No. 12-1466

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS
Plaintiff-Appellee,

v.
UNITED STATES CONFERENCE OF CATHOLIC BISHOPS
Defendant-Appellant

and

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

Appeal from the United States District Court for the District of Massachusetts in Civil Action No. 09-10038-RGS

BRIEF FOR APPELLANT UNITED STATES CONFERENCE OF CATHOLIC BISHOPS

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AUGUST 16, 2012

CORPORATE DISCLOSURE STATEMENT OF THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellant the United States Conference of Catholic Bishops ("USCCB") hereby files this corporate disclosure statement, and discloses the following:

USCCB has no parent company and no publicly-held company owns any percentage of USCCB.

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Jurisdictional Statement

Plaintiff, American Civil Liberties Union of Massachusetts ("ACLU"), alleged subject matter jurisdiction over its claim under 28 U.S.C. §1331. Defendants (collectively "HHS" or the "government") and defendant-intervenor, United States Conference of Catholic Bishops ("USCCB"), challenged ACLU's standing under Article III. The District Court's ruling that ACLU had standing to sue is one of the issues on appeal.

The District Court entered final judgment disposing of all claims on March 23, 2012 and USCCB filed a timely notice of appeal on April 17, 2012. 28 U.S.C. §1291 gives this Court jurisdiction over this appeal.

Statement of Issues

1. Whether ACLU had standing under Article III to assert the interests of its members as federal taxpayers, where no federal funds were appropriated for or spent on any religious activity.

2. Whether HHS violated the Establishment Clause by awarding to USCCB a case management contract to oversee federal reimbursement to providers of services to victims of human trafficking, notwithstanding USCCB's unwillingness on moral and religious grounds to participate in the reimbursement for abortion or contraception services, where (i) the statute authorizing the expenditure of funds for such services to trafficking victims

did not mandate the funding of abortion or contraception, and (ii) HHS did not select USCCB because of USCCB's position on abortion or contraception but rather because HHS determined on the basis of objective and religion-neutral criteria that awarding the contract to USCCB best advanced the secular goals of the relevant legislative scheme.

Statement of the Case

In January 2009, ACLU brought this action seeking a declaration that the government's decision to award a case management contract to USCCB on terms that accepted USCCB's unwillingness to participate in the funding of abortion or contraception services violated the First Amendment's Establishment Clause. ACLU predicated its standing to sue solely on the status of its members as federal taxpayers. The government moved to dismiss, arguing that ACLU lacked Article III standing. The District Court denied the motion to dismiss on March 22, 2010.

USCCB later intervened as a defendant. After discovery, all parties moved for summary judgment, and USCCB moved to dismiss for lack of standing based on *Arizona Christian School Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011), an Establishment Clause standing case decided after the denial of the government's earlier motion to dismiss. On March 23, 2012, the District Court denied USCCB's motion to dismiss, denied the defendants'

motions for summary judgment, and granted ACLU's motion for summary judgment. USCCB filed a timely notice of appeal on April 20, 2012, and the government followed suit on May 24, 2012.

Statement of Facts

USCCB supports the activities of the Roman Catholic bishops of the United States and the many ministries of the Catholic Church in this country. For nearly a century, USCCB has provided, managed and supervised extensive resettlement and social services to refugees and other recent immigrants. [*See* Joint Appendix 1551 (Hereinafter "JA___)]. Since 1975, USCCB's Office of Migration and Refugee Services ("MRS") has resettled more than 800,000 refugees to the United States, and is today the largest refugee resettlement agency in the world. [JA1670]

In 2000, Congress enacted the Trafficking Victims Protection Act ("TVPA"), 22 U.S.C. §§7101-7112, "to ensure just and effective punishment of traffickers, and to protect their victims," 22 U.S.C. §7101(a). Among other things, the TVPA created new law enforcement tools to facilitate the prosecution of traffickers, 22 U.S.C. §7109, made non-citizen trafficking victims eligible for temporary visas, 22 U.S.C. § 7105, and made all victims of severe forms of human trafficking eligible for benefits and services funded by the TVPA itself, 22 U.S.C. §7105(b)(1)(B). Neither the text of

the TVPA nor any regulations thereunder identify any particular "benefits or services" that HHS must provide to trafficking victims under the Act, and make no reference at all to abortion or contraception. [*See* JA159] (noting that TVPA leaves such matters "to the discretion of the Secretary" of Health and Human Services); *see also* 22 U.S.C. §7105(b)(1)(B); [JA0633]

TVPA was never meant to be the sole or even the primary source of funding for social services for trafficking victims. [JA0634] Annual appropriations for benefits and services under the TVPA have never exceeded $15 million. It is undisputed that these amounts have always fallen far short of the amounts required to meet the basic human needs of trafficking victims for housing, food, shelter, legal assistance, job training and the like, whether or not such needs are deemed to include abortion or contraception services. [JA0647] By appropriating such relatively modest sums, Congress clearly expected that TVPA funding would supplement existing federal, state, and private resources. [JA0960] *See* 22 U.S.C. §7105(b)(1)(B) (federal funding intended to "expand" services available to trafficking victims).

To carry out the congressional mandate, HHS did not undertake to reinvent the social services wheel, but instead explored mechanisms for making federal funding available through private, non-profit organizations

that provided services for trafficking victims and other recent immigrants. Initially, HHS funded grants to such organizations. [JA0958-JA0959] This proved inefficient because it did not permit the quick reallocation of resources to locations where law enforcement officials might find trafficking victims. [*Id.*]

In 2005, HHS adopted a different model under which it proposed to reimburse service organizations with other independent sources of funding for certain services they might provide to eligible trafficking victims. [JA0959-960; JA0634-JA0635] In 2005, HHS issued a request for proposals ("RFP") from national organizations willing to serve as case manager under a contract with HHS. The RFP specified that the contractor would subcontract with private charitable organizations to provide services to trafficking victims, and furnish case management and reimbursement services to the subcontractors. [JA0959-960; JA0634-JA0636] HHS would provide limited federal funding to reimburse subcontractors for the provision of direct services, including: "housing, legal services … , health screening and medical care, mental health screening and therapy, and other forms of counseling," as well as "food, public transportation passes, translation services, and clothing." [JA0960]

USCCB, through MRS, already worked with an extensive national network of local organizations that provided social services to refugees, including trafficking victims, and it viewed the RFP as an opportunity to expand the range and volume of services that it could provide. USCCB submitted a proposal, as did another national, religious organization. [JA0960]. In its proposal, USCCB added:

> [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, sub-contractors could not provide or refer [victims] for abortion services or contraceptive materials . . . .

[JA0961-JA0962] Throughout the RFP process and this litigation, USCCB has taken the consistent position that it bases its objections to abortion and contraception on *both* moral *and* religious considerations, as stated in its response to the RFP. Its moral objections are accessible (even if not always persuasive) to people of any faith or no faith, and are reinforced by specifically Catholic religious beliefs. [JA220, JA604] ACLU proffered no evidence to challenge the accuracy or sincerity of this position.

HHS undertook an elaborate and comprehensive evaluation of the proposals it received, including review by a panel of seasoned HHS staff and

an outside contractor with relevant experience. [JA0637; JA0962] Some of these reviewers expressed reservations about the USCCB's unwillingness to reimburse subcontractors for providing abortion and contraception services. [JA0963; JA0640-JA0641] None of the reviewers expressed support for USCCB's position in this regard or identified it as a reason to accept the USCCB's proposal. [JA0640-JA0641] Indeed, HHS tried to persuade USCCB to be more flexible, asking USCCB whether a "don't ask, don't tell" approach would satisfy USCCB's moral and religious concerns. [JA0964; JA0641]

USCCB clarified that it would be willing to subcontract with any capable organization so long as the organization agreed not to seek reimbursement *under its subcontract* for providing abortion or contraception services. [JA0642] Thus, USCCB agreed that organizations that might provide abortion or contraception services using other funding sources could participate as subcontractors under the TVPA program and obtain reimbursement through USCCB for other appropriate services for trafficking victims. [*Id.*] USCCB's only condition in its response to HHS's inquiries was that USCCB would not itself participate in reimbursing organizations for abortion or contraception services with funds under the TVPA program, just as it did not use its own resources to fund such services.

Even though the reviewers counted USCCB's conditions against its proposal, they concluded that USCCB's proposal better advanced the overall goals of the TVPA program than the competing proposal. [JA0642-JA0643] They determined that USCCB would do a better job of managing subcontractors, providing them with clear guidance in the provision of services, processing reimbursement claims, reporting to HHS, and carrying out the many other requirements of the TVPA program. [JA0638-JA0639] It based this judgment on a careful assessment of USCCB's organizational capabilities, its extensive experience in the area, and its submission of a superior implementation plan. [JA0639-JA0640] HHS determined "that USCCB is the best value for the Government, offering the highest scored proposal at the lowest evaluated price." [JA0968] There was no dispute below that HHS awarded the contract to USCCB because of these considerations, and did so *in spite of* and not *because of* USCCB's position on abortion and contraception funding.

The contract gave ample opportunity for HHS to monitor USCCB's performance. HHS and USCCB participated in a weekly conference call. USCCB provided monthly written reports concerning activities under the contract, and HHS visited USCCB's offices. [JA0972; JA0645]

For the six years in which the contract remained in force, USCCB reimbursed a large number of non-profit organizations — the majority of which were not Catholic organizations — for services provided to trafficking victims. [JA0969-JA0971] HHS largely achieved the efficiencies it sought. Before the case management contract between HHS and USCCB was implemented, the TVPA program assisted only 711 victims at a cost of $17,000,000. [JA0959] Within the first four years of the contract, contractors overseen by USCCB served approximately 2,254 trafficking victims at a cost of $10,000,000. [JA0971-JA0972]

It was undisputed that no portion of the TVPA funds distributed by USCCB was spent on religious services, religious instruction, or any other religious purpose. [JA0648] TVPA funds were used only for the delivery of secular social services to trafficking victims and related administrative expenses. There was no evidence whatever that any trafficking victim who sought contraceptives or an abortion was prevented from obtaining them because of USCCB's unwillingness to participate in reimbursing for such services. The USCCB did not in any way restrict which trafficking victims could be served under the program based on whether the victim sought contraception or abortion services. Similarly, there was no evidence that

any contractor or service provider has been prevented from providing such services to trafficking victims using other resources. [JA0648]

Although the specific contract involved in this litigation has expired, USCCB collaborates on many programs with HHS and other federal agencies in programs involving immigrants and refugees. [JA1663, JA1670] For example, USCCB has received grants from HHS to provide foster care placements, transitional foster care and other social services to undocumented unaccompanied minors taken into federal custody, and USCCB works extensively with the State Department in refugee settlement programs. [JA1663-JA16651, JA1670-JA1674] In all of these programs, the federal government has accepted and accommodated USCCB's unwillingness to participate in abortion or contraception funding in connection with the provision of desperately needed services to refugees who arrive in this country friendless and destitute. [JA1551, JA1663, JA1670-1674]

Introduction and Summary of Argument

Federal and state governments often collaborate with religious organizations to meet the needs of the most vulnerable members of the human family. As in this case, the government typically chooses to collaborate with religious organizations that have the most skill and

experience in providing particular social services because those organizations will best advance the government's goals. In some cases, the government makes accommodations to allow such religious collaborators to participate without violating their moral and religious commitments.

Here, HHS retained USCCB, which coordinates the largest single network of agencies providing social services to refugees in the country, to manage the TVPA's funding program for trafficking victims and to distribute federal funds to reimburse the providers of services to trafficking victims. USCCB agreed to this arrangement only if it could avoid participating in the provision of certain particular services to which it objected on moral and religious grounds. The government reasonably concluded that it would best serve the needs of trafficking victims to select USCCB because USCCB's proposal was objectively the best proposal overall, despite the limitation on abortion and contraception funding. As demonstrated below, extending to the government sufficient latitude to make decisions of this nature serves the greater good and is entirely consistent with the government's obligations under the Establishment Clause.

The District Court ruled, however, that if the federal government accommodates the moral and religious commitments of the organization found best able to advance the overall goals of the TVPA in collaboration

with the government, then the government "establishes" religion in violation of the First Amendment, and that ACLU's members, as taxpayers, have standing to challenge that accommodation. The District Court erred on both points.

First, the District Court erred in holding that ACLU, as a representative of its taxpayer-members, has Article III standing to challenge the HHS contract with the USCCB. Federal taxpayers in general lack the particularized remediable injury needed for standing to challenge federal law or executive action. While *Flast v. Cohen*, 392 U.S. 83 (1968), recognized a "narrow exception" to this principle where the federal government exercises power under the Spending Clause "in aid of religion," that exception applies only when Congress directs that federal funds be used to pay for religious worship or indoctrination, and the funds are actually used for such purposes. The rationale for this exception is that the Establishment Clause protects the conscience rights of taxpayers not to contribute even tiny sums to support a church to which they do not belong or promulgate religious doctrines to which they do not adhere.

ACLU proved no impermissible appropriation or expenditure of federal funds. It conceded that every taxpayer dollar distributed by USCCB went to reimburse non-profit organizations for providing *secular* social

services to trafficking victims: food, shelter, medical and legal assistance, job training and the like. ACLU challenges only HHS's decision to accommodate the religious and moral principles of a federal contractor, an accommodation that neither required nor resulted in the expenditure of any federal funds "in aid of religion." The District Court cited no authority, and we are aware of none, recognizing federal taxpayer standing to challenge such an accommodation. The District Court should have dismissed ACLU's complaint for lack of subject matter jurisdiction.

On the merits, ACLU challenges only the decision of the government to forego the funding of abortion and contraception services with funds appropriated under the TVPA in order to obtain the superior case management services offered by the USCCB. *Harris v. McCrae*, 448 U.S. 297 (1980), makes clear that such a decision cannot be found to violate the Establishment Clause. Where, as here, the government has a secular rationale for refusing to pay for such services, the fact that that decision may coincide with some religious belief is immaterial. *Id.* at 319-20.

HHS selected the USCCB because HHS concluded, for reasons unrelated to religion, that USCCB submitted the best proposal. Even if HHS's decision is viewed as an "accommodation" of USCCB's principles, the law clearly permits the government to accommodate the religious beliefs

of persons and religious organizations, even to relieve them of obligations imposed by laws of otherwise general application, without violating the Establishment Clause. *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 336-38 (1987). Indeed, in the Religious Freedom Restoration Act, Congress has required the federal government to make such accommodations absent a "compelling" reason not to do so. 42 U.S.C. §2000bb-1. Only when the accommodation runs afoul of the principles of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and *Agostini v. Felton*, 521 U.S. 203 (1997), may it violate the Establishment Clause.

ACLU demonstrated no such violation here. It conceded, and the undisputed facts show, that HHS had no purpose of advancing religion when it selected the USCCB for the contract, even if in doing so it accommodated USCCB's moral and religious principles. Neither did this decision have the "primary effect" of "advancing religion." Rather, the primary effect of the government's decision was the selection of the most effective contractor to carry out the purely secular goal of efficiently managing the distribution of limited federal funds to organizations providing social services to trafficking victims. Nor did HHS's management of the contract with USCCB cause "excessive entanglement" between Church and State. HHS's decision not to

burden USCCB's deeply held convictions "effectuates a more complete separation of the two." *Amos*, 483 U.S. at 339.

The District Court nevertheless found an Establishment Clause violation on two theories: that HHS's selection of USCCB "endorsed" USCCB's religious beliefs, and that HHS impermissibly delegated "governmental powers" to a religious organization in violation of the principles set forth in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). Neither theory is correct.

Initially, the District Court ignored the principle that, as a matter of law, a government practice that meets the *Lemon/Agostini* standard, as the one challenged in this case does, cannot constitute an impermissible "endorsement" of religion. *Agostini*, 521 U.S. at 235. Beyond that, to establish an impermissible government endorsement of religion, the plaintiff must prove that an "objective observer" familiar with the relevant circumstances would conclude that the government has "endorsed" religious beliefs and conveyed the message that those who do not accept the endorsed beliefs are political "outsiders." *Freedom from Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1, 10-11 (1st Cir. 2010). ACLU made no such showing.

The only conclusion that reasonable, objective observers could draw, if they were familiar with the undisputed circumstances surrounding HHS's

decision to award the case management contract to USCCB, is that HHS made that decision *in spite of* USCCB's unwillingness to facilitate reimbursement for abortion or contraception services, and not *because of* that unwillingness. Its pragmatic decision to forego the provision of a narrow range of services — services that Congress itself never required — in order to better serve the overall goals of the statute cannot plausibly be viewed as an endorsement of any religious belief. This is particularly true where, as here, the views allegedly endorsed have a secular, as well as a religious, basis. *See Harris*, 448 U.S. at 319-20.

The District Court's ruling that the government improperly delegated governmental authority to USCCB fares no better. First, this case involves no exercise by USCCB of *governmental power*. *Larkin* and its progeny all involved the delegation of powers that only the government could exercise, such as the power to deny a liquor license in *Larkin*, or the power to govern a public school district, as in *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994). By contrast, nothing in its contract with HHS gave USCCB the power either to prohibit any trafficking victim from obtaining or any social service provider from furnishing abortion or contraception services. The government simply decided not to fund such services, a decision made to better further the overall goals of the TVPA.

The purely managerial tasks that USCCB performed under the contract are not exclusively *governmental* tasks; USCCB performed similar tasks in supporting private refugee programs long before its contract with HHS.

Second, HHS's contract with USCCB did not give unreviewable, standardless discretion to USCCB. The statute in *Larkin* gave churches unreviewable discretion to "veto" liquor licenses for stores and restaurants located within 500 feet of the church. The Court recognized that the state itself could prohibit the grant of such licenses without violating the Establishment Clause. The challenged law was unconstitutional not because it protected churches against the social ills associated with the sale of alcohol, but because it gave churches unreviewable discretion to veto some licenses but not others (*i.e.*, to favor applicants who belonged or contributed to the church).

Nothing comparable is present here. USCCB did not propose to decide for itself on a case-by-case basis whether to reimburse for abortion or contraception services. On the contrary, the government accepted USCCB's position that abortion and contraception services *categorically* would not be eligible for federal reimbursement under the contract. The government was free to make this decision under *Harris*, 448 U.S. at 319-20, without running afoul of the Establishment Clause.

Where, as here, it is conceded that the government's decision to forego reimbursement for abortion and contraception services was not made to advance any religion but rather to advance secular statutory goals, the fact that the decision accommodated a contractor's moral and religious beliefs does not make the decision an establishment of religion. If this Court reaches the merits, it should reverse the District Court's declaratory judgment.

Argument

I. Standard of Review

The District Court decided this case on cross-motions for summary judgment. All parties agreed that the relevant facts were not disputed and the case turned on questions of law. This Court reviews such legal questions *de novo*. *Gelabert-Ladenheim v. American Airlines, Inc.*, 252 F.3d 54, 58 (1st Cir. 2001). Questions of a plaintiff's Article III standing are also reviewed *de novo*. *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 46 (1st Cir. 2011); *Bingham v. Massachusetts*, 616 F.3d 1, 5 (1st Cir. 2010).

Moreover, ACLU as the plaintiff had the burden of proof on both issues raised on appeal. In the context of its motion for summary judgment, ACLU thus had the obligation to proffer evidence sufficient to establish both Article III standing and a violation of the Establishment Clause. *E.g.*,

Bingham, 616 F.3d at 5; *E.E.O.C. v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 55 (1st Cir. 2002); *Singh v. Blue Cross/Blue Shield of Massachusetts, Inc.*, 308 F.3d 25, 32 -33 (1st Cir. 2002).

II. ACLU lacked taxpayer standing to assert its Establishment Clause claim.

A. Basic principles of taxpayer standing.

Article III limits the subject matter jurisdiction of federal courts to the resolution of "cases" and "controversies." Central to this limitation is the requirement that plaintiffs establish their standing to sue by alleging and demonstrating that they have

> [first,] suffered an "injury in fact" — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations omitted). This showing is the "irreducible constitutional minimum," absent which a case must be dismissed for lack of jurisdiction. *Id.* at 560.

Federal courts have consistently held that federal taxpayers in general lack standing *as taxpayers* to challenge the constitutionality of actions taken by the federal government, even if the government spends taxpayer dollars in the process. The Supreme Court explained the rationale for this rule as follows:

> [A taxpayer's] interest in the moneys of the Treasury — partly realized from taxation and partly from other sources — is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

Massachusetts v. Mellon, 262 U.S. 447, 487 (1923). *Accord*, *Winn*, 131 S. Ct. at 1443. As the Supreme Court noted in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006), it is a matter of sheer conjecture whether a judicial ruling that an expenditure is unconstitutional will cause elected officials to take steps that will economically benefit any individual taxpayer/plaintiff. Accordingly, taxpayers generally cannot satisfy the constitutional standing requirement of a remediable injury-in-fact.

However, in *Flast v. Cohen*, 392 U.S. 83 (1968), the Court recognized a "narrow exception" to the general rule that applies only where two conditions are satisfied. First, the taxpayer/plaintiff must challenge

Congress's exercise of its power under the taxing and spending clause and not merely "an incidental expenditure of tax funds in the administration of an essentially regulatory statute." *Id.* at 102. Second, there must be a "nexus" between the plaintiff's status as taxpayer and "the precise nature of the constitutional infringement alleged." *Id.* Since *Flast*, only violations of the Establishment Clause have been found to have the required nexus with the plaintiff's status as taxpayer. *See Winn*, 131 S. Ct. at 1445.

Courts have looked to the history of the Establishment Clause to discern what sort of Establishment Clause challenge taxpayers have standing to mount. As the Supreme Court has often noted, the Establishment Clause reflects the Founders' judgment that it violated the consciences of taxpayers to compel them to pay even a trivial sum to support a religion to which they do not belong. The Court has often quoted James Madison's *Memorial and Remonstrance Against Religious Assessments* to the effect that government should not "force a citizen to contribute three pence only of his property for the support of any one [religious] establishment." 2 Writings of James Madison 183, 186 (G. Hunt ed. 1901). *See, e.g., Winn*, 131 S. Ct. at 1446; *DaimlerChrysler*, 547 U.S. at 347-48; *Flast*, 392 U.S. at 103. The Establishment Clause thus guarantees that the government will compel no one to make a contribution, even through taxation, "in aid of religion," and

that being forced to make such a contribution is an "injury" sufficient to sustain standing. *DaimlerChrysler*, 547 U.S. at 349.

The Supreme Court has rigorously enforced the limitation of taxpayer standing to challenges to those government appropriations and expenditures that are specifically made in aid of religion. *See Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553, 2569 (2007) ("the *Flast* exception has largely been confined to its facts") (plurality opinion). The most recent example is *Winn*. There, the Court rejected taxpayer standing to challenge a statutory tax credit for contributions to organizations that provided scholarships to private schools, including parochial schools. The Court distinguished *Flast* and found no Article III standing because even though many of the tax credits were used by taxpayers who contributed to funds that aided only religious schools, the government did not appropriate and spend taxpayer dollars to provide that economic benefit to religion (as it did in *Flast*).

In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), taxpayer plaintiffs mounted an Establishment Clause challenge to the federal government's donation of a parcel of federal "surplus" property to a sectarian school. Although the federal government had conveyed a substantial economic benefit to a

religious organization, the Supreme Court concluded that there was no taxpayer standing because there was no actual expenditure of taxpayer funds in aid of religion. *Id.* at 479-80.

In *Hein*, taxpayer plaintiffs challenged the expenditure of federal taxpayer dollars on conferences held as part of the Faith-Based and Community Initiatives program adopted by the second Bush Administration. Plaintiffs alleged that the money was spent, at least in part, to promote religion. Unlike the situation in *Flast*, however, Congress had not made a "direct and unambiguous … mandate" that the money be spent in aid of religion. 551 U.S. at 605. Rather, the challenged expenditures were made from a general appropriation for the Executive Branch. Because the plaintiffs challenged a discretionary decision by the President that did not implicate the validity of Congress' exercise of its power to tax and spend, the Court concluded that the *Flast* exception to the rule against taxpayer standing did not apply.[1]

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[1] Although only three Justices joined in Justice Alito's plurality opinion, two other Justices (Scalia and Thomas) took the position that the *Flast* exception to the general rule against taxpayer standing should be overruled. Because the plurality's basis for rejecting taxpayer standing was narrower than the Scalia/Thomas position, the plurality opinion supplies the precedential rule of law. *See Murray v. U.S. Dept. of Treasury*, 681 F.3d 744, 750 n.4 (6th Cir. 2012) (citing *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 764 n.9 (1988)).

Thus, for taxpayers to have standing under *Flast*, they must challenge an actual expenditure of federal funds to support religious worship or indoctrination, and must show that it was made pursuant to a Congressional appropriation that specifically contemplated such support. ACLU did neither.

B. ACLU did not challenge a federal appropriation made and expended in aid of religion.

1. The appropriation of funds for the TVPA program did not contemplate religious uses for the funds.

ACLU lacks standing because its challenge involves neither an appropriation that directly mandates support for religion nor an actual expenditure in aid of religion. Here, Congress appropriated funds to provide secular social services for victims of human trafficking, making no reference to religion, and the funds were distributed to reimburse for the provision of those secular social services. ACLU challenges not the appropriation, but rather HHS's exercise of its discretionary authority to determine the mechanism for distributing the funds that Congress appropriated. As in *Hein*, Congress appropriated funds for serving trafficking victims in general terms with no direct or implied mandate to spend the money in aid of religion or to involve religious organizations in the process. Accordingly,

ACLU has failed to prove a nexus between a Congressional exercise of its taxing and spending power, and the alleged Establishment Clause violation.

The District Court declined to follow *Hein*, concluding that the Supreme Court's earlier decision, *Bowen v. Kendrick*, 487 U.S. 589 (1988), was controlling. In *Bowen*, taxpayers challenged a federal statute that appropriated funds for grants to various organizations involved in efforts to discourage teen pregnancy where Congress had expressly directed HHS to involve "religious … organizations" in these efforts. 487 U.S. at 596. Taxpayer-plaintiffs alleged that the statute violated the Establishment Clause by awarding grants to organizations that actually used federal funds to support religious instruction on questions of sexual morality. *Id.* at 597-98. The Court concluded that taxpayers had standing to challenge a payment of federal funds *pursuant to a "statutory mandate" requiring the involvement of religious organizations* to a group that apparently used the money for religious instruction. *Id.* at 619-21.

In both *Bowen* and *Hein*, the taxpayer plaintiff challenged the decision of an executive agency to spend federal funds in a manner alleged to violate the Establishment Clause (to promote religion in *Hein* and to teach religious principles of sexual morality in *Bowen*). The District Court in this case distinguished *Hein* from *Bowen* by suggesting that *Hein* involved a "lump

sum" appropriation to meet the general needs of the Executive Branch, while the appropriations in *Bowen* and in this case were specifically targeted (to prevent teen pregnancy in *Bowen* and to serve trafficking victims here). But that distinction has nothing to do with the *Flast* test. *Flast* looks not to the generality or specificity of the appropriation, but rather to whether the appropriation is alleged to violate limitations on federal spending imposed by the Establishment Clause. That, in turn, depends not on whether the appropriation is general or specific, but rather on whether *Congress* intended that the appropriation be used to support religious activity and taxpayer dollars are actually used to provide such support. That is how Justice Alito distinguished *Bowen* in *Hein*. *See* 551 U.S. at 606 (federal statute "not only expressly authorized and appropriated specific funds for grant-making, it also expressly contemplated that some of those moneys might go to projects involving religious groups"). *See also Freedom From Religion Found. v. Nicholson*, 536 F.3d 730, 743-44 (7th Cir. 2008). That such intended *congressional* support for religious activity was present in *Bowen*, but absent in *Hein*, provides the only principled basis for reconciling those cases.

Other circuits applying the *Flast* test in light of *Hein* have likewise focused not on the specificity of the federal appropriation but on whether the

appropriation contemplated the use of funds in aid of religion. For example, in *Murray*, taxpayer-plaintiffs challenged the federal government's acquisition (as part of a 2008 bailout) of a major stake in a financial services company that sold, among other things, "Sharia-compliant" financing products that conformed to Islamic law. Notwithstanding evidence that the Treasury Department was aware of these Sharia-compliant products, the Sixth Circuit ruled that taxpayers lacked standing because they failed to demonstrate that Congress understood and intended that bailout funds would be used to market "religious" products. 681 F.3d at 752. *See also Pedreira v. Kentucky Baptist Homes for Children*, 579 F.3d 722, 730-31 (6th Cir. 2009) (taxpayers cannot challenge a State's use of federal funding under the Social Security program to pay a "pervasively sectarian" children's home to care for abused and neglected children because the federal statute does not "contemplate religious indoctrination").

Similarly, in *Hinrichs v. Speaker of House*, 506 F.3d 584, 599 (7th Cir. 2007), taxpayers challenged a state legislature's use of public funds to pay the incidental costs of a "Minister of the Day" program whereby different members of the clergy would begin legislative sessions with a prayer. The pertinent appropriation was specifically made to support the operation of the legislature, but did not mention prayer. The Seventh Circuit denied

standing, not because the appropriation was insufficiently specific in its target, but because "[t]he appropriations … 'did not expressly authorize, direct, or even mention the expenditures' … attendant to the 'Minister of the Day' program." 506 F.3d at 599 (quoting *Hein*, 127 S. Ct. at 2565). *Accord*, *Sherman v. Illinois*, 682 F.3d 643, 647 (7th Cir. 2012); *Freedom From Religion Foundation*, 536 F.3d at 744-45. *See also In re Navy Chaplaincy*, 534 F.3d 756, 761-62 (D.C. Cir. 2008) (no taxpayer standing to challenge alleged discrimination in favor of Catholic chaplains in U.S. Navy).

The District Court in this case pointed to nothing in the TVPA or the legislation appropriating funds under the TVPA that even remotely suggests that Congress contemplated HHS's entering into a contract with any religious organizations, or that funds would be spent for any religious purpose. Accordingly, *Bowen* does not govern the resolution of this case. As the Seventh Circuit noted in a similar setting, "[w]e cannot accept [the] argument that *Hein* allows taxpayer standing any time that funds appropriated for a congressionally established program are administered in a way that allegedly violates the Establishment Clause, even when the alleged maladministration bears no relationship to congressional action." *Freedom From Religion Foundation*, 536 F.3d at 743. Since there is no legislative

mandate in this case to spend federal funds in aid of religion, *Hein*, not *Bowen*, controls and precludes taxpayer standing in this case.

2. Because plaintiffs challenge no expenditure "in aid of religion," taxpayer standing is unavailable.

A further reason why there is no taxpayer standing in this case is that ACLU did not even allege, much less demonstrate, that any federal funds have been spent to support religious worship or indoctrination – *i.e.*, "in aid of religion." Every penny distributed by USCCB reimbursed social services agencies for secular services provided to trafficking victims. ACLU has not challenged a single reimbursement.

ACLU's complaint is that HHS did not require USCCB to use federal taxpayer dollars to reimburse those agencies for abortion and contraception services. But no case supports taxpayer standing to assert claims predicated on the federal government's *failure* to spend money. Where there has been no impermissible expenditure of taxpayer dollars in aid of religion *at all*, taxpayers cannot complain that they have been compelled in violation of conscience to provide economic support for a religion not their own. Indeed, the Supreme Court has ruled that taxpayers lack standing to bring suit even to challenge government actions that provide direct economic support for religious organizations, so long as the support does not consist of the transfer of taxpayer funds. *See, e.g.*, *Valley Forge* (transfer of "surplus

property" to religious group); *Winn* (creation of tax credit that primarily benefitted religious schools).[2]

When the government initially moved to dismiss, the District Court acknowledged that if the case were merely about ACLU's objection to HHS's failure to require reimbursement for abortion services, ACLU might not have standing to pursue its challenge, but denied the government's motion to dismiss as premature. [JA0171] After completion of discovery, USCCB renewed the argument that ACLU did not challenge any actual expenditure of government funds and therefore could not assert taxpayer standing. The District Court rejected that argument in a footnote in which it

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[2] In *Americans United for the Separation of Church and State v. Reagan*, 786 F.2d 194 (3d Cir 1986), the Third Circuit ruled that taxpayers lacked standing to challenge as an establishment of religion the federal government's diplomatic recognition of the Vatican because the legislation extending that recognition "is not a spending enactment." *Id*. at 199. The court of appeals read *Flast* as limited to taxpayer challenges to spending bills, a reading confirmed in *Winn*'s limitation of *Flast* to cases challenging the "extraction" of taxes from the plaintiff and expenditure of the resulting funds "in aid of religion."

The District Court in this case dismissed the Third Circuit's ruling as "dicta," suggesting that the court decided the case on the ground that decisions concerning diplomatic recognition are political questions. [JA170] This is incorrect. The Third Circuit squarely held that there was no taxpayer standing; the political question ruling was an alternative holding. *See* 786 F.2d at 200 ("we *hold* that, to the extent plaintiffs rely on their taxpayer status, they lack a sufficient protectable interest to permit them to litigate") (emphasis added).

characterized ACLU's claim as a challenge to "the use of taxpayer dollars to enforce a religiously based restriction on access to [abortion] services." [JA1615]

There are many things wrong with the District Court's conclusory holding in this regard. First, nothing in the TVPA program or the USCCB contract imposes a "restriction on [trafficking victims'] access" to abortion or contraception services. HHS's decision simply made those services ineligible for reimbursement under TVPA, although government funding under other federally funded programs (such as Medicaid) for some of these services might well be available, as the District Court noted.[3] [JA1611] *Harris* makes it quite clear that the government does not interfere with whatever rights trafficking victims have to obtain abortions simply by declining to pay for them as part of one specific program of limited federal aid. *See also Maher v. Roe*, 432 U.S. 464 (1977).

Second, there is no sense in which any taxpayer dollars appropriated for the TVPA program were spent on "enforcing" any restriction on the access of trafficking victims to abortion or contraception services. No such restrictions were imposed. The subcontractors remained free to provide

[3] TVPA made certain victims of extreme forms of human trafficking in the U.S. eligible for benefits under such programs without regard for their immigration status. *See* 22 U.S.C. §7105(b)(1)(B)

those services to trafficking victims using other resources, and the victims themselves were free to obtain those services from anyone willing to offer them. No subcontractor was denied reimbursement or victim denied services for doing so. All of the taxpayer money that passed from the Treasury to service providers reimbursed the latter for *secular* social services provided to trafficking victims. It is misleading — indeed, incoherent — to suggest that taxpayers *paid for* the "enforcement" of any religious doctrine.

The District Court relied on ACLU's stated willingness at the summary judgment hearing to challenge federal funding of organizations that *promote* abortion on religious grounds.[4] [JA1615] But this case does not involve federal funding of organizations either to support or to oppose abortion. TVPA authorizes HHS to reimburse organizations that provide social services to trafficking victims and HHS selected USCCB to manage the reimbursement. ACLU has challenged HHS's decision to accommodate

[4] On ACLU's apparent view, the moment that its own moral commitment to reproductive rights is reinforced by religious doctrine, the government is forbidden from adopting policies in agreement with the position. But *Harris*, *Bowen*, and *McGowan v. Maryland*, 366 U.S. 420 (1961) — as well as common sense — all forbid that conclusion. And in any event, this case does not involve adoption of a combined moral and religious view, or even technically the accommodation of such a view, but instead the mere decision not to impose a governmental burden on such a view.

USCCB's moral and religious commitments in the distribution of those funds *even though that decision did not result in any advocacy for or against abortion and cost taxpayers nothing*. *See Doe v. Madison School Dist. No. 321*, 177 F.3d 789, 794 (9th Cir. 1999) (no taxpayer standing to challenge recitation of prayer at public high school graduation where the government spent no funds at all on the graduation prayer).

Because ACLU challenged no expenditure of federal funds, much less an expenditure for religious purposes mandated by Congress, the District Court erred as a matter of law in upholding taxpayer standing. The judgment in this case should be vacated and the case remanded with instructions to dismiss for lack of subject matter jurisdiction.

III. Even if HHS's selection of USCCB involved an accommodation of USSCB's moral and religious principles, it did not violate the Establishment Clause.

A. Basic principles governing Establishment Clause claims.

As this Court has noted, the Supreme Court has used several "analytical approaches" in discerning whether government action violates the Establishment Clause. *Freedom from Religion Found. v. Hanover School Dist.*, 626 F.3d 1, 7 (1st Cir. 2010). The first approach germane to this case derives from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as later modified in *Agostini v. Felton*, 521 U.S. 203 (1997). Under *Lemon*:

> First, [the challenged law] must have a secular legislative purpose; second, its 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.

Id. at 612-13 (internal citations and quotations omitted); *see Hanover*, 626 F.3d at 9. In *Agostini*, the Court ruled that the "excessive entanglement" prong of the *Lemon* test was simply an aspect of the inquiry whether the challenged government action had as its "principal effect" the advancement or inhibition of religion. 521 U.S. at 232-35.

A second analytical approach turns on whether the challenged government action has the "purpose or effect of endorsing, favoring, or promoting religion." *Hanover*, 626 F.3d at 10. This test developed in response to challenges to governmentally sponsored religious displays in such cases as *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), and *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). To apply this "endorsement test," the court asks whether a reasonable and objective observer, fully informed of all the relevant circumstances, would conclude that the challenged government action does, in fact, convey the government's approval or disapproval of a particular religion or religious practice. *Hanover*, 626 F.3d at 11.

The District Court here also employed a third analytical approach, not mentioned in *Hanover*,[5] derived from *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), under which the District Court considered whether the government has impermissibly delegated standardless governmental authority to a religious organization.

In *Hanover*, this Court "bypass[ed]" the question how these tests relate to each other, 626 F.3d at 7 n.14, and it may do so here as well, for the government's decision to award the case management contract to USCCB passes muster under any of them.

B. The decision not to require USCCB to participate in paying for abortion or contraception services did not violate the Establishment Clause.

1. An Establishment Clause violation cannot be predicated on the government's refusal for secular reasons to pay for abortion or contraception services.

The District Court made it clear that it was not the government's decision to award the case management contract to USCCB that it found to violate the Establishment Clause, but rather the government's decision not to

[5] The third test mentioned in *Hanover*, derived from *Lee v. Weisman*, 505 U.S. 577 (1992), prohibits government action that coerces individuals to participate in religious activity. No party suggested that this "coercion test" applies here, and the District Court held that it did not. [JA1623]

require the funding of abortion or contraception services in carrying out that contract. The District Court correctly noted that

> 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.

[JA1624] In other words, the gravamen of ACLU's challenge is that the government has established religion by countenancing the exclusion of abortion and contraception services from a governmental social welfare program.

Harris v. McRae precludes this argument. In *Harris*, the Supreme Court confirmed its earlier rulings[6] that while the government has only a limited ability to prevent a woman from obtaining an abortion, it has no obligation to pay for even medically necessary abortions through social welfare programs, even if such programs otherwise fund a broad range of medical services. The Court in *Harris* specifically rejected the argument that singling out abortion services for non-funding violated the Establishment Clause because it "incorporates into law the doctrines of the

[6] *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977).

Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences." 448 U.S. at 319.

The *Harris* Court applied the *Lemon* test and concluded that the denial of funding for abortion had a secular legislative purpose, did not have as its principal or primary effect the advancement of religion, and fostered no excessive entanglement with religion. *Id.* The Court squarely rejected any argument that "a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions'." *Id.* (quoting *McGowan*, 366 U.S. at 442). The government is entitled to enact laws that "reflect[] 'traditionalist' values towards abortion" without being found to have adopted as law "the views of any particular religion." *Id.*[7]

The District Court acknowledged these principles, but distinguished *Harris* on the ground that the government's actions in that case "were not found to be explicitly motivated by the beliefs of a particular religious group." [JA1629] But this distinction has no bearing on this case because HHS's actions were also not "motivated by the beliefs of a particular religious group." ACLU conceded that the government had a secular, not a

[7] It is worth noting that the Establishment Clause theory advanced by the plaintiffs in *Harris* and rejected by the majority was not endorsed by the dissenting justices in *Harris*.

religious, purpose in awarding the case management contract to USCCB. [JA624] The District Court made no finding to the contrary, nor could it have in light of the undisputed evidence that HHS awarded the contract to USCCB because USCCB submitted the proposal that best advanced the secular goals of the TVPA.

The District Court may have meant by this statement that USCCB was religiously motivated to refuse to participate in the funding of abortion and contraception services. Indeed, the District Court found that USCCB's position was "motivated by deeply held religious beliefs." [JA1628] But that is only part of the truth. What the lower court omits, in an attempt to avoid the controlling impact of *Harris* and *Bowen*, is that USCCB's beliefs about abortion and family planning have *both* secular *and* religious bases. The undisputed evidence was that USCCB's position reflects its adherence to principles of natural justice to which non-Catholics and non-theists can and sometimes do adhere. *See* pp. 50-51 n.14 *infra*. Adherence to these moral principles alone would warrant USCCB's objections to participating in the provision of abortion and contraception services. [JA219-220; 1654]

But even if one ignores the record and assumes that *USCCB*'s position was wholly religious, it does not follow that *the government shared* those religious beliefs. The Establishment Clause is a limitation only on

government action, and the motivations of government contractors are irrelevant for purposes of the Establishment Clause analysis. The Court in *Harris* specifically refused to infer governmental adherence to Catholic moral and religious principles from the legislature's denial of funding for abortions. Such an inference is even less warranted in this case where the record is clear that the government not only did not share USCCB's position on abortion and contraception funding, but actually urged USCCB to recede from it. The *government's motivation* was simply that of retaining the organization that would provide the best overall case management services and therefore best achieve the secular goals of the TVPA. Under *Harris*, there can be no Establishment Clause violation.

2. The Establishment Clause generally permits the government to accommodate religious beliefs.

Even if *Harris* did not by itself require the rejection of the Establishment Clause claim in this case, the extensive jurisprudence concerning the government's accommodation of religious beliefs and practices warrants the same result. If one characterizes HHS's decision to accept USCCB's conditions as an accommodation of USCCB's religious and moral beliefs, it does not violate the Establishment Clause.

There is nothing constitutionally suspect about the government's accommodating believers and religious organizations in their dealings and

interactions with the government. Indeed, making such accommodations "follows the best of our traditions." *Zorach v. Clausen*, 343 U.S. 306, 314 (1952). Courts "have long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Amos*, 483 U.S. at 334; *accord Cutter v. Wilkinson*, 544 U.S. 709, 713-14 (2005); *Boyajian v. Gatzunis*, 212 F.3d 1, 7 (1st Cir. 2000). At times an accommodation may be required by the Free Exercise clause. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 706-707 (2012) (Free Exercise clause requires "ministerial exception" precluding application of antidiscrimination laws to the employment of religious ministers); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136-144-45 (1987) (State may not refuse unemployment benefits to employee terminated for refusing to work on her Sabbath). However, "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." [8] *Walz v. Tax*

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[8] Indeed, federal statutes generally *require* such accommodations. The Religious Freedom Restoration Act of 1993 prohibits the federal government from substantially burdening a person's exercise of religion, unless the government "demonstrates that application of the burden to the person" advances a compelling governmental interest and is the least restrictive means of doing so. 42 U.S.C. §2000bb-1(b). *See generally*

(continued on next page)

Comm'n, 397 U.S. 664, 673 (1970) (upholding property tax exemptions for properties used solely for religious worship). As explained below, the government's accommodation of USCCB's moral and religious principles in this case is unquestionably permissible.

At the outset, however, we address a terminological issue that appeared to confuse the District Court. Cases that address the validity of religious accommodations under the Establishment Clause typically involve challenges to legislative exemptions of believers and religious organizations from carrying out legal obligations that would violate their religious principles. *See, e.g.*, *Amos*, 483 U.S. 327 (upholding exemption of religious organizations from Title VII's prohibition against religious discrimination). The TVPA does not require the funding of abortion or contraception services, and so in declining to require USCCB to reimburse subcontractors for such services HHS did not relieve USCCB of a "legal obligation." Because there was no legal obligation to fund abortion or contraception

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Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 424 (2006); *In re Young*, 141 F.3d 854, 861-63 (8th Cir. 1988) (upholding RFRA's requirement that federal government accommodate religious believers absent a compelling interest not to do so against Establishment Clause challenge). Similar requirements for religious accommodations appear in other federal statutes. *See, e.g.*, 42 U.S.C. §2000cc-1(a)(1)-(2); 42 U.S.C. §238n(c); 42 U.S.C. §300a-7(d).

services to begin with, the District Court may have been led to question whether HHS's decision constituted an "accommodation" at all. [JA1627] However, if "[g]overnmental efforts to accommodate religion are permissible when they remove burdens on the free exercise of religion," *Allegheny County*, 492 U.S. at 601 n.51, they are no less permissible when they consist of not imposing a burden in the first place.

Indeed, if anything, HHS's decision is easier to justify here than in the typical accommodation case. That decision was not a "favor" granted by the government, affording USCCB special treatment in relation to a rule that would otherwise apply to everyone else. Instead, it was a decision not to impose an additional burden on religion that the statute did not otherwise impose. If government may utilize the "play in the joints" between the Free Exercise and Establishment Clauses to relieve a burden that a general rule would otherwise impose, the government's latitude to choose general rules that would avoid imposing the burden in the first place is much greater. Either way, HHS's decision not to burden USCCB in this case is consistent with the Establishment Clause. Because, as we will demonstrate below the acceptance of USCCB's moral and religious commitments is permissible under the Supreme Court's "accommodation" jurisprudence, it follows *a*

fortiori that it is also permissible as a decision not to impose a needless burden that might, if imposed, warrant or necessitate an accommodation.

3. The government's accommodation of USCCB's moral and religious opposition to participating in funding abortion or contraception services was consistent with the *Lemon/Agostini* standard.

The Supreme Court in *Amos* applied the *Lemon* test to an Establishment Clause challenge to Title VII's exemption of religious organizations from the ban on religious discrimination by applying the *Lemon* test. 483 U.S. at 335. The first requirement of that test is that the challenged governmental action have a "secular legislative purpose."

HHS plainly had such a purpose in accommodating USCCB's moral and religious objections to participating in funding abortion and contraception services. The undisputed evidence established that HHS awarded the case management contract to USCCB *in spite of* not *because of* its unwillingness to participate in such funding.[9] HHS held USCCB's unwillingness in this regard against its proposal, and even tried to persuade USCCB to modify its position. [JA0640- JA0641; JA0963-JA0964]. HHS ultimately accepted the USCCB proposal over the competing submission but

[9] The existence of an improper purpose often turns on this distinction. *See Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (no intent to discriminate where action taken in spite of and not because of its discriminatory impact).

only because it concluded that the USCCB proposal would best carry out the overall goals of the TVPA even with the limitations on which USCCB insisted. ACLU conceded HHS's secular purpose. [JA1480] The record supports no other conclusion. The accommodation of religious beliefs against government-imposed burdens constitutes a legitimate secular purpose as a matter of law. *Children's Healthcare is a Legal Duty, Inc. v. Min de Parle*, 212 F.3d 1084, 1093 (8th Cir. 2000).

The second *Lemon* factor is that "the principal or primary effect must be one that neither advances nor inhibits religion." In *Agostini*, the Court identified "three primary criteria ... to identify whether government aid has the effect of advancing religion: It does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive [government] entanglement [with religion]." 521 U.S. at 234.

ACLU did not even allege, much less offer any evidence, that any funds appropriated under the TVPA program were used to pay for religious worship or indoctrination. Nor was there any allegation or evidence that either the organizations receiving reimbursement or the trafficking victims receiving benefits were selected by reference to religion.[10] The

[10] HHS regulations prohibit any "organization that participates in programs funded by direct financial assistance from" HHS from "discriminat[ing]

(continued on next page)

organizations that received TVPA funds through USCCB are established social services organizations that provided services to clients in accordance with protocols that are approved by HHS and reflect ordinary secular social services practices. [JA0971] A majority of these organizations were non-Catholic. [JA0641; JA0971] There was not a scrap of evidence that trafficking victims were exposed to any form of proselytization or religious indoctrination in receiving services. There is no presumption that funds made available to a religious organization to use for secular activities will be diverted to sectarian ends,[11] and the trial court made no findings of any religious discrimination in the TVPA program.

Nor did the challenged activity "create an excessive entanglement" between government and religion. The "entanglement" inquiry commonly

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against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief." 45 C.F.R § 87.1(e). *Cf.* 45 C.F.R § 87.1(c) ("Organizations that receive direct financial assistance from [HHS] under any [HHS] program may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded with direct financial assistance from [HHS].").

[11] *Agostini*, 521 U.S. at 234; *Mitchell v. Helms*, 530 U.S. 793, 849-57 (O'Connor, J., concurring). *See also Bradfield v. Roberts*, 175 U.S. 291 (1899) (rejecting Establishment Clause challenge to government grant for construction of hospital to be run by religious order where there was no allegation that the hospital's care would be limited to church members).

turns on whether the government must undertake pervasive and intrusive monitoring to assure that government aid is used only for legitimate secular uses,[12] or whether the challenged law requires the government to resolve questions of religious doctrine as in the "kosher fraud" cases.[13] However, neither administrative cooperation between the government and a religious organization receiving government funding nor the potential for "religious divisiveness" are sufficient by themselves to create excessive government entanglement. *Agostini*, 521 U.S. at 235.

The District Court made no finding of "excessive entanglement" between HHS and USCCB in connection with the TVPA program and the record supports no such finding. HHS awarded the case management contract to an organization with vast experience in supervising and supporting social services agencies that serve recent immigrants. Government monitoring here was limited to ensuring that the secular case management goals that HHS sought to achieve through the contract were carried out efficiently and effectively, as is the case with any government contract. [JA0972; JA0645]. This is not the kind of monitoring that gives

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[12] *See, e.g., Lemon*, 403 U.S. at 619; *Agostini*, 521 U.S. at 233-234.

[13] *See, e.g., Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 425-28 (2d Cir. 2002); *Barghout v. Bureau of Kosher Meat and Food Control*, 66 F.3d 1337, 1340-45 (4th Cir. 1995).

rise to entanglement concerns. *See Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378, 396 (1990) (no impermissible entanglement in application of a general sales tax to religious articles because no need for State to determine the religious content of the items sold or the religious motive for selling them). Moreover, nothing in its contract with USCCB required HHS to resolve or even address any question of religious doctrine.

In short, the challenged decision to accommodate USCCB's moral and religious principles satisfies all prongs of the *Lemon/Agostini* standard.

4. No reasonable, objective and fully informed observer could conclude that the government "endorsed" USCCB's moral and religious beliefs by selecting USCCB's case management proposal.

The District Court ruled that by accommodating USCCB's moral and religious principles, the government "endorsed" those principles in violation of the Establishment Clause. This ruling is incorrect as a matter of law.

First, *Agostini* established that government action that satisfies the *Lemon* standard (as reformulated in *Agostini*) *cannot* constitute an impermissible endorsement of religion. 521 U.S. at 235 ("The same considerations that justify this holding [that there has been no impermissible advancement of religion] require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement of

religion.") Because, as we have demonstrated, the *Lemon/Agostini* requirements are all met in this case, as a matter of law the District Court's ruling that the government "endorsed" Catholic beliefs cannot be sustained.

Second, the specific test articulated by this Court for finding an endorsement of religion has not been met. In *Hanover*, this Court explained that the constitutionality of an alleged government endorsement "does not turn on the *subjective* feelings of plaintiffs as to whether a religious endorsement has occurred. Rather, … the court assumes the viewpoint of an 'objective observer acquainted with the text, legislative history, and implementation of the statute'." 626 F.3d at 11 (emphasis in original; citations omitted). Moreover, the "reasonable and objective observer" is presumed to be "fully aware of the relevant circumstances." *Id*. The question in this case, therefore, is whether a reasonable and objective person, fully aware of the law and all of the circumstances that resulted in the award of the case management contract to USCCB, would conclude that by accommodating USCCB's moral and religious principles HHS attempted to convey "a message that [those principles are] favored or preferred." *Allegheny County*, 492 U.S. at 593 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment)).

That conclusion could not possibly be drawn in this case. No reasonable objective person could infer an endorsement of the USCCB's moral and religious objections to abortion and contraception in light of the unchallenged evidence that:

- HHS held USCCB's unwillingness to participate in the reimbursement of providers for abortion or contraception services *against* its proposal.
- HHS attempted to persuade USCCB to change its mind.
- The reasons articulated by the HHS reviewers and contracting officer for awarding the case management contract to USCCB made no reference to any religious beliefs.
- USCCB scored far higher than its competitor in a panel assessment of its response to the RFP based on purely secular skills, background and abilities.
- No funds made available under the TVPA program were devoted to religious indoctrination on abortion, contraception or any other religious subject.
- No part of the funds made available through the USCCB went to pay for any religious activities, items or religious expression.
- The government made no statement supporting the beliefs underlying USCCB's position.

Neither ACLU nor the District Court adduced any evidence to support the conclusion that the government endorsed Catholic religious beliefs.

The District Court did not even attempt to apply the "objective observer" analysis mandated by this Court in *Hanover*. Instead, the District Court simply posited that USCCB's opposition to abortion and

contraception was based wholly on religious belief, and that by accommodating that religious belief, the government *necessarily* endorsed it. [JA1627-1630] This reasoning is clearly wrong.

To begin with, the record was clear and undisputed that USCCB's principles were not exclusively religious. USCCB submitted unchallenged evidence that its beliefs concerning abortion and contraception rest in large measure on principles of natural justice to which non-Catholics and persons of no religious belief can and sometimes do adhere. [JA219-220; JA606-608] The District Court acknowledged that such beliefs "need not be based on a religious viewpoint" [JA1628], but nevertheless concluded that in the case of USCCB, the belief was purely religious. *Id.* That finding, which is contradicted by undisputed record evidence, is clear error.[14]

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[14] The only evidence the District Court cited in support of this conclusion is USCCB's statement in response to the government's RFP that "as we are a Catholic organization," USCCB could not participate in funding abortion or contraception. [JA1628] But this statement is not inconsistent with the fact that USCCB's position on abortion and contraception relies on *both* religious doctrine *and* moral argument independent of religious authority — once again, a fact supported repeatedly in the record by undisputed evidence. Indeed, later in the same sentence, USCCB emphasizes that its "*moral convictions and* religious beliefs" are at stake. *Id.* at 21 n.23 (emphasis added). Moreover, the fact that USCCB operates "as … a Catholic organization" supports, rather than undermines, its claim that its moral conclusions must rely on *both* faith *and* reason. *See, e.g.*, Pope John Paul II, *Evangelium Vitae*, No. 2 (1995) (emphasizing that the value of every

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This error matters because even if one could infer a government endorsement of USCCB's opposition to abortion and contraception — and there is no evidence to support such an inference — the Establishment Clause does not preclude the government from acting on secular principles of morality to prohibit the funding of abortion or contraception simply because those principles may coincide with some religious views. *Harris*, 448 U.S. at 319-20. Thus, even if it were proper to infer that HHS shared USCCB's moral principles, there is nothing to support the further inference — essential to ACLU's Establishment Clause claim — that the government endorses USCCB's religious beliefs as well.

Second, even if USCCB's unwillingness to participate in funding abortion or contraception services were purely religious, it does not follow that the government could reasonably be perceived by an informed objective observer to have "endorsed" them. As noted above, there is no dispute that HHS awarded the case management contract to USCCB in spite of and not because of those beliefs.

If the "explicitly religious" character of the accommodated belief were enough to transform an accommodation into an endorsement, as the

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human life is a truth accessible to "believer and non-believer alike" by the exercise of reason, also confirmed by revelation); *see generally* Pope John Paul II, *Fides et Ratio* (1998).

District Court apparently concluded, then every religious accommodation by the government would run afoul of the Establishment Clause. That is simply not the law. Government accommodation of religious belief "follows the best of our traditions," *Zorach*, 343 U.S. at 314, permitted and sometimes statutorily mandated even when not constitutionally required. *See Employment Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872, 890 (1990); *Cutter v. Wilkinson*, 544 U.S. 709, 713-14 (2005); p.40 n.8 *supra*. As this Court has recognized, accommodation is generally proper to alleviate — or, as in this case, to decline to impose — burdens that compliance with a government requirement would cause for religious adherents. *Boyajian*, 212 F.3d at 8.

The District Court acknowledged that some religious accommodation is permitted, but noted (citing *Amos*, 483 U.S. at 334-35) that "at some point, accommodation may devolve into 'an unlawful fostering of religion'." (citations omitted). [JA1627] But the District Court did not even attempt to articulate a principled basis for distinguishing permitted from unpermitted accommodations. The "explicitly religious" character of the accommodated belief plainly provides no such basis because it is present in all religious accommodation cases.

None of the cases cited by the District Court in support of its finding an impermissible endorsement (as opposed to a permissible accommodation) is remotely on point. In some of them the challenged accommodation consisted of an economic subsidy granted to one religion but denied to another,[15] or granted to religious organizations but denied to similar non-religious organizations.[16] Nothing of the sort is present here. Other cases involve state support for undeniably religious expressions or iconography, such as prayer at public events, religious holiday displays, and images of the Decalogue.[17] No such issue is present here.

The only case cited by the District Court that held that an governmental accommodation of religion simply went too far was *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). In that case, a Connecticut statute gave every employee in the state "an absolute and unqualified right not to work on whatever day they designate as their Sabbath." *Id.* at 709.

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15 *E.g.*, *Foremaster v. City of St. George*, 882 F.2d 1485, 1489 (10th Cir. 1989) (invalidating municipal subsidy of electric bill for Mormon temple, but not for other churches in town).

16 *E.g.*, *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (invalidating sales tax exemption for religious publications, but not publications that address similar subject matter from a non-religious perspective.)

17 *E.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (student-led "invocations" at public high school football games); *Allegheny County*, 492 U.S. at 592 (display of crèche).

Critical to the Court's ruling was that this entitlement admitted no exceptions whatever:

> There is no exception under the statute for special circumstances, such as the Friday Sabbath observer employed in an occupation with a Monday through Friday schedule — a school teacher for example; the statute provides for no special consideration if a high percentage of an employer's work force asserts rights to the same Sabbath. Moreover, there is no exception when honoring the dictates of Sabbath observers would cause the employer substantial economic burdens or when the employer's compliance would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers. Finally the statute allows for no consideration as to whether the employer has made reasonable accommodation proposals.

Id. at 709-10 (footnote omitted). The statute threatened to impose significant and unfair burdens on other employees, whose seniority rights to more favorable work schedules or pressing non-religious needs would have to yield to the statutory rights of sabbatarians. *Id*. at 710 n.9.

The Supreme Court later explained that it was the failure to "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries" that caused the statute in *Estate of Thornton* to cross the line. *Cutter*, 544 U.S. at 720. *See also Boyajian*, 212 F.3d at 8-9. The *Cutter* Court added, however, that it *is* "compatible with the Establishment Clause" to make accommodations for religious beliefs that *do* take into

account such burdens. *Id.* There is nothing extreme or unreasonable about the accommodation challenged in this case, and there was no evidence that nonbeneficiaries were burdened *at all* by it. For example, there was no evidence at all that any trafficking victim was unable to obtain an abortion or contraception because of USCCB's unwillingness to participate in reimbursing subcontractors for those services.[18]

It was clear and undisputed that HHS decided to accommodate USCCB not because of any preference for the Catholic Church or agreement with the moral and religious beliefs that USCCB professed — HHS made clear its preference that USCCB *not* implement limitations based on those beliefs at all — but rather because it was the only way to obtain USCCB's superior case management services. The government applied religiously neutral criteria in deciding to accept USCCB's proposal. Accordingly, the District Court erred as a matter of law in concluding that HHS "endorsed"

[18] The District Court also cited *Board of Educ. of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), as defining the outer limits of permissible accommodation of religious beliefs, but the circumstances in that case are far removed from those presented here. [JA1632-34] As the passage from *Kiryas Joel* quoted by the District Court makes clear, that case involved a "delegation of political power to a religious group," specifically the creation of a separate political entity (a public school district) effectively controlled by a specific religious sect. Nothing remotely comparable to such an extraordinary concession to a particular religious group is presented in this case.

USCCB's moral and religious beliefs by accommodating them. No reasonable objective person, fully informed of the relevant facts, would so conclude, and no case cited by the District Court requires a contrary conclusion.

5. The case management contract did not delegate any government power to USCCB, much less standardless or discretionary government power.

The District Court ruled that the government delegated standardless discretionary governmental power to USCCB to decide what services to trafficking victims would be reimbursed, and that the delegation was inconsistent with the Supreme Court's decision in *Larkin*. The District Court erred.

Larkin involved a Massachusetts statute that prohibited granting such a liquor license to a facility located within 500 feet of a church or school over the church's or school's objection. 459 U.S. at 117. The Supreme Court said that Massachusetts itself was free to exercise its zoning power to prohibit liquor licenses for establishments within 500 feet of those institutions, *id.* at 124, but that it had violated the Establishment Clause by giving churches a "veto" over liquor licenses.

The Court applied the *Lemon* test. It recognized that Massachusetts had a legitimate secular purpose in protecting churches and schools from the

social ills associated with liquor sales. *Id*. at 123-24. It held, however, that the law had the primary effect of advancing religion because it lacked safeguards against churches exercising their veto to advance sectarian goals, as by approving only those applications submitted by members of the same faith. "[A]ppellants have not suggested any 'effective means for guaranteeing' that the delegated power 'will be used exclusively for secular, neutral, and nonideological purposes'." *Id*. at 125 (quoting *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 780 (1973)).

In this case, there has been no delegation of *governmental power* at all, much less a standardless delegation of unreviewable decision making authority. In *Larkin*, the challenged law gave churches the right to deny retailers the right to sell liquor nearby. By contrast, USCCB was hired by the government to oversee the provision of social services to a needy population, and to reimburse the providers. Nothing in its contract with HHS gave USCCB the power either to prohibit any trafficking victim from obtaining contraceptive services or an abortion, or to prevent any subcontractor from providing such services. In contrast to *Larkin*, there was thus no delegation of power over the rights of third parties because, under *Harris*, there is no right to government funding of abortion.

Moreover, the case management contract did not give to USCCB any authority that only the government could exercise. USCCB and other private charitable organizations have performed similar tasks long before the federal government got involved. HHS essentially chose to "piggy back" on an extensive infrastructure that USCCB already had in place to spend more effectively the relatively modest sums that Congress appropriated to assist trafficking victims. By contrast, courts have applied *Larkin* only where the government delegated to the religious organization tasks that, by their nature, only the government could perform. *See id.* (granting liquor licenses); *Commack Self-Service*, 294 F.3d at 430-31 (defining the statutory term "kosher" for purposes of applying statute banning false designation of foods as "kosher"); *State v. Pendleton*, 339, N.C. 379, 451 S.E.2d 274 (N.C. 1994) (security personnel at Bible college delegated powers of county and municipal police).[19] *See also Kiryas Joel*, 512 U.S. at 696-702 (operation of school district) (plurality opinion).

Further, the case management and reimbursement responsibilities granted to USCCB under the contract were not standardless. The contract set forth clear, secular standards and gave HHS ample oversight authority.

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[19] *But see Myers v. State*, 714 N.E.2d 276 (Ind. App. 1999); *State v. Yencer*, 365, N.C. 292, 718 S.E.2d 615 (N.C. 2011).

[JA0971-JA0972; JA0645] Had USCCB demonstrated any impermissible religious bias in selecting service providers or benefitting trafficking victims based on religion — and there is no evidence whatever that it did — HHS could have and undoubtedly would have intervened. *See* note 10 *supra*.

The Court in *Larkin* also concluded that the delegation of government powers to churches under the challenged statute created an excessive entanglement between church and state. But *Larkin* does not preclude the government from collaborating with religious organizations to advance public welfare, as the Court's later decision in *Bowen* demonstrates. Decided six years after *Larkin*, *Bowen* upheld a statute that specifically directed federal officials to work with local organizations, including religious organizations, to discourage teen sexual behavior. The Court noted that it had "never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." 487 U.S. at 609. And the Court specifically rejected the suggestion that the limited monitoring authority retained by the government to ensure that religious collaborators did not cross the line into impermissible religious proselytizing gave rise to "excessive" entanglement of church and state. *Id.* at 615-17.

The instant case is far closer to *Bowen* in this regard than it is to *Larkin.* USCCB carried out its tasks as HHS's contractor, not as an independent actor free to pursue its own sectarian goals with no neutral standards to cabin its discretion, as in *Larkin*. The government here simply provided additional financial resources to support and expand what remains an essentially private network of support for victims of extreme forms of human trafficking. Here, as in *Bowen*, the federal government recognized that public and private efforts should be coordinated to address complex social problems, and that in many respects private organizations would take the lead in those efforts with the federal government providing financial support. Here, as in *Bowen*, the critical issue for purposes of an Establishment Clause challenge is whether there are adequate safeguards in place to ensure that the government does not support religious worship or instruction. Here, as in *Bowen*, there are.

The District Court made no attempt to apply these controlling principles. The District Court merely posited that HHS "delegate[d] authority to USCCB to exclude certain services from government funding" and concluded that that "'provides a significant symbolic benefit to religion,' in violation of the Establishment Clause." [JA1632 (quoting *Larkin*, 459 U.S. at 125-26)]. But the "symbolic benefit" to which the *Larkin* Court

referred derived from a perceived "joint exercise of legislative power." 459 U.S. at 125. No delegation of legislative or rulemaking authority is present here. Instead, HHS simply agreed that USCCB would not be required to reimburse for abortion or contraceptive services. If anyone "excluded services from government funding," it was the government itself and under *Harris* and *Maher*, the government was entitled to make that decision.

The *Bowen* Court rejected a similar attempt to apply the "symbolic benefit" principle beyond the very unusual circumstances in *Larkin*:

> As yet another reason for invalidating parts of the AFLA, the District Court found that the involvement of religious organizations in the Act has the impermissible effect of creating a "crucial symbolic link" between government and religion. [Citation omitted] If we were to adopt the District Court's reasoning, it could be argued that any time a government aid program provides funding to religious organizations in an area in which the organization also has an interest, an impermissible "symbolic link" could be created, no matter whether the aid was to be used solely for secular purposes. This would jeopardize government aid to religiously affiliated hospitals, for example, on the ground that patients would perceive a "symbolic link" between the hospital — part of whose "religious mission" might be to save lives — and whatever government entity is subsidizing the purely secular medical services provided to the patient. We decline to adopt the District Court's reasoning and conclude that, in this litigation, whatever "symbolic link" might in fact be created by the AFLA's disbursement of funds to religious

> institutions is not sufficient to justify striking down the statute on its face.

487 U.S. at 613-14.

We have already shown that under the standards articulated by the Supreme Court in *Agostini* and by this Court in *Hanover*, HHS's accommodation of USCCB's moral and religious principles did not endorse those principles or Catholicism in general. Absent such an endorsement, it makes no sense to refer to any kind of "symbolic benefit" that USCCB derives from that accommodation. Because there was no delegation of discretionless government power to USCCB, this Court should reverse the District Court's conclusion that the government's decision to award the case management contract to USCCB despite its unwillingness to participate in the funding of abortion or contraception services violated the Establishment Clause under the principles of *Larkin*.

Conclusion

The Court should vacate the judgment below and remand with instructions to dismiss the complaint for want of subject matter jurisdiction. If this Court reaches the merits, it should reverse the judgment below on the ground that HHS's decision to accommodate USCCB's moral and religious principles did not violate the Establishment Clause.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,329 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2012 word processing software in 14 point Times New Roman font.

Dated: August 16, 2012 /s/ Henry C. Dinger

CERTIFICATE OF SERVICE

I hereby certify pursuant to Fed. R. App. P. 25(d) that on August 16, 2012, I transmitted the foregoing "Brief for Appellant United States Conference of Catholic Bishops" in the above-captioned matter to the Clerk of the United States Court of Appeals for the First Circuit through the Court's CM/ECF filing system. Also on that date, I certify that I served the counsel listed below, who are Filing Users, through the CM/ECF system.

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USCCB ADDENDUM PURSUANT TO LOCAL RULE 28.0(b)(1)

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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,

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[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

[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

[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

[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

[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

[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

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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

[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*

[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

[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

[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

[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 judgment are DENIED.

SO ORDERED.

/s/ Richard G. Stearns

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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 Seelye
Deputy Clerk

Effective: December 23, 2008

United States Code Annotated Currentness
Title 22. Foreign Relations and Intercourse
Chapter 78. Trafficking Victims Protection Act
§ 7105. Protection and assistance for victims of trafficking

(a) Assistance for victims in other countries

(1) In general

The Secretary of State and the Administrator of the United States Agency for International Development, in consultation with appropriate nongovernmental organizations, shall establish and carry out programs and initiatives in foreign countries to assist in the safe integration, reintegration, or resettlement, as appropriate, of victims of trafficking. Such programs and initiatives shall be designed to meet the appropriate assistance needs of such persons and their children, as identified by the Task Force, and shall be carried out in a manner which takes into account the cross-border, regional, and transnational aspects of trafficking in persons. In addition, such programs and initiatives shall, to the maximum extent practicable, include the following:

(A) Support for local in-country nongovernmental organization-operated hotlines, culturally and linguistically appropriate protective shelters, and regional and international nongovernmental organization networks and databases on trafficking, including support to assist nongovernmental organizations in establishing service centers and systems that are mobile and extend beyond large cities.

(B) Support for nongovernmental organizations and advocates to provide legal, social, and other services and assistance to trafficked individuals, particularly those individuals in detention, and by facilitating contact between relevant foreign government agencies and such nongovernmental organizations to facilitate cooperation between the foreign governments and such organizations.

(C) Education and training for trafficked women and girls.

(D) The safe integration or reintegration of trafficked individuals into an appropriate community or family, with full respect for the wishes, dignity, and safety of the trafficked individual.

(E) Support for developing or increasing programs to assist families of victims in locating, repatriating, and treating their trafficked family members, in assisting the voluntary repatriation of these family members or their integration or resettlement into appropriate communities, and in providing them with treatment.

(F) In cooperation and coordination with relevant organizations, such as the United Nations High Commissioner for Refugees, the International Organization for Migration, and private nongovernmental organizations that contract with, or receive grants from, the United States Government to assist refugees and internally displaced persons, support for--

(i) increased protections for refugees and internally displaced persons, including outreach and education efforts to prevent such refugees and internally displaced persons from being exploited by traffickers; and

(ii) performance of best interest determinations for unaccompanied and separated children who come to the attention of the United Nations High Commissioner for Refugees, its partner organizations, or any organization that contracts with the Department of State in order to identify child trafficking victims and to assist their safe integration, reintegration, and resettlement.

(2) Additional requirement

In establishing and conducting programs and initiatives described in paragraph (1), the Secretary of State and the Administrator of the United States Agency for International Development shall take all appropriate steps to enhance cooperative efforts among foreign countries, including countries of origin of victims of trafficking, to assist in the integration, reintegration, or resettlement, as appropriate, of victims of trafficking, including stateless victims. In carrying out this paragraph, the Secretary and the Administrator shall take all appropriate steps to ensure that cooperative efforts among foreign countries are undertaken on a regional basis.

(b) Victims in the United States

(1) Assistance

(A) Eligibility for benefits and services

Notwithstanding title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, an alien who is a victim of a severe form of trafficking in persons, or an alien classified as a nonimmigrant under section 1101 (a)(15)(T)(ii) of Title 8, shall be eligible for benefits and services under any Federal or State program or activity funded or administered by any official or agency described in subparagraph (B) to the same extent as an alien who is admitted to the United States as a refugee under section 1157 of Title 8.

(B) Requirement to expand benefits and services

Subject to subparagraph (C) and, in the case of nonentitlement programs, to the availability of appropriations, the Secretary of Health and Human Services, the Secretary of Labor, the Board of Directors of the Legal Services Corporation, and the heads of other Federal agencies shall expand benefits and services to victims of severe forms of trafficking in persons in the United States, and aliens classified as a nonimmigrant under section 1101(a)(15)(T)(ii) of Title 8, without regard to the immigration status of such victims. In the case of nonentitle-

ment programs funded by the Secretary of Health and Human Services, such benefits and services may include services to assist potential victims of trafficking in achieving certification and to assist minor dependent children of victims of severe forms of trafficking in persons or potential victims of trafficking.

(C) Definition of victim of a severe form of trafficking in persons

For the purposes of this paragraph, the term "victim of a severe form of trafficking in persons" means only a person--

(i) who has been subjected to an act or practice described in section 7102(8) of this title as in effect on October 28, 2000; and

(ii)(I) who has not attained 18 years of age; or

(II) who is the subject of a certification under subparagraph (E).

(D) Repealed. Pub.L. 108-193, § 6(a)(2), Dec. 19, 2003, 117 Stat. 2880.

(E) Certification

(i) In general

Subject to clause (ii), the certification referred to in subparagraph (C) is a certification by the Secretary of Health and Human Services, after consultation with the Attorney General and the Secretary of Homeland Security, that the person referred to in subparagraph (C)(ii)(II)--

(I) is willing to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons or is unable to cooperate with such a request due to physical or psychological trauma; and

(II)(aa) has made a bona fide application for a visa under section 1101(a)(15)(T) of Title 8, as added by subsection (e) of this section, that has not been denied; or

(bb) is a person whose continued presence in the United States the Attorney General and the Secretary of Homeland Security is [FN1] ensuring in order to effectuate prosecution of traffickers in persons.

(ii) Period of effectiveness

A certification referred to in subparagraph (C), with respect to a person described in clause (i)(II)(bb), shall be effective only for so long as the Attorney General [FN2] Secretary of Homeland Security determines [FN3] that the continued presence of such person is necessary to effectuate prosecution of traffickers

in persons.

(iii) Investigation and prosecution defined

For the purpose of a certification under this subparagraph, the term "investigation and prosecution" includes--

(I) identification of a person or persons who have committed severe forms of trafficking in persons;

(II) location and apprehension of such persons;

(III) testimony at proceedings against such persons; or

(IV) responding to and cooperating with requests for evidence and information.

(iv) Assistance to investigations

In making the certification described in this subparagraph with respect to the assistance to investigation or prosecution described in clause (i)(I), the Secretary of Health and Human Services shall consider statements from State and local law enforcement officials that the person referred to in subparagraph (C)(ii)(II) has been willing to assist in every reasonable way with respect to the investigation and prosecution of State and local crimes such as kidnapping, rape, slavery, or other forced labor offenses, where severe forms of trafficking appear to have been involved.

(F) Eligibility for interim assistance of children

(i) Determination

Upon receiving credible information that a child described in subparagraph (C)(ii)(I) who is seeking assistance under this paragraph may have been subjected to a severe form of trafficking in persons, the Secretary of Health and Human Services shall promptly determine if the child is eligible for interim assistance under this paragraph. The Secretary shall have exclusive authority to make interim eligibility determinations under this clause. A determination of interim eligibility under this clause shall not affect the independent determination whether a child is a victim of a severe form of trafficking.

(ii) Notification

The Secretary of Health and Human Services shall notify the Attorney General and the Secretary of

Homeland Security not later than 24 hours after all interim eligibility determinations have been made under clause (i).

(iii) Duration

Assistance under this paragraph may be provided to individuals determined to be eligible under clause (i) for a period of up to 90 days and may be extended for an additional 30 days.

(iv) Long-term assistance for children

(I) Eligibility determination

Before the expiration of the period for interim assistance under clause (iii), the Secretary of Health and Human Services shall determine if the child referred to in clause (i) is eligible for assistance under this paragraph.

(II) Consultation

In making a determination under subclause (I), the Secretary shall consult with the Attorney General, the Secretary of Homeland Security, and nongovernmental organizations with expertise on victims of severe form of trafficking.

(III) Letter of eligibility

If the Secretary, after receiving information the Secretary believes, taken as a whole, indicates that the child is eligible for assistance under this paragraph, the Secretary shall issue a letter of eligibility. The Secretary may not require that the child cooperate with law enforcement as a condition for receiving such letter of eligibility.

(G) Notification of children for interim assistance

Not later than 24 hours after a Federal, State, or local official discovers that a person who is under 18 years of age may be a victim of a severe form of trafficking in persons, the official shall notify the Secretary of Health and Human Services to facilitate the provision of interim assistance under subparagraph (F).

(2) Grants

(A) In general

Subject to the availability of appropriations, the Attorney General may make grants to States, Indian tribes, units of local government, and nonprofit, nongovernmental victims' service organizations to develop, expand, or strengthen victim service programs for victims of trafficking.

(B) Allocation of grant funds

Of amounts made available for grants under this paragraph, there shall be set aside--

(i) three percent for research, evaluation, and statistics;

(ii) 5 percent for training and technical assistance, including increasing capacity and expertise on security for and protection of service providers from intimidation or retaliation for their activities. [FN4]

(iii) one percent for management and administration.

(C) Limitation on Federal share

The Federal share of a grant made under this paragraph may not exceed 75 percent of the total costs of the projects described in the application submitted.

(c) Trafficking victim regulations

Not later than 180 days after October 28, 2000, the Attorney General, the Secretary of Homeland Security and the Secretary of State shall promulgate regulations for law enforcement personnel, immigration officials, and Department of State officials to implement the following:

(1) Protections while in custody

Victims of severe forms of trafficking, while in the custody of the Federal Government and to the extent practicable, shall--

(A) not be detained in facilities inappropriate to their status as crime victims;

(B) receive necessary medical care and other assistance; and

(C) be provided protection if a victim's safety is at risk or if there is danger of additional harm by recapture of the victim by a trafficker, including--

(i) taking measures to protect trafficked persons and their family members from intimidation and threats of reprisals and reprisals from traffickers and their associates; and

(ii) ensuring that the names and identifying information of trafficked persons and their family members are not disclosed to the public.

(2) Access to information

Victims of severe forms of trafficking shall have access to information about their rights and translation services. To the extent practicable, victims of severe forms of trafficking shall have access to information about federally funded or administered anti-trafficking programs that provide services to victims of severe forms of trafficking.

(3) Authority to permit continued presence in the United States

(A) Trafficking victims

(i) In general

If a Federal law enforcement official files an application stating that an alien is a victim of a severe form of trafficking and may be a potential witness to such trafficking, the Secretary of Homeland Security may permit the alien to remain in the United States to facilitate the investigation and prosecution of those responsible for such crime.

(ii) Safety

While investigating and prosecuting suspected traffickers, Federal law enforcement officials described in clause (i) shall endeavor to make reasonable efforts to protect the safety of trafficking victims, including taking measures to protect trafficked persons and their family members from intimidation, threats of reprisals, and reprisals from traffickers and their associates.

(iii) Continuation of presence

The Secretary shall permit an alien described in clause (i) who has filed a civil action under section 1595 of Title 18, to remain in the United States until such action is concluded. If the Secretary, in consultation with the Attorney General, determines that the alien has failed to exercise due diligence in pursuing such action, the Secretary may revoke the order permitting the alien to remain in the United States.

(iv) Exception

Notwithstanding clause (iii), an alien described in such clause may be deported before the conclusion of the administrative and legal proceedings related to a complaint described in such clause if such alien is inadmissible under paragraph (2)(A)(i)(II), (2)(B), (2)(C), (2)(E), (2)(H), (2)(I), (3)(A)(i), (3)(A)(iii), (3)(B), or (3)(C) of section 1182(a) of Title 8.

(B) Parole for relatives

Law enforcement officials may submit written requests to the Secretary of Homeland Security, in accordance with section 1229b(b)(6) of this title, to permit the parole into the United States of certain relatives of an alien described in subparagraph (A)(i).

(C) State and local law enforcement

The Secretary of Homeland Security, in consultation with the Attorney General, shall--

(i) develop materials to assist State and local law enforcement officials in working with Federal law enforcement to obtain continued presence for victims of a severe form of trafficking in cases investigated or prosecuted at the State or local level; and

(ii) distribute the materials developed under clause (i) to State and local law enforcement officials.

(4) Training of Government personnel

Appropriate personnel of the Department of State, the Department of Homeland Security, the Department of Health and Human Services, and the Department of Justice shall be trained in identifying victims of severe forms of trafficking and providing for the protection of such victims, including juvenile victims. The Attorney General and the Secretary of Health and Human Services shall provide training to State and local officials to improve the identification and protection of such victims.

(d) Construction

Nothing in subsection (c) of this section shall be construed as creating any private cause of action against the United States or its officers or employees.

(e) Protection from removal for certain crime victims

(1) to (4) Omitted

(5) Statutory construction

Nothing in this section, or in the amendments made by this section, shall be construed as prohibiting the Secretary of Homeland Security from instituting removal proceedings under section 1229a of Title 8 against an alien admitted as a nonimmigrant under section 1101(a)(15)(T)(i) of Title 8, as added by subsection (e) of this section, for conduct committed after the alien's admission into the United States, or for conduct or a condition that was not disclosed to the Secretary of Homeland Security prior to the alien's admission as a nonimmigrant under such section 1101(a)(15)(T)(i) of Title.

(f) Assistance for United States citizens and lawful permanent residents

(1) In general

The Secretary of Health and Human Services and the Attorney General, in consultation with the Secretary of Labor, shall establish a program to assist United States citizens and aliens lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8) who are victims of severe forms of trafficking. In determining the assistance that would be most beneficial for such victims, the Secretary and the Attorney General shall consult with nongovernmental organizations that provide services to victims of severe forms of trafficking in the United States.

(2) Use of existing programs

In addition to specialized services required for victims described in paragraph (1), the program established pursuant to paragraph (1) shall--

(A) facilitate communication and coordination between the providers of assistance to such victims;

(B) provide a means to identify such providers; and

(C) provide a means to make referrals to programs for which such victims are already eligible, including programs administered by the Department of Justice and the Department of Health and Human Services.

(3) Grants

(A) In general

The Secretary of Health and Human Services and the Attorney General may award grants to States, Indian tribes, units of local government, and nonprofit, nongovernmental victim service organizations to develop, expand, and strengthen victim service programs authorized under this subsection.

(B) Maximum Federal share

The Federal share of a grant awarded under this paragraph may not exceed 75 percent of the total costs of the projects described in the application submitted by the grantee.

(g) Annual reports

On or before October 31 of each year, the Attorney General or the Secretary of Homeland Security shall submit a report to the appropriate congressional committees setting forth, with respect to the preceding fiscal year, the number, if any, of otherwise eligible applicants who did not receive visas under section 1101(a)(15)(T) of Title 8 , as added by subsection (e) of this section, or who were unable to adjust their status under section 1255(l) of Title 8, solely on account of the unavailability of visas due to a limitation imposed by section 1184(o)(2) or 1255(l)(4)(A) of Title 8.

CREDIT(S)

(Pub.L. 106-386, Div. A, § 107, Oct. 28, 2000, 114 Stat. 1474; Pub.L. 107-228, Div. A, Title VI, § 682(a), Sept. 30, 2002, 116 Stat. 1409; Pub.L. 108-193, §§ 4(a)(1) to (3), 6(a)(2), 8(b)(2), Dec. 19, 2003, 117 Stat. 2877, 2880, 2887; Pub.L. 109-162, Title VIII, § 804, Jan. 5, 2006, 119 Stat. 3055; Pub.L. 109-164, Title I, § 102(a), Jan. 10, 2006, 119 Stat. 3560; Pub.L. 110-457, Title I, § 104, Title II, §§ 205(a)(1), 212, 213(a)(1), (3), Dec. 23, 2008, 122 Stat. 5046, 5060, 5063, 5066.)

[FN1] So in original. Probably should be “are”.

[FN2] So in original.

[FN3] So in original.

[FN4] So in original. The clause probably should end not with a period but with “; and”.

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106-939, see 2000 U.S. Code Cong. and Adm. News, p. 1380.

2002 Acts. House Conference Report No. 107-671 and Statement by President, see 2002 U.S. Code Cong. and Adm. News, p. 869.

2003 Acts. House Report No. 108-264(Parts I and II), see 2003 U.S. Code Cong. and Adm. News, p. 2408.

2006 Acts. House Report No. 109-233, see 2005 U.S. Code Cong. and Adm. News, p. 1636.

House Report No. 109-317 (Parts I and II), see 2005 U.S. Code Cong. and Adm. News, p. 1888.

Statement by President, see 2005 U.S. Code Cong. and Adm. News, p. S56.

References in Text

Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, referred to in subsec. (b)(1), is Title IV [§§ 400 to 451] of Pub.L. 104-193, Aug. 22, 1996, 110 Stat. 2260. See Tables for complete classification.

Section 1101(a)(15)(T)(ii) of Title 8, referred to in subsec. (b)(1)(A), (B), originally read "section 101(a)(15)(T)(ii)", and was translated as meaning section 101(a)(15)(T)(ii) of the Immigration and Nationality Act, Act June 27, 1952, c. 477, which is classified to section 1101(a)(15)(T)(ii) of Title 8, to reflect the probable intent of Congress. Section 101 of Pub.L. 106-386 does not contain a subsec. (a)(15)(T)(ii), and section 101(a)(15)(T)(ii) of the Immigration and Nationality Act describes certain nonimmigrant aliens.

The amendments made by this section, referred to in subsec. (e)(5), are the amendments made by section 107 of Pub.L. 106-386, which enacted this section and amended 8 U.S.C.A. §§ 1101, 1182, 1184 and 1255. See Codifications note set out under this section.

Codifications

Section consists of section 107 of Pub.L. 106-386. The following provisions thereof have been omitted, as they affect matter set out in other sections of the U.S. Code, as follows:

Subsec. (e)(1) amended 8 U.S.C.A. § 1101(a)(15).

Subsec. (e)(2) amended 8 U.S.C.A. § 1184.

Subsec. (e)(3) amended 8 U.S.C.A. § 1182(d).

Subsec. (e)(4) amended 8 U.S.C.A. § 1101 by adding subsec. (i) thereto.

Subsec. (f) amended 8 U.S.C.A. § 1255.

Pub.L. 109-162, § 804(a)(1), which directed that subsecs. (b)(1)(E) and (g) of this section be amended by striking "Attorney General" each place it appears and inserting "Secretary of Homeland Security", was not executed due to conflict with subsequent amendments by Pub.L. 109-162, § 804(b) and (d). See 2006 Amendments notes set out under this section.

Pub.L. 109-162, § 804(c), which directed that subsec. (e) of this section be amended by striking "Attorney General" each place it occurs and inserting "Secretary of Homeland Security", was not executed due to prior identical amendment by Pub.L. 109-162, § 804(a)(1). See 2006 Amendments notes set out under this section.

Amendments

2008 Amendments. Subsec. (a)(1). Pub.L. 110-457, § 104(1)(A), inserted ", and shall be carried out in a manner which takes into account the cross-border, regional, and transnational aspects of trafficking in persons" in the

second sentence.

Subsec. (a)(1)(F). Pub.L. 110-457, § 104(1)(B), added subpar. (F)

Subsec. (a)(2). Pub.L. 110-457, § 104(2), added at the end "victims. In carrying out this paragraph, the Secretary and the Administrator shall take all appropriate steps to ensure that cooperative efforts among foreign countries are undertaken on a regional basis".

Subsec. (b)(1)(E)(i)(I). Pub.L. 110-457, § 212(a)(1), inserted "or is unable to cooperate with such a request due to physical or psychological trauma" before the semicolon.

Subsec. (b)(1)(F), (G). Pub.L. 110-457, § 212(a)(2), added subpars. (F) and (G).

Subsec. (b)(2)(B)(ii). Pub.L. 110-457, § 213(a)(3), rewrote cl. (ii), which formerly read: "two percent for training and technical assistance; and".

Subsec. (c)(3). Pub.L. 110-457, § 205(a)(1), rewrote subsec. (c)(3), which formerly read:

"(3) Authority to permit continued presence in the United States

"Federal law enforcement officials may permit an alien individual's continued presence in the United States, if after an assessment, it is determined that such individual is a victim of a severe form of trafficking and a potential witness to such trafficking, in order to effectuate prosecution of those responsible, and such officials in investigating and prosecuting traffickers shall protect the safety of trafficking victims, including taking measures to protect trafficked persons and their family members from intimidation, threats of reprisals, and reprisals from traffickers and their associates."

Subsec. (c)(4). Pub.L. 110-457, § 212(b), inserted ", the Department of Homeland Security, the Department of Health and Human Services," after "the Department of State"; and inserted ", including juvenile victims. The Attorney General and the Secretary of Health and Human Services shall provide training to State and local officials to improve the identification and protection of such victims" before the period at the end.

Subsec. (f). Pub.L. 110-457, § 213(a)(1), inserted subsec. (f).

2006 Amendments. Subsec. (b)(1)(E). Pub.L. 109-162, § 804(a)(1), struck out "Attorney General" each place it appeared and inserted "Secretary of Homeland Security" but was not executed. See Codifications note set out under this section.

Subsec. (b)(1)(E)(i). Pub.L. 109-162, § 804(b)(1)(A), in the matter preceding subcl. (I), inserted "and the Secretary of Homeland Security" after "Attorney General".

Subsec. (b)(1)(E)(i)(II)(bb). Pub.L. 109-162, § 804(b)(1)(B), inserted "and the Secretary of Homeland Security" after "Attorney General".

Subsec. (b)(1)(E)(ii). Pub.L. 109-162, § 804(b)(2), inserted "Secretary of Homeland Security" after "Attorney General".

Subsec. (b)(1)(E)(iii)(II). Pub.L. 109-162, § 804(b)(3)(A), struck out "and" at the end.

Subsec. (b)(1)(E)(iii)(III). Pub.L. 109-162, § 804(b)(3)(B), struck out the period at the end and inserted "; or".

Subsec. (b)(1)(E)(iii)(IV). Pub.L. 109-162, § 804(b)(3)(C), added subcl. (IV).

Subsec. (c). Pub.L. 109-162, § 804(a)(2), in the matter preceding par. (1), inserted ", the Secretary of Homeland Security" after "Attorney General".

Subsec. (c)(2). Pub.L. 109-164, § 102(a), at the end, inserted "To the extent practicable, victims of severe forms of trafficking shall have access to information about federally funded or administered anti-trafficking programs that provide services to victims of severe forms of trafficking.".

Subsec. (e). Pub.L. 109-162, § 804(c), struck out "Attorney General" each placed it occurred and inserted "Secretary of Homeland Security" but was not executed due to prior identical amendment by Pub.L. 109-162, § 804(a)(1). See Codifications note set out under this section.

Subsec. (e)(5). Pub.L. 109-162, § 804(a)(1), struck out "Attorney General" each place it appeared and inserted "Secretary of Homeland Security".

Subsec. (g). Pub.L. 109-162, § 804(a)(1), struck out "Attorney General" and inserted "Secretary of Homeland Security" but was not executed. See Codifications note set out under this section.

Pub.L. 109-162, § 804(d), inserted "or the Secretary of Homeland Security" after "Attorney General".

2003 Amendments. Subsec. (a)(1)(B). Pub.L. 108-193, § 4(a)(1), added at the end before the period: ", and by facilitating contact between relevant foreign government agencies and such nongovernmental organizations to facilitate cooperation between the foreign governments and such organizations".

Subsec. (b)(1)(A). Pub.L. 108-193, § 4(a)(2)(A), inserted ", or an alien classified as a nonimmigrant under section 1101(a)(15)(T)(ii)," after "in persons".

Subsec. (b)(1)(B). Pub.L. 108-193, §4(a)(2)(B)(i), after "United States", inserted "and aliens classified as a non-immigrant under section 101(a)(15)(T)(ii),".

Pub.L. 108-193, §4(a)(2)(B)(ii), at the end, added the following new sentence: "In the case of nonentitlement programs funded by the Secretary of Health and Human Services, such benefits and services may include services to assist potential victims of trafficking in achieving certification and to assist minor dependent children of victims of severe forms of trafficking in persons or potential victims of trafficking."

Subsec. (b)(1)(D). Pub.L. 108-193, § 6(a)(2), struck out subpar. (D), which formerly read:

"(D) Annual report

"Not later than December 31 of each year, the Secretary of Health and Human Services, in consultation with the Secretary of Labor, the Board of Directors of the Legal Services Corporation, and the heads of other appropriate Federal agencies shall submit a report, which includes information on the number of persons who received benefits or other services under this paragraph in connection with programs or activities funded or administered by such agencies or officials during the preceding fiscal year, to the Committee on Ways and Means, the Committee on International Relations, and the Committee on the Judiciary of the House of Representatives and the Committee on Finance, the Committee on Foreign Relations, and the Committee on the Judiciary of the Senate."

Subsec. (b)(1)(E)(iv). Pub.L. 108-193, § 4(a)(3), added clause (iv).

Subsec. (g). Pub.L. 108-193, § 8(b)(2), struck out "1184(n)(1)" and inserted "1184(o)(2)".

2002 Amendments. Subsec. (a)(1). Pub.L. 107-228, § 682(a), rewrote par. (1), which formerly read:

"(1) In general

"The Secretary of State and the Administrator of the United States Agency for International Development, in consultation with appropriate nongovernmental organizations, shall establish and carry out programs and initiatives in foreign countries to assist in the safe integration, reintegration, or resettlement, as appropriate, of victims of trafficking. Such programs and initiatives shall be designed to meet the appropriate assistance needs of such persons and their children, as identified by the Task Force."

Effective and Applicability Provisions

2008 Acts. Pub.L. 110-457, Title II, § 205(a)(2), Dec. 23, 2008, 122 Stat. 5061, provided that: "The amendment made by paragraph (1) [amending subsec. (c)(3) of this section]--

"(A) shall take effect on the date of the enactment of this Act [Dec. 23, 2008];

"(B) shall apply to pending requests for continued presence filed pursuant to section 107(c)(3) of the Trafficking Victims Protection Act (22 U.S.C. 7105(c)(3)) and requests filed on or after such date; and

"(C) may not be applied to an alien who is not present in the United States."

Transfer of Functions

For abolition of Immigration and Naturalization Service, transfer of functions, and treatment of related references, see note set out under 8 U.S.C.A. § 1551.

Establishment of Pilot Program for Residential Rehabilitative Facilities for Victims of Trafficking

Pub.L. 109-164, Title I, § 102(b), Jan. 10, 2006, 119 Stat. 3561, as amended Pub.L. 110-457, Title III, §§ 302(1), 304(b), Dec. 23, 2008, 122 Stat. 5087, provided that:

"(1) Study.--

"(A) In general.--Not later than 180 days after the date of the enactment of this Act [Jan. 10, 2006], the Administrator of the United States Agency for International Development shall carry out a study to identify best practices for the rehabilitation of victims of trafficking in group residential facilities in foreign countries.

"(B) Factors.--In carrying out the study under subparagraph (A), the Administrator shall--

"(i) investigate factors relating to the rehabilitation of victims of trafficking in group residential facilities, such as the appropriate size of such facilities, services to be provided, length of stay, and cost; and

"(ii) give consideration to ensure the safety and security of victims of trafficking, provide alternative sources of income for such victims, assess and provide for the educational needs of such victims, including literacy, and assess the psychological needs of such victims and provide professional counseling, as appropriate.

"(2) Pilot program.--Upon completion of the study carried out pursuant to paragraph (1), the Administrator of the United States Agency for International Development shall establish and carry out a pilot program to establish residential treatment facilities in foreign countries for victims of trafficking based upon the best practices identified in the study.

"(3) Purposes.--The purposes of the pilot program established pursuant to paragraph (2) are to--

"(A) provide benefits and services to victims of trafficking, including shelter, psychological counseling, and assistance in developing independent living skills;

"(B) assess the benefits of providing residential treatment facilities for victims of trafficking, as well as the most efficient and cost-effective means of providing such facilities; and

"(C) assess the need for and feasibility of establishing additional residential treatment facilities for victims of trafficking.

"(4) Selection of sites.--The Administrator of the United States Agency for International Development shall select 2 sites at which to operate the pilot program established pursuant to paragraph (2).

"(5) Form of assistance.--In order to carry out the responsibilities of this subsection, the Administrator of the United States Agency for International Development shall enter into contracts with, or make grants to, organizations with relevant expertise in the delivery of services to victims of trafficking.

"(6) Report.--Not later than one year after the date on which the first pilot program is established pursuant to paragraph (2), the Administrator of the United States Agency for International Development shall submit to the Committee on Foreign Affairs of the House of Representatives and the Committee on Foreign Relations of the Senate a report on the implementation of this subsection.

"(7) Authorization of appropriations.--There are authorized to be appropriated to the Administrator of the United States Agency for International Development to carry out this subsection $2,500,000 for each of the fiscal years 2008 through 2011."

[Amendment of this note by Pub.L. 110-457 may not be construed to affect the availability of funds appropriated pursuant to authorizations under the Trafficking Victims Protection Act of 2000 (Pub.L. 106-386, Div. A, §§ 101 to 113, Oct. 28, 2000, 114 Stat. 1466) and the Trafficking Victims Protection Reauthorization Act of 2005 (Pub.L. 109-164, Jan. 10, 2006, 119 Stat. 3558), see Pub.L. 110-457, § 303, set out as a note under 22 U.S.C.A. § 7110].

Savings provision

Pub.L. 109-162, Title I, § 104(b), Jan. 5, 2006, 119 Stat. 2979, provided that: "Nothing in this Act, or the amendments made by this Act [Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub.L. 109-162, Jan. 5, 2006, 119 Stat. 2960; see Tables for classifications], shall be construed to restrict the legal assistance provided to victims of trafficking and certain family members authorized under section 107(b)(1) of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7105(b)(1))[subsec. (b) of this section]."

CROSS REFERENCES

Immigration, child trafficking, enhancing efforts to combat trafficking, safe placement and repatriation of children, see 8 USCA § 1232.

LIBRARY REFERENCES

American Digest System

Slaves 24.
Key Number System Topic No. 356.

RESEARCH REFERENCES

Encyclopedias

Am. Jur. 2d Involuntary Servitude and Peonage § 14, Trafficking Victims Protection Act.

Treatises and Practice Aids

Immigration Law Service 2d PSD INA § 240A, Cancellation of Removal; Adjustment of Status.

NOTES OF DECISIONS

Constitutionality 2
Persons entitled to maintain action 1

1. Persons entitled to maintain action

Civil liberties organization had associational standing to maintain Establishment Clause-based action against Department of Health and Human Services (DHHS) officials, challenging agency's decision to allow religion-based restrictions on disbursement of taxpayer-funded services pursuant to Trafficking Victims Protection Act (TVPA), by virtue of its members' status as federal taxpayers; TVPA designated victims of human trafficking abuse as intended beneficiaries, and required funding of services for such persons. American Civil Liberties Union of Massachusetts v. Sebelius, D.Mass.2010, 697 F.Supp.2d 200. Constitutional Law 825

2. Constitutionality

Department of Health and Human Services (HHS) permitting Catholic organization, which was acting as general contractor under the Trafficking Victims Protection Act (TVPA), to exclude certain services, including abortion and contraception, from government funding to victims' services was an endorsement of religion in violation of the First Amendment establishment clause; restriction imposed on subcontractors was motivated by deeply held religious beliefs, and subcontractors could not opt out of restriction without shouldering the financial burden. American Civil Liberties Union of Massachusetts v. Sebelius, D.Mass.2012, 2012 WL 987995. Abortion and Birth Control 126; Constitutional Law 1334; Social Security and Public Welfare 4; United States 82(1)

22 U.S.C.A. § 7105, 22 USCA § 7105

Current through P.L. 112-142 (excluding P.L. 112-140 and 112-141) approved 7-9-12

END OF DOCUMENT

United States Code Annotated Currentness
Constitution of the United States
Annotated
Amendment I. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances (Refs & Annos)

Amendment I. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

<This amendment is further displayed in three separate documents according to subject matter>

<see USCA Const Amend. I, Religion>

<see USCA Const Amend. I, Speech>

<see USCA Const Amend. I, Assemblage>

Current through P.L. 112-142 (excluding P.L. 112-140 and 112-141) approved 7-9-12

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