left to the discretion of the Secretary. [Section 1232] does, however, make a specific annual appropriation . . . to carry out its victims' services mandate.

Id.

Just so here, too. Sections 1232 and 1522 specifically contemplate the disbursement of funds to certain entities to provide certain services to certain refugees and immigrants, including certain unaccompanied youth. 8 U.S.C. § 1522(a)(1)(A), (d); *id.* § 1232(c)(2)(A) (providing for placement in a URM program pursuant to Section 1522(d)). Since their enactment, Congress has specifically funded these statutory schemes. *See e.g.*, Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2479 (appropriating funds for refugee and entrant assistance); Consolidated Appropriations Act, 2018, Pub. L. 115-141, H.R. Doc. No. 1625, at 381 (2018) (appropriating funds for refugee and entrant assistance) *see also* S. Rep. No. 115-150, at 133 (2017) (noting that the programs provide care for unaccompanied children); Refugee and Entrant Assistance, 164 Cong. Rec. H2704 (Mar. 22, 2018) (directing the Department of Health and Human Services to provide joint briefing outlining planned policies that affect the resources needed to assist unaccompanied children); Consolidated Appropriations Act, 2017, Pub. L. 115-31, 131 Stat. 531 (appropriating funds for refugee and entrant assistance); H.R. Rep. No. 114-699 at 95–96 (2016) (specific appropriations for unaccompanied children programs and directing agencies to submit related reports); Consolidated Appropriations Act, 2016, Pub. L. 114-113, 129 Stat. 2612–13 (appropriating funds for refugee and entrant assistance); H.R. Rep. No. 114-195 at 24, 94–95 (2015) (specific appropriations for unaccompanied children programs and directing agencies to submit related reports) ("URM and UC Appropriations History"). The Executive has then distributed these congressionally

appropriated funds in accordance with the statutory schemes. *See Hein*, 551 U.S. at 606–07 (noting that, in both *Bowen* and *Flast*, the Supreme Court found taxpayer standing "notwithstanding the fact that the funding authorized by Congress ha[d] flowed through and been administered by an Executive Branch official") (internal quotations omitted). The appropriations at issue are simply not "general" or "lump sum."

Moreover, Federal Defendants' congressionally mandated annual expenditure reports, encompassing the URM and UC programs, confirm that Congress understood that those funds might be distributed to religious organizations. *See Hein*, 551 U.S. at 604 n.3 (suggesting that common knowledge of the school system at the time in *Flast* was enough to impute congressional intent to distribute funds to parochial and sectarian schools). Those annual reports specifically state that USCCB receives the majority of grant funds under the URM and UC programs. *See, e.g.*, *Office of Refugee Resettlement ("ORR") Annual Report to Congress FY 2014*, U.S. Dep't of Health & Human Servs., Admin. for Children and Families, ORR 51 (2014), https://www.acf.hhs.gov/orr/resource/annual-orr-reports-to-congress ["ORR Annual Reports"]. Thus, as in *Flast*, when Congress appropriated funds for the statutory schemes at issue, it "plainly understood" that religious organizations—including USCCB in particular—might, and were in fact likely to, receive such funds. *Hein*, 551 U.S. at 604 n.3.

Further, Defendants' argument that Plaintiffs cannot maintain taxpayer standing in light of the Executive's exercise of discretion to determine where the funds should go reveals their fundamental misunderstanding of the case law. Indeed, contrary to Defendant's assertions, it is legally immaterial whether executive discretion determines the grantees. *Hein* speaks of *either* congressional authorization *or* congressional mandate: as long as one exists, taxpayer standing can be found. *Hein*, 551 U.S. at 608 (holding that, "[b]ecause the "expenditures . . . were not

expressly authorized *or* mandated by any specific congressional enactment," taxpayer standing could not be found) (emphasis added). Here, Congress has specifically authorized the award of the grants under the URM and UC programs, *and* has specifically appropriated funds for use under those programs. 8 U.S.C. § 1522(a)(1)(A), 1522(d); *id.* § 1232(c)(2)(A) (providing for placement in a URM program pursuant to Section 1522(d); *see also* URM and UC Appropriations History, *supra*. Moreover, in *Bowen*, the Court specifically stated that executive discretion was immaterial to the taxpayers' standing: "[w]e do not think that . . . appellees' claim that AFLA funds are being used improperly by individual grantees is any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary." *Bowen*, 487 U.S. at 619. Thus, because Congress has specifically authorized and appropriated funds for the grants at issue, it is legally of no matter that the Executive ultimately exercised discretion in disbursing them.

B. *Hein* and *In Re Navy Chaplaincy* Are Factually Distinguishable from, and Therefore Inapplicable to, This Case.

Defendants argue that taxpayer standing is precluded by the Supreme Court's precedent in *Hein* and this Circuit's precedent in *In re Navy Chaplaincy*. But those cases involved markedly different statutory schemes and—crucially—general, lump sum congressional appropriations.

In *Hein*, for example, the President issued an executive order creating a faith-based office within the Executive Office of the President. *Hein*, 551 U.S. at 595. "No congressional legislation specifically authorized" the creation of this office. *Id.* Thus, the office was funded solely "through general Executive Branch appropriations." *Id.* Similarly, in *In re Navy Chaplaincy*, Congress's general, lump sum appropriations for navy reservists and the naval retirement fund funded the Navy Chaplain Corps. *See also* URM and UC Appropriations

History, *supra*. This was because the statutory scheme categorized navy chaplains as reservists. *See* 10 U.S.C. §§ 5142, 5150. There was *no* appropriation specific to the Navy Chaplain Corps—and indeed no mention of navy chaplains at all—in the appropriations bill or relevant committee reports.

Indeed, many cases where allegations of taxpayer standing have been rejected have suffered the same fatal flaw: "no-strings, lump-sum appropriations" not tied to "any specific congressional enactment." *Hein*, 551 U.S. at 608. *See also e.g.*, *Valley Forge Christian College v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 479 (1982) (finding that an executive decision to transfer federal property to a religious college was neither a congressional action nor a congressional appropriation); *Drake v. Obama*, 664 F.3d 774 (9th Cir. 2011) (no taxpayer standing where plaintiffs did not challenge "any spending action at all"); *Freedom from Religion Found. v. Nicholson*, 536 F.3d 730 (7th Cir. 2008) (no taxpayer standing where the challenged administration of funds by Department of Veterans Affairs concerned a program established solely through executive directive and thus bore an insufficient relationship to the general appropriations for the Department, which did not specifically authorize the program at issue or specifically appropriate funds for it).

But that flaw is not present here. To the contrary: here, Congress has created "at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers." *Hein*, 551 U.S. at 595 (quoting *Bowen*, 487 U.S. at 619–20); *see* 8 U.S.C. § 1522; 8 U.S.C. § 1232(i). As explained above, Sections 1522 and 1232 have a primary and explicit purpose of disbursing funds to assist certain refugees and immigrants, including certain unaccompanied youth. And the appropriations for these statutory programs themselves have a similarly express purpose, specifically mentioning the unaccompanied youth in Federal Defendants' care. *See* URM and

UC Appropriations History, *supra*. No such facts existed in the cases in which allegations of taxpayer standing were rejected.

Defendants argue that, in order for taxpayer standing to be available, an act of Congress explicitly contemplating disbursement of funds to faith-based organizations must exist. *See* Fed. Defs.' MTD at 13–14, USCCB's MTD at 13–14. But this cannot be so for two reasons.

First, in both *Bowen* and *Flast*, the Supreme Court found taxpayer standing despite the fact that the Executive exercised discretion to decide that funding should go to religious organizations. *Bowen*, 487 U.S. at 619–20; *Flast*, 392 U.S. at 86–87. The authorizing statute in *Flast* did not specify that grantees might include religious organizations. *Hein*, 551 U.S. at 604 n.3. Only in *Bowen* was there any express contemplation in the statutory text that funds might go to religious grantees. *Id*. at 607 (citing *Bowen*, 487 U.S. at 595–96). Moreover, here, while there is no such contemplation in the statutory text, thanks to Federal Defendants' annual reports, when Congress appropriated funds for the statutory schemes at issue, it had knowledge that the funds would go primarily to USCCB. *See generally* ORR Annual Reports, *supra*.

Second, Justice Alito's opinion in *Hein* did not so limit the concept of taxpayer standing. Instead, it merely maintained the status quo established in *Flast* that expenditures "expressly authorized or mandated by any specific congressional enactment . . . directed at an exercise of congressional power [have] . . . the requisite logical nexus between taxpayer status and the type of legislative enactment attacked." *Hein*, at 608–09 (upholding *Flast*) (internal quotations omitted). *See also Bowen*, 487 U.S. at 619 (("[W]e do not think . . . that appellees' claim that AFLA funds are being used improperly by individual grantees is any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary."). And *In re Navy Chaplaincy* did

not—and, indeed, could not—alter or extend *Hein*'s central holding. Any notion that taxpayer standing is conditional on explicit statutory text noting that religious organizations might receive funds is outside the holding of *Flast*, and thus also outside the holding of *Hein*.

C. Taxpayer Standing in Cases Such as This One Is Essential to Protect Against Infringement of the Establishment Clause.

"The Establishment Clause was designed as a specific bulwark against . . . potential abuses of governmental power." *Flast*, 392 U.S. at 104. The Supreme Court has continued to recognize that the exception to the general bar on taxpayer standing is necessary to protect against infringement of this constitutional cornerstone. In the absence of taxpayer standing, Establishment Clause violations uniquely could go unchecked in many instances. *See, e.g.*, Richard Albert, *The Constitutional Politics of the Establishment Clause*, 87 CHI.-KENT L. REV. 867, 884 (2012) ("The consequence of denying taxpayers the power to sue in federal court under the Establishment Clause is to effectively shield states from federal judicial oversight."). In this regard, nothing has changed since *Flast* was decided. *Hein*, 551 U.S. at 616 (Kennedy, J., concurring) (noting that *Flast* should be upheld because it embraced "the Constitution's special concern that freedom of conscience not be compromised by government taxing and spending in support of religion").

If it were correct that taxpayer standing is conditional on Congress specifically directing the disbursement of funds to a particular organization in a manner that favors or disfavors religion, there would be a much more limited check on governmental abuse under the Establishment Clause. The reality is that Congress does not ordinarily direct the award of a grant to a particular organization. Responsibility for the exercise of judgment in disbursing such funds is ordinarily delegated to the Executive. If "the Constitution's special concern that freedom of conscience not be compromised by government taxing and spending in support of religion" is to

be vindicated, taxpayer standing in cases such as this one must remain a vital avenue for policing such fundamental governmental abuse. *Id.*

III. PLAINTIFFS PROPERLY REQUESTED NOMINAL DAMAGES.

Finally, Federal Defendants argue that sovereign immunity bars Plaintiffs' request for nominal damages. Plaintiffs first clarify that they seek nominal damages only with respect to those Federal Defendants who are federal officials.[5] Plaintiffs further clarify that they are seeking such damages only in the alternative, i.e., to the extent that the Court ultimately concludes that other relief is unavailable and such damages become the only mechanism by which Plaintiffs can vindicate their constitutional rights. Under these circumstances, Plaintiffs' request for nominal damages is proper, as set forth below. More fundamentally, however, efforts by Federal Defendants to limit Plaintiffs' potential alternative remedies are premature at the motion-to-dismiss stage.

According to Federal Defendants, requests for nominal damages fail in the absence of a *statutory* waiver of sovereign immunity. *See* Fed. Defs.' MTD at 20. This position is unsupported by the case law. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) and its progeny stand for the proposition that sovereign immunity does not serve as a categorical bar to all damages claims, and that plaintiffs do not necessarily need a specific statutory mechanism to vindicate their constitutional rights and seek damages. The Supreme Court, in fact, made it clear that Federal Defendants' position is untenable when it held that "[t]he federal courts' power to grant relief not expressly authorized by Congress is firmly

[5] Plaintiffs acknowledge the need to sue these officials in their individual capacities, in addition to their official capacities. If necessary to do so at this time, Plaintiffs will seek leave to amend their complaint to do so. As discussed below, however, the Court should not address the question of the propriety of nominal damages now, as it may never need to do so. Accordingly, Plaintiffs submit that it would be prudent to permit Plaintiffs to wait to seek leave to amend its complaint until it is clear that it is necessary to do so.

established." *Bush v. Lucas*, 462 U.S. 367, 374 (1983). This principle is fundamental to the vindication of constitutional rights.

> [U]nless . . . [constitutional] rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.

Davis v. Passman, 442 U.S. 228, 242 (1979).

Accordingly, Federal Defendants overstate the reach of any sovereign immunity defense. Damages can be available to plaintiffs despite the absence of a statute expressly providing for such a remedy. While *Bivens* and its progeny have thus far permitted damages against federal officials in only certain types of cases, the availability of damages in cases such as this one has not been foreclosed and is assessed on a "case-by-case basis." *Meshal v. Higgenbotham*, 804 F.3d 417, 422 (D.C. Cir. 2015). Thus, the question is not whether Plaintiffs are categorically barred from recovering damages in the absence of an enabling statute; they are not, despite Federal Defendants' assertion that the analysis stops there. Rather, the question is whether, consistent with *Bivens* and its progeny, the Court may allow Plaintiffs to seek nominal damages to vindicate the violations of certain of their First and Fifth Amendment rights.[6] *See Bivens*, 403 U.S. at 397. The answer is yes.

While awarding nominal damages here may require the Court to apply the principle established in *Bivens* in a new context,[7] such application is appropriate where there are no

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[6] In *Bivens*, the Supreme Court remanded to allow a plaintiff's claim for damages arising out of a Fourth Amendment violation to proceed because damages are a "remedial mechanism normally available in the federal courts." 403 U.S. at 397. *See also Davis*, 442 U.S. at 243–45 (same for Fifth Amendment Due Process Clause rights); *Carlson v. Green*, 446 U.S. 14, 19–23 (1980) (same for Eighth Amendment rights).

[7] Notably, the Supreme Court has already allowed a *Bivens* action to proceed under a different set of facts in a case in which a plaintiff alleged a violation of her Fifth Amendment

"special factors counsel[ing] hesitation in creating a *Bivens* remedy" and where the plaintiff would otherwise be left entirely without recourse or compensation for the constitutional wrong. *Id.*; *see also Meshal*, 804 F.3d at 425. *See also Davis*, 442 U.S. at 245 (finding it persuasive that no other meaningful relief would be available to the plaintiff if a damages claim against federal officials were not allowed). Thus, where damages are permitted, they "represent a judgment about the best way to implement a constitutional guarantee." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). *See also Bush*, 462 U.S. at 374 (recognizing that courts have "the authority to choose among available judicial remedies in order to vindicate constitutional rights"). Indeed, if "it is damages or nothing," as it was in *Bivens* and *Davis*, plaintiffs are entitled to seek damages to redress their constitutional wrongs. *Davis*, 442 U.S. at 228 (internal quotations omitted).

More fundamentally, Federal Defendants' Motion to Dismiss is not an appropriate vehicle for addressing whether nominal damages are properly suited to vindicate Plaintiffs' constitutional rights. Indeed, this question is properly presented only if the Court concludes *both* that Plaintiffs' constitutional rights have been violated *and* that Plaintiffs' other requested relief is unavailable. Discovery and subsequent briefing will enable the parties to explore and answer

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rights. *See generally Davis,* 442 U.S. at 243–45 (allowing a *Bivens* action to be brought when a plaintiff alleged that her federal employer, an elected official, discriminated against her and caused an adverse employment action in violation of her due process rights). In contrast, the Supreme Court previously declined to extend *Bivens* to a plaintiff's claim alleging a violation of his First Amendment free speech rights after he was reprimanded by his federal agency-employer for making certain public comments. *See generally Bush*, 462 U.S. 367. However, in *Bush*, the Supreme Court found determinative the fact that there were "comprehensive procedural and substantive provisions giving meaningful remedies against the United States" through which the plaintiff could obtain relief such that there was no need for resort to a *Bivens* action. *Id.* at 368. As noted above, here, Plaintiffs seek nominal damages only to the extent that other relief is not available.

these questions in full[8]; they are not questions that can be answered based on Federal Defendants' Motion to Dismiss. As a prudential matter, the Court should not address the question of the propriety of nominal damages now, as it may never need to do so.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' motions to dismiss or, in the alternative, request leave to amend their complaint.

Respectfully submitted,

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[8] Of course, following discovery, should Plaintiffs need to amend their complaint to perfect their request for nominal damages by naming additional federal officials to be sued, they would seek leave to do so at that time.

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Dated: June 18, 2018

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing, PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' OPPOSITION TO FEDERAL DEFENDANTS' AND DEFENDANT UNITED STATES CONFERENCE OF CATHOLIC BISHOPS' MOTIONS TO DISMISS, attached hereto, with the Clerk of the Court through the ECF system on June 18, 2018. This system provided a copy to and effected service of this document on all parties.

By: /s/ *Kenneth Y. Choe*
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