IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 12-1466

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, (ACLUM)

Plaintiff-Appellee

v.

UNITED STATES CONFERENCE OF CATHOLIC BISHOPS

Defendant-Appellant

KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services; GEORGE SHELDON, Acting Assistant Secretary for the Administration of Children and Families; ESKINDER NEGASH, Director of the Office of Refugee Resettlement

Defendants

No. 12-1658

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, (ACLUM)

Plaintiff-Appellee

v.

KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services; ESKINDER NEGASH, Director of the Office of Refugee Resettlement; GEORGE SHELDON, Acting Assistant Secretary for the Administration of Children and Families

Defendants-Appellants

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STATEMENT REGARDING ORAL ARGUMENT

This is an appeal of a final judgment holding that a government contract for the provision of secular social services to victims of human trafficking violated the Establishment Clause. The district court held the contract unconstitutional not because the government had any religious motivations or funded any religious activity, but instead because of the private religious motivations of the entity that received the contract. For that reason, and because this case also involves important and complex issues relating to mootness and Article III standing, we respectfully request oral argument and believe argument would be of value to the Court.

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STATEMENT OF JURISDICTION

Plaintiff filed this Establishment Clause action against three federal officials in their official capacities, seeking declaratory and injunctive relief. The complaint invoked the jurisdiction of the district court pursuant to 28 U.S.C. 1331. *See* Complaint, ¶ 6, Joint Appendix (JA 19-20). The United States Conference of Catholic Bishops ("USCCB") intervened as a defendant.

The district court granted summary judgment to plaintiff and entered final judgment on March 23, 2012, resolving all the claims of all the parties. *See* Judgment (JA 1655). USCCB filed a timely notice of appeal on April 17, 2012 (JA 1638), and the federal defendants filed a timely notice of appeal on May 22, 2012 (JA 1682). This Court consolidated the two appeals by order of June 5, 2012. This Court has jurisdiction over the consolidated appeals pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether this case is moot because the contract plaintiff challenges has expired and no further reimbursements under the contract are payable.

2. Whether plaintiff lacks taxpayer standing to bring this action.

3. Assuming this Court has jurisdiction, whether the district court erred by granting summary judgment for plaintiff on its Establishment Clause claim.

STATEMENT OF THE CASE

This case concerns a contract the federal government awarded to USCCB for the provision of secular government services under the Trafficking Victims Protection Act ("TVPA") to protect and assist victims of human trafficking. Plaintiff claims the contract violated the Establishment Clause not because of the services the contract funded, but because of services it did *not* fund. Specifically, USCCB's contract proposal, accepted by the agency, did not provide TVPA funds for the provision of or referral for abortion or contraceptive services (although subcontractors were not restricted by the subcontract from providing such services through the use of any other funding). Because USCCB declined to include those services in its contract proposal due to its religious beliefs, plaintiff contends that the government's decision to award the contract violates the Establishment Clause. The contract expired on October 10, 2011, and USCCB will not be making any further reimbursements to is

subcontractors under the contract.

The district court held that the expiration of the TVPA contract with USCCB does not render this case moot because a similar TVPA contract might be awarded in the future to USCCB. The court also held that plaintiff has Establishment Clause taxpayer standing to bring this action, rejecting the government's argument that *Hein* v. *Freedom from Religion Foundation, Inc.*, 551 U.S. 587 (2007), precludes standing because the TVPA does not mandate or expressly contemplate the use of federal tax dollars for religious purposes or by a religious entity. Finally, the court held that the contract violated the Establishment Clause because it delegated authority to USCCB to impose religiously based restrictions on the expenditure of taxpayer funds. The federal defendants challenge each of these rulings in this appeal, which this Court has consolidated with an appeal separately filed by USCCB.

STATEMENT OF FACTS

1. Facts

a. The Trafficking Victims Protection Act ("TVPA")

On October 20, 2000, Congress enacted the Trafficking Victims Protection Act, Pub. L. 106-386, 114 Stat. 1464 (2000) (codified as amended at 22 U.S.C. 7101, *et seq.*). The Act's purpose is "to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, and

to ensure just and effective punishment of traffickers, and to protect their victims." 22 U.S.C. 7101(a). To achieve that end, the Act, among other things, directs the Secretary of Health and Human Services to "expand benefits and services to victims of severe forms of trafficking in persons . . ." 22 U.S.C. 7105(b)(1)(B). That statutory directive is subject, in the case of nonentitlement programs, to the availability of appropriations. *See* 22 U.S.C. 7105(b)(1)(B). Congress has appropriated funds for that purpose for each year since the Act was passed. *See* Defendants' Statement of Material Facts, ¶¶ 4, 5 (JA 972-73).

b. Transition from Grant-Based Model To Contract-Based Model for Deployment of TVPA Funds.

Shortly after Congress enacted the TVPA in 2000, HHS began providing support to victims of human trafficking through a series of competitively selected grants. *See* Wagner Dep., pp. 16-17, 22-24 (JA 998-1002). As of February 2005, however, only 711 victims had been certified as eligible for the receipt of benefits under the TVPA during the five years of the program, even though the government estimated that 15,000-17,500 victims were being trafficked into the United States every year. *See* Request for Proposals, p. 7 (App. 58). HHS also found that its provision of services to trafficking victims through grants to multiple entities had proven inefficient because the grantees provided TVPA services only in their own

geographic areas. *See id.*, p. 8 (JA 59).

As a result of the above findings, HHS decided to change from the above-described grants-based model in favor of awarding a single "per capita" contract. *See* Wagner Dep., pp. 24-25 (JA 1002-03). HHS anticipated that a per capita funding model would eliminate geographic barriers and provide organizations with an incentive to identify more trafficking victims and provide services to them. *See* Request for Proposals, pp. 7-8 (JA 58-59); Kelly Dep., pp. 85-86 (JA 1370-71).

In its Request for Proposals, HHS explained that the contractor selected would need to provide a range of services, including counseling services, case management, and benefits coordination. *See* Request for Proposals, p. 11 (JA 62). The Request for Proposals did not, however, state that the contractor would be required to provide, or offer referrals for, abortion or contraceptive services.

The Request for Proposals noted that the contractor would be paid on the basis of how many victims it served and for how long, with a minimum guaranteed payment ($500,000) and a maximum amount the contractor could receive ($6,000,000) for the base period of one year. *See id.*, p. 2 (JA 53). The Request explained that HHS would select the contract recipient based on four factors: technical criteria, past performance, Small Disadvantaged Business participation, and price. *See id.,* p. 45 (JA 113). *See also id.*, pp. 45-46 (JA 113-14) (listing technical

evaluation criteria). HHS received timely proposals from only two organizations: USCCB and the Salvation Army. *See* M. Edwards Dep., pp. 30-31 (JA 1067-68).

To evaluate the technical merit of the proposals, HHS convened a panel consisting of two HHS employees and two HHS contractors. *See* Wagner Dep., p. 37 (JA 1004). HHS directed the panel to rate the two proposals on the four technical evaluation criteria that were specified in the Request for Proposals: organizational profile, approach, staff and position data, and past experience. *See* Instructions to Technical Evaluation Panel (JA 1039-43).

The panel gave USCCB's proposal a score of 89.00 (with 39 strengths and 13 weaknesses), and the Salvation Army's proposal a score of 71.75 (with 11 strengths and 32 weaknesses). *See* Initial Technical Evaluation Report, p. HHS001739b-42b (JA 1159-62). The panel did not identify the religious nature of USCCB or the Salvation Army as a strength, *see ibid.*, and it specifically requested USCCB to follow up on two aspects of its proposal that the panel identified as weaknesses.

First, the panel noted that USCCB had "[m]inimal current partnerships outside of the Catholic service provider network," Initial Tech. Eval. Rpt., p. HHS001741b (JA 1145), and asked whether USCCB would seek out service providers that do not have a Catholic affiliation. *See id.*, p. HHS001743b (JA 1147). Second, the panel referred to a statement in USCCB's proposal indicating that, consistent with

USCCB's religious beliefs, USCCB would advise subcontractors that they "could not provide or refer for abortion services or contraceptive materials for our clients pursuant to this contract." USCCB Initial Technical Proposal, p. HHS000123 (JA 335). *See* Initial Tech. Eval. Rpt., p. HHS001741b (JA 1145). The panel asked USCCB to explain whether it was aware of any providers who would be unwilling to participate in the program because of this restriction on the scope of the contract. *See id.*, p. HHS001743b (JA 1147).

Both USCCB and the Salvation Army submitted amended proposals. USCCB's response explained that it was already enlisting the services of both Catholic and non-Catholic service providers; that it would seek out both Catholic and non-Catholic service providers if granted the TVPA contract; and that it would not consider a provider's religious affiliation, if any, in placing trafficking victims with appropriate service providers. *See* USCCB Amended Technical Proposal, p. HHS000712 (JA 1252). USCCB's amended proposal also explained that none of its existing providers had any concerns about the fact that USCCB would not make reimbursements under the contract for the provision of or referral for abortion or contraceptive services, and that potential new subcontractors would have advance notice of those contract limitations. *See id.*, p. HHS000711-12 (JA 1251-52).

The panel gave USCCB's amended technical proposal a score of 93.75, and a score of 75.00 to the Salvation Army's amended technical proposal. *See* Revised Technical Evaluation Report, p. HHS001792b (JA 1265). *See also id.*, p. HHS001793b-94b (JA 1260-61) (listing 10 comments on the weaknesses of USCCB's amended proposal and 15 comments on the weaknesses of the Salvation Army's amended proposal).

None of the reviewers rated USCCB's proposal higher than the Salvation Army's for any religious reasons. *See* M. Edwards Dep., pp. 106-109 (JA 1060-61); Wagner Dep., pp. 69, 70 (JA 996-97); Tota Dep., p. 90 (JA 1014); Anderson Dep., p. 92 (JA 1140); C. Edwards Dep., pp. 90-92 (JA 1118-20). To the contrary, the panel considered USCCB's proposal not to cover the provision of or referral for abortion and contraception services under the contract as a weakness, *see* Revised Tech. Eval. Rpt., p. HHS001793b (JA 1260), albeit one that did not render USCCB's amended proposal ultimately inferior to the Salvation Army's amended proposal.

In addition to the technical aspects of USCCB's and the Salvation Army's amended proposals, HHS also rated the two proposals on the other criteria identified in the Request for Proposals. *See* pp. 6-7, *supra*. The Salvation Army received a slightly higher score for "past performance" and for small disadvantaged business participation. *See* Recommendation for Award, pp. HHS001256a-1257a (JA 1301-

02). The USCCB proposal's much higher technical evaluation score, however, led HHS to give USCCB's proposal a total combined score on those three criteria (97.73 out of 106) that was much higher than the Salvation Army's (79.29 out of 106). *See id.*, p. HHS001263a (JA 1263).

Finally, HHS estimated the cost of USCCB's amended proposal to be $28,813,068, as compared to $88,690,962 for the Salvation Army's amended proposal. *See id.* at HHS001263a (JA 1308). Considering all the above criteria together, therefore, HHS determined that USCCB's proposal was "the best value for the Government, offering the highest scored proposal at the lowest evaluated price." *Ibid.* Accordingly, on March 29, 2006, HHS awarded the TVPA contract to USCCB. *See ibid.*; M. Edwards Dep., pp. 28, 68 (JA 1050, 1053).

c. The USCCB TVPA Contract

The USCCB TVPA contract was signed on April 11, 2006. *See* Per Capita Contract, p. HHS001324 (JA 1315). The contract was for one base year, with four option years. *See id.*, p. HHS001329 (JA 1311); M. Edwards Dep., p. 109 (JA 1079). HHS picked up each of the contract's four option years (in April 2007, April 2008, April 2009, and April 2010). *See* M. Edwards Dep., p. 109 (JA 1079); Womack Dep., pp. 231-233 (JA 1358-60).

USCCB received monthly payments from HHS for each victim of human trafficking it served that month, *see* Womack Dep., pp. 45-47, 84-85 (JA 1332-34, 1338-39), along with a payment to cover the costs of administering the contract. *See id.*, pp. 45-46 (JA 1332-33); Parampil Dep., pp. 27-28 (JA 1219-20).

USCCB did not provide services under the contract to trafficking victims directly. Rather, it subcontracted with other organizations to provide those services. *See* Womack Dep., p. 56 (JA 1341); Sample Subcontract, p. HHS001860-61 (JA 1375-76). USCCB reimbursed its subcontractors (up to a certain amount) for the expenses they incurred in providing services to victims, and also provided a fixed monthly administrative fee for each victim that was served. *See* Parampil Dep., pp. 29, 36 (JA 1205, 1206); Sample Subcontract, p. HHS 001862 (JA 1377).

USCCB specified for its subcontractors what costs were allowable for reimbursement with contract funds and what costs were not. Allowable costs included case management services, food, clothing, rent, doctor bills and prescriptions, therapy, substance abuse treatment, transportation expenses, English classes, child care, and cash for food, clothing, and personal care items. *See* Sample Subcontract, pp. HHS001863 (JA 1378); 2008 POM, p. HHS001319-20 (JA 1424-25). Unallowable costs included TVs, DVDs, tobacco, drinking alcohol, mortgage payments, Internet service, braces, contact lenses, "abortion counseling/services," and

"abortive/contraceptive prescriptions." 2008 POM, p. HS001319-20 (JA 1424-25). *See also* Sample Subcontract, p. HHS001863 (JA 1378) (mentioning, *inter alia*, "referral for abortion services or contraceptive materials"). Expenditures for religious items and materials also were not reimbursable. *See* 2008 POM, p. HHS001307 (JA 1423).

USCCB did not, however, restrict its subcontractors' use of funds from sources other than the TVPA contract. *See* Brown Dep., pp. 35, 74-75, 78-79 (JA1242-46) Pl.'s Response to Def.-Intervenor's First Set of Interrogs., pp. 5-6 (JA 1448-49). USCCB also did not prohibit organizations that referred or paid for abortion or contraceptive services with funds from other sources from participating as subcontractors under the TVPA program. *See* Parampil Dep., pp. 43-44, 219-220 (JA 1207-08, 1216-17). Neither did USCCB exclude any subcontractor from the program because of the subcontractor's views on abortion or contraception or its practices regarding the provision of or referral for abortion or contraceptive services. *See* Anderson Dep., p. 91 (JA 1139); C. Edwards Dep., p. 80-81 (JA 1116-17); Baldwin Dep., pp. 30, 190 (JA 1411, 1412); Wynne e-mail, p. HHS005579 (JA 1451).

d. Expiration of the USCCB TVPA Contract and Issuance of New TVPA Grants

HHS picked up the last option year on the USCCB TVPA contract in April 2010. As a result, the contract's option-year renewals expired on April 10, 2011, and the USCCB contract was not renewed further. *See* Timmerman Decl., ¶ 6 (JA 1486). Prior to the contract's expiration, however, HHS approved a six-month extension of a "task order" under the contract until October 10, 2011, pursuant to the authority provided under 48 C.F.R. 52.217-8. *See* JA 1545. That extension allowed HHS to continue obligating funds under the USCCB TVPA contract from April 10, 2011 until October 10, 2011. *See* Timmerman Decl., ¶¶ 7-9 (JA 1487). Once the Task Order expired, HHS no longer had authority to obligate any additional funding for additional services under the contract. *See id.* ¶ 10 (JA 1487). While HHS could continue to pay for services already rendered, using funds obligated under the Task Order, *see id.* ¶ 11 (JA 1487), USCCB has indicated that it is no longer making reimbursements to its subcontractors under the contract. *See* Memorandum of United States Conference of Catholic Bishops in Support of Motion for Stay of Judgment Pending Appeal, p. 17 n.7 (JA 1657).

In 2011, HHS decided to dispense with the "per capita" contract approach, in favor of multiple grant awards that could be used for an array of victim services that

includes "the full range of legally permissible gynecological and obstetric care" for trafficking victims. Funding Opportunity Announcement No. HHS-2011-ACF-ORR-ZV-0148 ("FOA"), at 6 (JA 487). HHS selected three organizations to receive grant awards under the FOA. USCCB was not among the recipients.

2. Proceedings Below

On January 12, 2009, plaintiff American Civil Liberties Union of Massachusetts filed the complaint in this action. The complaint named three federal officials, in their official capacities, as defendants: Michael O. Leavitt, Secretary of HHS; Daniel Schneider, Acting Assistant Secretary for the Administration for Children and Families ("ACF"); and David H. Siegel, Acting Director of the Office of Refugee Resettlement ("ORR"). *See id.* ¶¶ 11-13 (JA 20-21).[1]

The complaint alleges that defendants acted in violation of the Establishment Clause by "permitting USCCB to impose its religiously-based restrictions on the types of services trafficked individuals can receive with taxpayer funds." Complaint, ¶ 3 (JA 19). Plaintiff asserted Article III injury on the ground that its members pay federal taxes and that defendants allegedly caused federal tax dollars to be used in a

[1] By operation of law, Kathleen Sebelius has been substituted for Michael O. Leavitt as Secretary of HHS; George Sheldon for Daniel Schneider as Acting Assistant Secretary for ACF; and Eskinder Negash, Director of ORR, for David H. Siegel.

manner that violates the Establishment Clause. *See id.* ¶ 10 (JA 20).

a. Motion to Dismiss

Defendants moved to dismiss the complaint for lack of jurisdiction. Defendants argued, based on *Hein* v. *Freedom from Religion Foundation, Inc.*, 551 U.S. 587 (2007), that plaintiff lacks taxpayer standing to bring this case because the TVPA – the only federal statute plaintiff identifies in the complaint – does not mandate or expressly contemplate the use of federal tax dollars for religious purposes or by a religious entity. Defendants also argued that plaintiff lacks taxpayer standing because it is not challenging the extraction and spending of any federal tax dollars for religious items or services.

The district court denied the motion to dismiss. *See* March 22, 2010 Memorandum and Order (JA 152). The court conceded that HHS has discretion to decide whether to include religious organizations as providers of services under the TVPA and to decide what services must be provided. *See id.* at 8 (JA 159). Nevertheless, the court held that plaintiff has Establishment Clause taxpayer standing here because the TVPA "designate[s] a group of intended beneficiaries" and "require[s] the funding of services for that group. *Id.*, p. 14 (JA 165). *See also id.*, p. 14-16 (JA 165-67).

The district court also held that plaintiff lacks Article III standing even though it is not challenging the extraction and spending of federal funds on religious items or services. It is enough, the court held, that plaintiff alleges that "tax dollars are being paid to the USCCB to support the propagation of its religious beliefs" and that this case is about "the delegation of Congress's spending power to a religious organization to enforce its doctrinal views." Mem. and Op., p. 20 (JA 171).

b. Motions for Summary Judgment

After the district court denied defendants' motion to dismiss, the parties engaged in discovery, and plaintiff and defendants moved for summary judgment. In addition, USCCB intervened as a defendant and moved to dismiss for lack of jurisdiction because plaintiff lacks standing or in the alternative for summary judgment.

The federal defendants once again challenged plaintiff's standing to bring this suit. Defendants noted that in *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436 (2011), the Supreme Court reaffirmed that Establishment Clause taxpayer standing exists only when federal tax dollars have been "extracted and spent" on religious activity, none of which occurred in this case. Defendants also notified the district court that this case was likely to become moot because the USCCB TVPA contract was set to expire on October 10, 2011.

The district court held that *Arizona Christian* is distinguishable because that case involved a challenge to a tax credit, whereas this case involves a disbursement of federal funds to USCCB. *See* Mem. & Op., p. 10 (JA 1617). The court also held that the expiration of the USCCB TVPA contract did not render this case moot because there is no absolute assurance that HHS will not award a TVPA contract in the future to USCCB or some other faith-based organization with similar tenets. *Id.*, pp. 12-13 (JA 1619-20) (citing cases describing circumstances in which "voluntary cessation" of allegedly illegal conduct does not moot a case). In addition, the court held, this case is not moot because plaintiff has requested a declaratory judgment. *See id.*, pp. 14-15 (JA 1621-22).

On the merits, the court held that the USCCB TVPA contract violated the Establishment Clause because it "impliedly endorsed the religious beliefs of the USCCB and the Catholic Church" by "delegat[ing] authority to a religious organization to impose religiously based restrictions on the expenditure of taxpayer funds." Mem. & Op., p. 28 (JA 1635). The court acknowledged that government action does not violate the Establishment Clause if it merely coincides with private religious beliefs, but held that this principle does not apply here because the restriction USCCB imposed on its subcontractors was motivated by USCCB's deeply held religious beliefs. *See id.* at 21 & n.23 (JA 1628).

The court issued a final judgment declaring that the government defendants violated the Establishment Clause, but did not grant any injunctive relief. *See* Judgment (JA 1637). USCCB thereafter filed a notice of appeal, JA 1638, along with a motion for a stay pending appeal, and the federal defendants subsequently filed their own timely notice of appeal. *See* JA 1682. The district court denied USCCB's motion for stay pending appeal, and this Court consolidated the two appeals.

SUMMARY OF ARGUMENT

This Establishment Clause case arises not from an allegation that a government contract dispensed funds for religious items or services, but from a non-expenditure of funds. HHS awarded a contract to the United States Conference of Catholic Bishops ("USCCB") for providing secular services to victims of human trafficking under the Trafficking Victims Protection Act ("TVPA"). The record shows, and the district court did not find to the contrary, that HHS awarded USCCB that contract because USCCB's proposal was superior – on the exclusively secular criteria HHS considered – to the only other timely contract proposal HHS received. The district court nevertheless held that because the contract provided for a range of services that did not include the provision of or referral for abortion or contraceptive services, and because USCCB's decision not to bid to provide those services was based upon its religious beliefs, HHS implicitly endorsed USCCB's religious motivations.

The district court erred in adopting that broad theory, under which the government is deemed to endorse the motivation of any contractor or grantee because of what the contractor or grantee chose not to include in its contract offer. Regardless of the motivation of a particular contractor, the Establishment Clause does not preclude agencies from deciding, on purely secular and otherwise lawful grounds, whether to approve a contract that provides for some secular goods and services but not others. The contract at issue here did not involve an endorsement of religion, nor did it involve the accommodation of the religious views of any particular contractor. It reflected the agency's permissible judgment as to which of the available contract offers provided the best value for the agency and the public.

This Court need not reach the merits, however, because this case is plainly moot. The USCCB TVPA contract has expired, and USCCB will not be making any more reimbursement payments to its subcontractors under the contract. As a result, there is no longer any judicial remedy for plaintiff's Establishment Clause claims. There is nothing left to enjoin, plaintiff has not sought damages, and the law is clear that a request for declaratory relief does not save a case from being moot under such circumstances. This case also does not fall within the voluntary cessation exception to the mootness doctrine, because the contract expired by its own scheduled terms rather than because of any act by HHS to avoid a ruling on plaintiff's claims.

Even if this case were not clearly moot, this Court would still lack jurisdiction because plaintiff lacks Article III standing. Plaintiff asserts standing because some of its members are federal taxpayers, relying on the "narrow" exception to the general rule against federal taxpayer standing that exists for certain Establishment Clause claims. In *Hein* v. *Freedom from Religion Foundation, Inc.*, 551 U.S. 587 (2007), however, the Supreme Court held that Establishment Clause taxpayer standing exists only where a statute mandates or expressly contemplates the federal expenditures that the plaintiff challenges. Pursuant to *Hein*, there is no taxpayer standing here because the TVPA neither mandates nor expressly contemplates that any religious organization will be selected to administer federal TVPA funds. And if that were not enough, plaintiff is not even alleging that any federal funds were extracted and spent on religious items and services. The Supreme Court has never recognized Establishment Clause taxpayer standing without that kind of allegation.

If this Court were to reach the merits, the district court should be reversed because it erred in granting summary judgment for plaintiff. The law is clear that religious organizations are allowed to participate as providers of secular government services, and the record indisputably shows that HHS awarded USCCB the contract at issue only because its proposal was superior, on strictly secular terms, to the only other timely proposal HHS had received.

The district court was mistaken when it held that the USCCB TVPA contract had the primary effect of advancing religion because it allowed USCCB to preclude its subcontractors from using federal TVPA funds to provide or refer for abortion or contraceptive services – neither of which is mentioned let alone required by the TVPA. It is well-established that government action does not have the primary effect of advancing religion merely because it happens to coincide with a private party's own religious motivations, and no more than that happened here.

The district court also erred in holding that the USCCB TVPA contract unconstitutionally delegated inherent government authority to USCCB. The government does not delegate inherent government authority to a private entity merely by granting it a contract to provide federally funded services, nor does a federal contractor become a state actor for constitutional law purposes merely by agreeing to provide services to beneficiaries.

The district court also was wrong to hold that the USCCB TVPA contract unconstitutionally burdened the interests of USCCB's subcontractors. The contract left the subcontractors free to provide or refer for abortion and contraceptive services outside the scope of the contract that USCCB was administering, and the Supreme Court has never held that there is any constitutional right to obtain federal funding to provide a particular service.

Likewise, the district erred in holding that the contract unconstitutionally burdened the interests of trafficking victims. Indeed, it is the district court's ruling that could burden the interests of trafficking victims and other beneficiaries under government social service programs. Under the district court's rule, the government is forbidden from maximizing the secular services it can obtain for beneficiaries where, as here, a religious entity is judged – on strictly secular terms – best qualified to provide those services and that entity has religious motivations (as religious organizations typically do) for what it can and cannot do. For the above reasons and those set forth below, the judgment below should be reversed and the case dismissed.

STATEMENT OF THE STANDARD OF REVIEW

Legal determinations concerning the jurisdictional questions of standing and mootness are reviewed *de novo*. *See*, *e.g.*, *Paul Revere Variable Annuity Ins. Co.* v. *Kirschhofer*, 226 F.3d 15, 19 (1st Cir. 2000). This Court also reviews a district court's grant of summary judgment *de novo*, drawing all reasonable inferences in favor of the non-moving party. *See*, *e.g.*, *Jones* v. *Walgreen Co.*, 679 F.3d 9 (1st Cir. 2012). Summary judgment is appropriate only where "'the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.'" *Ibid.* (quoting Fed. R. Civ. P. 56(a)).

ARGUMENT

I. The Judgment Should Be Vacated As Moot.

Article III of the Constitution allows federal courts to decide only cases or controversies. *See*, *e.g.*, *Burke* v. *Barnes*, 479 U.S. 361, 363 (1987). A live case or controversy must exist not only when a case is filed, but "at the time that a federal court decides the case." *Id.* at 363. Thus, "t[o] qualify as a case fit for federal-court jurisdiction, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997), *quoting Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975).

Accordingly, "if a case is moot, even if it becomes moot on appeal, [a court] cannot hear it because 'Article III of the Constitution restricts federal courts to the resolution of actual cases or controversies.'" *Libertarian Party of New Hampshire* v. *Gardner*, 638 F.3d 6, 12 (1st Cir.) (citation omitted), *cert. denied*, 132 S. Ct. 402 (2011). *Accord United States* v. *Reid*, 369 F.3d 619, 624, 626 (1st Cir. 2004).[2] "A case becomes moot if, at some point after the institution of the action, the parties no longer have a legally cognizable stake in the outcome," or if the court can no longer

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[2] This Court may order this case dismissed as moot without addressing any other issue, including defendants' argument that plaintiff lacks Article III standing. *See Arizonans for Official English*, 520 U.S. at 66-67. *See generally Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 584-85 (1999) (jurisdictional issues may be addressed in any sequence).

afford the plaintiff any effective relief. *Goodwin* v. *C.N.J., Inc.*, 436 F.3d 44, 48 (1st Cir. 2006) (citations omitted). In that consequence, "'a case or controversy ceases to exist, and dismissal of the action is compulsory.'" *Libertarian Party of New Hampshire*, 638 F.3d at 12 (citations omitted).

A. Pursuant to the above principles, this case is clearly moot. The USCCB TVPA contract plaintiff challenges has expired, and USCCB is no longer making any reimbursements to its subcontractors under the contract. *See* Memorandum of United States Conference of Catholic Bishops in Support of Motion for Stay of Judgment Pending Appeal, p. 17 n.7 (JA 1657). As a result, plaintiff no longer has any legally cognizable stake in challenging the terms of that contract, and this court can no longer grant plaintiff any effective relief.

The courts of appeals have consistently held that Establishment Clause claims similar to those plaintiff brings here became moot in similar circumstances. For example, in *Caldwell* v. *Caldwell*, 545 F.3d 1126 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1617 (2009), the Ninth Circuit held that a plaintiff's Establishment Clause challenge to a federal grant became moot after the grant expired of its own terms. *See id.* at 130. Similarly, in *Laskowski* v. *Spellings*, 443 F.3d 930 (7th Cir. 2006), *vacated and remanded on other grounds*, *Univ. of Notre Dame* v. *Laskowski*, 551 U.S. 1160 (2007), the Seventh Circuit held that a plaintiff's Establishment Clause suit

against the government arising out of a federal grant became moot after the grant expired and all grant funds had been drawn down and spent. *See id.* at 933. *See also Pub. Utilities Com'n* v. *F.E.R.C.*, 236 F.3d 708, 714 (D.C. Cir. 2001) ("Ordinarily, it would seem readily apparent that a challenge to an expired contract is moot, because the court could provide no relief to the allegedly aggrieved parties"). This Court should follow those decisions and hold that plaintiff's Establishment Clause claims became moot once the USCCB TVPA contract expired and USCCB ceased making reimbursements to its subcontractors under the contract.

B. The district court held that this case falls within the "voluntary cessation" exception to the mootness doctrine. *See* Mem. & Op., pp. 12-13 (JA 1619-20). *See generally City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) ("a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice"). It is well-settled, however, that a case does not involve voluntary cessation where the activity challenged expires through "the normal course of events." *O'Connor* v. *Washburn Univ.*, 416 F.3d 1216, 1221 (10th Cir. 2005) (citation omitted), *cert. denied*, 547 U.S. 1003 (2006). *See also Reid*, 369 F.3d at 619 (inmate's challenge to prison disciplinary measures became moot when measures expired by their own terms). The expiration of a contract by its own scheduled terms undeniably constitutes "the

normal course of events."

The purpose of the voluntary cessation exception is to prevent a defendant from "immuniz[ing] itself from suit by altering its behavior so as to secure a dismissal, and then immediately reinstat[ing] the challenged conduct afterward." *Brown* v. *Colegio de Abogados de Puerto Rico*, 613 F.3d 44, 49 (1st Cir. 2010) (citations omitted), *cert. denied*, 131 S. Ct. 1046 (2011). *See also United States* v. *W.T. Grant, Co.*, 345 U.S. 629, 632 (1953) (to allow a defendant to moot a case by voluntary cessation of the conduct challenged would leave the defendant "free to return to his old ways"). No such concern is present where a contract expires of its own scheduled terms. In that circumstance, the case does not become moot because of any expediency on the part of the defendant. *See* pp. 24-25, *supra* (citing cases).[3] For all the above reasons, therefore, the district court erred by holding that this case falls within the "voluntary cessation" doctrine.

C. The district court also held that this case is not moot because plaintiff "is seeking, among other forms of relief, a declaratory judgment." Mem. & Op., p. 14 (JA 1621). The law is clear, however, that a mere request for declaratory relief

[3] Accordingly, the district court was wrong to hold that this case is not moot because it is not absolutely certain that this controversy will not recur. Mem. & Op., pp. 12, 13 (JA 1619-20). That standard of proof is appropriate only where there has been a "voluntary cessation" of the conduct challenged, and for the reasons already explained, there has been no such voluntary cessation here.

cannot render a case that is otherwise moot a live case or controversy. *See*, *e.g.*, *Aetna Life Ins. Co. of Hartford, Conn.* v. *Haworth*, 300 U.S. 227, 240 (1937) (noting that the Declaratory Judgment Act enlarged the range of remedies available in the federal courts, but did not expand the courts' jurisdiction). Thus, plaintiff's request for declaratory relief would save this case from being moot only if plaintiff could show "the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest." *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 125-26 (1974).

Plaintiff cannot make that showing. The only harm plaintiff alleges concerns the use of federal tax dollars to support allegedly unconstitutional behavior, but those tax dollars have already been spent. The contract that authorized those expenditures has expired, with no further expenditures of federal funds to be made under the contract. For those reasons, plaintiff cannot identify any "present interest" in the terms of that expired contract, *Super Tire*, 416 U.S. at 126, and plaintiff's request for declaratory relief cannot create federal court jurisdiction where, as here, it would not otherwise exist.

Nothing in *Verizon New England, Inc.* v. *Int'l Bhd. of Elec. Workers*, 651 F.3d 176 (1st Cir. 2011), which the district court cited in this context, *see* Mem. & Op., p. 15 (JA 1622), is to the contrary. That case merely held that a court can consider

granting declaratory relief even if it has decided that the alleged irreparable harm to the moving party does not justify granting an injunction. *See* 651 F.3d at 189. That holding is not relevant to whether this case has become moot.[4]

D. USCCB's intervention as a defendant does not make this a live case or controversy. An Establishment Clause claim can be asserted only against a government defendant, and the complaint does not request an order directing HHS to recoup any federal TVPA funds from USCCB. In addition, even if plaintiff were to have made any such request, plaintiff would not have Establishment Clause taxpayer standing to assert it because that kind of claim goes far beyond the "facts" and "results" in *Flast* v. *Cohen*, which provide the outer boundaries of Establishment Clause taxpayer standing under *Hein*. *See Laskowski* v. *Spellings*, 546 F.3d 822 (7th

[4] Although the district court did not reach this issue, this case also does not fall within the exception to the mootness doctrine for cases that are capable of repetition yet evade review. That exception does not apply where, as here, a party fails to seek preliminary relief that would have preserved the status quo. *See*, *e.g.*, *Newdow* v. *Roberts*, 603 F.3d 1002, 1008-09 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1441 (2011). Moreover, the contract that plaintiff challenges was in effect for five and one-half years, which is more than enough time for a case to be fully litigated. *See*, *e.g.*, *Valentino* v. *Howlett*, 528 F.2d 975, 980-81 (7th Cir. 1976); *Washegesic* v. *Bloomingdale Pub. Schs.*, 33 F.3d 679, 681 n.1 (6th Cir. 1994), *cert. denied*, 514 U.S. 1095 (1995). In addition, plaintiff cannot show a "demonstrated probability" that this issue will recur again between the same parties. *United States* v. *Mazzillo*, 373 F.3d 181, 183 (1st Cir. 2004). USCCB did not receive one of the grants HHS recently issued to administer TVPA services, and it is completely speculative whether USCCB will receive any future contract award similar to the one plaintiff challenges here.

Cir. 2008). *Accord Sherman* v. *Illinois*, 682 F.3d 643, 647 (7th Cir. 2012).

E. When a case becomes moot on appeal, vacatur of the judgment below is appropriate unless the mootness arose from a settlement between the parties or from the appellant's voluntary dismissal of the appeal. *See Arevalo* v. *Ashcroft*, 386 F.3d 19, 20 (1st Cir. 2004), *citing United States Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 25 (1994). *Accord Reid*, *supra*, 369 F.2d at 624 ("standard practice in cases that become moot on appeal is to vacate the judgment below"), *citing United States* v. *Munsingwear Inc.*, 340 U.S. 36, 39-41 (1950). Accordingly, because this case is moot, this Court should vacate the district court's judgment and direct the district court to dismiss the complaint for lack of jurisdiction. *See*, *e.g.*, *Kerkhof* v. *MCI Worldcom, Inc.*, 282 F.3d 44, 54 (1st Cir. 2002).

II. Plaintiff Lacks Article III Standing To Bring This Action Under Controlling Supreme Court Precedent.

Article III of the Constitution limits the judicial power of the United States to the resolution of "Cases" and "Controversies." Article III standing enforces that limitation by requiring a plaintiff to "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Hein* v. *Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 598 (2007) (citation omitted).

"Strict[] adherence" to these requirements is necessary where, as here, a plaintiff requests a court to decide whether action taken by one of the other two branches of government is unconstitutional. *Elk Grove Unified School Dist.* v. *Newdow*, 542 U.S. 1, 11 (2003). The plaintiff bears the burden of demonstrating Article III standing, *see*, *e.g.*, *Hein*, 551 U.S. at 598, and because Article III standing is jurisdictional, a court must determine whether the plaintiff has standing before addressing the merits. *See Steel Co.* v. *Citizens for Better Environment*, 523 U.S. 83, 94-95 (1988).

In this case, plaintiff asserts Article III standing only as a federal taxpayer. As explained below, plaintiff lacks taxpayer standing on two grounds: (1) because the TVPA does not mandate or specifically contemplate the use of federal TVPA funds by religious entities or for religious purposes; and (2) because plaintiff does not allege that any federal funds under the USCCB TVPA contract were spent for religious items or services. Under settled Supreme Court precedent, the "narrow" exception to the general rule against taxpayer standing recognized in *Flast* v. *Cohen*, 392 U.S. 83 (1968), does not apply under either of those conditions.

A. Plaintiff Lacks Establishment Clause Taxpayer Standing Because the TVPA Does not Mandate or Expressly Contemplate the Use of TVPA Funds By Religious Entities or For Religious Purposes.

1. Establishment Clause Taxpayer Standing Exists Under Controlling Supreme Court Precedent Only Where a Statute Expressly Directs or Contemplates Government Funding of Religious Activity.

As a general rule, Article III standing "cannot be based on a plaintiff's mere status as a taxpayer." *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1442 (2011). "'The effect upon future taxation [resulting from] any payment out of funds' [is] too 'remote, fluctuating and uncertain' to give rise to a case or controversy." *Id.* at 1443 (citations omitted). Moreover, a taxpayer-plaintiff's "'interest in the moneys of the Treasury'" is too generalized to support Article III standing because it is "necessarily 'shared with millions of others.'" *Id.* at 1443 (citations omitted). *Accord Daimler-Chrysler Corp.* v. *Cuno*, 547 U.S. 332, 343 (2006).

Flast v. *Cohen*, 392 U.S. 83 (1968), recognized a "'narrow'" exception to that general rule, *Arizona Christian*, 131 S. Ct. at 1445 (citation omitted), for cases involving challenges to government action under the Establishment Clause. That exception applies where there is a "'logical link' between the plaintiff's taxpayer status 'and the type of legislative enactment attacked.'" *Ibid.* (citations omitted).

In *Hein*, *supra*, a plurality of the Supreme Court explained that this "logical link" exists only where the challenged congressional appropriations "expressly authorize, direct, or . . . mention the expenditures of which respondents complain." 551 U.S. at 605. *Accord id.* at 608. Where, by contrast, federal funds are used by a religious entity only as a result of "executive discretion," *ibid.*, "the requisite 'logical nexus' between taxpayer status 'and the type of legislative enactment attacked' is missing, because the taxpayer's suit "is not directed at an exercise of congressional authority." *Id.* at 608-09.

For example, the *Hein* plurality noted that in *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), the plaintiff had taxpayer standing because the Adolescent Family Life Act "not only expressly authorized and appropriated specific funds for grantmaking, it also expressly contemplated that some of those moneys might go to projects involving religious groups." *Hein*, 551 U.S. at 607 & n.6. Indeed, the *Hein* plurality emphasized that Establishment Clause taxpayer standing does not exist even if Congress, in a committee report, "informally 'earmark[s]' portions of its general Executive Branch appropriations" to the specific appropriations challenged. *Id.* at 608 n.7. That reference confirms that under *Hein*, Establishment Clause taxpayer standing exists only where a statute's *text* specifically directs or contemplates the use of federal funds by a religious entity or for religious activity.

Justices Scalia and Thomas concurred in the judgment in *Hein* because they believed that *Flast* should be overruled. *See* 551 U.S. at 618. The *Hein* plurality opinion is controlling precedent, therefore, because it rested on narrower grounds than the reasons Justices Scalia and Thomas articulated. *See*, *e.g.*, *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 764 n.9 (1988) (where no single rationale commands a majority, the controlling opinion is one that "put forth the narrowest rationale for the Court's judgment"). *See also Marks* v. *United States*, 430 U.S. 188, 193 (1977).

All three courts of appeals to have addressed the question to date have held, in multiple opinions issued by a variety of different panels, that *Hein* must be understood and applied as set forth above. *See Sherman* v. *Illinois*, 682 F.3d 643, 647 (7th Cir. June 4, 2012); *Murray* v. *U.S. Dept of Treasury*, 681 F.3d 744, 749-52 (6th Cir. 2012); *Pedreira* v. *Kentucky Baptist Homes for Children, Inc.*, 579 F.3d 722, 730-31 (6th Cir. 2009), *cert. denied*, 131 S. Ct. 2143 (2011); *American Atheists, Inc.* v. *City of Detroit Downtown Development Auth.*, 567 F.3d 278, 286 (6th Cir. 2009); *Freedom From Religion Foundation, Inc.* v. *Nicholson*, 536 F.3d 730, 741-45 (7th Cir. 2008); *In re Navy Chaplaincy*, 534 F.3d 756, 762 (D.C. Cir.), *cert. denied*, 129 S. Ct. 1918 (2009); *Hinrichs* v. *Speaker of the House of Representatives of the Indiana Gen'l Assembly*, 506 F.3d 584, 599 (7th Cir. 2007).

2. Plaintiff Lacks Taxpayer Standing Because the TVPA Does Not Mandate or Expressly Contemplate the Use of Federal Funds by Religious Entities or For Religious Purposes.

Pursuant to *Hein* and the circuit cases that have applied it, plaintiff lacks Establishment Clause taxpayer standing to bring this action. Here, as in *Hein* and each of those circuit decisions, plaintiff does not challenge the constitutionality of any federal statute, and the only statute that is relevant here, the TVPA, does not mandate or expressly contemplate the use of federal funds by religious entities or for religious purposes. Rather, similar to the statutes that were at issue in *Hein* and the cases discussed above, the TVPA says nothing whatsoever about religion, and leaves the decision regarding the choice of providers of TVPA services entirely to the discretion of the Secretary.

The district court agreed that the TVPA does not direct the Secretary to disburse federal funds to religious entities or for religious purposes. *See* Mem. & Op., p. 8 (JA 159) (noting that the TVPA "does not order HHS to include religious organizations among the service providers . . . nor does it specify the exact nature of the social services that are to be provided"). The district court also correctly observed that, similar to the statute at issue in *Hein*, the TVPA leaves those matters to the Secretary's discretion. *See ibid.* That should end the matter.

The district court attempted to distinguish *Hein,* however, by noting that the TVPA "make[s] a specific annual appropriation . . . to carry out its victims' services mandate." Mem. and Op., pp. 8-9 (JA 159-60). But the statute in *Hein* also made a specific annual appropriation for a discrete purpose – to fund the day-to-day activities of the Executive Office of the President which then created the office and agency centers that administered the program involving faith-based community groups that was under challenge. *See Hein*, 551 U.S. at 605 & n.4. The key fact in *Hein* was that the decision to use federal funds for the activity plaintiffs challenged there "resulted from executive discretion, not congressional action." *Id.* at 605. The same dispositive consideration also is present here. HHS, not Congress, decided to award USCCB a contract for the provision of TVPA services, and USCCB's decision not to include the provision of or referral for abortion or contraceptive services in its contract proposal also "[was] not expressly authorized or mandated by any specific congressional enactment." *Id.* at 608 (citation omitted).

The district court, citing an unpublished district court opinion, *Murray* v. *Geithner*, 2010 WL 431730, at *2 (E.D. Mich. Feb. 2, 2010), held that *Hein* is inapplicable here because it applies only when "a taxpayer challenges a statute generally providing funding to the executive branch." Mem. & Op., p. 14 (JA 165). The Sixth Circuit recently overruled the district court's standing ruling in that case,

however, *see Murray* v. *U.S. Dept of Treasury*, 681 F.3d 744, 749-52 (6th Cir. 2012), for reasons that accurately reflect the Supreme Court's opinion in *Hein*.

In *Hein*, "Congress provided general appropriations to the Executive Branch to fund its day-to-day activities." 551 U.S. at 605 (footnote omitted). The reason why those appropriations did not support Establishment Clause taxpayer standing was that they "did not expressly authorize, direct, or even mention the expenditures of which respondents complain[ed.]" *Ibid.* For that reason, and because "[t]hose expenditures resulted from executive discretion, not congressional action," *ibid.*, those expenditures could not support taxpayer standing. *See*, *e.g.*, *Murray*, 681 F.3d at 749-50; *Nicholson*, 536 F.3d at 737-38;

The same controlling facts are present here. The TVPA does not expressly "authorize, direct, or even mention" expenditures of federal funds by any religious organization. The fact that the statutes at issue in *Hein* happened to be general appropriations provisions – as opposed to a law, such as the TVPA, that authorizes the government to make disbursements of federal funds to private entities for particular purposes – is immaterial. *See*, *e.g.*, *Murray*, 681 F.3d at 752 (rejecting a similar effort to distinguish *Hein*). "A holding . . . can extend through its logic beyond the specific facts of the particular case," *Los Angeles County* v. *Humphries*, 131 S. Ct. 447, 453 (2010), and as a result, the lower courts "must follow the logic

of [*Hein's*] reasoning" in this respect. *Ibid.*[5]

The district court's attempt to limit *Hein* to its facts also was incorrect because *Hein* expressly limited *Flast* v. *Cohen* – on which the district court principally relied in finding taxpayer standing here – to *its* facts, *see Hein*, 551 U.S. at 610, in addition to explaining why the rule *Hein* announced is consistent with *Flast.* As *Hein* explained, the statute at issue in *Flast* expressly authorized the provision of federal funds to private schools, without excluding private religious schools. *See* 551 U.S. at 604. For that reason, and because "[a]t around the time . . . *Flast* was decided, the great majority of nonpublic elementary and secondary schools in the United States were associated with a church," the Court noted that "Congress surely understood that much of the aid mandated by the statute would find its way to religious schools." *Id.* at 604 n.3.

Here, by contrast, nothing in the text of the TVPA expressly defines the entities that may participate as contractors or grantees under that statute in terms that would specifically include religious entities. Neither is there any other reason to conclude that Congress "surely understood" that TVPA funds would be disbursed to a religious

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[5] *Hein* would be binding here under this Circuit's precedent even if this Court were to conclude that the principles identified above are dicta. *See Rossiter* v. *Potter*, 357 F.3d 26, 31 (1st Cir. 2004) ("[w]e 'are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings'") (citation omitted).

contractor or grantee. *See* pp. 4-5, *supra* (describing the TVPA). *See also Hein*, 551 U.S. at 608 n.7 (noting that Establishment Clause taxpayer standing requires a specific textual commitment of federal funds to religion, as opposed to an informal earmark in a committee report or other legislative history).

Significantly, *Hein* also explained why the rule we describe is consistent with *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), on which the district court also relied here. The plaintiff in *Bowen* had taxpayer standing, *Hein* observed, because the statute at issue there "not only expressly authorized and appropriated specific funds for grantmaking, it also expressly contemplated that some of those moneys might go to projects involving religious groups." *Hein*, 551 U.S. at 607 & n.6. *See also Murray*, 681 F.3d at 750 (noting that *Hein*, "in surveying *Kendrick*, emphasized the fact that the AFLA's text raised the possibility that AFLA funds could be disbursed to religious groups"). The TVPA contains no similar express statutory language.

Thus, under *Hein*, the fact that the TVPA "designated a group of intended beneficiaries . . . and required the funding of services for the group," Mem. & Op., p. 14 (JA 165), is *not* enough to support Establishment Clause taxpayer standing. *See*, *e.g.*, *Pedreira*, 579 F.3d at 730-31 (not enough for taxpayer standing that plaintiffs "refer[red] to specific federal programs and specific portions of these programs"); *Nicholson*, 536 F.3d at 741 (not enough that Congress mandated the

provision of medical care to veterans and mentioned the use of chaplains because no statute directed the particular uses of chaplains that plaintiffs challenged); *In re Navy Chaplaincy*, 534 F.3d at 762 (not enough that Congress established the Navy Chaplain Corps because the statute made no denominational preference, which is what plaintiff challenged).

What is missing here is precisely what was missing in *Hein* and the circuit cases identified above – statutory language that mandates or expressly contemplates the use of federal funds by religious groups or for religious purposes. *See*, *e.g.*, *Murray*, 681 F.3d at 750; *Nicholson*, 536 F.3d at 742; *Navy Chaplaincy*, 534 F.3d at 762. As *Hein* explains, to recognize taxpayer standing in the absence of such express statutory language would violate separation of powers principles, *see Hein*, 551 U.S. at 611-12, and "effectively subject every federal action . . . to Establishment Clause challenge by any taxpayer in federal court." *Id.* at 610.

Finally, the district court expressed concern that applying *Hein* to this case "'would eviscerate as-applied challenges under the Establishment Clause, which have been expressly permitted since [*Bowen* v.] *Kendrick*.'" Mem. & Op., pp. 15-16 (JA 166-67), *quoting Murray* v. *Geithner*, 2010 WL 431730, at *3.[6] That concern,

[6] As we have already noted, the Sixth Circuit in *Murray* held that the district court erred by declining to dismiss the complaint in that case for lack of taxpayer standing under *Hein*, rejecting arguments similar to those the district court adopted

however, is misplaced.

First, as explained above, *Hein* explained that there was taxpayer standing in *Bowen* v. *Kendrick* because the statute at issue there expressly contemplated that federal funds would be disbursed to religious organizations. *See* pp. 32, *supra*. The district court's citation of *Kendrick* is inapt, therefore, because the TVPA, unlike the statute at issue there, does not mandate or expressly contemplate the use of federal funds by religious entities or for religious purposes. *See also Hein*, 551 U.S. at 614 (noting that *Flast* "has not previously been expanded in the way that respondents urge," *i.e.*, to provide taxpayer standing to challenge "discretionary Executive Branch expenditures").

Second, *Hein* explicitly rejected the argument that Establishment Clause taxpayer standing must be extended to cover discretionary Executive Branch expenditures because to do otherwise would lead to a "parade of horribles." 551 U.S. at 614. No such inappropriate government activity had occurred since *Flast* v. *Cohen*, the Court noted, even though *Flast* had never been read as expansively as the respondents in *Hein* requested, *see ibid.*, and "[i]n the unlikely event that any [such] executive actions did take place, Congress could quickly step in." *Ibid.* The same points apply with respect to the district court's stated concern about what might

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here.

happen if there is no taxpayer standing here.

Third, just as in *Hein*, there is no reason to believe that the claims plaintiff asserts here could not be made "by plaintiffs who would possess standing based on grounds other than taxpayer standing." 551 U.S. at 614. For example, nothing in the record precludes the possibility that one of USCCB's subcontractors or a trafficking victim might have been in a position to challenge the USCCB TVPA contract on Establishment Clause grounds based on traditional Article III injury-in-fact.

Fourth, *Hein* noted that to describe that case as an "'as-applied challenge'" to a statute would "stretch the meaning of that term past its breaking point." 551 U.S. at 608. "It cannot be," the Court explained, "that every legal challenge to a discretionary Executive Branch action implicates the constitutionality of the underlying congressional appropriation." *Ibid.* (noting that "[w]hen a criminal defendant charges that a federal agent carried out an unreasonable search or seizure, we do not view that claim as an as-applied challenge to the constitutionality of the statute appropriating funds for the [FBI]"). The district court's concern that the government's reading of *Hein* would "eviscerate as-applied challenges under the Establishment Clause" directly conflicts with this aspect of *Hein*. *See Murray*, 681 F.3d at 752 (holding that *Hein* "squarely prohibits" the argument that *Kendrick* allows "as-applied" Establishment Clause taxpayer suits where government funding results

from executive discretion rather than congressional action); *Nicholson*, 536 F.3d at 743-45 (noting that in *Hein*, the Supreme Court considered it "critical" that the challenged congressional action in *Kendrick* expressly contemplated that funds would be disbursed to religious organizations).

For all the above reasons, this Court should hold that plaintiff lacks Establishment Clause taxpayer standing to bring this case under *Hein* and the other circuit decisions noted above, because the TVPA does not mandate or expressly contemplate the use of federal funds by religious organizations or for religious purposes.

B. Plaintiff Also Lacks Taxpayer Standing Because Plaintiff Is Not Challenging the Extraction and Spending of Tax Funds, But Rather a Private Entity's Decision *Not* to Extend Its Contract With The Federal Government To Include Provision of Certain Services Under The Contract.

In *Arizona Christian School Tuition Org.* v. *Winn*, *supra*, the Supreme Court reaffirmed that Establishment Clause taxpayer standing exists only where a taxpayer alleges "'that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power.'" 131 S. Ct. at 1446, *quoting Flast*, 392 U.S. at 106. The Court explained that, "[w]hen the government collects and spends taxpayer money, governmental choices are

responsible for the transfer of wealth," and "[i]n that case, a resulting subsidy of religious activity is, for purposes of *Flast*, traceable to the government's expenditures." 131 S. Ct. at 1447. For those reasons, *Arizona Christian* held there is no taxpayer standing to challenge a tax credit, given that a tax credit does not involve the government's extracting and spending a taxpayer's funds.

Plaintiff lacks Establishment Clause taxpayer standing in this case for similar reasons. Here, plaintiff is not alleging that tax money is being "extracted and spent" or for religious materials or services. Rather, plaintiff's claim is that the USCCB TVPA contract violated the Establishment Clause because federal tax funds were *not* spent. That kind of claim does not involve any "transfer of wealth" to USCCB or any "subsidy of religious activity," *Arizona Christian*, 131 S. Ct. at 1447, and thus falls outside the "narrow" *Flast* exception to the general rule against taxpayer standing.

By contrast, in *Flast*, plaintiff challenged Congress's extraction and expenditure of federal tax dollars to pay for services to students in religious schools. *See Flast*, 392 U.S. at 36-37. That action on Congress's part *did* accomplish a "transfer of wealth" and a "subsidy of religious activity," similar to the Virginia bill that James Madison protested in his Memorial and Remonstrance Against Religious Assessments, which the Establishment Clause was adopted in large part to reflect.

See Arizona Christian, 131 S. Ct. at 1446.[7]

That this case differs from *Flast* in this respect is critical because, as noted above, the Supreme Court in *Hein* limited *Flast*'s "narrow" exception to the general rule against taxpayer standing to *Flast's* own "facts" and "results." *Hein*, 551 U.S. at 609-10. The fact that this case is unlike the Virginia bill to which James Madison objected, also is significant, because the *Flast* exception rests on the unique history of the Establishment Clause, and "particularly" on Madison's Memorial and Remonstrance. *Arizona Christian*, 131 S. Ct. at 1446, *citing DaimlerChrysler*, 547 U.S. at 348.

The district court nonetheless rejected the argument set out above because it reasoned that, "in contrast to [*Arizona Christian*], this case does not involve any form of tax credit." Mem. & Op., p. 10 (JA 1617). In so ruling, however, the district court erred by attempting to limit *Arizona Christian* to its facts – the same error the court made in attempting to distinguish the Supreme Court's decision in *Hein*. *See* p. 37, *supra*. The reasoning from *Arizona Christian* discussed above is directly relevant to the Supreme Court's disposition of that case, and is thus binding precedent on this

[7] "Under the proposed assessment bill, taxpayers would direct their payments to Christian societies of their choosing," and "[i]f a taxpayer made no such choice, the General Assembly was to divert his funds to 'seminaries of learning,' at least some of which 'undoubtedly would have been religious in character.'" *Arizona Christian*, 131 S. Ct. at 1446 (citation omitted).

court. *See Rossiter* v. *Potter*, 357 F.3d 26, 31 (1st Cir. 2004). For all the above reasons, therefore, this case should be dismissed for lack of standing, if this Court concludes this case is not moot.

III. The District Court Also Erred in Granting Summary Judgment for Plaintiff on the Merits.

If Congress or a federal agency decided to fund certain activities, but excluded services such as the provision of or referrals for contraception and abortion on secular grounds, that choice would not violate the Establishment Clause. *See Harris* v. *McRae*, 448 U.S. 297 (1980). Consequently, nothing in the Establishment Clause deprives HHS of the discretion to determine, on non-religious grounds, what services it believes are essential to a particular contract, and what contracts are essential to accomplish the purposes of a program such as the TVPA. In fact, HHS has now determined, on non-religious grounds, that the ability to offer trafficking victims referrals to medical providers who can provide or refer for family planning services for the full range of legally permissible gynecological and obstetric care is an important feature of an organization that is selected to receive a TVPA grant.

But under the district court's rationale, if a contractor proposes to cover certain services and not others, the contractor's motives become imputed to the government, rendering the scheme unconstitutional. What is entirely permissible for the

government to do itself now becomes impermissible if the government happens – for strictly secular reasons – to choose a contractor that is motivated by religion. But if a secular organization had sought and won the contract and had included the same restriction in its proposal, under the district court's approach the contract would be valid. That result finds no support in Establishment Clause jurisprudence.

The Establishment Clause prohibits the government from acting with the primary purpose or effect of advancing religion. *See*, *e.g.*, *Agostini* v. *Felton*, 521 U.S. 203, 222-23 (1997). Government funding has the primary effect of advancing religion if it results in government indoctrination of religion, if the government defines aid recipients by reference to religion, or if the aid creates an excessive entanglement with religion. *See id.* at 234-35.

The district court did not hold that the USCCB TVPA contract had the primary purpose of advancing religion, and the record would not support any such conclusion. The record shows that HHS awarded USCCB the contract at issue for entirely secular reasons – specifically, because the proposal USCCB submitted was by far the most cost-effective proposal for providing secular services to victims of human trafficking. *See* pp. 5-10, *supra*. HHS did not give USSCB any preference in the selection process because USCCB is religious, *see*, *e.g.*, Tota Dep., pp. 89, 97 (App. 1013, 1018); M. Edwards Dep., pp. 106-09 (JA 1060-63); Womack Dep., pp. 233-34 (JA

1360-61), and it granted USCCB the contract despite, rather than because of, USCCB's disclosure that it would only enter into a contract that did not require it to allow its subcontractors to use contract funds for the provision of or referral for abortion or contraceptive services. *See* pp. 5-10, *supra*.

The USCCB TVPA contract also did not have the primary effect of advancing religion. The contract did not result in any indoctrination of religion, much less any such indoctrination that could be attributed to the government. *See* p. 12 *supra* (noting that USCCB prohibited subcontractors from using the TVPA contract funds for religious materials or services). Neither did HHS rely on any selection criteria in awarding the grant that would have skewed that process in favor of religion, *see* pp. 5-10, *supra*, or engage in any contract monitoring that would have raised excessive entanglement concerns. *See* Womack Dep., pp. 97-100, 219 (JA 1340-43, 1350).

A. The district court held that the USCCB TVPA contract violated the Establishment Clause because it "impliedly endorsed the religious beliefs of the USCCB and the Catholic Church." Mem. & Op., p. 28 (JA 1635). That ruling conflicts with controlling Supreme Court precedent.

It is hornbook law that religious organizations may participate, on religiously neutral terms, as providers of secular services under government programs such as the TVPA. *See*, *e.g.*, *Bowen* v. *Kendrick*, 487 U.S. 589, 609 (1988) ("this Court has never

held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs"), *citing Bradfield* v. *Roberts*, 175 U.S. 291 (1899). *See also Roemer* v. *Md. Bd. of Pub. Works*, 426 U.S. 736, 746 (1976) (plurality opinion) (noting that "religious institutions need not be quarantined from public benefits that are available to all").

Moreover, as the district court conceded, the Supreme Court has consistently held that the government does not violate the Establishment Clause merely because its action happens to coincide with the beliefs of certain religious organizations. *See* Mem. & Op., p. 22 (JA 1629), *citing Bowen* v. *Kendrick*, 487 U.S. 589, 605 (1988); *Harris* v. *McRae*, 448 U.S. 297, 319 (1980); and *McGowan* v. *Maryland*, 366 U.S. 420, 444 (1961).[8]

The district court deemed *Kendrick*, *Harris*, and *McGowan* to be distinguishable because they involved challenges to government action that was not motivated by the beliefs of a particular religious group. *See* Mem. & Op., p. 22 (JA 1629). By contrast, the court noted, "here there is no reason to question the sincerity of the USCCB's position that the restriction it imposed on its subcontractors on the

[8] Consistent with those Supreme Court decisions, HHS regulations provide that religious organizations are eligible for discretionary grants "on the same basis as any other organization." 45 C.F.R. 87.1(b). *See also id.* 87.2(b) (applying same rule to formula and block grants).

use of TVPA funds for abortion and contraceptive services was motivated by deeply held religious beliefs." *Id.* at 21 (footnote omitted).

But the district court's reasoning does not follow from the case law. Here, as in *Kendrick*, *Harris*, and *McGowan*, there is no evidence that the government was "motivated by the beliefs of any particular religious group." *See* pp. 5-10, *supra*. The fact that *USCCB* considered its contract restrictions to be required by *its* sincere religious beliefs does not mean that the *government* decided to award the TVPA contract to USCCB for religious reasons, and the district court erred by concluding otherwise in purporting to distinguish those decisions. Indeed, the record shows that HHS awarded USCCB the TVPA contract in question *despite*, and not because of, USCCB's disclosure that it would not allow its subcontractors to use TVPA contract funds for the provision of or referral for abortion or contraceptive services. *See* pp. 5-10, *supra*.

Thus, in the course of attempting to distinguish *Kendrick*, *Harris*, and *McGowan*, the district court in fact committed the very error those cases denounced, by assuming that HHS was motivated by religion merely because the USCCB TVPA contract in part coincided with USCCB's religious motivations.[9] *Kendrick*, *Harris*,

[9] Consistent with *Kendrick*, *Harris*, and *McRae*, HHS regulations provide that religious entities may not be disqualified from participating in HHS programs "because such organizations are motivated or influenced by religious faith to provide

and *McGowan* thus defeat plaintiff's claim that the USCCB TVPA contract constitutes a government endorsement of USCCB's religious beliefs.

Nothing in *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985), on which the district court relied, *see* Mem. & Op., p. 19 (JA 1626), is to the contrary. That case concerned a state law that provided Sabbath day observers "an absolute and unqualified right not to work on whatever day they designate as their sabbath." *Thornton*, 472 U.S. at 709 (footnote omitted). The Supreme Court held that the statute violated the Establishment Clause because it "command[ed] that Sabbath religious concerns automatically control over all secular interests at the workplace," *id.* at 710, and for the same reason, Justice O'Connor concurred on the ground that the law constituted a religious endorsement. *See id.* at 711.

Unlike *Thornton*, this case does not involve a law that imposes any affirmative duty on a private party, grants a special benefit for religion, or attempts to accommodate religious interests. *Cf. Thornton*, 472 U.S. at 710 (noting that "[t]he First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities'") (citation omitted). This case involves a contract, awarded on a religiously-neutral

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social services, or because of their religious character or affiliation." 45 C.F.R. 87.1(f). *Accord id.* 87.2(f).

basis, that was given to USSCB *despite* its religious convictions, and that did not impose any legally cognizable burden on USCCB's subcontractors.

The district court held that this case resembles *Thornton* because USCCB's subcontractors and trafficking victims "could not 'opt out' of" the restrictions on the use of TVPA funds under the USSCB contract "without shouldering the financial burden of doing so." Mem. & Op., p. 23 (JA 1630) (footnote omitted). That conclusion is erroneous for several reasons.

First, the burden on USCCB's contractors the district court identified – the inability to use federal funds for certain purposes – is nothing like the burden the law at issue in *Thornton* imposed. The law in *Thornton* required employers to allow employees an "absolute" and "unqualified" right to a day off from work of their choosing. The USCCB TVPA contract, by contrast, did not impose *any* affirmative duty on the part of USCCB's subcontractors. The contract did not preclude USCCB's contractors from providing or referring for abortion and contraceptive services outside of the USCCB contract, *see* p. 12, *supra*, and private parties generally have no constitutional right to demand that the government fund their activities. *See*, *e.g.*, *Rust* v. *Sullivan*, 500 U.S. 173 (1991); *Harris* v. *McRae*, 448 U.S. 297 (1980).

Second, even assuming the district court identified a cognizable burden on USCCB's contractors, that burden – unlike the one that was imposed on employers in *Thornton* – did not result from the government's granting of a special benefit to religion. Rather, it would have been the indirect result of a decision by the government to award a contract to a religious organization for wholly secular reasons. As noted above, the Establishment Clause does not disable religious organizations from participating as providers of secular government benefits, and nothing in *Thornton* suggests that the limitations expressed there on the government's ability to make special accommodations in favor of religion apply where, as here, the government has acted without taking religion into account, with respect to services that were not stated as required in the relevant statute or the agency's funding announcement.

Third, the district court's concern that the USCCB TVPA contract would impose a burden on trafficking victims has it exactly backward. As noted, HHS awarded this contract to USCCB because HHS determined that USCCB's proposal was superior – on purely secular terms – to the other timely contract proposal HHS received. To conclude that the government may not contract with a religious organization under those circumstances because of what that organization is religiously motivated to provide or not provide could *harm* prospective beneficiaries,

as it would preclude the government from selecting the contractor that the government believes, on strictly secular grounds, would be best able to provide the sought-after services.

Indeed, taken to its logical conclusion, the district court's concern about USCCB's religious motivations could completely disable religious organizations from participating – on a religiously neutral basis – as providers under government social service programs. Religious organizations, by their very nature, typically have religious motivations not only for abstaining from certain activities, but also for the secular services (*e.g.*, food, shelter, and clothing) they wish to provide. *See*, *e.g.*, *Spencer* v. *World Vision, Inc.*, 633 F.3d 723, 737 (9th Cir.), *cert. denied*, 132 S. Ct. 96 (2011). Thus, to conclude that a private entity's religious motivations are imputed to the government whenever it awards that entity a federal contract or grant would threaten to exclude religious providers from government social service programs on a wholesale basis, contrary to longstanding Supreme Court precedent. *See* pp. 47-48, *supra* (citing cases).

Moreover, even if a subcontractor or a trafficking victim could identify the kind of burden that could give rise to a cognizable Establishment or Free Exercise Clause interest, plaintiff would not have standing to litigate those interests here. The complaint does not allege that any of plaintiff's members is a trafficking victim or one

of USCCB's subcontractors under the USCCB TVPA contract. *See*, *e.g.*, *Sprint Communications Co.. L.P.* v. *APCC Services, Inc.*, 554 U.S. 269, 290 (2008) ("'In the ordinary case, a party is denied standing to assert the rights of third persons'") (citation omitted)

B. The district court's other main reason for holding that the USCCB TVPA contract had the primary effect of advancing religion is that the contract "delegated authority to a religious organization to impose religiously based restrictions on the expenditure of taxpayer funds." Mem. & Op., p. 28 (JA 1635). That ruling, respectfully, misreads the pertinent Supreme Court decisions; misconceives the nature of a government contract; and effectively treats a private entity that enters into a contract with the government as a state actor, in conflict with controlling Supreme Court precedent.

1. The principal decision the district court cited in holding that the USCCB TVPA contract unlawfully delegated federal authority to USCCB is *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116 (1982). In *Larkin*, the Supreme Court addressed the constitutionality of a state statute that vested in the governing bodies of churches and schools the power effectively to veto applications for liquor licenses within a five hundred foot radius of the church or school. *See id.* at 117. The Court held that the statute violated the Establishment Clause because it delegated to a religious entity a

"power ordinarily vested in agencies of the government" – specifically, "the zoning function," which is "traditionally a governmental task." *Id.* at 121, 122.

The Supreme Court identified several Establishment Clause concerns that the state statute in *Larkin* raised. First, "[t]he churches' power under the statute [was] standardless, calling for no reasons, findings, or reasoned conclusions." 459 U.S. at 125. As a result, the Court observed, "[t]hat power [could] therefore be used by churches to promote goals beyond insulating the church from undesirable neighbors; it could be employed for explicitly religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith." *Ibid.*[10]

That concern is not present in this case. The USCCB TVPA contract authorized the use of TVPA funds under the contract only for valid, secular purposes, and explicitly precluded the use of TVPA funds for religious items or materials. *See* p. 12, *supra.* To ensure compliance with those terms and others, HHS monitored USCCB's administration of the contract by use of the same procedures HHS uses to monitor all its other contracts, including weekly conference calls, review of written monthly reports, and site visits. *See* Womack Dep., pp. 97, 219 (JA 1340, 1350);

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[10] By contrast, the Supreme Court noted that it would be perfectly permissible for a state to enact "an absolute ban on liquor outlets within reasonable prescribed distances from churches, schools, hospitals and like institutions . . .." 459 U.S. at 124 n.7.

Request for Proposals, pp. 13-14 (JA 64-65); Monthly Status Report (Feb. 2007) (JA 1430); Monthly Status Report (March 2010) (JA 1437). Accordingly, the USCCB TVPA contract did not provide USCCB or its subcontractors with the kind of unbounded, standardless discretion to advance religion that characterized the state law at issue in *Larkin*.

The Supreme Court in *Larkin* also held that the state law at issue there violated the Establishment Clause because it effected "'a fusion of governmental and religious functions'" that "enmeshe[d] churches in the exercise of substantial governmental powers." 459 U.S. at 512 (citations omitted). The Supreme Court explained that such a law was invalid because "[t]he Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions." *Ibid.*

That concern also is not present here. This case does not involve any statute or regulation, or indeed *any* delegation of inherent governmental power. Rather, it involves only a standard government contract, in which the government obtains services from a private party in exchange for the provision of government funds. The district court cited no case holding that the government's obtaining of services and materials from a private party under a standard government contract involves the delegation of inherent government authority, and we are aware of none.

That is no surprise. There could be such a case only if receipt of a standard government contract for the provision of goods or services were to render the contractor a state actor for constitutional law purposes, a concept the Supreme Court has specifically rejected. *See*, *e.g.*, *United States* v. *Orleans*, 425 U.S. 807, 815-17 (1976). As the Court explained in *Orleans*, "by contract, the Government may fix specific and precise conditions to implement federal objectives. Although such regulations are aimed at assuring compliance with goals, the regulations do not convert the acts of entrepreneurs or of state governmental bodies into federal governmental acts." *Id.* at 816 (footnote and citations omitted). *See also Rendell-Baker* v. *Kohn*, 457 U.S. 830, 841 (1982) (acts of private contractors "do not become acts of the government by reason of their significant or even total engagement in performing public contracts"); *Genera* v. *Puerto Rico Legal Services, Inc.*, 697 F.2d 447 (1st Cir. 1983) ("receipt of government funds does not render the government responsible for a private entity's decisions concerning the use of those funds").[11]

Finally, the Supreme Court in *Larkin* held that the law at issue there violated the Establishment Clause because "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to

[11] Pursuant to *Orleans*, a contract or grant renders a private party a state actor only if it gives the government day-to-day control over the private party's activities. *See* 425 U.S. at 815-17. HHS had no such control under the USCCB TVPA contract.

religion in the minds of some by reason of the power conferred." 459 U.S. at 125-26. That concern is not present here because the "'objective observer, acquainted with the text, history, and implementation of the statute [or other challenged government action,]'" Mem. & Op., p. 18 (JA 1625), *quoting Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 308 (2000), would not perceive the USCCB TVPA contract as a "joint exercise of legislative authority by Church and State."

The reasonable observer here would be aware of the relevant facts, explained above, *see* pp. 5-10, *supra*, that preclude any "objective" determination that the USCCB TVPA contract delegated inherent governmental authority to USCCB. Accordingly, the endorsement inquiry, to the extent it is relevant at all in a funding case such as this,[12] does not empower a court to strike down government action that is otherwise compliant with the Establishment Clause merely because someone may misperceive what the government has done as endorsing religion. That kind of understanding would effectively provide Establishment Clause plaintiffs with a "heckler's veto," by giving legal sanction to perceptions of the government's activity that are unreasonable in light of the relevant objective facts. The Supreme Court has never interpreted or applied the endorsement inquiry in such a manner.

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[12] We are aware of no Supreme Court case in which a majority of the Court has held that the constitutionality of a government funding program under the Establishment Clause depends on how it is viewed by a reasonable observer.

2. The district court also held that *Bd. of Ed. of Kiryas Joel Village Sch. Dist.* v. *Grumet*, 512 U.S. 687 (1994), supports concluding that the USCCB TVPA contract unconstitutionally delegated inherent government authority to USCCB. *Kiryas Joel*, however, is distinguishable for the same basic reasons set forth above with respect to *Larkin*. *Kiryas Joel* involved a state statute that was enacted to carve out a separate public school district for a religious group. Based on the principles set out in *Larkin*, the Supreme Court held that the law violated the Establishment Clause because it delegated discretionary power to a religious community on the ground of religious identity. *See id.* at 699.

Unlike in *Kiryas Joel*, HHS did not award USCCB its TVPA contract because of USCCB's religious nature, nor did HHS give USCCB's proposal any extra credit because of USCCB's limitation of its contract to not allow its subcontractors to use TVPA funds under the contract for services that violate USCCB's religious beliefs. *See* pp. 5-10, *supra*. To the contrary, HHS awarded the contract to USCCB *despite* that limitation on the scope of the contract. *See ibid*. Moreover, *Kiryas Joel*, like *Larkin*, involved a statute, not a contract, and for the reasons explained above, the USCCB TVPA contract did not delegate to USCCB any inherent government authority or render USCCB a state actor for Establishment Clause purposes.

3. The district court also relied upon two decisions from other circuits to support its finding of an unconstitutional delegation of government authority. *See Commack Self-Service Kosher Meats, Inc.* v. *Weiss*, 294 F.3d 415 (2d Cir. 2002); *Barghout* v. *Bureau of Kosher Meat and Food Control*, 66 F.3d 1337 (4th Cir. 1995). Both of those cases, however, also involved statutes or ordinances, not contracts, and in both cases the government wrongly allowed religious authorities to exercise inherent government functions – specifically, the regulation of food advertisement. Thus, neither of those cases suggests that the government delegates inherent government authority to a private party when, as here, it merely arranges by contract for the provision of secular services to beneficiaries.

C. Finally, the district court held that the USCCB TVPA contract was not religiously neutral because "prior to awarding [that contract], the government defendants 'did not impose any prohibition on the use of TVPA funds for abortion or contraceptive referrals . . .'" Mem. & Op., p. 26 (JA 1633) (citations omitted). That holding is incorrect for two reasons.

First, as explained above, HHS has never imposed any restriction on the use of TVPA funds for the provision of or referral for abortion or contraceptive services. *USCCB* imposed such a restriction on its subcontractors in administering its TVPA contract, but it was USCCB's decision to bid to provide certain services rather than

others, not the government's. HHS merely gave USSCB money for the provision of secular services to trafficking victims, and the record shows that HHS considered USCCB's religiously-based contract limitations as a *shortcoming* in USCCB's proposal, not a reason for awarding the contract to USCCB. *See* pp. 5-10, *supra*. These undisputed facts alleviate any concern that HHS awarded USCCB the contract on a non-religiously-neutral basis.

Second, and relatedly, the fact that previous *grantees* did not limit the grants they sought and obtained under the TVPA to services other than abortions and contraception does not constitute the kind of "customary" *agency* practice to which the Supreme Court referred in *Kiryas Joel*. There, the Supreme Court found that "carving out the village school district ran counter to customary districting practices in [New York state]" because "the trend in New York is not toward dividing school districts, but towards consolidating them," to create school districts "large enough to provide a comprehensive education at affordable cost." 512 U.S. at 700.

Here, by contrast, the record shows that while HHS's former grants-based model for administering the TVPA program "helped to establish a network of service providers ready to assist victims of a severe form of trafficking," Request for Proposals, p. 7 (JA 58), HHS awarded USCCB the per capita contract at issue because that prior model had failed to identify sufficient numbers of trafficking

victims for assistance, and because USCCB's contract proposal was rated, on purely secular terms, far superior to the only other proposal HHS received. *See* pp. 5-10, *supra*.

Thus, the record in this case shows that HHS's "customary" practice, both before and after it awarded the USCCB TVPA contract, was to attempt to arrange for the most effective provision of TVPA services to as many trafficking victims as it could, according to its best judgment at the time. Unlike in *Kiryas Joel*, those are not the kind of facts that suggest a hidden motive to favor religion, which a court should not lightly assume. *See*, *e.g.*, *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (noting that "'in the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties'").

CONCLUSION

For the foregoing reasons, the judgment of the district court should be vacated as moot or dismissed for lack of standing or, if this Court concludes that it has jurisdiction, the judgment should be reversed because defendants are entitled to summary judgment on the merits.

Respectfully submitted,

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AUGUST 2012

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(s) Lowell V. Sturgill Jr.

Attorney for Federal Defendants

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 2012, I filed the foregoing Brief for Defendants Kathleen Sebelius, Eskinder Negash, and George Sheldon, with the corrected addendum as required by the Court, with the Clerk of the United States Court of Appeals for the First Circuit by use of the Court's CM/ECF system. Service of counsel listed below will be made by that system:

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 09-10038-RGS

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS

v.

KATHLEEN SEBELIUS, et al.

MEMORANDUM AND ORDER ON
DEFENDANTS' MOTION TO DISMISS

March 22, 2010

STEARNS, D.J.

On January 12, 2009, the American Civil Liberties Union of Massachusetts (ACLU) brought this lawsuit against officials of the U.S. Department of Health and Human Services (HHS), alleging that defendants are violating the Establishment Clause of the First Amendment by allowing the United States Conference of Catholic Bishops (USCCB) to impose a religion-based restriction on the disbursement of taxpayer-funded services.[1] On May 15, 2009, defendants filed a motion to dismiss for lack of subject matter jurisdiction. A hearing on the motion was held on December 3, 2009.[2]

BACKGROUND

The facts, viewed in the light most favorable to the ACLU as the non-moving party, are as follows. In 2000, with the noble goal of suppressing human trafficking, Congress

[1]The Complaint originally named Michael O. Leavitt, the former Secretary of HHS. Leavitt's successor, Kathleen Sebelius, has been substituted as a defendant.

[2]In recognition of the importance of the issue, the parties dispatched two very able young advocates, Brigitte Amiri for the ACLU, and Peter Phipps for the government, to argue the case.

passed the Trafficking Victims Protection Act (TVPA), 22 U.S.C. § 7105, *et seq.*[3] The TVPA included a provision directing HHS to "expand benefits and services to victims of severe forms of trafficking in persons in the United States . . . ." 22 U.S.C. § 7105(b)(1)(B). Congress initially funded the mandate by appropriating $5 million for victims' services in fiscal year 2001 and $10 million in fiscal year 2002. Congress has since appropriated up to $12.5 million for each of the fiscal years 2008 through 2011.

HHS initially implemented the victims' services mandate of the TVPA by making grants to private providers on a case-by-case basis. In November of 2005, HHS decided to award a master contract to a single provider on a per capita basis. On February 23, 2006, the USCCB submitted a proposal to HHS to enlist non-governmental organizations (NGOs) under its oversight umbrella.[4] However, the USCCB added a caveat:

> [A]s we are a Catholic organization, we need to ensure that our victim services funds are not used to refer or fund activities that would be contrary to our moral convictions and religious beliefs. Therefore, we would explain to potential subcontractors our disclaimer of the parameters within which we can work. Specifically, subcontractors could not provide or refer [victims] for abortion services or contraceptive materials . . . .

Compl. ¶ 46.[5] HHS sought to clarify this "conscience exception" by asking the USCCB,

[3]The TVPA was reauthorized in 2003, 2005, and 2008. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 112 Stat. 5044 (2008). William Wilberforce was an English politician and social reformer whose campaign to suppress the slave trade led to the passage by Parliament of the Slavery Abolition Act of 1833, ending the institution of slavery in the British Empire.

[4]The USCCB's purposes include to "unify, coordinate, encourage, promote and carry on Catholic activities in the United States" and to "organize and conduct religious, charitable and social welfare work at home and abroad." Compl. ¶ 41.

[5]HHS's Request for Proposal made no reference to contraception or abortion services. The USCCB presumably raised the issue because abortions and contraceptive

"Would a 'don't ask, don't tell' policy work regarding the exception? What if a subcontractor referred victims supported by stipend to a third-party agency for such services?" Id. at ¶ 49. The USCCB responded unequivocally. "We cannot be associated with an agency that performs abortions or offers contraceptives to our clients. If they sign the written agreement [the subcontract], the 'don't ask, don't tell' wouldn't apply because they are giving an assurance to us that they wouldn't refer for or provide abortion service to our client using contract funding." Id. at ¶ 50. Despite this answer, in April of 2006, HHS awarded the master contract to the USCCB. Id. at ¶ 51.[6] From April of 2006 to April of 2007, the USCCB was awarded $2.5 million. Id. at ¶ 66. From April of 2007 to April of 2008, it received more than $3.5 million. Id.

The USCCB has enforced the "conscience exception" by incorporating language in its subcontractor agreements prohibiting NGOs from using TVPA funds for "referral for abortion services or contraceptive materials." Id. at ¶ 57. This restriction is also set out in the operations manual that the USCCB distributes to the provider NGOs. The manual flatly states that "program funding cannot be used for abortion services or contraceptive materials. Subcontractors will not be reimbursed for these services." Id. at ¶¶ 58-59.[7]

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materials were among the clinical services that victims of human trafficking might likely request. In enacting the TVPA, Congress made the finding that female trafficking victims were often forced into prostitution and subjected to rape and other forms of sexual abuse, exposing them to sexually transmitted diseases, including HIV and AIDS, and inferentially, unwanted pregnancies. See 22 U.S.C. § 7101(b)(6)-(11).

[6]The USCCB's contract has since been renewed annually and is eligible for renewal through 2011. Id. at ¶ 64.

[7]The issue is not rendered moot by the so-called "Hyde Amendment," styled after Henry Hyde, Congressman from Illinois and a staunch opponent of abortion. The Hyde

DISCUSSION

Defendants move to dismiss the ACLU's Complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Specifically, defendants challenge the ACLU's claim to have standing to litigate the case. Article III, § 2, of the Constitution limits federal courts to the adjudication of actual "Cases" or "Controversies." "To invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." Lewis v. Cont'l Bank Corp., 494 U.S. 472, 477 (1990). "Standing differs, in theory, from all other elements of justiciability by focusing primarily 'on the *party* seeking to get his complaint before a federal court' and only secondarily 'on the *issues* he wishes to have adjudicated.'" Laurence H. Tribe, American Constitutional Law 385-386 (3d ed. 2000) (footnotes omitted) (emphases in original).

The burden of establishing standing rests with the party invoking the jurisdiction of the federal courts. See Bennett v. Spear, 520 U.S. 154, 167-168 (1997).

> [There are] three fundamental requisites of standing that every litigant invoking the jurisdiction of the federal courts must possess: (1) injury-in-fact – an invasion of a legally-protected interest that is both concrete and particularized, and actual or imminent; (2) causation; and (3) redressability. Several prudential considerations also infuse standing determinations. These considerations, which militate against standing, principally concern whether the litigant (1) asserts the rights and interests of a third party and not his or her own, (2) presents a claim arguably falling outside the zone of

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Amendment is a rider (not a statute) which, if attached to an appropriations bill, bars the use of federal funds for abortions. Congress has annually attached the Hyde Amendment to HHS's general appropriation causing its impact to be felt primarily by recipients of Medicaid funds. The Amendment has also been used to deny abortion services to U.S. military personnel, federal prisoners, and Peace Corps Volunteers. To the best of the court's knowledge, it has never been attached as a rider to the TVPA.

> interests protected by the specific law invoked, or (3) advances abstract questions of wide public significance essentially amounting to generalized grievances more appropriately addressed to the representative branches.

Benjamin v. Aroostook Med. Ctr., Inc., 57 F.3d 101, 104 (1st Cir. 1995) (internal citations omitted). See also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992) (same).

An association has standing to bring a lawsuit on behalf of its members "when [1] at least one of its members possesses standing to sue in his or her own right; [2] the interests that the suit seeks to vindicate are pertinent to the objectives for which the organization was formed; and [3] neither the claim asserted nor the relief demanded necessitates the personal participation of affected individuals." Libertad v. Welch, 53 F.3d 428, 440 (1st Cir. 1995). See also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181 (2000). The ACLU contends that it has associational standing by virtue of its members' status as federal taxpayers.[8]

Until 1968, the law was clear that a taxpayer could not claim standing to challenge the constitutionality of a federal statute based on the use of his or her tax dollars to implement an allegedly unconstitutional practice or program.

> The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the

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[8]Defendants do not challenge the ACLU's claim to standing under the second and third elements of the test.

> conclusion which we have reached, that a suit of this character cannot be maintained.

Frothingham v. Mellon, 262 U.S. 447, 487 (1923). The Court backed away from this flat prohibition, however, in Flast v. Cohen, 392 U.S. 83 (1968). In Flast, the Court entertained an Establishment Clause challenge to the expenditure of federal funds "to finance instruction in reading, arithmetic, and other subjects in religious schools, and to purchase textbooks and other instructional materials for use in such schools." Id. at 85-86.

The congressional act challenged in Flast set up a complicated mechanism under which local entities serving the educational needs of low income families submitted requests to state agencies for federal funds. The applications were approved based on a set of criteria established by the United States Commissioner of Education that permitted distribution of public financial aid to religious schools. Describing the Frothingham decision as "confus[ing]" and "critici[zed]," the Flast Court concluded that its holding was likely motivated by prudential concerns, and that there was "no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs." Id. at 92, 101.

The Court then fashioned a two-part test to be applied in determining whether a taxpayer had a stake in a controversy over the expenditure of public funds sufficient to confer standing.

> First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the

> administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.

Id. at 102-103.

The Flast Court found that the plaintiff taxpayers had satisfied both prongs of the test.[9] First, the Court found that the constitutional challenge was "made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare, and the challenged program involves a substantial expenditure of federal tax funds." Id. at 103. Second, the Court found that the plaintiffs had shown a constitutional nexus between their status as taxpayers and the constitutional harm by alleging "that the challenged expenditures violate the Establishment and Free Exercise Clauses of the First Amendment." Id.

In its most recent taxpayer standing case, Hein v. Freedom From Religion Found., Inc., 551 U.S. 587 (2007), the Court cautioned that the Flast exception is "narrow" and must be applied with "rigor." Id. at 602, 603 (plurality opinion) (citation omitted). See also DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 347 (2006) (declining to extend Flast to a taxpayer challenge to state investment tax credits alleged to discriminate against interstate

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[9]Although one of the seven plaintiffs in Flast was identified as a parent of school-age children, taxpayer status appears to have been the only common denominator among the plaintiffs. Id. at 85 n.1.

commerce). It is worth noting that in applying the Flast exception, the Court has never permitted standing where the Spending Clause of Article I was not directly implicated.[10] See Hein, 551 U.S. at 610. Nor has the Court ever allowed standing to challenge a violation under any constitutional provision other than the Establishment Clause.[11] Id. at 609.

Defendants offer three reasons why they believe that the ACLU lacks standing under the Flast exception: (1) the TVPA does not itself mandate spending in violation of the Establishment Clause; (2) the TVPA is not based solely on Congress's exercise of its powers under the Spending Clause; and (3) the ACLU cannot show a "direct dollar-and-cents injury." The court will address each of these arguments in turn.

Statutory Mandate

It cannot be disputed that the TVPA does not directly mandate HHS to spend taxpayer money in violation of the Establishment Clause. The mechanism rather is more like the one created in Flast. The TVPA 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. The TVPA does, however, make a specific annual

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[10]"The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ." U.S. Const., Art. I, § 8, cl. 1.

[11]"Congress shall make no law respecting an establishment of religion . . . ." U.S. Const., Amend. I.

appropriation (currently of "up to" $12.5 million) to carry out its victims' services mandate.

Supreme Court cases since Flast discussing taxpayer standing are admittedly confusing. They do, however, at least stake out the poles of the spectrum that divides what is authorized from what is not. At one pole is Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464 (1982). In Valley Forge, the Court held that taxpayers did not have standing to challenge a decision by the Secretary of Health, Education, and Welfare (HEW) to give over a tract of surplus federal land to a Bible study college. See id. at 479. The Secretary based his decision on the authority bestowed by the Federal Property and Administrative Services Act of 1949. That Act authorized the Secretary to transfer surplus real property (in the Valley Forge case, land from a decommissioned military hospital) to nonprofit, tax-exempt educational institutions. Id. at 467.

In refusing standing to plaintiff taxpayers, the Court noted that "the source of their complaint is not a congressional action, but a decision by HEW to transfer a parcel of federal property." Id. at 479. Because the transfer did not involve an exercise of the congressional spending power under Article I, but rather one of executive authority under the Property Clause of Article IV, it did not in the Court's estimation fall within the Flast exception. Id. at 480. The Court found that the link between the property transfer and any burden on the taxpayers was "at best speculative and at worst non-existent" because the government had acquired the property some three decades before the lawsuit was brought. Id. at 480 n.17.

The other pole on the spectrum was planted six years later in Bowen v. Kendrick,

487 U.S. 589 (1988). In Kendrick, taxpayers brought Establishment Clause challenges, both facial and "as-applied," to the Adolescent Family Life Act (AFLA), 42 U.S.C. § 300z, *et seq.* The AFLA appropriated money to be disbursed by HHS to community service groups, including religiously affiliated groups, working to discourage premarital sex and teen pregnancy. Kendrick, 487 U.S. at 593. As the Court noted, "the AFLA expressly states that federally provided services in this area should promote the involvement of parents, and should emphasize the provision of support by other family members, religious and charitable organizations, voluntary associations, and other groups." Id. at 596 (citation omitted).[12]

The Court first rejected plaintiffs' facial challenge to AFLA, explaining that,

> [a]s we see it, it is clear from the face of the statute that the AFLA was motivated primarily, if not entirely, by a legitimate secular purpose – the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood. Appellees cannot, and do not, dispute that, on the whole, religious concerns were not the sole motivation behind the Act, nor can it be said that the AFLA lacks a legitimate secular purpose. . . . There is simply no evidence that Congress' actual purpose in passing the ALFA was one of endorsing religion.

Id. at 602-604 (internal citations and quotation marks omitted).

Turning to the "as-applied" challenge, the Court had little difficulty identifying a link

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[12]The AFLA findings stated that issues of adolescent premarital sex and pregnancy "are best approached through a variety of integrated and essential services provided to adolescents and their families" by groups including "religious and charitable organizations." 42 U.S.C. § 300z(a)(8)(B). The AFLA further mandated that services provided by the federal government should "emphasize the provision of support by . . . religious and charitable organizations . . . ." Id. § 300z(a)(10)(C). It also instructed that demonstration projects funded by the government "shall . . . make use of support systems such as . . . religious and charitable organizations . . . ." Id. § 300z-2(a). Finally, the AFLA required demonstration project grant applicants to describe how they would "involve religious and charitable organizations." Id. § 300z-5(a)(21)(B).

between plaintiffs' status as taxpayers and the underlying congressional appropriation, even though the funds had ultimately been disbursed by the Secretary.

> We 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 . . . . [Since Flast], we have not questioned the standing of taxpayer plaintiffs to raise Establishment Clause challenges, even when their claims raised questions about the administratively made grants. . . . Nor is this, as we stated in Flast, a challenge to "an incidental expenditure of tax funds in the administration of an essentially regulatory statute." The AFLA is at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers, and appellees' claims call into question how the funds authorized by Congress are being disbursed pursuant to the AFLA's statutory mandate. In this litigation there is thus a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power, notwithstanding the role the Secretary plays in administering the statute.

Id. at 619-620 (internal citations omitted).

The Court, however, faulted the district court's approach for failing to identify more specifically those grantees who in its view were "pervasively sectarian," and therefore constitutionally suspect, although the Court agreed that from all appearances, some AFLA funds had been used "for constitutionally improper purposes." Id. at 620. The Court remanded the case to the district court with the instruction that if it definitively found "that the Secretary has wrongfully approved certain AFLA grants, an appropriate remedy would be to require the Secretary to withdraw such approval." Id. at 622.

That brings us, nineteen years later, to Hein. Plaintiffs in Hein objected to a 2001 Presidential Executive Order creating a White House Office of Faith-Based and Community Initiatives (OFBCI). See 551 U.S. at 593. The purpose of the OFBCI as

explained in the Order was to ensure that "private and charitable community groups, including religious ones . . . have the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve valid public purposes." Id. at 594, quoting Exec. Order No. 13199, 3 C.F.R. § 752 (2001 Comp.).[13]

Plaintiffs, an organization of atheists and agnostics and three of its taxpayer members, objected to the use of Executive Branch funds by the OFBCI to hold regional conferences explaining federal grant opportunities to which religious and secular groups were invited. At the conferences, federal officials extolled the value of religiously-oriented social services. The Hein Court, however, disagreed with plaintiffs' premise that the congressional spending power had been diverted to religious purposes, noting that "Congress [had only] provided general appropriations to the Executive Branch to fund its day-to-day activities. These appropriations did not expressly authorize, direct, or even mention the expenditures of which [taxpayers] complain. Those expenditures resulted from executive discretion, not congressional action." Id. at 605. The Court additionally noted that "[n]o congressional legislation specifically authorized the creation of the White House Office or the Executive Department Centers. Rather, they were 'created entirely within the executive branch . . . by Presidential executive order.' Nor has Congress enacted any law specifically appropriating money for these entities' activities. Instead, their activities are funded through general Executive Branch appropriations." Id. at 595 (internal citation omitted).

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[13]As part of the initiative, the President issued four separate Executive Orders creating Executive Department Centers for Faith-Based and Community Initiatives within certain federal agencies and departments. Id. at 594 n.1.

In contrasting the general appropriation at issue in Hein with the specific appropriation of funds in Flast, the Court plurality, in an opinion authored by Justice Alito, found that

> [t]he link between congressional action and constitutional violation that supported taxpayer standing in Flast is missing here. Respondents do not challenge any specific congressional action or appropriation; nor do they ask the Court to invalidate any congressional enactment or legislatively created program as unconstitutional. That is because the expenditures at issue here were not made pursuant to any Act of Congress.

Id. at 605. The Court plurality concluded that Flast had turned on a finding of congressional action, and declined to extend its holding to "purely executive expenditures" from discretionary funds appropriated for administrative expenses.[14] Hein, 551 U.S. at 610. In summary, the plurality stated that while "[w]e do not extend Flast, . . . we also do not overrule it. We leave Flast as we found it." Id. at 615.

Justice Alito then turned to Kendrick, redoubling the focus on the distinction between general Executive Branch appropriations and the AFLA's designated appropriations.

> [K]ey to [the finding that a sufficient nexus existed in Kendrick] was the Court's recognition that AFLA was "at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers," and that the plaintiffs' claims "call[ed] into question how the funds authorized by

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[14]The executive-legislative distinction propounded by Justice Alito attracted the support of only Chief Justice Roberts and Justice Kennedy. The two concurring Justices (Scalia and Thomas) would have overruled Flast altogether. Justice Scalia was particularly scathing in his rejection of the source-of-funds distinction Justice Alito had attempted to draw. Justice Souter wrote for the dissent, also arguing that the distinction between congressionally-mandated spending and executive discretion was arbitrary and unmanageable. It is a matter of some interest that the government in its brief to the Court in Hein argued for limiting taxpayer standing to objections to expenditures of public funds by non-governmental third parties (such as the USCCB).

Congress [were] being disbursed *pursuant to the AFLA's statutory mandate*."

Id. at 607 (emphasis in original) (citation omitted). In rejecting respondents' "attempt to paint their lawsuit as a Kendrick-style as-applied challenge," the Court stated that the

> effort is unavailing for the simple reason that they can cite no statute whose application they challenge. The best they can do is to point to unspecified, lump-sum "Congressional budget appropriations" for the general use of the Executive Branch – the allocation of which "is a[n] administrative decision traditionally regarded as committed to agency discretion." Characterizing this case as an "as-applied challenge" to these general appropriation statutes would stretch the meaning of that term past its breaking point.

Id. at 607-608 (internal citation omitted).

This much at least seems clear. Hein "precludes standing when a taxpayer challenges a statute generally providing funding to the executive branch." Murray v. Geithner, 2010 WL 431730, at *2 (E.D. Mich. Feb. 2, 2010). It would also seem that Flast and Kendrick 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." Hein, 551 U.S. at 607. Navigating between these poles, the TVPA expenditures at issue here appear more like the funds disbursed under the AFLA than those spent to support the activities of the OFBCI. The TVPA, like the AFLA, designated a group of intended beneficiaries – in the case of the TVPA, victims of human trafficking abuse, in the case of the AFLA, sexually active adolescents – and like the AFLA, the TVPA required the funding of services for the group.[15]

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[15]The court is aware of at least one post-Hein decision that denied taxpayer standing in an apparent contradiction of this analysis. See Freedom From Religion Found., Inc. v. Nicholson, 536 F.3d 730 (7th Cir. 2008). In Nicholson, a public interest group brought an action challenging the Department of Veterans Affairs' integration of faith and spirituality into health care services offered to veterans. The Seventh Circuit denied

Defendants' argument that for taxpayer standing to attach under Hein, the challenged appropriation must directly mandate the turnover of funds to religious organizations is not supported by the text of the Hein plurality decision. In commenting on Flast, Justice Alito observed that "[a]t around the time the [AFLA] was passed and [Flast] was decided, the great majority of nonpublic elementary and secondary schools in the United States were associated with a church. . . . Congress surely understood that much of the aid mandated by the statute would find its way to religious schools."[16] Hein, 551 U.S. at 604 n.3. As Judge Zatkoff observed in Murray, "a requirement of religious contemplation in the challenged statute would eviscerate as-applied challenges under the Establishment Clause, which have expressly been permitted since Kendrick." Murray,

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taxpayer standing, holding that the lawsuit was "not predicated, as Hein requires, on the notion that *Congress* appropriated money from federal taxpayers expressly for the creation of a clinical chaplaincy. Instead, [plaintiffs simply are] challenging the executive branch's approach to veterans' healthcare and the manner in which the executive, in its discretion, uses the services of its chaplain personnel." Id. at 742 (emphasis in original). To the extent that Judge Ripple's opinion may be read to interpret Hein to deny standing whenever an executive agency exercises its discretion over expenditures, this court disagrees. What Justice Alito's plurality opinion requires for taxpayer standing is an expenditure made "pursuant to an[] Act of Congress," Hein, 551 U.S. at 605, as opposed to a "general appropriation statute[]." Id. at 608. As Justice Scalia noted in his concurring opinion in Hein, "[t]he whole point of the as-applied challenge in Kendrick was that the Secretary, not Congress, had *chosen* inappropriate grant recipients. Both Kendrick and [Hein] equally involve, in the relevant sense, attacks on executive discretion rather than congressional decision: Congress generally authorized the spending of tax funds for certain purposes but did not explicitly mandate that they be spent in the *unconstitutional* manner challenged by the taxpayers." Id. at 630-631 (Scalia, J., concurring) (emphases in original). Significantly, Justice Scalia felt that the plurality opinion in Hein "flatly contradicts Kendrick." Id. at 630.

[16]In Flast, Congress did not expressly state that religious organizations would be eligible grantees of the funds appropriated to support elementary and secondary education, rather it provided funding for "private" schools. 392 U.S. at 86-87.

2010 WL 431730, at *3. See also Am. Civil Liberties Union of Minn. v. Tarek Ibn Ziyad Acad., 2009 WL 2215072, at *6 (D. Minn. July 21, 2009) ("To the extent that Defendants suggest that a statute must mention religion on its face, the Court disagrees. Funding under a legislative enactment that does not specifically mention religion is not necessarily a general appropriation. Hein did not overrule Flast or Kendrick.").[17]

The issue is by no means open and shut, but the court is of the view that the ACLU has met its burden under Flast of showing a link between the congressional power to tax and spend and a possible violation of the Establishment Clause in the grant of public funds to the USCCB. As with the AFLA, the TVPA "is at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers, and [plaintiff's] claims call into question how the funds authorized by Congress are being disbursed pursuant to the . . . statutory mandate. . . . [T]here is thus a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power, notwithstanding the [discretionary] role the Secretary plays in administering the statute." Kendrick, 487 U.S. at 620.

Sole Exercise of the Spending Power

Defendants next argue that taxpayer standing does not attach because in enacting the TVPA, Congress invoked two of its powers that are independent of the Spending Clause – the Commerce Clause, Article I, § 8,[18] and the Enabling Clause of the Thirteenth

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[17]Although Ibn Ziyad involved a constitutional challenge to a state religious aid statute, Judge Frank's analysis is apt in a federal context as well.

[18]"[The Congress shall have power] to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. Const., Art. 1, § 8, cl. 3.

Amendment (prohibiting involuntary servitude). As defendants note, in enacting the TVPA, Congress made findings that "[t]rafficking in persons substantially affects interstate and foreign commerce," 22 U.S.C. § 7101(b)(12), and that "[t]he right to be free from slavery and involuntary servitude is among [a person's] inalienable rights." Id. § 7101(b)(22). However, the power of Congress to appropriate funds is entirely a function of the Spending Clause – whatever might be the additional grants of legislative authority granted to Congress by the Constitution.

Defendants nonetheless argue that for taxpayer standing to attach under Flast, Congress must have enacted the challenged legislation relying *solely* on the Spending Clause. That is, even if an exercise of the Spending Clause is a necessary predicate of a statute, standing does not exist when Congress in enacting legislation relies on additional provisions of the Constitution. Defendants point to the following sentence in Flast: " [A] taxpayer will be a proper party to allege the unconstitutionality *only* of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution." Flast, 392 U.S. at 102 (emphasis added).

"Only" is a flexible qualifier, the placement of which can dramatically alter the meaning of even a simple sentence.[19] Here, sensibly interpreted, the qualifier "only" in Flast is meant to delimit taxpayer standing to circumstances in which an exercise by Congress of its power under the Spending Clause can be affirmatively linked to a violation of the Establishment Clause, as opposed to congressional acts that are strictly regulatory

[19]Take, for example, "only he loves his wife," "he only loves his wife," and "he loves his only wife."

in nature. Defendants place too much weight on the word "only" as it is used in the Flast sentence in reading it to eliminate standing when Congress cites powers in addition to the Spending Clause in making an appropriation. The reasoning of the district court in Katcoff v. Marsh, 582 F. Supp. 463, 471 (E.D.N.Y. 1984) (citations omitted) (emphasis in original), overruled on other grounds, 755 F.2d 223, 231 (2d Cir. 1985), is persuasive:

> Because there is no litmus test to determine which power Congress exercises in enacting a given statute, some writers have suggested that it is wiser to regard "all government spending [as] an exercise of the congressional power to tax and spend." This view finds some support in Flast, where the Court repeatedly emphasized that taxpayer standing was designed to allow federal taxpayers to challenge "a specific expenditure of federal funds." In limiting the scope of taxpayer standing, the Court's concern was to block challenges to "essentially regulatory statute[s]." It may be fairly inferred that the *fact* of Congressional spending – rather than the nominal source of that spending – was the Court's central concern.

See also Newdow v. Eagen, 309 F. Supp. 2d 29, 39 (D.D.C. 2004) (finding taxpayer standing to bring an Establishment Clause challenge to a federal statute authorizing funds to employ Senate and House chaplains where the statute was "at least in part an exercise of Congress's authority under the taxing and spending clause of U.S. Const. art. I, § 8.").

A case relied upon by defendants in this regard, Winkler v. Gates, 481 F.3d 977 (7th Cir. 2007), is readily distinguishable. In Winkler, the Seventh Circuit considered an Establishment Clause challenge to a congressional statute directing the United States Military to assist the Boy Scouts of America in staging its quadrennial "Jamboree." Id. at 979.[20] The Court of Appeals framed the issue as "whether the Jamboree statute is more

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[20]The Jamoboree is a national Boy Scout event. The Boy Scouts condition membership on a Scout's belief in God. Id. at 979. The statute at issue in Winkler required the military to assist the Jamboree by lending equipment such as cots, blankets, and medical supplies, and by providing transportation to individual Boy Scouts. See id.

like the surplus property act in Valley Forge or more like the AFLA program in [Kendrick]." Id. at 982. The Court held that the statute was "not a 'taxing and spending' statute but rather is authorized by Congress's powers under the Property Clause, Art. IV, § 3, cl. 2, and the Military Clauses, Art. I, § 8, cls. 12-14. The military is, in other words, just regulating its own property and manpower." Id. at 985-986. Finally, the Court noted that while some "incidental spending" might be involved, the statute was not the "kind of 'taxing and spending' legislation identified in Flast as suitable for a taxpayer challenge." Id. at 988.[21]

Affirmative Spending

Defendants' final argument is that the Complaint does not allege that any taxpayer monies have been spent to support religious activities. As defendants see it, the ACLU objects not to the services being provided through the USCCB, but to the fact that certain other services are *not* provided – namely, contraceptive materials and abortions. Defendants refer to the Supreme Court's pre-Flast ruling denying standing to taxpayers

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at 982, citing 10 U.S.C. § 2554.

[21]In another case cited by defendants, Ams. United for Separation of Church and State v. Reagan, 786 F.2d 194 (3d Cir. 1986), the Third Circuit rejected taxpayer standing to challenge legislation authorizing diplomatic recognition and the dispatch of a legation to the Vatican. The Court ruled that "[t]he repeal of the 1867 prohibition against maintaining a mission in Rome is not a spending enactment." Id. at 199. Despite dicta suggesting that the Flast limitation should be read as defendants do, the case turned on the fact that "[l]egal challenges to the establishment of diplomatic relations require the review of one of the rare governmental decisions that the Constitution commits exclusively to the Executive Branch." Id. at 202.

challenging a New Jersey statute requiring that public schools open the school day with the reading of five verses from the Old Testament. See Doremus v. Bd. of Educ. of Borough of Hawthorne, 342 U.S. 429 (1952). In Doremus, the Court ruled that the grievance at issue "is not a direct dollars-and-cents injury but it is a religious difference." Id. at 434. In that case, it was crucial to the Court's determination that there was "no allegation that this activity is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school." Id. at 433. In contrast, here, the ACLU alleges that pursuant to the TVPA, tax dollars are being paid to the USCCB to support the propagation of its religious beliefs.

If defendants are right – that this is a case not about the Establishment Clause, but about the issue of abortion – and not as the ACLU insists, about an alleged unconstitutional act by Congress, namely, the delegation of Congress's spending power to a religious organization to enforce its doctrinal views, then defendants have a perhaps dispositive point.[22] It is simply too early in the litigation, however, to make that determination.[23] For present purposes, the court concludes no more than that the ACLU has established that it has standing to proceed.

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[22]At the hearing, the court asked Ms. Amiri, the counsel for the ACLU, whether this lawsuit would have been brought if "Congress had insisted the money be given to religious organizations that as a matter of faith believed in promoting abortion rights." Hr'g Tr. at 24. She replied, "Yes, your Honor, I think to the extent that there is any sort of furthering of religion with taxpayer dollars, that rises to the level of an Establishment Clause claim, regardless of what the specific contours are, and it also means that taxpayers have standing to bring that case." Id. at 25.

[23]Both sides agree that this case does not in any way impugn the efforts undertaken by the USCCB to provide valuable and needed services to human trafficking victims.

In closing, I do not pretend that Hein offers clear direction to lower courts as to how to draw the line between just enough congressional involvement to confer taxpayer standing and too little so as to deny it. I further recognize that the distinction between congressional and executive spending propounded in Hein may be unrealistic given the complexities of modern interactions between Congress and the Executive Branch. I have no present allegiance to either side of the debate, only a firm conviction that the Establishment Clause is a vital part of the constitutional arrangement envisioned by the Framers, and perhaps a reason we have not been as riven by sectarian disputes as have many other societies. I also agree that a rule that has no enforcement mechanism is not a rule at all. Taxpayer standing may not be the best or the most desirable or even a necessary means of enforcing the separation of church and state, but unless the Supreme Court decrees differently, it is one of the principal tools available. The uncertainty of the scope of taxpayer standing necessarily invites decisions lacking in consistency. I have no doubt that many of my colleagues would (and will) in all good faith draw the line differently than have I. But until the Supreme Court gives definitive guidance, judges will have to decide using their best understanding of the law as it exists. That is what I have attempted to do here.

ORDER

For the foregoing reasons, defendants' motion to dismiss will be DENIED. Within fourteen (14) days from the date of this Order, the parties will file a joint proposed order defining the scope and scheduling of any necessary discovery.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 09-10038-RGS

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS

v.

KATHLEEN SEBELIUS, et al.

MEMORANDUM AND ORDER ON
CROSS-MOTIONS FOR SUMMARY JUDGMENT AND
DEFENDANT-INTERVENOR'S MOTION TO DISMISS

March 23, 2012

STEARNS, D.J.

In this case, plaintiff American Civil Liberties Union of Massachusetts (ACLU) claims that officials of the U.S. Department of Health and Human Services (HHS) violated the Establishment Clause of the First Amendment by allowing the United States Conference of Catholic Bishops (USCCB) to impose a religiously based restriction on the disbursement of taxpayer-funded services. Presently before the court are the parties' cross-motions for summary judgment, as well as defendant-intervenor USCCB's motion to dismiss for lack of subject matter jurisdiction. The court heard oral argument on October 18, 2011.

BACKGROUND

The undisputed facts are as follows. In 2000, Congress passed the Trafficking

Victims Protection Act (TVPA). *See* 22 U.S.C. §§ 7101-7112.[1] The purposes of the TVPA are "to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims." *Id.* § 7101(a). The TVPA includes a provision directing the Secretary of HHS and other federal government officials to "expand benefits and services to victims of severe forms of trafficking in persons in the United States . . . ." *Id.* § 7105(b)(1)(B). Congress appropriated "up to" $5 million "to carry out the TVPA" in fiscal year 2001, and "up to" approximately $10 million for each of the subsequent fiscal years. Gov. Defs.' Statement of Facts (SOF) ¶ 5.

HHS initially implemented the victims' services mandate by making grants to nonprofit organizations that worked directly with trafficking victims. In November of 2005, HHS decided to select a general contractor to administer the funds. To this end, HHS published a Request For Proposals (RFP). In response, HHS received timely proposals from two organizations: the USCCB ("a religious organization whose

[1] The TVPA was reauthorized in 2003, 2005, and 2008. *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875; Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044.

membership consists of the Catholic bishops in the United States")[2] and the Salvation Army ("an evangelical part of the universal Christian Church" engaged in various charitable enterprises).[3] In its proposal, the USCCB included the following cautionary note:

> *as we are a Catholic organization*, we need to ensure that our victim services are not used to refer or fund activities that would be contrary to our moral convictions and religious beliefs. Therefore, we would explain to potential subcontractors our disclaimer of the parameters within which we can work. Specifically, subcontractors could not provide or refer for abortion services or contraceptive materials for our clients pursuant to this contract.

Gov. Defs.' SOF ¶ 28 (emphasis added).[4]

To evaluate the two proposals, HHS appointed a four-member "technical evaluation panel." Gov. Defs.' SOF ¶ 32. On the initial evaluation, two of the panel members raised concerns about the USCCB's stated intent to prohibit subcontractors

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[2] Pl.'s SOF ¶ 27; USCCB's Resp. to Pl.'s SOF ¶ 27.

[3] *About: Mission Statement*, The Salvation Army, http://www.salvationarmyusa.org/usn/www_usn_2.nsf/vw-local/About-us (last visited Mar. 23, 2012).

[4] This frank statement that the abortion/contraception restriction was motivated by Catholic dogma is at odds with the argument advanced by the government defendants that "[t]he funding restrictions at issue here simply represent a coincidental overlap between legitimate governmental objectives and religious tenets." Gov. Defs.' Mem. at 10.

from offering or subsidizing abortion services and contraceptives.[5] The panel members' reservations were conveyed to the USCCB in the form of written questions. Among the questions, the USCCB was asked: "Would a 'don't ask, don't tell' policy work regarding the exception? What if a subcontractor referred victims supported by stipend to a third-party agency for such services?" Gov. Defs.' SOF ¶ 43. The USCCB responded:

> [w]e can not be associated with an agency that performs abortions or offers contraceptives to our clients. If they sign the written [subcontract] agreement, the "don't ask, don't tell" wouldn't apply because they are giving an assurance to us that they wouldn't refer for or provide abortion service to our client using contract funding. The subcontractor will know in advance that we would not reimburse for those services.

Id. ¶ 52.

After receiving the answers, HHS reopened the RFP process to permit the USCCB and the Salvation Army to submit revised technical proposals, which both

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[5] In enacting the TVPA, Congress made a finding that female trafficking victims are often forced into prostitution and subjected to rape and other forms of sexual abuse. *See* 22 U.S.C. § 7101(b)(6). The TVPA specifies that trafficking victims "shall be eligible for benefits and services under any Federal or State program or activity funded or administered by any official or agency . . . to the same extent as" refugees. *Id.* § 7105(b)(1)(A). "Medicaid and Refugee Medical Assistance pay for contraception and abortions in the case of rape, incest, and when the woman's life is in danger." Pl.'s SOF ¶ 59; USCCB's Resp. to Pl.'s SOF ¶ 59. The RFP made no reference to restrictions on the use of TVPA funds for contraception or abortion services. The USCCB apparently raised the issue on the understanding that abortions and contraceptives are among the clinical services that victims of human trafficking might request.

organizations did.[6] On April 11, 2006, HHS awarded the master contract to the USCCB. The contract incorporated by reference the USCCB's Technical Proposal and Amended Technical Proposal, including the abortion and contraception restriction. Gov. Defs.' SOF ¶ 75. Pursuant to the award, the USCCB entered into subcontracts with over 100 service providers, many of which are not Catholic institutions. The subcontract included the restriction that "funds shall not be used to provide referral for abortion services or contraceptive materials, pursuant to this contract." Pl.'s SOF ¶ 62; USCCB's Resp. to Pl.'s SOF ¶ 62. The abortion/contraception restriction was also contained in the program operations manual that the USCCB distributed to its subcontracters. Pl.'s SOF ¶ 63; USCCB's Resp. to Pl.'s SOF ¶ 63. Subcontractors were further required to ensure that no staff time paid through the USCCB contract was used in providing referrals for abortions or contraceptive materials. Pl.'s SOF ¶ 64; USCCB's Resp. to Pl.'s SOF ¶ 64.

The original HHS-USCCB contract had a term of one year, with options for four annual renewals. HHS exercised each of these options, renewing the contract for a five-year duration. During the first four years of the contract, the government defendants awarded the USCCB over $13 million. As of June of 2010, the government

[6] The USCCB's Amended Technical Proposal included the same prohibition on the use of contract funds to pay for abortion services and contraceptive materials. Pl.'s SOF ¶ 46; USCCB's Resp. to Pl.'s SOF ¶ 46.

defendants awarded the USCCB an additional $2.9 million.[7] Pl.'s SOF ¶ 79; USCCB's Resp. to Pl.'s SOF ¶ 79. Before the contract was set to expire (on April 10, 2011), HHS approved a six-month extension by way of a "Task Order." The Task Order expired on October 10, 2011. While HHS no longer has the authority to obligate additional funds under the original master contract or the Task Order, it can continue to pay the USCCB for "services provided within the period of performance of the Task Order." Timmerman Decl. ¶¶ 6-11.

On January 12, 2009, the ACLU brought this lawsuit against HHS officials,[8] alleging that they "have violated and continue to violate the Establishment Clause of the First Amendment by permitting [the] USCCB to impose a religiously based restriction on the use of taxpayer funds." Compl. ¶ 71. On May 15, 2009, defendants filed a motion to dismiss the Complaint for lack of standing. This court denied the motion on March 22, 2010. In June of 2010, the USCCB intervened in the lawsuit as permitted by Rule 24 of the Federal Rules of Civil Procedure. All three parties now move for summary judgment.

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[7] Of this $15.9 million, the USCCB allocated over $5.3 million to pay for its administrative services and expenses. Pl.'s SOF ¶ 79; USCCB's Resp. to Pl.'s SOF ¶ 79.

[8] The Complaint originally named Michael O. Leavitt, the former Secretary of HHS. Leavitt's successor, Kathleen Sebelius, has since been substituted as a defendant in Leavitt's place.

DISCUSSION

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A 'genuine' issue is one that could be resolved in favor of either party, and a 'material fact' is one that has the potential of affecting the outcome of the case." *Calero-Cerezo v. U.S. Dep't of Justice*, 355 F.3d 6, 19 (1st Cir. 2004), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-250 (1986).

I. Threshold Issues: Standing and Mootness

A. Standing

Defendants previously challenged the ACLU's claim to have standing to litigate this case. In a Memorandum and Order dated March 22, 2010, the court found a sufficient showing of taxpayer standing on the part of the ACLU under existing Supreme Court doctrine. In reaching this conclusion, I reasoned that the ACLU had met its prima facie burden under *Flast v. Cohen*, 392 U.S. 83 (1968), which is to show "a logical link" between the plaintiff's taxpayer status and "the type of legislative enactment attacked," as well as "a nexus" between such taxpayer status and "the precise nature of the constitutional infringement alleged." *Id.* at 102.[9]

[9] I further reasoned that, for purposes of standing, "the TVPA expenditures at issue here appear more like the funds disbursed under the AFLA [the Adolescent

The government defendants and the USCCB now seek to revisit the issue of standing. The government defendants contend that "due to the further development of taxpayer standing principles in *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011), it is now clear that plaintiff lacks taxpayer standing in this case." Gov. Defs.' Reply at 6.[10] In *Winn*, the Supreme Court held that the taxpayer plaintiffs lacked standing to mount an Establishment Clause challenge to a dollar-for-dollar tax credit (up to $500) matched against contributions to scholarship funds

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Family Life Act, at issue in *Bowen v. Kendrick*, 487 U.S. 589 (1988)] than those spent to support the activities of the OFBCI [the White House Office of Faith-Based and Community Initiatives, at issue in *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007)]. The TVPA, like the AFLA, designated a group of intended beneficiaries – in the case of the TVPA, victims of human trafficking abuse, in the case of the AFLA, sexually active adolescents – and like the AFLA, the TVPA required the funding of services for the group." Mar. 22, 2010 Mem. & Order at 14.

[10] The USCCB offers the additional argument that "[s]ince [the] ACLU challenges only the failure to use appropriated funds to pay for abortion and contraception services, the interests of [the] ACLU's members as taxpayers will not support standing in this case." USCCB's Mem. in Support of its Mot. to Dismiss at 8. I question whether this framing of the case accurately characterizes the position taken by counsel for the ACLU, that the focus of the lawsuit is not on the defense of a right of access to abortion services, but instead on an objection to the use of taxpayer dollars to enforce a religiously based restriction on access to such services. At a hearing on December 3, 2009, I asked ACLU counsel directly whether this lawsuit would have been brought "if Congress had insisted the money be given to religious organizations that as a matter of faith believed in promoting abortion rights." Dec. 3, 2009 Hr'g Tr. at 24. She replied, "Yes, your Honor, I think to the extent that there is any sort of furthering of religion with taxpayer dollars, that rises to the level of an Establishment Clause claim, regardless of what the specific contours are, and it also means that taxpayers have standing to bring that case." *Id.* at 25.

supporting students attending private schools, many of which are religiously based. In reaching its holding, the Court incorporated an "extracted and spent" element into the taxpayer standing analysis. It explicitly distinguished challenges to tax credits from challenges to governmental expenditures, stating that "tax credits and governmental expenditures do not both implicate individual taxpayers in sectarian activities. A dissenter whose tax dollars are 'extracted and spent' knows that he has in some small measure been made to contribute to an establishment in violation of conscience." *Winn*, 131 S. Ct. at 1447, quoting *Flast*, 392 U.S. at 106. The Court further reasoned that in contrast to a governmental expenditure, "awarding some citizens a tax credit allows other citizens to retain control over their own funds in accordance with their own consciences." *Winn*, 131 S. Ct. at 1447.[11]

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[11] Justice Scalia, joined by Justice Thomas, concurred. He stated that he "would repudiate" *Flast*, as it is "an anomaly in our jurisprudence, irreconcilable with the Article III restrictions on federal judicial power that our opinions have established." *Id.* at 1450 (Scalia, J., dissenting). Nevertheless, he joined the majority opinion "because it finds respondents lack standing by applying *Flast* rather than distinguishing it away on unprincipled grounds." *Id.*

Justice Kagan, joined by Justice Ginsburg, Justice Breyer, and Justice Sotomayor, dissented. She noted that the majority opinion's "novel distinction in standing law between appropriations and tax expenditures has as little basis in principle as it has in our precedent." *Id.* at 1450 (Kagan, J., dissenting). She reasoned that "[c]ash grants and targeted tax breaks are means of accomplishing the same government objective – to provide financial support to select individuals or organizations." *Id.* Thus, "[t]axpayers experience the same injury for standing purposes whether government subsidization of religion takes the form of a cash grant

Here, taxpayer members of the ACLU seek to challenge a governmental expenditure – the disbursement to the USCCB of funds appropriated by Congress under the TVPA. In contrast to *Winn*, this case does not involve any form of tax credit that allows plaintiffs and other dissenting citizens "to retain control over their own funds in accordance with their own consciences." *Id.* at 1447 (majority opinion).[12] Thus, the holding of *Winn* does not impeach this court's pre-*Winn* holding that the ACLU has standing to proceed.[13]

B. Mootness

The government defendants next argue that this case is moot in light of the

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or a tax measure." *Id.* at 1452.

[12] *See also id.* at 1448 ("[W]hat matters under *Flast* is whether sectarian [organizations] receive government funds drawn from general tax revenues, so that moneys have been extracted from a citizen and handed to a religious institution in violation of the citizen's conscience."). Here, a sectarian organization (the USCCB) has received government funds drawn from general tax revenues, implicating "*Flast*'s narrow exception to the general rule against taxpayer standing." *Winn*, 131 S. Ct. at 1440.

[13] It may be the case, as a prominent law journal suggests, that the Supreme Court will further restrict taxpayer standing in Establishment Clause cases at the next opportunity, or abolish it altogether (as Justice Scalia advocates). *See The Supreme Court, 2010 Term – Leading Cases*, 125 Harv. L. Rev. 172, 181-182 (2011). This court, however, does not have the freedom to blaze predictive trails. In the absence of any clear direction from higher authority, it must apply the law as the Supreme Court presently declares it to be.

expiration of the HHS-USCCB contract on October 10, 2011.[14] Both the ACLU and the USCCB disagree with this contention. "The doctrine of mootness enforces the mandate 'that an actual controversy must be extant at all stages of the review, not merely at the time the complaint is filed.'" *Mangual v. Rotger-Sabat*, 317 F.3d 45, 60 (1st Cir. 2003), quoting *Steffel v. Thompson*, 415 U.S. 452, 460 n.10 (1974). A case is moot when a court cannot give "'any effectual relief whatever'" to the potentially prevailing party. *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992), quoting *Mills v. Green*, 159 U.S. 651, 653 (1895). The distinction between standing and mootness is not always easily grasped. "The confusion is understandable, given [the Supreme Court's] repeated statements that the doctrine of mootness can be described as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal quotation marks omitted). *See*

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[14] Although the HHS-USCCB contract and Task Order have expired, HHS is authorized to pay the USCCB for activities performed under the Task Order with federal taxpayer funds. *See* Timmerman Decl. ¶ 11 ("USCCB may submit invoices for services provided within the period of performance for the Task Order. On the basis of those invoices, HHS can pay for services rendered with the funds obligated under the Task Order."). At the hearing on October 18, 2011, counsel for the government defendants confirmed that "USCCB may still submit further invoices or have certain intellectual property transferred back to the federal government . . . ." Oct. 18, 2011 Hr'g Tr. at 24.

also Becker v. Fed. Election Comm'n, 230 F.3d 381, 387 n.3 (1st Cir. 2000) ("[W]hile it is true that a plaintiff must have a personal interest at stake throughout the litigation of a case, such interest is to be assessed under the rubric of standing at the commencement of the case, and under the rubric of mootness thereafter.").

"The burden of establishing mootness rests squarely on the party raising it, and '[t]he burden is a heavy one.'" *Mangual*, 317 F.3d at 60, quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). "Mere voluntary cessation of allegedly illegal conduct does not moot a case . . . . A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Exp. Ass'n.*, 393 U.S. 199, 203 (1968). *See also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice."); *Conservation Law Found. v. Evans*, 360 F.3d 21, 26-27 (1st Cir. 2004) (noting that the government defendant's "voluntary cessation of the challenged conduct does not render the challenge moot" where the government defendant has not shown that the challenged action "will not recur.").

Here, the government defendants have failed to meet their "heavy" burden of demonstrating that it is "absolutely clear" that the circumstances giving rise to this case

will not recur. Indeed, the USCCB states that it

> will continue to seek opportunities to collaborate with the government to provide [social] services if, but only if, it can do so without violating its moral and religious obligations not to facilitate the provision of abortion and contraception. The government's filings give no indication that HHS has decided to reject such conscience protections in future contract and grant applications under the TVPA, and, even if such a decision were made, policies (and administrations) can change. Moreover, although the particular case management contract involved in this litigation has expired, [the] USCCB currently has under other programs similar arrangements with HHS that contain the same exclusion of abortion and contraception purposes.[15]

USCCB's Supplemental Mem. at 4. There is simply no "absolute" assurance that the challenged action will not be repeated. Only two bidders (the USCCB and the Salvation Army) qualified for the original TVPA contract, which strongly suggests that the USCCB (or another faith-based organization with similar tenets) will be among the small number of qualified candidates vying for future TVPA contracts.[16] As the ACLU

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[15] "For example, HHS's Office of Refugee Resettlement administers a federal grant program to provide long-term foster care placements, transitional foster care services and related follow up services to unaccompanied undocumented children who have been apprehended and are in federal custody. USCCB has recently received grants under this program under terms that accept that USCCB will not participate in funding abortion or contraception services. USCCB's Migration and Refugee Services operation participates in several other similar programs. *See* http://nccbuscc.org/mrs/funding-sources.shtml. In all of them, USCCB has insisted on a conscience provision that stipulates that USCCB will not provide or fund abortion or contraception services." USCCB's Supplemental Mem. at 4 & n.1.

[16] Congress has not indicated that it will not continue funding the TVPA.

notes, the USCCB

> has a long history of being awarded numerous government contracts. In fiscal year 2009 alone, for example, [the] USCCB received over $29 million in federal grants and contracts. And [the] USCCB has admitted that in all subcontract agreements – with both Catholic and non-Catholic entities – it imposes the same restriction on the use of abortion and contraceptive referrals and services. . . . Thus, ACLU members who object to their tax dollars being used to promote religion are likely to be subjected to the same injury again.

Pl.'s Opp'n at 11-12; *see also* Gov. Defs.' Resp. to Pl.'s SOF ¶ 77.[17]

There is a second reason why the case is not moot: the ACLU is seeking, among other forms of relief, a declaratory judgment. *See* Compl. at 12. "The fact that there is no present ongoing dispute . . . does not, of course, mean the case is moot. . . . '[A]

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[17] The government defendants argue that the voluntary cessation exception to the mootness doctrine does not apply because "HHS did not voluntarily terminate the contract;" rather, "[t]he contract expired due to the operation of law – HHS had no further options to renew the contract or extend the life of task orders under the contract." Gov. Defs.' Opp'n to USCCB's Supplemental Mem. at 6. While this is true, HHS could have awarded the new TVPA contract to the USCCB. It chose instead to divide the TVPA funds among three other organizations. *See* USCCB's Supplemental Mem. at 5-6. The record does not disclose whether the USCCB's abortion/contraception restriction was a determinative factor in HHS's decision not to award a new contract to the USCCB. The decision may well have been a political one that a successor administration with a different view of the issue could easily reverse. In any event, one effect of awarding the TVPA grants to other organizations is that HHS has (at least for the time being) voluntarily ceased its challenged endorsement of the USCCB's religiously motivated abortion/contraceptives restriction. However, the USCCB has emphatically stated that it "is not going away and . . . it is very likely to seek funding in the future under terms that include the conscience protections concerning abortion and contraception services that ACLU has challenged in this case." *Id.* at 6.

federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunctions.'" *Verizon New England, Inc. v. Int'l Bhd. of Elec. Workers*, 651 F.3d 176, 187, 189 (1st Cir. 2011), quoting *Zwickler v. Koota*, 389 U.S. 241, 254 (1967).[18]

II. The Establishment Clause Challenge

Turning to the merits, the ACLU argues that "by authorizing [the] USCCB to impose a religiously based prohibition on the use of TVPA funds, Defendants impermissibly endorsed and advanced religious beliefs, and fostered an excessive entanglement with religion, in violation of the Establishment Clause of the First Amendment to the U.S. Constitution." Pl.'s Opp'n at 1. The Supreme Court has stated that

> [t]he "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a

[18] The government defendants argue that a request for declaratory relief cannot sustain this case. In support of this argument, they cite *Golden v. Zwickler*, 394 U.S. 103 (1969), in which the Supreme Court concluded that no case or controversy of "sufficient immediacy and reality" allowed for a declaratory judgment where it was "most unlikely" that the plaintiff would ever again be subject to the statute at issue. *Id.* at 109. *See also Knight v. Mills*, 836 F.2d 659, 671 (1st Cir. 1987) (concluding that plaintiff's request for declaratory relief was moot where the record did not demonstrate "a reasonable expectation that the feared violation will recur."). Here, in contrast to *Zwickler* and *Knight*, it is not at all improbable that the challenged government action will recur.

> church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 15-16 (1947) (citation omitted).

To determine whether a government action runs afoul of the Establishment Clause,

> the Supreme Court has articulated three interrelated analytical approaches: the three-prong analysis set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971); the "endorsement" analysis, first articulated by Justice O'Connor in her concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984), and applied by a majority of the Court in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); and the "coercion" analysis of *Lee v. Weisman*, 505 U.S. 577, 587 (1992).[19]

Freedom From Religion Found. v. Hanover Sch. Dist., 626 F.3d 1, 7 (1st Cir. 2010).

The first of these analytical approaches – the *Lemon* test – encompasses three criteria that the government must meet if its actions are to be deemed religiously neutral.

> First, the statute must have a secular legislative purpose; second, its

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[19] The coercion analysis does not apply here, as the ACLU does not argue that the government defendants have coerced support of or participation in a particular religion.

> principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."

Lemon, 403 U.S. at 612-613 (citations omitted).[20] The ACLU argues that by authorizing the USCCB to impose a religiously based restriction on the use of TVPA funds, defendants have violated the second and third prongs of the *Lemon* test.

"Under the related endorsement analysis, courts must consider whether the challenged governmental action has the purpose or effect of endorsing, favoring, or promoting religion."[21] *Hanover Sch. Dist.*, 626 F.3d at 10. "[T]he prohibition against

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[20] In *Agostini v. Felton*, 521 U.S. 203 (1997), the Supreme Court treated the excessive entanglement inquiry as part of the effects prong, rather than as a separate prong. *Id.* at 232-233. The First Circuit recently noted that "[a]lthough the *Lemon* analysis has been often criticized, including by members of the Supreme Court, the Court has never expressly rejected it in cases such as this, and we have continued to apply it in the First Circuit. The *Lemon* factors have, in the years since their first use in 1971, been described as 'no more than helpful sign posts.'" *Hanover Sch. Dist.*, 626 F.3d at 9 n.16 (citations omitted).

[21] Defendants define "the challenged government action" in this case variably: at times they frame it as the entire contract between HHS and the USCCB, *see, e.g.*, Gov. Defs.' Mem. at 10, while at other times they focus on the enactment of the TVPA, *see id.* at 12. However, the ACLU does not claim that the enactment of the TVPA or the HHS-USCCB contract in its entirety violates the Establishment Clause. Rather, the ACLU challenges only the government's authorization of the religiously based restriction on the use of TVPA funds. For purposes of the endorsement analysis, the court will define the challenged government action as plaintiff ACLU has. At the hearing on October 18, 2011, counsel for the government defendants agreed with the court's statement that "under an endorsement test, I think all we look at is the government action, not the statute or the statutory purposes as a whole." Oct. 18, 2011 Hr'g Tr. at 14. *See Cnty. of Allegheny*, 492 U.S. at 592 (holding that the display of a

governmental endorsement of religion 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*.'" *Cnty. of Allegheny*, 492 U.S. at 593 (citation omitted). To determine whether the government has endorsed or advanced a particular religious belief, the relevant inquiry is "'whether an objective observer, acquainted with the text, legislative history, and implementation of the statute [or other challenged government action], would perceive it as a state endorsement . . . .'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000), quoting *Wallace v. Jaffree*, 472 U.S. 38, 73 (1985) (O'Connor, J., concurring).[22]

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crèche in a county courthouse violated the Establishment Clause and stating that "[i]n recent years, we have paid particularly close attention to whether the *challenged governmental practice* either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence.") (emphasis added); *Hanover Sch. Dist.*, 626 F.3d at 10 (stating that under the "endorsement analysis, courts must consider whether the *challenged governmental action* has the purpose or effect of endorsing, favoring, or promoting religion.") (emphasis added).

[22] The government defendants state that "the endorsement test is most commonly applied in the context of religious displays and religious expression," and that "no Supreme Court majority opinion has applied the endorsement test to a funding case." Gov. Defs.' Reply at 4. However, defendants cite no authority that explicitly limits the applicability of the endorsement test to cases involving religious displays and expression, and there is no reason to assume that the endorsement analysis would not be equally applicable here. There are cases outside of the religious display context in which the endorsement test has been at least implicitly applied. *See, e.g.*, *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 305 (holding that a school's policy of allowing student-led "invocations" prior to football games "involve[d] both perceived and actual

A. Endorsement

The ACLU argues that to an objective observer, the government defendants would appear to have endorsed a Catholic belief by permitting the USCCB to place a religiously motivated restriction on reproductive services that beneficiaries of the TVPA program would otherwise have received. In support of this argument, the ACLU cites *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708-711 (1985), which held that a Connecticut statute that provided Sabbath observers with a right not to work on their day of worship violated the Establishment Clause because it imposed on employers and employees an absolute duty to conform their business practices to the particular religious observances of an employee. *See also id.* at 711 (O'Connor, J., concurring) (finding that the Connecticut statute "conveys a message of endorsement of the Sabbath observance," and that "an objective observer or the public at large would perceive this statutory scheme . . . . [as] one of endorsement of a particular religious belief, to the detriment of those who do not share it.").

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endorsement of religion."); *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 431 (2d Cir. 2002) (finding kosher food statutes unconstitutional where they "produce an *actual* joint exercise of governmental and religious authority," which is "prohibited by the Establishment Clause because of the danger that the government's action will be 'perceived by [some] as an endorsement of their religious choices, or by [others] as a disapproval of their own.'"); *Foremaster v. City of St. George*, 882 F.2d 1485, 1489 (10th Cir. 1989) (concluding that "the Constitution required the City to terminate the electric subsidy" to a local Mormon temple because the subsidy "conveyed a message of City support for the [Mormon] faith.").

The USCCB, for its part, argues that the government's acceptance of the abortion/contraception restriction is an accommodation of religious belief and not an endorsement of a sectarian view. In support of this argument, the USCCB cites case law holding that an accommodation of religion is not equivalent to an endorsement of religious belief. *See, e.g.*, *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987) (applying rational basis analysis to test the constitutionality of a statute exempting secular nonprofit activities of religious organizations from the requirements of Title VII). However, as counsel for the USCCB stated at oral argument, HHS's authorization of the abortion/contraception restriction is "strictly speaking, not an accommodation because the TVPA does not require the provision of abortion or contraceptive services. It permits it, but it doesn't require it. So the government, by accepting the conscience clause in this case, did not relieve [the] USCCB of a legal obligation." Oct. 18, 2011 Hr'g Tr. at 39.

Even if viewed as an accommodation of the USCCB's religious beliefs, the government's authorization of the abortion/contraception restriction would not necessarily pass constitutional muster. In *Amos*, the Supreme Court noted that "[a]t some point, accommodation may devolve into 'an unlawful fostering of religion . . . .'" 483 U.S. at 334-335, quoting *Hobbie v. Unemp't Appeals Comm'n of Florida*, 480 U.S. 136, 145 (1987). The Supreme Court reiterated the limited nature of permissible

religious accommodations in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994):

> accommodation is not a principle without limits, and what petitioners seek is an adjustment to the Satmars' religiously grounded preferences that our cases do not countenance. Prior decisions have allowed religious communities and institutions to pursue their own interests free from governmental interference, but we have never hinted that an otherwise unconstitutional delegation of political power to a religious group could be saved as a religious accommodation. Petitioners' proposed accommodation singles out a particular religious sect for special treatment, and whatever the limits of permissible legislative accommodations may be, it is clear that neutrality as among religions must be honored.

Id. at 706-707 (internal citations omitted).

Beliefs about the morality of abortion and the use of contraceptives need not be based on a religious viewpoint. But here there is no reason to question the sincerity of the USCCB's position that the restriction it imposed on its subcontractors on the use of TVPA funds for abortion and contraceptive services was motivated by deeply held religious beliefs.[23] In this respect, the present case is distinguishable from those relied

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[23] As discussed previously, the USCCB's Technical Proposal and Amended Technical Proposal (which were both incorporated into the final contract between HHS and the USCCB) stated, "*as we are a Catholic organization*, we need to ensure that our victim services are not used to refer or fund activities that would be contrary to our moral convictions and religious beliefs. Therefore, we would explain to potential subcontractors our disclaimer of the parameters within which we can work. Specifically, subcontractors could not provide or refer for abortion services or contraceptive materials for our clients pursuant to this contract." *See* USCCB's Resp. to Pl.'s SOF ¶¶ 28, 46 (emphasis added); USCCB's Supplemental Mem. at 2 (citing

upon by the government defendants – *Bowen v. Kendrick*, *Harris v. McCrae*, and *McGowan v. Maryland* – all of which involved challenges to government actions that coincided with religious beliefs, but were not found to be explicitly motivated by the beliefs of a particular religious group. *See Bowen v. Kendrick*, 487 U.S. 589, 605 (1988) (upholding the eligibility of religious groups to receive funding under the Adolescent Family Life Act (AFLA), reasoning that AFLA's "approach is not inherently religious, although it may coincide with the approach taken by certain religions."); *Harris v. McCrae*, 448 U.S. 297, 319 (1980) (rejecting an Establishment Clause challenge to the Hyde Amendment, which limits federal funding for abortion, reasoning that "[t]he Hyde Amendment . . . is as much a reflection of 'traditionalist' values towards abortion, as it is an embodiment of the views of any particular religion."); *McGowan v. Maryland*, 366 U.S. 420, 444 (1961) (upholding Maryland's Sunday closing laws against an Establishment Clause challenge, reasoning that "[i]n light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather

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the USCCB's "moral and religious objections to facilitating abortion or contraception"); Gov. Defs.' Mem. at 1-2 (acknowledging that "the funding restriction on abortion services and contraceptive materials was proposed by [the] USCCB for religious reasons . . . .").

than of a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States.").

This case is also distinguishable from *Hanover School District*, in which the First Circuit held that the New Hampshire School Patriot [Pledge of Allegiance] Act did not violate the Establishment Clause. In its analysis, the First Circuit emphasized the voluntary nature of the Pledge of Allegiance ceremony, under which "both the choice to engage in the recitation of the Pledge and the choice not to do so are entirely voluntary." *Hanover Sch. Dist.*, 626 F.3d at 11. Here, by contrast, the restriction on the use of TVPA funds for abortion services and contraceptive materials is not a subject of truly voluntary participation; subcontracting organizations and trafficking victims cannot "opt out" of the restriction without shouldering the financial burden of doing so.[24]

B. Delegation of Authority

The ACLU further argues that by impermissibly delegating discretion to the

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[24] The government defendants note that despite the restriction, "subcontractors may use their own funding to provide abortion and contraceptive services." Gov. Defs.' Reply at 5. The pertinent issue, however, is not the allocation of financial burdens among the service providers; rather, it is whether the shifting of costs based on religious dogma violates the Establishment Clause when taxpayer money is involved.

USCCB to decide which services would be offered under the TVPA, and which would not, the government defendants violated their constitutional obligations under the second and third prongs of the *Lemon* test.[25] In support of this argument, the ACLU cites *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), which held that a Massachusetts statute that vested in the governing bodies of schools and churches the power to block the issuance of liquor licenses for establishments within a 500-foot radius of the church or the school could "be seen as having a 'primary' and 'principal' effect of advancing religion," and "enmeshe[d] churches in the exercise of substantial governmental powers contrary to our consistent interpretation of the Establishment Clause . . . ." *Id.* at 126. In reaching this conclusion, the Supreme Court reasoned that the "Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions." *Id.* at 127. *See Kiryas Joel*, 512 U.S. at 696; *see also Commack Self-Serv. Kosher Meats*, 294 F.3d at 430 (holding that the challenged kosher food statutes "fail the second prong of the *Lemon* test . . . . because they (1) have a primary effect that both advances religion, by preferring the dietary restrictions of Orthodox Judaism over those of other

[25] Under the TVPA, and pursuant to the statutory authority for the RFP, 8 U.S.C. § 1522(c)(1)(A), the government defendants are charged with providing services to individuals trafficked into the United States. *See* Pl.'s SOF ¶¶ 20-21; USCCB's Resp. to Pl.'s SOF ¶¶ 20-21.

branches, and inhibits religion, by effectively prohibiting other branches from using the kosher label in accordance with their religious beliefs, and (2) create an impermissible joint exercise of religious and civic authority that advances religion."); *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1345 (4th Cir. 1995) (stating that under the second prong of the *Lemon* test, the relevant question "is not the subjective intent of the [governmental body] in enacting the [challenged action], but whether the objective effect of [the challenged action] is to suggest government preference for a particular religious view or for religion in general"; and finding that "[a]lthough the City has not expressly endorsed Orthodox Judaism or encouraged its practice by passing the [kosher food consumer fraud municipal] ordinance, the incorporation of the Orthodox standard creates an impermissible symbolic union of church and state.").

Here, as in *Grendel's Den, Kiryas Joel, Commack,* and *Barghout*, the government defendants' delegation of authority to the USCCB to exclude certain services from government funding "provides a significant symbolic benefit to religion," in violation of the Establishment Clause. *See Grendel's Den*, 459 U.S. at 125-126. This conclusion is buttressed by the fact that the government defendants' authorization of the abortion/contraception funding restriction represents a deviation from their ordinary practices. In *Kiryas Joel*, the Supreme Court held unconstitutional a New

York state statute that "ran counter to customary [school] districting practices in the State" and "delegat[ed] the State's discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally." 512 U.S. at 696, 700.

The government defendants attempt to distinguish *Kiryas Joel* from the present case with the conclusory statement that here, "HHS evaluated [the] USCCB's proposal in response to the RFP using 'customary and neutral principles' without any religious motivation." Gov. Defs.' Reply at 4 n.2, quoting *Kiryas Joel*, 512 U.S. at 702. This may have been true at the outset. However, during the bidding process, the USCCB made clear its intention to distribute the TVPA funds in a manner it deemed consistent with Catholic beliefs. HHS's ultimate delegation to the USCCB of the discretion to prohibit the use of TVPA funds for abortion services and contraceptive materials was neither customary nor neutral. It is not a matter of dispute that prior to awarding the TVPA contract to the USCCB, the government defendants "did not impose any prohibition on the use of TVPA funds for abortion or contraception referrals, or contraceptive services." Pl.'s SOF ¶ 17; Gov. Defs.' Resp. to Pl.'s SOF ¶ 17. Moreover, the government defendants now take the position that "HHS no longer intends to assist human trafficking victims through a single, nationwide contract;

instead funding is provided through multiple grant awards that *give strong preference to organizations that will make referrals for the full range of legally permissible obstetrical and gynecological services, including abortion and contraception.*" Gov. Defs.' Opp'n to USCCB's Supplemental Mem. at 7-8 (emphasis added).

As I stated in my March 22, 2010 Memorandum and Order, "I have no present allegiance to either side of the debate, only a firm conviction that the Establishment Clause is a vital part of the constitutional arrangement envisioned by the Framers, and perhaps a reason we have not been as riven by sectarian disputes as have many other societies." Mar. 22, 2010 Mem. & Order at 21. That conviction remains unshaken. To insist that the government respect the separation of church and state is not to discriminate against religion; indeed, it promotes a respect for religion by refusing to single out any creed for official favor at the expense of all others. *See Kiryas Joel*, 512 U.S. at 696 ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents.") (internal quotations omitted); *Cnty. of Allegheny*, 492 U.S. at 610 ("The government does not discriminate against any citizen on the basis of the citizen's religious faith if the government is secular in its functions and operations. On the contrary, the Constitution mandates that the government remain secular, rather than

affiliate itself with religious beliefs or institutions, precisely in order to avoid discriminating among citizens on the basis of their religious faiths.").[26]

ORDER

For the foregoing reasons, the ACLU's motion for summary judgment is ALLOWED. It is therefore ADJUDGED and DECLARED that the government defendants violated the Establishment Clause of the First Amendment to the United States Constitution, insofar as they delegated authority to a religious organization to impose religiously based restrictions on the expenditure of taxpayer funds, and thereby impliedly endorsed the religious beliefs of the USCCB and the Catholic Church. The government defendants' motion for summary judgment is DENIED. The USCCB's motion to dismiss and motion for summary are DENIED.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE

[26] Let me add one final note. This case is not about government forcing a religious institution to act contrary to its most fundamental beliefs. No one is arguing that the USCCB can be mandated by government to provide abortion or contraceptive services or be discriminated against for its refusal to do so. Rather, this case is about the limits of the government's ability to delegate to a religious institution the right to use taxpayer money to impose its beliefs on others (who may or may not share them).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

American Civil Liberties Union of Massachusetts,
Plaintiff(s),

V. CIVIL ACTION NO. 1:09cv10038 RGS

Kathleen Sebelius, et al.,
Defendant(s).

JUDGMENT

STEARNS, DJ. March 23, 2012

In accordance with Court's Memorandum and Order entered on March 23, 2012 it is hereby ordered, the ACLU's motion for summary judgment is ALLOWED. It is therefore ADJUDGED and DECLARED that the government defendants violated the Establishment Clause of the First Amendment to the United States Constitution, insofar as they delegated authority to a religious organization to impose religiously based restrictions on the expenditure of taxpayer funds, and thereby impliedly endorsed the religious beliefs of the USCCB and the Catholic Church. The government defendants' motion for summary judgment is DENIED. The USCCB's motion to dismiss and motion for summary judgment are DENIED. It is hereby ordered that the above-entitled action be CLOSED.

SO ORDERED.

RICHARD G. STEARNS
UNITED STATES DISTRICT JUDGE

BY: /s/ Terri Scelfo
Deputy Clerk