UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 12-1466

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, (ACLUM)

Plaintiff-Appellee

v.

UNITED STATES CONFERENCE OF CATHOLIC BISHOPS

Defendant-Appellant

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

No. 12-1658

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, (ACLUM)

Plaintiff-Appellee

v.

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-Appellants

and

UNITED STATES CONFERENCE OF CATHOLIC BISHOPS

Defendant

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

BRIEF FOR APPELLEE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellee American Civil Liberties Union of Massachusetts ("ACLU") discloses that it has no parent company and no publicly held company owns any percentage of the ACLU.

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to Local Rule 34.0(a), the ACLU respectfully requests oral argument in this case, which raises the important constitutional question of whether the federal government is permitted under the First Amendment to delegate to a religious organization the authority to define the parameters of a federal trafficking victims program based on its religious beliefs, and to allow that religious organization to prohibit government funds from being used to provide crucial reproductive health services to vulnerable trafficking victims solely because of the organization's religious beliefs.

STATEMENT OF THE ISSUES

1. Whether this case falls within an exception to the mootness doctrine because the government voluntarily ceased its unconstitutional conduct by awarding the trafficking contract to entities other than USCCB, and could easily award the contract to USCCB again and allow USCCB to impose its religious beliefs on its subcontractors and trafficking victims.

2. Whether the ACLU has taxpayer standing based on the Supreme Court's directly relevant and undisturbed holdings in *Flast v. Cohen*, 392 U.S. 83 (1968), and *Bowen v. Kendrick*, 487 U.S. 589 (1988).

3. Whether the Establishment Clause prohibits the government from authorizing a contractor to use the contractor's religious beliefs to dictate the parameters of a federal program, namely by prohibiting subcontractors from using federal funds to provide otherwise-included services solely because of the contractor's religious doctrine.

STATEMENT OF THE CASE

This case presents the question of whether the government may contract with a religious organization to administer a federally funded trafficking victims' services program, and authorize that organization to prohibit its subcontractors from using government funds for otherwise-covered services – namely, abortion and contraception referrals and services – based on the organization's religious

beliefs. As the District Court properly held, well-established Supreme Court precedent makes clear that the Establishment Clause prohibits such a practice.

Trafficking victims endure the most horrific conditions imaginable. They are often beaten, brutally raped, forced into prostitution, and are required to live in inhumane conditions. In order to assist these individuals, Congress passed the Trafficking Victims Protection Act ("TVPA") in 2000, which, *inter alia*, authorized funding to provide needed services to trafficking victims in the United States. Under the TVPA, certified trafficking victims are eligible to receive the same benefits as refugees, which include abortion and contraception referrals and services. In implementing the TVPA, the government appellants (collectively "HHS") did not prohibit TVPA grantees from using TVPA funds to pay for abortion and contraception services.

In 2005, however, HHS decided to hire a central contractor to administer TVPA funds, which would then subcontract with nonprofit organizations to provide services directly to trafficking victims. In the course of the bidding process, Intervenor-Appellant United States Conference of Catholic Bishops ("USCCB") made clear that "as 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. . . . Specifically, subcontractors could not provide or refer for abortion services or contraceptive materials." Nevertheless,

HHS awarded the contract to USCCB and authorized USCCB to prohibit its subcontractors from using TVPA funds to provide abortion and contraceptive referrals and services to trafficking victims because of USCCB's Catholic beliefs.

By allowing USCCB to impose its religion on its contractors and their clients, HHS violated the Establishment Clause. As the District Court held, HHS's actions had the effect of endorsing USCCB's religious beliefs. Mem. and Order on Cross Mots. for Summ. J. ("Order on Summ. J.") at 28 (Joint Appendix ("JA") 1635). The District Court also correctly held that HHS's actions constituted an impermissible delegation of HHS's statutory authority to USCCB to determine – based on USCCB's religious beliefs – which health services trafficking victims could receive with federal funds. *Id.*

In addition, the District Court rightly held that this case is not moot. HHS's unconstitutional conduct ceased, not because the contract expired, but because HHS decided on its own to reject USCCB's new request for TVPA funding, and to instead award the trafficking grant to entities that did not impose a religiously based restriction on services. *Id.* at 11-15 (JA 1617-22). Furthermore, relying on established Supreme Court precedent, the District Court correctly held that the ACLU has taxpayer standing to raise an Establishment Clause claim because the ACLU challenges the application of a specific law passed by Congress and its

attendant appropriation. *Id.* at 7-10 (JA 1614-17). This Court should affirm the District Court's decision in its entirety.

STATEMENT OF FACTS

I. Human Trafficking in the United States.

Human trafficking is a form of modern-day slavery, and it occurs when "victims are compelled to engage in commercial sex or to provide labor by means of force, fraud, or coercion." HHS Request for Proposals ("RFP") (JA 56). Human trafficking happens worldwide, and it is estimated that thousands of individuals are trafficked into the United States each year. *See* Compl. ¶ 1 (JA 18); HHS's Ans. ¶ 1 (JA 174); USCCB's Ans. ¶ 1 (JA 193). To combat this appalling crime, Congress passed the Trafficking Victims Protection Act, 22 U.S.C. § 7105, in 2000, and reauthorized that Act in 2003, 2005, and 2008. *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2005); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

Trafficking victims endure unimaginable conditions. Many trafficked women are sexually abused by their traffickers and some are forced to work in the sex trade. *See* Compl. ¶ 1 (JA 18); HHS's Ans. ¶ 1 (JA 174); USCCB's Ans. ¶ 1

(JA 193); Baldwin Dep. 88:23-90:1-7 (JA 259-61); Baldwin Report ¶ 5 (JA 282). As the government has recognized, "[t]rafficking victims may suffer from an array of physical and psychological health issues stemming from inhumane living conditions, poor sanitation, inadequate nutrition, poor personal hygiene, brutal physical and emotional attacks at the hands of their traffickers, . . . and general lack of quality health care." HHS's Resps. to Interrogs. at 10-11 (JA 304-05).

Some trafficked women are subjected to forced sex multiple times a day. Baldwin Dep. 74:8-25 (JA 258). It is therefore not surprising that they experience unintended pregnancies and are at risk for sexually transmitted infections ("STIs"). *Id.*; *see also id.* 71:5-19 (JA 257); Baldwin Report ¶¶ 7-8 (JA 282); HHS's Resps. to Interrogs. at 10-11 (JA 304-05); 22 U.S.C. § 7101(b)(11) (Congressional finding that trafficking victims are exposed to diseases, including HIV/AIDS). As a result, upon escape from their traffickers, many of these women will need access to an array of medical services, including abortion services, STI and HIV testing and treatment, and contraception. Baldwin Dep. 95:7-97:18 (JA 262-64); Baldwin Report ¶¶ 7-8 (JA 282); HHS Request for Proposals (JA 487); *see also* Appellants' Br. for Government Defendants ("HHS's Br.") at 45; Mem. and Order on Defs.' Mot. to Dismiss ("Order on Mot. to Dismiss") at 2-3 n.5 (JA 153-54) (finding that it can be inferred from the TVPA's findings that trafficking victims will face unwanted pregnancy). Trafficking victims may also need access to emergency

contraception, which prevents pregnancy up to 120 hours after unprotected sex. Baldwin Dep. 164:17-165:4 (JA 276-77); Baldwin Report ¶ 8 (JA 282). Moreover, providing testing and treatment for STIs and HIV, including information about condoms, is particularly important from a public health perspective given the role that trafficking may have in spreading these infections. Baldwin Dep. 125:7-127:12; 135:24-136:9 (JA 265-69); Baldwin Report ¶ 9 (JA 282); *see also* 22 U.S.C. § 7601(23) (Congressional finding that the trafficking of individuals into the sex industry is a cause of and factor in the spread of the HIV/AIDS epidemic).

Allowing trafficking survivors to make their own decisions about their reproductive health is important to helping them become self-sufficient, particularly because many traffickers control their victims by withholding reproductive health care, including contraceptives and condoms, and by forcing their victims to undergo abortion. Baldwin Dep. 150:16-151:5; 155:9-24 (JA 270-72); Baldwin Report ¶ 10 (JA 282). Trafficking victims often do not know where to access services, including health care, and often do not speak English. Baldwin Dep. 159:22-160:17 (JA 273-74); Baldwin Report ¶ 11 (JA 283); Busch-Armendariz Dep. 26:15-27:5 (JA 317-18). As a result, upon rescue, trafficking victims rely on case managers at nonprofit organizations, like USCCB's former subcontractors, to help them navigate services including housing, education, transportation, and health care. Baldwin Dep. 160:20-161:1 (JA 274-75). It is the

responsibility of the case manager or social worker to know the resources available in the community and assist trafficking victims in accessing services. *Id.* 198:25-199:8 (JA 278-79). This includes providing the appropriate referrals for reproductive health care, and helping victims by transporting them to the appropriate physician's office. Busch-Armendariz Dep. 46:9-47:20 (JA 321-22). Preventing case managers from providing referrals is, in essence, the same as denying medical services for this population. Baldwin Dep. 58:1-12 (JA 255). Nonprofit organizations have limited resources, and these limited resources create obstacles for providing services to trafficking victims. Busch-Armendariz Dep. 40:21-41:3 (JA 319-20).

II. The Government's Trafficking Program and the Award of the Trafficking Contract to USCCB.

Prior to 2005, HHS sought to ensure that trafficking victims received the services they needed to rebuild their lives, and that were mandated by the TVPA, by providing grants and contracts to various nonprofit organizations that provided direct services to clients. HHS's Resps. to Interrogs. at 4-6 (JA 298-300). Under these grants and contracts, HHS did not impose any prohibition on the use of TVPA funds for abortion or contraception referrals and services. *Id.* at 4 (JA 298). In 2005, HHS decided to change the funding mechanism for the provision of services to trafficking victims. It developed a program with one central nonprofit administrator, which would then subcontract with nonprofit organizations across

the country that provided services to trafficking victims. Mem. to Wade F. Horn (JA 324-28).

Accordingly, on November 9, 2005, HHS released a Request for Proposals to find a contractor to provide services to victims of human trafficking. HHS RFP at 5-29 (JA 224-48). The RFP cited 22 U.S.C. § 7105(b)(1)(B) as the authority for the proposed contract, *id.* at 8 (JA 227), which allows the government to expand nonentitlement programs to victims of trafficking. The RFP also indicated that the "statutory authority that will be expanded to provide benefits and services to these victims of severe forms of trafficking . . . is found at" 8 U.S.C. § 1522(c)(1)(A) of the Immigration and Nationality Act ("INA"). *Id.* at 9 (JA 228). The relevant INA provision states that Appellant Director of the Office of Refugee Resettlement ("ORR") is "authorized to make grants to, and enter into contracts with, public or private nonprofit agencies for projects specifically designed . . . to [*inter alia*] provide where specific needs have been shown and recognized by the Director, health (including mental health) services, social services, educational and other services." 8 U.S.C. § 1522(c)(1)(A); *see also* HHS RFP at 9 (JA 228). Furthermore, the RFP specifically stated that the "Contractor shall provide authentic victims of human trafficking the support they need to rebuild their lives and re-establish their ability to live independently." *Id.* at 10-11 (JA 229-30). The RFP also said that service providers receiving federal money under the contract

shall provide case management and counseling, and at minimum the counseling "shall explain how the victim accesses the full range of federally funded benefits." *Id*. at 11 (JA 230). The RFP also stated that the direct services that trafficking victims may need include health screening and medical care. *Id.* The RFP does not prohibit the contractor from using TVPA funds for contraception or abortion referrals and services. To the contrary, the TVPA says that trafficking victims are eligible for the same services as refugees, 22 U.S.C.§ 7105 (b)(1), and, for certified trafficking victims, this includes Medicaid and Refugee Medical Assistance, which pay for contraception, and abortion in the cases of rape, incest, and life endangerment. *See, e.g.,* HHS RFP at 11-12 (JA 230-31); Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, Title V General Provisions §§ 507-508, 123 Stat. 3034; 45 C.F.R. § 400.105 (refugee medical assistance must mirror Medicaid benefits).

USCCB submitted a proposal in response to the RFP. USCCB is a religious organization whose membership consists of the Catholic bishops in the United States, and USCCB carries out the bishops' mission to "unify, coordinate, encourage, promote and carry on Catholic activities in the United States" and "organize and conduct religious, charitable and social welfare work at home and abroad." Compl. ¶ 41 (JA 25); USCCB Ans. ¶ 41 (JA 197). In its Technical

Proposal submitted in response to the RFP, USCCB included the following limitation:

> [A]s 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.

USCCB's Technical Proposal at 18 (JA 335). The District Court found that "USCCB apparently raised the issue on the understanding that abortions and contraceptives are among the clinical services that victims of trafficking might request." Mem. on Summ. J. at 4 n.5 (JA 1611).

To evaluate the proposals it received in response to the RFP, HHS convened a technical evaluation panel, comprised of three government employees and one government contractor. Technical Evaluation Report (JA 337). During the initial review of USCCB's proposal, two of the panel members identified USCCB's abortion/contraception prohibition as a weakness or deficiency of the proposal. Aqui's Individual Evaluation Sheet (JA 361-65); Edwards's Individual Evaluation Sheet (JA 370-74). For example, Antoinette Anderson (née Aqui) noted under "weaknesses" that "'[s]ubcontractors could not provide or refer for abortion services or contraceptive materials for [USCCB's] clients pursuant to this contract.'" Aqui's Individual Evaluation Sheet at 358 (JA 364). At her deposition,

Ms. Anderson testified that she was concerned that because of USCCB's abortion/contraception prohibition, trafficking victims would not receive needed medical services. She said that if a trafficked individual wanted an abortion, but the subcontractor did not have money to pay for the abortion, it would be problematic. Anderson Dep. 25:8-26:17 (JA 380-81).

After the individual panel members filled out their evaluation sheets, the head of the panel, Steven Wagner, and/or the contract specialist, Michellee Edwards, compiled a list of questions to ask USCCB about its proposal. Edwards Dep. 73:9-74:8 (JA 397-98); Wagner Dep. 45:18-46:18 (JA 406-07). One of the panel's questions asked: "Would a 'don't ask, don't tell' policy work regarding the exception [for abortion and contraception]? What if a sub-contractor referred victims supported by stipend to a third-party agency for such services?" Responses to HHS/ORR Technical Evaluation Panel Questions at 4 (JA 414). USCCB responded: "We can not be associated with an agency that performs abortions or offers contraceptives to our clients. If they sign the written 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.*

The panel members held a meeting with USCCB, after which USCCB submitted an Amended Technical Proposal, which included both the panel's questions and USCCB's answers, discussed *supra*, and the identical prohibition on abortion and contraception referrals and services. Amended Technical Proposal at 23 (JA 432).

HHS awarded the contract to USCCB on or about April 10, 2006. Contract HHSP23320062900YI (JA 441). The final contract incorporates by reference, *inter alia*, USCCB's Technical Proposal and Amended Technical Proposal, which include the explicitly Catholic-based abortion/contraception prohibition. *Id.* at HHS1340 (JA 457).

In May 2007 and 2008, the Attorney General's office provided its annual report to Congress about federal efforts to combat trafficking, and that report informed Congress of ORR's multimillion dollar contract with USCCB. *See* Attorney General's Annual Report to Congress on U.S. Government Activities to Combat Trafficking in Persons Fiscal Year 2006 (May 2007), 7, http://www.justice.gov/archive/ag/annualreports/tr2006/agreporthumantrafficing2006.pdf; Attorney General's Annual Report to Congress and Assessment of the U.S. Government Activities to Combat Trafficking in Persons Fiscal Year 2007 (May 2008), 5, http://www.justice.gov/archive/ag/annualreports/tr2007/agreporthumantrafficing20

07.pdf. Congress was therefore aware of the contract between USCCB and HHS when it reauthorized the TVPA on December 10, 2008, and when it authorized appropriations each year to fund the TVPA. *See* Pl.'s Compl. ¶ 69 (JA 29); Defs.' Ans. ¶ 69 (JA 181); Order on Mot. to Dismiss at 2 (JA 153) (finding that Congress appropriated $12.5 million under the TVPA for each of the fiscal years 2008-2011).

USCCB's contract with HHS was for one year, with four option years. Contract at 7 (JA 447). Each year, USCCB could spend up to $6 million, but it never spent more than approximately $4 million. Contract at 5 (JA 445); HHS's Resps. to Interrogs. at 13-14 (JA 307-08). HHS renewed USCCB's contract each term, including for an extra six-month term, until October 2011. Timmerman Decl. ¶¶ 6-8 (JA 1486-87). Prior to October 2011, the government issued a new RFP for trafficking grants that makes clear that TVPA funds may be used to pay for abortions in cases where the woman is a victim of rape or incest, or if her life is endangered by the pregnancy, and that trafficking victims do indeed need reproductive health services and referrals. National Human Trafficking Victim Assistance Program, HHS-2011-ACF-ORR-ZV-0148, at 5-6 (JA 486-87).

III. USCCB's Implementation of the Contract.

USCCB did not provide direct services itself, but instead subcontracted with nonprofit organizations across the country – many of which are not Catholic – to

do so. Parampil Dep. 27:17-28:19; 83:20-84:9 (JA 524-25, 531-32). HHS paid USCCB money for its administrative efforts under the contract, and paid USCCB a fixed amount for each client its subcontractors served, one amount for "certified" human trafficking victims and a lower amount for non-certified trafficking victims. Womak Dep. 46:13-47:10 (JA 545-46). To become certified, an individual must meet the definition of a victim of human trafficking under the TVPA; she must be willing to cooperate with law enforcement efforts unless she is too traumatized to do so; and she must have either a "continued presence" status from Homeland Security, or complete an application for a victim-of-trafficking visa. *Id.* 70:3-71:16 (JA 549-50); *see also* 22 U.S.C. § 7105(b)(1)(E). The difference in the price between certified and pre-certified victims is based on the fact that once a trafficking victim receives her certification, she is eligible for a range of government benefits, such as Refugee Medical Assistance, Medicaid, and Temporary Aid to Needy Families. Womack Dep. 47:11-20; 48:3-49:17 (JA 546, 547-48). But until she receives her certification, she is dependent upon social service agencies, including USCCB's subcontractors. *See, e.g.*, *id.* 47:11-20 (JA 546). 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. Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, Title V General

Provisions §§ 507-508, 123 Stat. 3034; 45 C.F.R. § 400.105 (refugee medical assistance must mirror state Medicaid benefits).

For each client served, USCCB's subcontractors could bill a maximum amount for administrative expenses, and submit for reimbursement for expenses related to providing the client with services, such as housing, food, and medical care. Parampil Dep. 36:7-37:14 (JA 526-27); Subcontract Between USCCB and Subcontractors ("Subcontract") at 3 (JA 558). The administrative rate provided subcontracting organizations with money to support case management work, including paying their employees' salaries. Parampil Dep. 37:18-38:22 (JA 527-28).

The subcontract USCCB required its subcontractors to sign said: "funds shall not be used to provide referral for abortion services or contraceptive materials, pursuant to this contract." Subcontract at 4 (JA 559). Moreover, USCCB distributed a program operations manual ("POM") to its subcontractors, which outlined case management guidance and protocols of service. The POM stated: "Please note that program funding can not be used for abortion services or contraceptive materials." POM at 22 (JA 576). If a subcontractor used the "administrative rate" to pay for staff salaries, that staff time could not be used to provide referrals for abortion or contraception. Parampil Dep. 45:12-46:14 (JA 529-30).

As the District Court found, USCCB's prohibition on abortion and contraceptive referrals and services is based on its Catholic beliefs: "[T]here is no reason to question the sincerity of 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." Order on Summ. J. at 21 (JA 1628); *see also id.* at 21-22 n.23 (JA 1628-29). Indeed, the District Court held that USCCB's "frank statement" about the imposition of the abortion/contraception prohibition in USCCB's request for proposal was "motivated by Catholic dogma." *Id.* at 3 n.4 (JA 1610); *see also* Technical Proposal at 18 (JA 335) ("*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*") (emphasis added). Anastasia Brown, who was the director of USCCB's refugee program and oversaw the operation of the contract stated that the abortion/contraception prohibition was put into place because USCCB would be working with non-Catholic entities and "wanted to be sure that through the provision of this service within this contract nothing would be done in violation of our religious and moral beliefs." Brown Dep. 14:16-17, 22:5-18 (JA 580, 581). In all of USCCB's contracts or agreements, not just the trafficking contract, USCCB includes language prohibiting the use of funding for abortion and contraception referrals and services. *Id.* 54:1-11 (JA 584).

After the award of the contract to USCCB, several individuals and organizations contacted HHS and USCCB with concerns about the abortion/contraception prohibition. Womack Dep. 154:10-156:12 (JA 552-54); Email from Vanessa Garza to Martha Newton, et al. (JA 586). For example, at the start of the contract in 2006, the Freedom Network, a national coalition of anti-trafficking organizations, sent a letter to USCCB, which said that "trafficked persons interested in avoiding sexually transmitted diseases and pregnancy often approach social service agencies for contraception and referrals. Moreover, trafficked persons who have been raped by their traffickers often approach social service providers for information regarding abortion services." Letter from Freedom Network – May 31, 2006 (JA 589-92).

HHS awarded USCCB more than $15.9 million over five years. As the District Court found, USCCB kept over $5.3 million for administrative services and expenses. Mem. on Summ. J. at 6 n.7 (JA 1613). In some years, these administrative expenses exceeded almost 35% of the total amount of the contract, despite the fact that the contract provided that no more than 20% of the contract should be used for non-victim services. HHS's Resps. to Interrogs. at 12-14 (JA 306-08); Contract at 7 (JA 447). USCCB's administrative expenses included paying the full salaries of several USCCB staff members; those staff members monitored its subcontractors to enforce USCCB's prohibition on using government

funds to pay for abortion and contraception referrals and services. Parampil Dep. 243:16-23; 248:1-5; 249:12-21 (JA 812, 816, 817); Brown Dep. 75:6-22 (JA 1244).

SUMMARY OF ARGUMENT

The Establishment Clause forbids precisely what HHS did here: it authorized USCCB to dictate what services trafficking victims should receive with federal dollars based on USCCB's Catholic beliefs. Although HHS, pursuant to its statutory mandate, has long recognized that trafficking victims should have access to abortion and contraception referrals and services, HHS allowed USCCB to override federal policy and further USCCB's religious mission by authorizing it to use its religious beliefs to prohibit federal funding for those services. As the District Court held, relying on well-settled Supreme Court precedent, HHS's actions violated the Establishment Clause. Order on Summ. J. at 28 (JA 1635).

In an effort to justify this unconstitutional arrangement, HHS and USCCB essentially argue that there is no Establishment Clause violation here because HHS awarded the contract to USCCB for secular reasons, namely, that USCCB submitted the best proposal. But this misses the point. The ACLU does not challenge the award of the contract to USCCB, nor does the ACLU argue that HHS lacked a secular purpose by entering into the contract with USCCB. The ACLU instead challenges HHS's decision to authorize a religious entity to restrict the

types of services that trafficking victims could receive with federal funds. As the District Court aptly stated, "[t]his case is about the limit 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 not share them)." *Id.* at 28 n.26 (JA 1635). Thus, the relevant question is not, as HHS and USCCB claim, *why* HHS entered into the contract with USCCB. Rather, the relevant question is whether, by authorizing USCCB to restrict services in a government program based on its religious beliefs, HHS endorsed and advanced religion in violation of the Establishment Clause. As the District Court properly found, the answer to that question is yes, and this Court should affirm that ruling.

Furthermore, HHS and USCCB's justiciability arguments lack merit, and the District Court's ruling on these issues should also be affirmed. As the District Court held on the standing issue, this case is materially indistinguishable from *Bowen v. Kendrick* and *Flast v. Cohen*. Order on Mot. to Dismiss at 16 (JA 167). Indeed, in both cases – as here – the Supreme Court held that taxpayers have standing to call into question under the Establishment Clause how funds authorized by Congress are being distributed by a government agency. Perhaps recognizing that this precedent forecloses their arguments, HHS and USCCB strive to invent a new requirement for taxpayer standing—one that would permit taxpayer standing only where the challenged statute facially contemplates the involvement of

religious groups. But such a requirement is directly contradicted by the relevant Supreme Court case law. To the extent that HHS and USCCB argue in the alternative that a taxpayer plaintiff must show that Congress had knowledge that religious groups would receive government funding – a contention likewise unsupported by Supreme Court precedent – the ACLU easily meets that requirement. It is undisputed that Congress had knowledge that HHS awarded a multimillion dollar contract to USCCB when it reauthorized the TVPA and approved its attendant appropriations.

As to HHS's mootness argument, the District Court properly held that HHS voluntarily ceased the unconstitutional activity, and that HHS did not meet its high burden of showing that it would not repeat the illegal activity. In the course of this litigation – and perhaps prompted by this litigation – HHS voluntarily decided to stop funding USCCB. But HHS could instead have easily awarded the contract to USCCB again. Nor has HHS taken steps to ensure that the constitutional violation will not be repeated, and indeed, HHS continues to vigorously defend its actions. Furthermore, HHS is also continuing other contracts with USCCB in which it authorized USCCB to impose the same religiously based prohibition on reproductive health services. Therefore, it is far from certain that HHS will not award the trafficking contract again to USCCB authorize USSCB to impose its religious beliefs on others using federal dollars.

ARGUMENT

I. Standard of Review.

On appellate review of summary judgment, legal conclusions are reviewed *de novo*. *United Paperworkers Int'l Union Local 14, AFL-CIO-CLC v. Int'l Paper Co.*, 64 F.3d 28, 32 (1st Cir. 1995). In a case like this one – a nonjury trial where the parties agree that there are no material facts at issue – the District Court's factual inferences should be set aside only if they are clearly erroneous. *Id.* at 31-32; *see also Garcia-Ayala v. Lederle Parenterals, Inc.,* 212 F.3d 638, 643-45 (1st Cir. 2000). Indeed, in this case, the parties agreed a trial was unnecessary and that the District Court could resolve the case on cross-motions for summary judgment. *See* Joint Mot. to Continue Trial Date, Dkt #102 (parties jointly requested continuance of trial date, agreeing that summary judgment should resolve the case and trial "need not . . . occur"). As a result, the parties submitted the case as a "case stated," and therefore the District Court's factual inferences should be reviewed only for clear error. *United Paperworkers*, 64 F.3d at 31.

II. The District Court Properly Held That This Case Is Not Moot Because HHS Voluntarily Ceased the Unconstitutional Conduct.

During the pendency of this lawsuit, HHS elected not to renew its contract with USCCB, and instead issued a new request for proposals from organizations seeking TVPA funds to assist trafficking victims. Funding Opportunity Announcement No. HHS-2011-ACF-ORR-ZV-0148 (JA 480-521). Although

USCCB submitted a proposal in response to HHS's request, HHS did not award a grant to USCCB, and instead decided to award TVPA funds to three different applicants whose proposals raised no Establishment Clause concerns. Picarello Decl. ¶ 7 (JA 1552). Having chosen on its own to cure the constitutional issue at the heart of this lawsuit, HHS now contends that this case has become moot. This argument should be rejected.

As this Court has repeatedly held, "[t]he burden of establishing mootness rests with the party urging dismissal," and "[t]his burden is a heavy one." *Connectu LLC v. Zuckerberg*, 522 F.3d 82, 88 (1st Cir. 2008) (citations omitted). Indeed, "[t]he Supreme Court has emphasized that the doctrine of mootness is more flexible than other strands of justiciability doctrine," *Karuk Tribe of California v. United States Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (en banc) (citation omitted), and has cautioned that "[t]o abandon the case at an advanced stage may prove more wasteful than frugal," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191-92 (2000). *Accord Adams v. Bowater Inc.*, 313 F.3d 611, 614 n.1 (1st Cir. 2002). Moreover, where – as here – the party asserting mootness rests its argument on its voluntary cessation of its unlawful conduct, that party cannot prevail unless it proves that it is "*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (per

curiam) (quotation marks and citations omitted, emphasis in original); *accord Adams*, 313 F.3d at 613.

As the District Court correctly held, HHS has not come close to showing that it is "absolutely clear that the circumstances giving rise to this case will not recur." Order on Summ. J. at 12-13 (JA 1619-20 (quotation marks omitted)). To the contrary, the prospects for recurrence here are significant. The record demonstrates that USCCB will continue to apply for TVPA funds, and, as the District Court found, the fact that USCCB was one of only two qualified bidders for the original TVPA contract "strongly suggests that the USCCB . . . will be among the small number of qualified candidates vying for future TVPA contracts." *Id.* at 13 (JA 1620). In addition, HHS continues to maintain that there was nothing unconstitutional about its decision to permit USCCB to impose religious restrictions on the use of TVPA funds, which increases the likelihood of future recurrence.[1] *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1* ("*PICS*"), 551 U.S. 701, 719 (2007) (concluding that a school district "has clearly not met" its burden of proving mootness where "the district vigorously defends the constitutionality of its race-based program, and nowhere suggests that if this

[1] This is particularly true where the party urging mootness has altered its challenged conduct *during litigation* but continues to defend the legality of the abandoned conduct. *See, e.g., United States v. Gov't of Virgin Islands*, 363 F.3d 276, 285 (3d Cir. 2004); *Conservation Law Found. v. Evans*, 360 F.3d 21, 27 (1st Cir. 2004) ("*Evans*").

litigation is resolved in its favor it will not resume using race to assign students"); *Adams*, 313 F.3d at 615; *Evans*, 360 F.3d at 26-27; *accord* Order on Summ. J. at 13 (JA 1620) ("'The government's filings give no indication that HHS has decided to reject [USCCB's] conscience protections in future contract and grant applications under the TVPA, and, even if such a decision were made, policies (and administrations) can change.'") (quoting USCCB's Supplemental Mem. at 4).

Furthermore, in addition to the TVPA contract, HHS has a long – and ongoing – history of contracting with USCCB and accepting precisely the same abortion and contraception restrictions that are at the heart of this case. *See* Englander Decl. ¶¶ 4, 9 (JA 1663-64); Picarello Decl. ¶ 6 (JA 1551-52). To take but a few examples:

- HHS has an agreement with USCCB to provide services, including medical referrals, to unaccompanied undocumented minors. USCCB insisted that HHS amend that agreement to impose USCCB's abortion and contraception restriction, and HHS agreed. *See* Englander Decl. ¶ 9 (JA 1664).

- HHS has an agreement with USCCB under the Voluntary Agency Matching Grant Program for USCCB to provide services, including medical referrals, to migrant populations eligible for refugee benefits. In the agreement, HHS agreed to USCCB's requirement that USCCB would only provide services "consistent with Catholic [t]eaching." Brown Decl. ¶ 12 (JA 1672).

- USCCB also has an agreement with the State Department to provide services, including medical referrals, to refugees. The State Department agreed to USCCB's requirement that USCCB would restrict the services it provided to those that are consistent with Catholic religious beliefs. *See id.* at ¶¶ 6-9 (JA 1670-71).

And as the District Court noted, USCCB has emphasized that it will continue to seek government contracts and to impose identical abortion and contraception restrictions on the services provided under those contracts. *See* Order on Summ. J. at 14 n.17 (JA 1621); Picarello Decl. ¶ 9 (JA 1552). Indeed, during the pendency of this appeal, HHS awarded to USCCB a new grant for the provision of services – including medical services – to human trafficking victims. *See* Enhanced Employment Services for Victims of Trafficking Demonstration, http://www.acf.hhs.gov/grants/open/foa/view/HHS-2012-ACF-OPRE-PH-0566/html ("Grantees provide services that must include case management . . . [and] they may also make referrals for . . . health and medical services . . . ."). Given that "USCCB consistently insists on conscience provisions similar to the one in this case," Picarello Decl. ¶ 6 (JA 1551-52), it appears that HHS has again authorized USCCB to impose yet another abortion/contraception prohibition on government funds even as this appeal was pending.

Courts have not hesitated to conclude that there are significant prospects for recurrence in comparable "repeat player" circumstances involving government contractors. *See, e.g.*, *California Indus. Facilities Res., Inc. v. United States*, 100 Fed. Cl. 404, 409 (Fed. Cl. 2011) (finding it likely that the plaintiff "would suffer the same injury again" where it "is a frequent bidder for Government shelter system contracts"); *Guardian Moving & Storage Co., Inc. v. ICC*, 952 F.2d 1428,

1432 (D.C. Cir. 1992) (where company was a repeat player in bidding for federal contracts, challenged conduct was likely to recur); *Ameron, Inc. v. U.S. Army Corps of Engineers*, 787 F.2d 875, 881 (3d Cir. 1986) (finding likelihood of recurrence from the fact that "Ameron, as a company frequently seeking government contracts, represented that it is likely to be faced with a similar situation again"). In light of USCCB's history of obtaining government contracts and imposing religious restrictions comparable to those at issue here, and its stated intention to continue to seek contracts and insist upon identical restrictions, the District Court rightly found that it was not "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[2] *Laidlaw*, 528 U.S. at 189 (citation and quotation marks omitted).

The two primary cases upon which HHS relies – *Caldwell v. Caldwell*, 545 F.3d 1126 (9th Cir. 2008), and *Laskowski v. Spellings*, 443 F.3d 930 (7th Cir. 2006), *vacated on other grounds by Hein v. Freedom From Religion Foundation,*

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[2] Indeed, this action is not only capable of repetition but it may evade review if this case is dismissed as moot. "Evading review can be shown if the case evades appellate review," *Valley Const. Co. v. Marsh*, 714 F.2d 26, 28 (5th Cir. 1983), and courts have recognized that multiyear timeframes may evade review, *see, e.g.*, *Anderson v. Evans*, 371 F.3d 475, 502 n.27 (9th Cir. 2002) ("[T]here is every reason to believe that further administrative delays and piecemeal litigation will continue to make even a five-year whaling quota unreviewable."). This litigation has already been pending for almost four years. Moreover, HHS's 2011 TVPA grants were for a three-year period – a timeframe shorter than the this case's pendency before the District Court alone – making clear that if this case were dismissed as moot, the issues it presents would likely evade review.

551 U.S. 587 (2007) – are inapposite. In both cases, the record made clear that the challenged conduct was a one-time event that was unlikely to recur. *See Caldwell*, 545 F.3d at 1130 (it was undisputed that "no [challenged] funding . . . is likely to occur in the future"); *Laskowski*, 443 F.3d at 933 (case involved a "one-time grant" that was unlikely to recur). Here, by contrast, the record makes plain – and the District Court found – that the TVPA grants will continue and that USCCB will apply for those grants. Neither *Caldwell* nor *Laskowski*, moreover, even addressed the issue of the voluntary cessation doctrine.

HHS does not even attempt to argue that its wrongful behavior will not recur—much less that it is absolutely clear that such recurrence will not transpire. *See* HHS's Br. at 25-26 & n.3. Instead, it attempts to make an end-run around the voluntary cessation doctrine, contending that because HHS's contract with USCCB expired, this dispute became moot only through "the normal course of events." But as the District Court held, HHS's argument takes far too narrow a view both of the voluntary cessation doctrine and of HHS's own role in the events underlying the HHS's mootness argument:

> HHS could have awarded the new TVPA contract to the USCCB. It chose instead to divide the TVPA funds among three other organizations . . . . [O]ne effect of awarding 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.

Order on Summ. J. at 14 n.17 (JA 1621). Indeed, the constitutional violation ended here not because the contract expired, but because HHS chose to turn down USCCB's bid and instead entered into contracts that do not raise an Establishment Clause issue.

In arguing otherwise, HHS focuses exclusively on the expiration of the contract and ignores its award of grants to organizations whose proposals did not raise Establishment Clause problems. But courts have rejected such a crabbed view of voluntary cessation principles. For example, in *Evans*, the plaintiffs contended, *inter alia*, that the National Marine Fisheries Service ("NMFS") employed improper procedures in adopting a modification to a fisheries management plan. 360 F.3d at 23. While the case was on appeal, the modification expired "by its own terms." *Id.* at 24. The NMFS thereafter adopted a new, unobjectionable modification, and contended that the expiration of the challenged modification rendered the case moot. *Id.* at 26. This Court, noting both that the NMFS had adopted the new modification while litigation was pending and that the agency might very well return to the objected-to procedures if the case were dismissed as moot, had no difficulty concluding that the voluntary cessation exception applied, notwithstanding the fact that the original modification had expired by its own terms. *Id.* at 26-27; *see also Americans United for Separation of Church and State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406 (8th Cir.

2007) (holding that case challenging state-funded religious program for inmates did not become moot after legislature declined to appropriate funds for the program because the prison failed to give any assurance from DOC that it would not continue the program).

So too here: As this litigation was pending, HHS voluntarily ceased its endorsement of USCCB's religious beliefs when it elected to fund different organizations, and to not award USCCB further TVPA funds. As *Evans* makes clear, the expiration of the contract on its own terms is not the relevant factor for the voluntary cessation analysis; instead, what is pertinent is HHS's voluntary determination thereafter to award TVPA grants in a manner consistent with the Establishment Clause. *See Evans*, 360 F.3d at 26-27; *Prison Fellowship Ministries*, 509 F.3d at 421. Accordingly, HHS cannot demonstrate mootness without proving that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," which it has not even attempted to do.[3]

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[3] Furthermore, where, as here, significant judicial resources have been expended in addressing an issue that is likely to arise again, dismissal on mootness grounds is disfavored. *See Adams*, 313 F.3d at 614 n.1 ("sunk costs to the judicial system counsel against finding mootness") (citing *Laidlaw*, 528 U.S. at 191-92 & n.5). In this case, the parties have already spent years in litigation, consuming considerable judicial resources. Judicial efficiency is particularly important where there is a "public interest in having the legality of the challenged practices settled." *Donovan v. Cunningham*, 716 F.2d 1455, 1462 (5th Cir. 1983) (citing, *inter alia*, *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953)). Here, the ACLU members who object to their tax dollars being used to promote religion are likely to be subjected to precisely the same injury again if this case is dismissed as moot;

Laidlaw, 528 U.S. at 189 (citation and quotation marks omitted); *see also Adams*, 313 F.3d at 615 (refusing to find case moot when the party urging dismissal "is unwilling to give any assurance that the conduct will not be repeated"); *accord PICS*, 551 U.S. at 719. HHS has not, therefore, sustained its heavy burden and is not entitled to dismissal on mootness grounds.

III. The District Court Correctly Held That the ACLU Has Taxpayer Standing.

Although the general rule in federal court is that taxpayers lack standing to challenge governmental actions, time-honored – and undisturbed – Supreme Court precedent carves out an exception to this rule that is applicable here: A federal taxpayer has standing to challenge a constitutional violation if the taxpayer can establish: 1) "a logical link between [taxpayer] status and the type of legislative enactment attacked," and 2) "a nexus between [that] status and the precise nature of the constitutional infringement alleged." *Flast v. Cohen*, 392 U.S. 83, 102 (1968). Applying this test, the Supreme Court has repeatedly held that federal taxpayers have standing to bring Establishment Clause challenges to administratively awarded grants of funds appropriated by Congress under the Spending Clause. *See id.*; *Bowen v. Kendrick*, 487 U.S. 589, 619 (1988) (holding

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indeed, given that this unconstitutional practice has already played out in other government contracts, the public interest in having this issue resolved is heightened. *See* Picarello Decl. ¶ 10 (JA 1552).

plaintiffs had taxpayer standing to bring such a challenge and citing other cases allowing taxpayers to bring Establishment Clause claims). The instant action is virtually indistinguishable from *Flast* and *Bowen*, and therefore the ACLU meets the taxpayer standing test.

In *Flast*, the Court considered whether the plaintiffs had standing to bring an Establishment Clause challenge to expenditures made pursuant to the Elementary and Secondary Education Act ("ESEA"). Under the ESEA, Congress appropriated funds to be distributed by a federal agency to state educational agencies, which in turn granted funds to local agencies that used the money to provide services and materials to schools. 392 U.S. at 90-91, 103 n.23. The plaintiffs did not facially challenge the ESEA. Rather, they mounted an as-applied challenge to the extent that, with the "consent and approval" of the federal agency, state and local agencies funded instruction at and materials for religious schools. *Id.* at 87. The Court held that the plaintiffs had taxpayer standing because they met the two-pronged test: First, their status as taxpayers was logically related to their challenge to an exercise of Congress's power under the Spending Clause; and second, they alleged that money was spent in violation of the Establishment Clause, which "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8." *Id.* at 103, 104. Setting out a guide for courts, the Court stated, "we hold that a taxpayer will have standing

. . . to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which [like the Establishment Clause] operate to restrict the exercise of the taxing and spending power." *Id*. at 105-06; *see also Members of the Jamestown Sch. Comm. v. Schmidt*, 699 F.2d 1, 3 n.1 (1st Cir. 1983) (holding taxpayers had standing to challenge a state law that provided busing to nonpublic school students because it involved a "legislative enactment authorizing the expenditure of funds" in potential violation of the Establishment Clause).

Twenty years later, the Court in *Bowen* reaffirmed *Flast* and gave further guidance to courts considering federal taxpayer standing. 487 U.S. 589 (1988). In *Bowen*, the Court considered both a facial challenge and an as-applied challenge to the Adolescent Family Life Act ("AFLA"), a federal program to prevent teen pregnancy. The statutory language stated that projects funded under the statute should "make use of support systems such as other family members, friends, religious and charitable organizations, and voluntary associations." *Id*. at 596. The Court rejected the plaintiffs' facial Establishment Clause challenge in part because there was "no requirement in AFLA that grantees be affiliated with any religious denomination." *Id*. at 604, 610. But the Court went on to consider the plaintiffs' as-applied challenge, first considering whether the plaintiffs had federal

taxpayer standing to bring such a challenge. Relying on *Flast*, the Court answered the question in the affirmative:

> 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 [of HHS]. . . . . [W]e have not questioned the standing of taxpayer plaintiffs to raise Establishment Clause challenges, even when their claims raised questions about administratively made grants.

Id. at 619.

As the District Court properly held, this case is on all fours with *Flast* and *Bowen*, and based on these cases, the ACLU showed 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." Order on Mot. to Dismiss at 16 (JA 167). Furthermore, just like *Flast* and *Bowen*, the ACLU challenges the TVPA as applied to HHS's authorization of USCCB's religiously motivated abortion/contraception prohibition. As the District Court held, "[a]s with the AFLA [in *Bowen*] 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.'" *Id*. (quoting *Bowen*, 487 U.S. at 619-20).

Trying to distinguish this case from *Flast* and *Bowen*, HHS and USCCB make two arguments, both of which should be rejected. First, HHS and USCCB

attempt to import a new requirement into taxpayer standing doctrine by arguing that taxpayer standing can be found only where the text of the challenged statute "specifically directs or contemplates the use of federal funds by a religious entity or for a religious activity."[4] HHS's Br. at 32. But this proposed, new requirement is untethered to either the facts of the relevant cases or the principles behind this jurisprudence. To begin with the facts of the relevant cases, HHS and USCCB's argument is directly contradicted by *Flast* itself. In that case, the challenged statute made no mention of religious schools, but nevertheless the Court held that the taxpayers had standing. 392 U.S. at 87-88.

HHS and USCCB claim that *Hein,* 551 U.S. 587, supports their argument. HHS's Br. at 39; USCCB Br. at 26. But as the District Court correctly held, the 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." Order on Mot. to Dismiss at 15 (JA 166). Indeed, the *Hein* plurality did not disturb or alter *Flast*, noting explicitly that "[w]e do not extend *Flast*, but we also do not overrule

[4] USCCB at times seems to argue that the *Establishment Clause violation* must be apparent on the face of the challenged statute. *See* USCCB Br. at 24-25. But this argument is squarely foreclosed by *Bowen* and *Flast*, given that neither statute violated the Establishment Clause on its face, but in both cases the Court granted standing to plaintiffs to pursue as-applied challenges to administratively awarded grants.

it. We leave *Flast* as we found it." *Hein*, 551 U.S. at 615. If *Hein* explicitly did not alter *Flast*, it cannot follow that *Hein* now requires – in direct contradiction to *Flast* – that the challenged statute must explicitly contemplate the potential involvement of religious groups for the plaintiff to have standing.[5]

If HHS and USCCB are instead arguing, notwithstanding *Hein*'s plain language to the contrary, that the *Hein* plurality altered *Flast* to now require a showing that Congress had *knowledge* that the funds authorized by the challenged statute would be used by religious organizations (HHS's Br. at 37-38; USCCB's Br. at 28) the ACLU easily makes that showing. The *Hein* plurality noted in a footnote that, although the challenged statute in *Flast* did not explicitly contemplate that ESEA funds may be disbursed to religious groups, Congress would have understood that ESEA funding would flow to religious schools because at the time most private schools were religiously affiliated. 551 U.S. at 604 n.3. Here, Congress had explicit notice that USCCB was receiving funds

[5] Although HHS and USCCB's arguments may be an attempt at predicting the development of taxpayer standing jurisprudence in the Supreme Court, the District Court properly recognized that lower courts do "not have the freedom to blaze predictive trails. In the absence of any clear direction from higher authority, [this Court] must apply the law as the Supreme Court presently declares it to be." Order on Summ. J. at 10 n.13 (JA 1617); *see also United States v. Sampson*, 486 F.3d 13, 20 (1st Cir. 2007) ("[W]hen the Supreme Court has directly decided an issue, we must 'follow the case [that] directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.'") (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)), *cert. denied*, 553 U.S. 1035 (2008).

under the TVPA, contrary to HHS and USCCB's claims. Each year the Attorney General presents a report to Congress informing it of federal anti-trafficking activities. In the years that USCCB received the trafficking contract, the Attorney General's reports informed Congress that HHS provided USCCB with a multimillion dollar contract to subcontract with nonprofit organizations to serve trafficking victims. It was with this knowledge that Congress reauthorized the TVPA in 2008 and made annual appropriations under it.[6] *See supra* at 14-14. Thus, even if *Hein* can be read as requiring taxpayer plaintiffs to show that Congress knew that religious groups may receive government funding under the challenged statute, Congress had such notice here.[7]

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[6] Furthermore, as part of the federal government's faith-based initiative, agencies that implement social services programs have promulgated regulations that require religious organizations to receive grant funding on the same footing as secular organizations. *See*, *e.g.*, 45 C.F.R. § 87.1-2 (2012). It can be presumed that Congress knew about these regulations when it reauthorized the TVPA and its attendant appropriation. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

[7] For this reason, the circuit cases cited by HHS and USCCB, such as *Murray v. U.S. Dep't of Treasury*, 681 F.3d 744 (6th Cir. 2012), *Freedom From Religion Foundation, Inc. v. Nicholson*, 536 F.3d 730 (7th Cir. 2008), and in *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008), are inapposite. As an initial matter, those cases are not controlling and rely on a misreading of *Flast*. In addition, unlike here, the plaintiffs in those cases could not demonstrate that Congress had knowledge that religious groups would receive government funds.

But taking a step back, HHS and USCCB's arguments are not only foreclosed by the close factual alignment between the applicable cases and the instant action, but they are also unsupported by the principles behind the jurisprudence. The *Flast* Court held that taxpayers have standing if there is a "logical link" between taxpayer status and "the type of legislative enactment attacked." 392 U.S. at 102. The *Flast* Court further held that taxpayer standing is appropriate if the plaintiff alleges unconstitutionality of the exercise of "congressional power" under the taxing and spending clause of the Constitution. *Id.* The *Flast* Court reached its holding in part because of our country's history, notably that James Madison and his supporters were concerned "that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general." *Id.* at 103-04. Indeed, a prohibition against government-funded religion is central to the Establishment Clause, and "[o]ur history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would not be used to favor one religion over another or to support religion in general." *Id.* at 103.

In sharp contrast to *Flast*, the plaintiffs in *Hein* could not cite to any statute "whose application they challenge[d]." *Hein*, 551 U.S. at 607. The *Hein* plaintiffs only challenged the Executive Branch's use of a lump sum appropriation. In

holding that the plaintiffs in *Hein* lacked standing, the *Hein* plurality simply reaffirmed *Flast*'s requirement that taxpayer plaintiffs must point to a particular statute with an attendant congressional appropriation under *Flast*. In this case, the ACLU has standing for the same reasons the plaintiffs had standing in *Bowen* and *Flast* – and unlike *Hein* – it has brought an as-applied challenge to the TVPA and its attendant appropriation.[8]

Second, HHS and USCCB argue that taxpayer standing is not appropriate here because tax dollars were not spent on "religious worship or indoctrination"; rather, federal funds were simply not spent on abortion and contraception referrals and services. HHS's Br. at 42-43. The District Court properly rejected this argument, holding that the ACLU has taxpayer standing because it "alleges that pursuant to the TVPA, tax dollars are being paid to the USCCB to support the propagation of its religious beliefs." Order on Mot. to Dismiss at 20 (JA 171).

[8] HHS further argues that limiting taxpayer standing in the manner it proposes will not insulate Establishment Clause violations from review because others can bring the legal claims. HHS's Br. at 41. In this case, HHS's words are cold comfort. If HHS truly believes that a trafficking victim will have the emotional capacity – and willingness to risk her safety – to bring a constitutional challenge to the trafficking program, it is sorely out of touch with reality. Upon rescue, a woman who has endured repeated rapes, physical abuse, and total degradation is unlikely to volunteer to be a plaintiff. She will instead be focused – rightly so – on rebuilding her life, and protecting her identity from her traffickers. Similarly, cash-strapped nonprofit organizations that provide crucial services to trafficking victims are unlikely to sue the government that funds them.

HHS awarded USCCB a multimillion dollar federal contract to serve trafficking victims, and explicitly authorized USCCB to prohibit its subcontractors from using federal funds to pay for abortion and contraception referrals and services because of USCCB's religious beliefs. HHS also paid USCCB to develop and enter into a subcontract with nonprofit organizations across the country, and this subcontract reflects USCCB's religiously based prohibition on the use of federal funds to pay for abortion and contraception referrals and services. *See supra* at 16. HHS also paid USCCB to monitor the subcontracts to ensure that federal funds were used in accordance with USCCB's religious beliefs. *See supra* at 18-19. For this work, HHS paid USCCB handsomely: USCCB retained over $5.3 million in administrative expenses, which paid for the full salaries of several USCCB staff members. *See supra* at 18. Thus, contrary to HHS's claims, HHS's Br. at 43, there was a tremendous "transfer of wealth" from HHS to USCCB pursuant to the trafficking contract. And USCCB used this wealth to impose on others its religious beliefs that abortion and contraception are immoral with the imprimatur of the government.

Arizona Christian School Tuition Organization v. Winn, 131 S. Ct. 1436 (2011), relied on by HHS and USCCB, is inapposite. In that case, the Court considered whether allowing individuals to claim a tax credit for contributions to scholarship funds for religious schools violated the Establishment Clause. The

Court held that the plaintiffs lacked standing because the money at issue was private donations made directly to religious organizations, and therefore no taxpayer money was "extracted and spent." *Id*. at 1447. The same is not true in this case. As the District Court reasoned, "[h]ere, taxpayer members of the ACLU seek to challenge a governmental expenditure – the disbursement to the USCCB of funds appropriated by Congress under the TVPA." Order on Summ. J. at 10 (JA 1617).

HHS also makes the puzzling argument that the ACLU cannot show that taxpayer dollars were spent on religious activity because subcontractors could use their own funds to pay for abortion and contraception referrals and services. HHS's Br. at 31-32. This argument is nonsensical. USCCB's subcontractors were prohibited from submitting for reimbursement for such services based solely on USCCB's religious beliefs. The fact that subcontractors could use private money for abortion and contraception referrals and services cannot mitigate the misuse of taxpayer dollars. The District Court rightly recognized that "[t]he pertinent issue . . . 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." Order on Summ. J. at 23 n.24 (JA 1630). Indeed, following HHS's logic, courts would have to deny taxpayer standing to challenge a federally funded homeless shelter that refused to

house people of one faith if the government could point to another, privately funded shelter next door that accepted people of all faiths.

Accordingly, for all of the foregoing reasons, this Court should affirm the District Court's holding that the ACLU has taxpayer standing.

IV. The District Court Properly Held That HHS Violated the Establishment Clause.

The District Court correctly found that HHS violated the Establishment Clause by allowing USCCB to restrict services in a federal program based on USCCB's religious beliefs. Recognizing that trafficking victims need access to a range of reproductive health services, HHS never imposed such a restriction itself, and the law dictates that some types of trafficking victims are eligible to receive such services. *See supra* at 8-10. Nevertheless, HHS authorized USCCB to carve out abortion and contraception referrals and services from all of the other services trafficking victims could receive with federal funds solely because of USCCB's religious doctrine.

The District Court properly found that HHS's actions violated the Establishment Clause under *Lemon v. Kurtzman*, 403 U.S. 602 (1971).[9] Under *Lemon* a court must consider three factors: 1) whether the government acted with a

[9] Although there is much commentary about the continuing vitality of the *Lemon* test, it is still employed by courts, including recently by this Court. *See, e.g.*, *Freedom From Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1, 7 (1st Cir. 2010).

predominantly secular purpose; 2) whether the principal or primary effect of the government action advances or inhibits religion; and 3) whether the government action fosters an excessive entanglement with religion. *Id.* at 612-13. Employing this test, the District Court correctly held that by permitting USCCB to place a religiously motivated prohibition on services that beneficiaries of a federal program can receive, HHS impermissibly advanced and endorsed USCCB's religious beliefs, and unconstitutionally delegated to USCCB HHS's statutory authority to determine which services trafficking victims should receive with federal funds.

A. By Authorizing USCCB to Use Its Religious Beliefs to Dictate What Services Trafficking Victims Should Receive With Federal Funds, HHS Advanced and Endorsed USCCB's Catholic Beliefs.

Despite the fact that HHS has historically recognized that reproductive health care is among the services trafficking victims may need upon rescue, HHS allowed USCCB to carve out these medical services from all other care because of USCCB's religious beliefs. Under either the "endorsement" test or "effect" test, these actions are unconstitutional because the government may not "convey[] or attempt[] to convey a message that religion or a particular religious belief is *favored* or *preferred*."[10] *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*,

[10] There is confusion among courts regarding whether the "endorsement" test is part of the second *Lemon* prong or a separate standalone test. *Compare ACLU of Ohio Found. v. DeWeese*, 633 F.3d 424, 431 (6th Cir. 2011), *with Freedom From*

492 U.S. 573, 593 (1989) (internal citations and quotation marks omitted). At the very least, the Establishment Clause prohibits the government from "appearing to take a position on questions of religious belief." *Id.* at 594.

Courts have therefore invalidated a range of government actions that appear to endorse or advance religion. For example, in *Texas Monthly, Inc. v. Bullock*, the Supreme Court held that a law exempting religious periodicals from a sales tax impermissibly conveyed the government's endorsement of religion. 489 U.S. 1 (1989) (plurality opinion). Similarly, in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710-11 (1985), the Court found that a state law that gave employees the unfettered right not to work on their Sabbath had the primary effect of advancing particular religious beliefs.[11] *See also id.* at 711 (O'Connor, J., concurring)

Religion Found., 626 F.3d at 7. But the distinction does not affect the substance of these tests. Moreover, the endorsement test has been used in a variety of contexts, including in government funding cases. *See, e.g., Mitchell v. Helms*, 530 U.S. 793, 842-43 (2000) (O'Connor, J., concurring) (Justice O'Connor's controlling concurrence holding that aid to a religious school can communicate a message of endorsement); *Commack Self-Service Kosher Meats v. Weiss*, 294 F.3d 415, 431 (2d Cir. 2002) (striking down kosher food statute in part because joint exercise between the state and religious entities can be viewed as an endorsement of religious views); *Foremaster v. City of St. George*, 882 F.2d 1485, 1489 (10th Cir. 1989) (holding unconstitutional city's subsidy of church's utility bill because it conveyed a message that the city endorsed the church).

[11] HHS takes great pains to try to distinguish *Thornton* on its facts, largely by arguing that the burdens on third parties in *Thornton* are absent here. HHS's Br. at 51-52. But the Court has never suggested that a burden on third parties is a prerequisite to finding that the government has advanced religion. *See, e.g.*, *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994) (holding

(finding that the law "conveys a message of endorsement of the Sabbath observance").

Here, no less than in those cases, by permitting USCCB to impose its religiously based restriction on services offered through a federal program, HHS "appear[ed] to take a position on questions of religious beliefs." *Allegheny*, 492 U.S. at 594. Indeed, HHS authorized USCCB to prohibit subcontractors from using federal funds for reproductive health care because of USCCB's Catholic beliefs.[12] *See* Order on Summ. J. at 21 n.23 (JA 1628) (noting that USCCB's Technical Proposal to HHS, which was incorporated into the final contract, explains that "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

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that government action violated the Establishment Clause without discussion of burden on third parties). Even if it did, USCCB's government-sanctioned abortion/contraception prohibition detrimentally affected trafficking victims and the nonprofit organizations that serve them. Trafficking survivors need access to reproductive health care, and the abortion/contraception provision burdened nonprofit organizations and the trafficking victims they serve by making them pay out of pocket for services previously funded by the government. *See* Order on Summ. J. at 23 (JA 1630) (finding that USCCB restriction forced nonprofit organizations to "shoulder the financial burden" of providing the full range of services to their clients).

[12] USCCB attempts to avoid triggering the Establishment Clause by arguing that the abortion/contraception restriction was based on its moral, not religious, beliefs. But the District Court made a factual finding, amply supported by the record and reversible only for clear error, that USCCB imposed the prohibition because of its "deeply held religious beliefs." Order on Summ. J. at 21 (JA 1628).

convictions and religious beliefs"). To the detriment of trafficking survivors, HHS allowed USCCB to impose this prohibition on subcontractors despite the fact that HHS never previously prohibited TVPA funds from being used in this manner, and does not do so now. Indeed, USCCB utilized a multimillion dollar contract to further its religious belief that abortion and contraception are immoral. HHS put its imprimatur on this arrangement, sending the "message to . . . nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[13] *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (internal citations and quotation marks omitted).

HHS and USCCB's contrary argument boils down to this: Because the government accepted the abortion restriction for a secular reason (*i.e.*, that USCCB submitted a superior proposal), it is irrelevant that HHS allowed USCCB to prohibit, on religious grounds, reimbursement for services that would have otherwise been included in the federal program. HHS's Br. at 47-50; USCCB's

[13] HHS and USCCB rely heavily on *Agostini v. Felton*, 521 U.S. 203 (1997), which is a case about some of the limits on government aid to religious entities. The instant action, however, is not a garden-variety government funding case, but rather is about whether HHS could allow USCCB to restrict services provided to trafficking victims in a federal program, with federal taxpayer dollars, based on USCCB's religious beliefs. Under the line of cases discussed herein, HHS's actions had the effect of advancing and endorsing USCCB's religious beliefs, including by unconstitutionally delegating to USCCB the ability to dictate the contours of this government-funded program.

Br. at 35-39. But under either the effect or endorsement test, HHS's secular motivations are entirely beside the point. To be sure, if HHS had a religious purpose for accepting the restriction, HHS would have *additionally* violated the first prong of the *Lemon* test, which asks whether the government acted with a predominantly secular purpose. But demonstrating that the government acted with a religious purpose is not a required element of Establishment Clause claims. The effect and endorsement tests at issue here ask whether the government's action has the effect of advancing or endorsing religion, even if the government has a secular purpose for its actions. *See Kiryas Joel*, 512 U.S. at 708 (finding an Establishment Clause violation despite the legislature's secular motives); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (same); *see also, e.g.*, *Comm. for Pub. Ed. and Religious Liberty v. Nyquist*, 413 U.S. 756, 774 (1973) ("[T]he propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State."). Contrary to appellants' suggestions, it is well-settled that "state action violates the Establishment Clause if it fails to satisfy *any* [one] of [*Lemon*'s three] prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) (emphasis added).

An example illustrates the fallacy of HHS and USCCB's argument: Suppose a cash-strapped municipality is offered a considerable sum of money if it

allows a nativity scene to be placed in the town hall over the Christmas holidays. And further suppose that the municipality attempts to negotiate with the church to make the display more secular, but ultimately the town capitulates, not out of a desire to promote religion, but because it needs the money. Under the government's theory, the display does not violate the Establishment Clause. This cannot be, and is not, the law.[14]

In an attempt to avoid the Establishment Clause violation here, HHS employs what are essentially two scare tactics. First, HHS suggests that if an Establishment Clause violation is found here, religious entities will no longer be able to provide social services pursuant to a government contract because, in some instances, it is the entities' religious beliefs that motivate them to provide the services. HHS's Br. at 53. This is a false conclusion. A government contractor's

[14] USCCB and HHS's argument (USCCB's Br. at 48-49; HHS's Br. at 58) that there is no Establishment Clause violation here because a reasonable, objective observer "fully aware of the relevant circumstances" would not conclude that HHS endorsed USCCB's religious beliefs fails for similar reasons. In the hypothetical scenario above, USCCB and HHS's all-knowing objective observer would know that the town's motivation was to raise money, yet the display nevertheless has the impermissible effect of advancing and endorsing religion. Moreover, in the case at hand, knowing the relevant facts adds to rather than detracts from the impermissible endorsement of religious beliefs. Indeed, if a trafficking victim sought emergency contraception, for example, from USCCB's subcontractor after surviving rape, and was told that government funds were unavailable to pay for that medication solely because the government contracted with a Catholic organization to provide services to trafficking victims, that woman could only conclude that the government endorsed USCCB's religious beliefs. This is true even if the woman knew that HHS did not want the prohibition.

religious motivation to provide secular services does not, on its own, create an Establishment Clause problem. Rather, a constitutional issue arises where, as here, the government allows a religious contractor to *limit* the provision of services that *were otherwise included in the program* based solely on the contractor's religious beliefs.

Second, HHS suggests that the Court should ignore the constitutional violation here because HHS was compelled to accept the restriction in order to ensure that trafficking victims received the services they need. HHS's Br. at 52-53. But this argument fails on the law and the facts. As an initial matter, as explained *supra* at 46-48, the government's motivations for accepting the restriction are irrelevant. Indeed, if USCCB had submitted the best bid but said that it would require all trafficking victims to attend Catholic mass, the superior nature of the bid would not excuse the constitutional violation. Moreover, the record belies HHS's suggestion that awarding a contract to USCCB was necessary in order to serve trafficking victims: HHS recently awarded trafficking grants to three organizations that did not insist on imposing their religious beliefs on their subcontractors and trafficking victims.[15] *See supra* at 23.

[15] None of the other cases HHS and USCCB cite – *Harris*, *Bowen*, *McGowan* – is to the contrary. Indeed, in those cases, unlike here, there was no allegation that the government authorized a religious entity to set the terms of a government-funded program. Rather, in those cases, the challenged government policy originated

B. HHS Violated the Establishment Clause by Impermissibly Delegating to USCCB Its Statutory Authority to Determine Which Reproductive Health Services Trafficking Victims Should Receive With Government Funds.

As the District Court properly held, HHS also unconstitutionally delegated to USCCB its statutory authority to determine which services trafficking victims could receive with TVPA funds. Order on Summ. J. at 25-26 (JA 1632-33). Under the statutory authority for the RFP for the trafficking contract, 8 U.S.C. § 1522(c)(1)(A), the Director of ORR is charged with determining which health services trafficking victims should receive with federal funds. ORR has historically (and currently) recognized that those "health services" include abortion and contraception referrals and services. *See supra* at 8. Furthermore, under the TVPA, certified trafficking victims are eligible for the same medical care as refugees, and that care includes abortion and contraception. *See supra* at 9-10. By allowing USCCB to prohibit TVPA funds from being used to pay for these services, HHS improperly handed over its statutory authority to USCCB to determine what services would be provided to trafficking victims with TVPA

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wholly from the government and merely coincided with religion. *See Harris v. McRae*, 448 U.S. 297, 319-20 (1980); *Bowen*, 487 U.S. at 605; *McGowan v. Maryland*, 366 U.S. 420, 442 (1961). Here, it is undisputed that the abortion/contraception prohibition originated from USCCB, and is based on USCCB's Catholic beliefs. *See supra* at 10-11.

funds, and allowed USCCB to make that determination based on its religious beliefs.

As the District Court recognized, the Supreme Court and numerous Courts of Appeals have repeatedly held that this type of delegation of a government function to a religious entity unconstitutionally advances religion. The seminal case is *Larkin*, which held unconstitutional a Massachusetts statute that gave schools and churches "the power effectively to veto applications for liquor licenses within a five hundred foot radius of the church or school." 459 U.S. at 117; *see also Kiryas Joel*, 512 U.S. at 696 (holding that the legislature impermissibly delegated its authority to define a local school district to a religious sect).

The *Larkin* Court held that although the government had a secular purpose in delegating this authority to churches, it nonetheless violated the Establishment Clause because it advanced religion under the second prong of the *Lemon* test. The Court reasoned that although it could "assume that churches would act in good faith," there was no "effective means of guaranteeing that the delegated power will be used exclusively for secular, neutral, and nonideological purposes." *Larkin*, 459 U.S. at 125 (internal citations and quotations omitted). The Court thus held the law unconstitutional because that veto power "*could* be employed for explicitly religious goals." *Id.* (emphasis added).

In addition, the *Larkin* Court held that "the mere appearance" of a joint exercise of authority between the government and the church provided a "significant symbolic benefit to religion in the minds of some." *Id.* at 125-26. As such, the Court concluded, "[i]t does not strain our prior holdings to say that the statute can be seen as having a 'primary' or 'principal' effect of advancing religion." *Id.* at 126; *see also Barghout v. Bureau of Kosher Meat and Food Control*, 66 F.3d 1337, 1345 (4th Cir. 1995) (striking down ordinance that allowed Orthodox rabbis to establish and enforce kosher food standards in part because it was an "impermissible symbolic union of church and state").

Here, like the government in *Larkin*, which denied the liquor license based solely on the objection of the church, HHS approved the restriction on reproductive health services based solely on USCCB's religious objection. 459 U.S. at 118. And, as in *Larkin*, HHS's decision to allow USCCB to impose its religious beliefs on beneficiaries of a federal program unquestionably provided a "symbolic benefit to religion in the minds of some." *Id.* at 125-26. But the constitutional violation here goes a step further than the one at issue in *Larkin*. In *Larkin*, the Court was concerned that religious entities *might* use their power to further "religious goals," despite the fact that the church in that case objected to the liquor license for secular reasons – namely, that there were so many licenses close together. *Id.* at 125. Here, there was no need for speculation that USCCB might wield its power to

further its "religious goals"; it *in fact* did so. *Id.* Indeed, USCCB explicitly prohibited federal funds from being used to provide necessary services to trafficking victims *because of* its Catholic beliefs. In authorizing USCCB to do so, the government violated the core of the Establishment Clause. As the *Larkin* Court explained, 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."[16] *Id.* at 127 (emphasis added).

Attempting to distinguish *Larkin* and its progeny, HHS seeks to characterize its decision to allow USCCB to impose the abortion/contraception restriction as simply part of a run-of-the-mill government contract, involving no delegation of "governmental power."[17] HHS's Br. at 56-57; USCCB's Br. at 57. This attempt is

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[16] The *Larkin* Court also held that the government violated the third *Lemon* prong – excessive entanglement with religion – because the government "substitute[d] the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body . . . on issues with significant economic and political implications." 459 U.S. at 127 (internal citations and quotation marks omitted); *see also Commack Self-Serv. Kosher Meats*, 294 F.3d at 428; *Barghout*, 66 F.3d at 1342. The same is true here because HHS delegated its statutory authority to USCCB to dictate which services trafficking victims could receive with federal funds.

[17] HHS also seeks to distinguish *Larkin* by arguing that this case does not involve a grant of "standardless discretion." But, as explained above, this argument turns *Larkin* on its head. *Larkin* spoke in terms of standardless discretion because of the fear that power "*could* be employed for explicitly religious goals." 459 U.S. at 125 (emphasis added). Here, HHS expressly authorized USCCB to further its religious goals by giving USCCB the power to use its religious beliefs to prevent federal funds from being used to pay for certain services. For similar reasons, HHS's

unavailing. As the request for proposals indicated, ORR is specifically charged, by statute, with determining the needs of trafficking victims. 8 U.S.C. § 1522(c)(1)(A). Prior to permitting USCCB to impose the abortion/contraception restriction, HHS exercised that authority by covering abortion and contraceptive referrals and services in the TVPA program, and during the pendency of the lawsuit it reassumed that authority and called for new proposals that included the provision of "family planning services and the full range of legally permissible gynecological and obstetric care." *See supra* at 8, 14; National Human Trafficking Victim Assistance Program, HHS-2011-ACF-ORR-ZV-0148, at 6 (JA 487). Thus, in essence, HHS impermissibly gave USCCB the power to *overrule* HHS's decision that trafficking victims should have access to these services based on USCCB's religious beliefs.[18] Therefore, this case does not simply involve a

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attempt to focus the Court on USCCB's day-to-day work under the contract and HHS's monitoring of it, HHS's Br. at 53-56, is irrelevant. Whatever relevance those factors may have in situations where the concern is that an entity *may* act to further religious goals, they can in no way cure the constitutional defect that occurs when an entity has *from the outset* reshaped a government program to further its religious beliefs.

[18] HHS also attempts to distinguish *Kiryas Joel* on two additional grounds. HHS's Br. at 59-62. First, HHS argues that there is no impermissible delegation here because HHS had secular, not religious, reasons for awarding the contract to USCCB. But as discussed *supra* at 46-48, *Kiryas Joel* itself makes clear that a finding of a secular purpose is immaterial to a finding of an unconstitutional delegation. Second, HHS quibbles about what constitutes customary agency action under *Kiryas Joel*. It cannot be disputed, however, that HHS historically allowed TVPA funds to pay for abortion/contraception referrals and services. But in any

government contract "for the provision of goods or services." HHS's Br. at 57; *see also* USCCB's Br. at 57. Rather, this case involves the abdication of statutory authority to determine the needs of a vulnerable population to a religious organization.[19] Indeed, HHS impermissibly allowed USCCB to substitute "reasoned decision making" for religious beliefs, and "[o]rdinary human experience and a long line of cases teach that few entanglements could be more offensive to the spirit of the Constitution." *Larkin*, 459 U.S. at 127.

C. HHS Admits That This Was Not an Attempt to Accommodate USCCB's Religious Beliefs, But Even If It Were, It Would Not Rescue the Constitutional Violation.

USCCB also argues that HHS's decision to accept the abortion and contraception prohibition was an accommodation, not an endorsement, of USCCB's religious beliefs. *See, e.g.*, USCCB's Br. at 39-43. This argument is,

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event, this issue is beside the point. The *Kiryas Joel* Court noted that the fact that the legislature's actions were contrary to its customary practice of consolidating school districts was further evidence of the Establishment Clause violation. This was important in *Kiryas Joel* because on the face of the statute the delegation of authority was to "qualified voters of the village" not a religious entity. *Kiryas Joel*, 512 U.S. at 699-700. Here, there is no question that the delegation of authority was to a religious entity, which used that authority to impose its religious beliefs on others.

[19] For similar reasons, USCCB's reliance on *Bowen* is misplaced. USCCB's Br. at 59-60. The Court in *Bowen* reached the unremarkable holding that religious organizations can contract with the government for the provision of services. But the *Bowen* Court did not address the issue presented in this case, namely whether the government can delegate to a religious entity the statutory authority to dictate the terms of a federal program.

however, foreclosed by HHS's repeated statements that it was not "attempting to accommodate religious interests." HHS's Br. at 50; *id.* at 52 ("unlike the [burden] that was imposed on employers in *Thornton* – [any burden here] did not result from the government's granting of a special benefit to religion"); *id.* ("the government [here] has acted without taking religion into account").

But even if HHS had not foreclosed this argument, simply labeling HHS's actions as an "accommodation" would not save them from a finding of unconstitutionality. Indeed, the Court "has never hinted that an otherwise unconstitutional delegation of political power to a religious group could be saved as a religious accommodation." *Kiryas Joel*, 512 U.S. at 706. Moreover, in the rare cases where the Court has upheld religious accommodations, the Court has only done so to remove a government-imposed burden. *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709, 720, 721 (2005) (holding that the Religious Land Use and Institutionalized Persons Act was a permissible accommodation of religion because it "alleviates exceptional government-created burdens on private religious exercise" and specifically protects institutionalized persons who are unable "freely to attend to their religious needs"). Here, there is no government-imposed burden on USCCB's religious exercise. Rather, USCCB voluntarily bid for the trafficking contract, had the privilege of receiving the contract, and was paid handsomely for its work. USCCB remains free to practice its religion in whatever manner it sees

fit. *See Allegheny*, 492 U.S. at 601 n.51 (holding that display of the crèche cannot be seen as an accommodation of religion because it does not remove any burdens on free exercise, and Christians remain free to practice their religion); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 226 (1963) ("While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs.").

CONCLUSION

If the Establishment Clause means anything, it surely means that the government cannot allow a religious organization to decide what services a vulnerable population will receive in a government-funded program based on the entity's religious beliefs. Such a situation flies in the face of the core principles of the First Amendment. Accordingly, and for the foregoing reasons, this Court should affirm the District Court's decision in its entirety.

Respectfully submitted,

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Dated: 10/17/12

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 2012, I filed the forgoing brief for Appellee American Civil Liberties Union of Massachusetts with the Clerk of the United States Court of Appeals for the First Circuit by use of the Court's CM/ECF system. Service of counsel listed below will be made by that system:

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