UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

AMERICAN CIVIL LIBERTIES UNION of MASSACHUSETTS, **Plaintiff,** **v.** **KATHLEEN SEBELIUS, *et al.*,** **Defendants,** **and** **UNITED STATES CONFERENCE OF CATHOLIC BISHOPS,** **Defendant-Intervenor.**	**Civil Action No. 1:09-cv-10038** **Hon. Richard G. Stearns**

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

The facts in this case are undisputed and the legal question is simple: Can the government contract with a religious organization to administer a federal trafficking victims' program knowing that the organization will prohibit its subcontractors from using government funds for otherwise covered services based solely on the organization's religious beliefs? As Supreme Court precedent and common sense make clear, the answer is a resounding no.

Trafficking victims endure the most horrific conditions imaginable. They are often beaten, brutally raped, forced into prostitution, and required to live in inhumane conditions. In order to assist these individuals, Congress passed the Trafficking Victims Protection Act ("TVPA") in 2000, which, among other things, authorized funding to

provide needed services to trafficking victims. For several years, the government defendants ("Defendants") used TVPA funds to award grants to nonprofit organizations that worked with trafficking survivors to help them rebuild their lives. Defendants never imposed any prohibition related to abortion and contraception referrals, contraceptive services and supplies, or abortion care in cases where the woman has been raped, was a victim of incest, or when her life was in danger in TVPA grants and contracts. In 2005, however, Defendants decided to hire a central contractor to administer TVPA funds, which would then subcontract with nonprofit organizations to provide services directly to trafficking victims. Defendants awarded the contract to Intervenor United States Conference of Catholic Bishops ("USCCB"), despite the fact that Defendants were fully aware of the fact that USCCB would, based solely on its religious beliefs, prohibit subcontractors from using TVPA funds to provide abortion and contraceptive referrals and services.

By allowing USCCB to use its power as the administrator of the federal TVPA funds to carve out reproductive health care from all medical care based solely on its religious doctrine – and to the detriment of trafficking victims – Defendants have run afoul of the Establishment Clause. Indeed, Defendants would appear to an objective observer to have endorsed USCCB's religious beliefs. Moreover, Defendants' actions constitute an impermissible delegation of authority to USCCB to determine – based on USCCB's religious beliefs – which health services trafficking victims should receive with federal funds. By delegating this authority to USCCB, Defendants have advanced USCCB's religious mission and goals. Furthermore, allowing USCCB to substitute its

religious tenets for government policy excessively entangles Defendants with religion. Defendants have therefore violated the Establishment Clause.

FACTUAL STATEMENT

Thousands of men and women are trafficked into the United States each year, and are compelled to engage in commercial sex or to provide labor through force, fraud, or coercion. Statement of Facts ("SOF") ¶¶ 1-2. The conditions under which victims of human trafficking suffer are horrendous, and may include being raped multiple times a day. SOF ¶¶ 2, 4-5. It is incontrovertible that some victims will need access to contraception (including emergency contraception which is used after intercourse) to prevent pregnancy, as well as access to abortion services. SOF ¶¶ 6, 8, 52. Providing trafficking survivors with access to condoms is also important from a public health perspective because of the role that trafficking and forced sex plays in the spread of sexually transmitted infections ("STIs") and HIV/AIDS. SOF ¶¶ 7-9. Moreover, because trafficking victims have been controlled by their traffickers – including withholding or forcing them to receive reproductive health care – allowing survivors to make their own reproductive health care decisions is important to helping them become self-sufficient. SOF ¶ 10.

To combat the appalling crime of human trafficking, Congress passed the TVPA in 2000, 22 U.S.C. § 7101 *et seq.*, and reauthorized that Act in 2003, 2005, and 2008. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 112 Stat. 5044 (2008); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2005). The TVPA requires Defendants to "expand benefits and services to victims of severe forms of

trafficking in persons in the United States." 22 U.S.C. § 7105(b)(1)(B). In addition, once victims receive an official "certification" from Defendants, the TVPA mandates that they become eligible for various assistance programs, including Medicaid, which covers contraception and, in limited circumstances including rape, abortion. 22 U.S.C. §§ 7105(b)(1)(A), (C); SOF ¶¶ 58-59.

Prior to the award of the contract to USCCB in 2005, Defendants fulfilled these statutory mandates by providing grants and contracts to nonprofit organizations that, *inter alia*, directly served trafficking victims. SOF ¶¶ 16-17. Defendants have not prohibited TVPA funds from being used to pay for reproductive health services and referrals like the ones at issue here in any other TVPA funding streams. SOF ¶ 17.

In 2005, Defendants decided to stop providing grants directly to numerous service providers and instead issued a Request for Proposals ("RFP") to find a single organization that would administer TVPA funds by subcontracting with other organizations to provide services directly to trafficking victims. SOF ¶¶ 18-19. The RFP pointed to 22 U.S.C. § 7105(b)(1)(B) as the basis of the statutory authority for the RFP, which allows Defendants to expand nonentitlement programs to victims of trafficking. SOF ¶ 20. In the RFP, Defendants said that they were "expanding [the] benefits and services" available to individuals under the Immigration and Nationality Act ("INA"), specifically 8 U.S.C. § 1522(c)(1)(A), which states, in relevant part, that Defendant 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) (emphasis added); SOF ¶¶ 20-21. Furthermore, the RFP specifically states 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." SOF ¶ 22. The RFP also indicates that the entities providing case management shall, at minimum, provide counseling on how trafficking survivors can access the full range of federal entitlement programs. SOF ¶ 23. The RFP recognizes that trafficking victims may need health services, and the RFP does not restrict the use of TVPA funds for abortion and contraception. SOF ¶¶ 24-25.

USCCB, which is a religious organization comprising the Catholic Bishops in the United States, submitted a proposal in response to the RFP. SOF ¶¶ 26-27. USCCB's Technical Proposal made clear that it would prohibit subcontractors from using government funds to pay for abortion or contraceptive referrals and services, and the Technical Proposal made clear that such prohibition was based on USCCB's Catholic beliefs. SOF ¶ 28. Indeed, USCCB stated in its proposal 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 convictions and religious beliefs." *Id.*

To evaluate all the proposals submitted in response to the RFP, Defendants convened a technical panel consisting of four members. SOF ¶ 29. Two of the four panel members raised concerns on their initial evaluation sheets about USCCB's abortion/contraception prohibition. SOF ¶ 30. These concerns, and others, were raised with USCCB in the form of written questions. SOF ¶¶ 39-42. For example, one question asked: "Would a 'don't ask, don't tell' policy work regarding the exception? What if a sub-contractor referred victims supported by stipend to a third-party agency for such

services?" SOF ¶ 42. 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." SOF ¶ 43.

Despite being informed that USCCB intended to prohibit reimbursement with federal funds for abortion or contraception, and despite knowing that such prohibition was based on USCCB's religious beliefs, Defendants nonetheless awarded the contract to USCCB. In fact, the final contract between USCCB and Defendants incorporates by reference, *inter alia*, USCCB's comment in its Technical Proposal 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 convictions and religious beliefs." SOF ¶ 28.

Under the contract, USCCB refuses to reimburse its subcontractors for abortion and contraceptive services, and it prohibits its subcontractors from using staff time to refer or help clients to obtain abortion and contraception services if that staff person's time is funded by the contract. SOF ¶¶ 62-64. Indeed, both the subcontract and the program operations manual ("POM") that USCCB distributes to its subcontractors make these prohibitions clear. SOF ¶¶ 62-63. These prohibitions apply despite the fact that the TVPA specifies that all trafficking victims must receive the same level of benefits and services as refugees, which includes access to contraception and, in limited circumstances including rape, abortion. SOF ¶ 59; 22 U.S.C. § 7105(b)(1)(A). By virtue of USCCB's

religiously based prohibition in the trafficking contract, a trafficking victim who is pregnant as a result of rape cannot obtain an abortion paid for with TVPA funds. Moreover, if a "certified" trafficking victim is on Medicaid, and wants an abortion because she has been raped, the government is required to pay for that abortion, SOF ¶ 59, but USCCB prohibits its subcontractors from using contract funds to pay the salary of a staff member to inform the woman that Medicaid will pay for her procedure, to refer that woman to an abortion provider, or to help her get to a provider (as subcontractors routinely do for health care services). SOF ¶¶ 11-13.

Indeed, USCCB's prohibition is problematic not only because it restricts the use of federal TVPA funds to pay for abortion care and contraceptive materials, but also because if subcontractors cannot refer trafficking victims for services and help them obtain care, those victims are unlikely to be able to obtain it at all. Trafficking victims often do not speak English, are unfamiliar with the U.S. health care system, and therefore heavily rely on their case managers to navigate the health care system and provide transportation to medical appointments. SOF ¶¶ 11-13. Preventing case managers from providing referrals and transportation for this population is, in essence, the same as denying medical services to them.[1] SOF ¶ 14.

ARGUMENT

Defendants have violated the Establishment Clause by allowing a religious entity, USCCB, to dictate – based solely on USCCB's religious beliefs – which services trafficking victims may receive with federal funds. This violates the test enunciated in

[1] Although organizations can in theory use other funds to pay for staff time and services, those organizations are generally strapped for resources, and the lack of resources is an obstacle to providing assistance to trafficking victims. SOF ¶ 15.

Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).[2] Under this test, a court must consider three factors: 1) whether the government acted with a 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*. "A violation of any prong of this test renders a statute or act of government unconstitutional." *Amancio v. Town of Somerset*, 28 F. Supp. 2d 677, 679 (D. Mass. 1998) (Stearns, J.).

Defendants' actions violate the second and third prongs of the *Lemon* test. In violation of the second prong, Defendants have endorsed USCCB's religious beliefs by permitting USCCB to place a religiously motivated prohibition on services that beneficiaries of a federal program can receive. In addition, Defendants have impermissibly delegated to USCCB the authority to prohibit TVPA funds from being used for certain services based solely on USCCB's religious beliefs, which advances USCCB's religious goals in violation of *Lemon*'s second prong. Moreover, by allowing USCCB to substitute its religious goals for government policy, Defendants have excessively entangled themselves with religion in violation of *Lemon*'s third prong. Accordingly, this Court should find that Defendants violated the Constitution.

A. Defendants Have Impermissibly Endorsed USCCB's Catholic Beliefs.

The "endorsement test," also referred to as the "effect" test, asks whether the challenged government action has the "purpose or effect of endorsing, favoring, or promoting religion." *Freedom From Religion Found.*, 626 F.3d at 10 (citing *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989)). Regardless of whether labeled under

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

"endorsement" or "effect" test, under this test, the government may not "convey[] or attempt[] to convey a message that religion or a particular religious belief is *favored* or *preferred*."[3] *Cnty. of Allegheny*, 492 U.S. at 593 (internal citations and quotation marks omitted). Indeed, at the very least, the Establishment Clause prohibits the government from "appearing to take a position on questions of religious belief." *Id*. at 594. To determine whether the government has endorsed or advanced particular religious beliefs, the inquiry is that of an objective viewer: What would a reasonable person fairly understand is the effect of the government action? *Id*. at 595.

Courts have thus invalidated a range of government actions that convey a message that the government is endorsing or advancing religion. For example, in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 25 (1989), the Supreme Court held that a law exempting religious periodicals from a sales tax impermissibly conveyed the government's endorsement of religion. 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. *See also id.* at 711 (O'Connor, J., concurring) (finding that the law "conveys a message of endorsement of the Sabbath observance," and "an objective observer or the public at large would perceive this statutory scheme . . . [as] one of endorsement of a particular religious belief").

Here, no less than in those cases, an "objective observer, acquainted with the text, [] history, and implementation" of the trafficking contract and Defendants' actions would

[3] There is confusion among courts regarding how this test is labeled, and whether it is part of the second *Lemon* prong or a separate stand alone test. *Compare ACLU of Ohio Found. v. DeWeese*, 633 F.3d 424, 431 (6th Cir. 2011), *with Freedom From Religion Found.*, 626 F.3d at 7. But the distinction is not material in the instant action.

conclude that Defendants have endorsed USCCB's religious beliefs by allowing them to prohibit subcontractors from using federal funds for reproductive health care solely because of USCCB's Catholic beliefs. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000). USCCB specifically told Defendants 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 convictions and religious beliefs." SOF ¶ 28. To the detriment of trafficking survivors, Defendants allowed USCCB to impose this prohibition on its subcontractors and even codified it in the final contract. Moreover, Defendants have never previously prohibited TVPA funds from being used in this manner. All of this demonstrates to the objective observer that the government endorses USCCB's religious beliefs and sends "the ancillary 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." *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290, 309-10 (2000) (internal citations and quotation marks omitted); *see also Amancio*, 28 F. Supp. 2d at 681 (holding prominent Nativity scene sent "the constitutionally forbidden message that the [county] officially supports Christianity"). By permitting USCCB to impose its religious doctrine to restrict the use of federal tax dollars for otherwise covered necessary health services, the Defendants have promoted that doctrine. Accordingly, Defendants have violated the Establishment Clause.

B. Defendants Have Advanced USCCB's Religious Goals By Impermissibly Delegating to USCCB the Ability to Dictate, Based on USCCB's Religious Beliefs, Which Reproductive Health Services Trafficking Victims Should Receive With Government Funds.

Defendants gave USCCB carte blanche to determine which services – particularly which reproductive health services – trafficking victims could receive with TVPA funds, and ratified USCCB's decision to carve out abortion and contraception referrals and services from all other medical care based solely on USCCB's religious beliefs. Under the TVPA, and pursuant to the statutory authority for the RFP, 8 U.S.C. § 1522(c)(1)(A), *Defendants* are charged with providing services to individuals trafficked into the United States based on specific health needs recognized by the Director of ORR, and those "health services" have historically included reproductive health care. SOF ¶ 21. By allowing USCCB to prohibit TVPA funds from being used to pay for certain reproductive health care services, Defendants improperly handed over their statutory authority to USCCB to determine what services would be provided to trafficking victims with TVPA funds.

As the Supreme Court and numerous Courts of Appeals have repeatedly held, this type of delegation of a government function to a religious entity is unconstitutional. The seminal case is *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 117 (1982), 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." The plaintiff, Grendel's Den, applied for a liquor license, but the adjacent Holy Cross Armenian Catholic Parish filed an objection to the restaurant's application. *Id*. at 118. The government denied the application based solely on Holy Cross's objection. *Id*. The Court held that the statute advanced religion in violation of the second prong of the *Lemon* test because although the Court 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." *Id*. 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).

The Establishment Clause violation in this case is even more pronounced than it was in *Larkin*. Like the government in *Larkin*, which denied the liquor license to Grendel's Den based solely on the objection of the church, Defendants approved USCCB's decision to prohibit its subcontractors from using any TVPA funds for abortion and contraceptive referrals and services based solely on USCCB's objection. *Id.* at 118. But the constitutional violation goes a step further here. 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.* Here, there is no need for speculation that USCCB might wield its power to further its "religious goals"; it has *in fact* done so. *Id*. at 125. Indeed, USCCB has explicitly prohibited federal funds from being used to provide trafficking victims with abortion and contraception referrals and services *because of* its Catholic beliefs.

Furthermore, the delegation of governmental authority by Defendants to USCCB, and Defendant's endorsement of USCCB's religious goals, creates a situation where the government and USCCB are engaged in an impermissible joint enterprise, which "provides a significant symbolic benefit to religion in the minds of some." *Id.* at 125-26; *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"). Again, the constitutional violation in this case goes beyond *Larkin*'s concern of an "appearance" of a joint exercise by church and state, and instead is an "actual" joint exercise by USCCB and Defendants because Defendants have allowed USCCB to impose their religious criteria on whether certain services for trafficking victims are reimbursement with federal funds. *See Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 431 (2d Cir. 2002) (holding that kosher food statute went beyond "mere appearance" of joint exercise of governmental and religious authority, as it created "an *actual* joint exercise"). Defendants' actions violate "the core rationale underlying the Establishment Clause" which is to "prevent[] a fusion of governmental and religious functions," *Larkin*, 459 U.S. at 126 (internal citations and quotation marks omitted); indeed, the "Framers did not set up a system of government in which important, discretionary governmental powers would be *delegated to or shared with* religious institutions." *Id.* at 127 (emphasis added).

Moreover, prohibiting TVPA funds from being used for abortion and contraception is counter to Defendants' historical practice of allowing TVPA funds to be used for these services, which highlights that Defendants acted solely based on USCCB's religious beliefs. *See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 699-700 (plurality opinion). Indeed, in that case, the Court looked precisely at those facts: What is the government's customary practice absent the influence of religion? In *Kiryas Joel*, the Court struck down a statute that created a special school district along religious lines. *Id.* at 710 (plurality opinion). The Court recognized that the New York Legislature knew that all residents of the village of Kiryas Joel were members of the

same sect, and the Court held that the legislature deliberately carved out a school district for Kiryas Joel in a manner that ran counter to its customary districting practices. *Id.* at 699-700 (plurality opinion). These facts led the Court to determine that the legislature created the school district to reflect religious criterion. *Id*. at 702 (plurality opinion). The same is true here: Defendants have not otherwise prohibited TVPA funds from being used for reproductive health services, and did so only upon USCCB's insistence, which demonstrates that they have strayed from their customary practices and advanced USCCB's religious goals.

C. Defendants Have Created an Excessive Entanglement Between Government and Religion By Allowing USCCB To Substitute Its Religious Goals for Reasoned Government Policy.

Defendants have also violated the Establishment Clause under the third *Lemon* prong because they have excessively entangled government functions with the religious goals of USCCB. Where the government "enmeshes churches in the exercise of substantial governmental powers," it acts "contrary to our consistent interpretation of the Establishment Clause; [t]he objective is to prevent, as far as possible, the intrusion of either [Church or State] into the precincts of the other." *Larkin*, 459 U.S. at 126 (internal citations and quotation marks omitted). A statute or government action is unconstitutional when it "substitutes 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." *Id*. at 127 (internal citations and quotation marks omitted); *see also Commack Self-Serv. Kosher Meats*, 294 F.3d at 428 (finding that the state's kosher fraud statute entangled the state with religion); *Barghout*, 66 F.3d at 1342

(holding that the kosher meat ordinance created excessive entanglement between religious and secular authority in part because it delegated authority to the Bureau).

Here, Defendants have excessively entangled themselves with USCCB and USCCB's religious goals. As discussed *supra*, Defendants have delegated governmental authority to USCCB and allowed them to define the contours of the trafficking program based on Catholicism. Defendants have allowed USCCB to substitute its judgment about what services victims should receive with federal tax dollars based wholly on USCCB's religious beliefs. Indeed, Defendants did not previously prohibit TVPA funds from being used for these services, and USCCB's prohibition is directly contrary to the best interests of the trafficking victims themselves.[4] Defendants have impermissibly allowed USCCB to substitute "reasoned decisionmaking" for religious beliefs. This combined exercise of government and religiously based activity excessively entangles the government with the Church. This is blatantly unconstitutional. As the *Larkin* Court held, "[o]rdinary human experience and a long line of cases teach that few entanglements could be more offensive to the spirit of the Constitution." 459 U.S. at 127.

CONCLUSION

For the foregoing reasons, summary judgment should be granted in Plaintiff's favor.

Dated: August 9, 2011

Respectfully Submitted,

/s/ Brigitte Amiri
Brigitte Amiri*
Rose A. Saxe*
Andrew Beck*

[4] In the context of the new request for proposals for funding to serve trafficking victims, Defendants make clear that trafficking victims need these reproductive health care referrals and services. SOF ¶ 52.

American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Phone: 212-549-2633
Fax: 212-549-2652
bamiri@aclu.org
rsaxe@aclu.org

Daniel Mach*
Heather Weaver*
American Civil Liberties Union Foundation
915 15th Street, 6th Floor
Washington, DC 20005
Phone: (202) 675-2330
Fax: (202) 546-0738
dmach@dcaclu.org
hweaver@dcaclu.org

Sarah R. Wunsch, BBO # 548767
ACLU of Massachusetts
211 Congress Street, 3rd Floor
Boston, MA 02110
swunsch@aclum.org
Phone: 617-482-3170, ext. 323

*Motion for *pro hac vice* admission granted

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2011, I caused a copy of Plaintiff's Memorandum in Support of Its Motion for Summary Judgment to be filed electronically. Notice of this electronic filing will be served on counsel for all parties to this action by operation of the Court's electronic filing system, which will also provide access to a copy of this filing.

Dated: August 9, 2011

/s/ Brigitte Amiri
BRIGITTE AMIRI