UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND TO DEFENDANT-INTERVENOR USCCB'S MOTIONS FOR SUMMARY JUDGMENT AND TO DISMISS

There is no dispute over the central facts in this case: The prohibition on the use of Trafficking Victims Protection Act ("TVPA") funds for abortion and contraception referrals and services was imposed solely because of USCCB's religious beliefs. As discussed in Plaintiff's opening brief, the inescapable conclusion is therefore that Defendants violated the Establishment Clause. Indeed, by authorizing USCCB to impose a religiously based prohibition on the use of TVPA funds, Defendants impermissibly endorsed and advanced religious beliefs, and fostered an excessive entanglement with religion, in violation of the Establishment Clause of the First Amendment to the U.S. Constitution. Nothing in Defendants' or USCCB's moving papers alters this conclusion.

The justicability arguments advanced by Defendants and USCCB are likewise meritless. As this Court has already determined, Plaintiff has standing to bring this case to protect its rights under the Establishment Clause, and no developments in this case or in the Supreme Court's jurisprudence require the Court to revisit that decision.

Nor is Plaintiff's claim moot. Not only is the contract still in effect today, but it could be extended (as it has been in the past) and USCCB may be awarded another contract pursuant to the latest funding announcement. Moreover, even if the contract expires and USCCB does not receive additional funding, because USCCB receives other government contracts that include the same prohibition that is at issue in this case, the issue presented falls squarely within the exception to the mootness doctrine because this issue is capable of repetition yet evades review. Moreover, Plaintiff has requested nominal damages. As other courts have held, a request for nominal damages in Establishment Clause cases prevents the plaintiff's claims from becoming moot.

Accordingly, Defendants' and USCCB's motions should be denied, and Plaintiff's motion for summary judgment should be granted.

I. Defendants Have Violated the Establishment Clause.

Neither Defendants nor USCCB dispute the material facts in this case. Despite the fact that trafficking victims need assistance from their TVPA-funded case managers in order to access abortion and contraceptive services, and despite the fact that Defendants have long permitted TVPA funds to be used for these critical services, Defendants authorized USCCB to prohibit its subcontractors from using TVPA funds to pay for abortion and contraception referrals and services based solely on USCCB's

religious beliefs.[1] *See, e.g.*, Pl.'s Statement of Undisputed Material Facts, Docket # 64, ("Pl.'s SOF") ¶¶ 8-17, 27-28, 40-43, 51-52.

As discussed below and in Plaintiff's opening brief, these facts demonstrate that Defendants violated the Establishment Clause. By authorizing USCCB to further its religious goals by carving out reproductive health care referrals and services, Defendants have endorsed USCCB's religious beliefs. Pl.'s Mem. in Supp. of its Mot. for Summ. J., Docket #65 ("Pl.'s Br.") at 8-10. Defendants have also advanced USCCB's religious beliefs by impermissibly delegating to USCCB the authority to impose religiously based limitations on the use of TVPA funds. *See id*. at 10-14. Moreover, by allowing USCCB to substitute its religious doctrine for government policy, Defendants have excessively entangled themselves with religion.[2] *Id*. at 14-15.

Faced with incontrovertible facts that lead to the inevitable conclusion that Defendants have violated the Establishment Clause, USCCB and Defendants resort to inapposite case law and irrelevant factual claims. Defendants and USCCB raise four basic issues, none of which has merit or alters the conclusion that Defendants violated the

[1] Pursuant to Local Rule 56.1, Plaintiff states that these are the undisputed key facts that are central to deciding this case, and any disputes over *immaterial* facts or legal conclusions masquerading as facts, as discussed *infra* at footnote 12, do not preclude this Court from finding that Plaintiff is entitled to judgment as a matter of law.

[2] As discussed in *Lemon v. Kurtzman*, a court deciding an Establishment Clause claim 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. 403 U.S. 602, 612-13 (1971). Defendants and USCCB suggest that this three-prong test has been fundamentally altered by the Court's decision in *Agostini v. Felton*, 521 U.S. 203 (1997). Defs.' Mem. in Support of Defs.' Mot. for Summ. J., Docket #75 at 11; Mem. of Def.-Intervenor U.S. Conference of Catholic Bishops In Supp. of Its Mot. for Summ. J., Docket #69 at 8. But the *Agostini* Court simply considered the excessive entanglement inquiry as part of the effects prong, rather than as a separate and independent prong. 521U.S. at 232-33. This refinement of the *Lemon* test in the funding context thus does not alter its substance in any meaningful way.

Establishment Clause by allowing USCCB to dictate, based on its religious beliefs, which reproductive health services and referrals trafficking victims should receive.[3]

First, Defendants argue that the prohibition at issue does not violate the Establishment Clause because "the funding restrictions at issue here simply represent a coincidental overlap between legitimate governmental objectives and religious tenets that is fully permissible under *McGowan*, *McRae*, and *Bowen*." Defs.' Mem. in Support of Defs.' Mot. for Summ. J., Docket #75 ("Defs.' Br.") at 10. But, as USCCB's and Defendants' admissions make abundantly clear, nothing is further from the truth. *See, e.g.*, Mem. of Def.-Intervenor U.S. Conference of Catholic Bishops In Supp. of Its Mot. for Summ. J., Docket #69 ("USCCB's Br.") at 3 ("[I]t is undisputed that USCCB's unwillingness to facilitate abortion or contraception was, for HHS, not a reason for *accepting* USCCB's bid, but instead a reason to *deny* it . . . ."); Defs.' Br. at 4-5 (admitting that the impetus to prohibit funding for abortion and contraception came from USCCB, was based on USCCB's religious beliefs, and that some of HHS's evaluators penalized USCCB's proposal because it contained the restriction).[4] Indeed, it is undisputed that the restriction was imposed solely because of USCCB's religious beliefs, and that the prohibition conflicts with HHS's historical approach,[5] its statutory

[3] Plaintiffs do not dispute that the TVPA or the award of the contract to USCCB, as opposed to the prohibition on referrals for contraception and referrals, has a secular purpose.

[4] Moreover, the fact that USCCB submitted the better bid in some respects does not excuse the constitutional violation. Establishment Clause violations are not "as an acceptable price to pay" for less expensive services. USCCB Br. at 12. For example, If USCCB had said that it would require all trafficking victims to attend Catholic mass, but was the lowest bidder for the contract, the government would not have been able to enter that contract.

[5] When the government departs from its historical practices – in this case allowing TVPA funds to be used for reproductive health services and referrals – it is evident that religion influenced government policy in violation of the Establishment Clause. *See, e.g., Bd. of Edu. Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 699-700 (1994) (plurality opinion); Pl.'s Br. at 13-14.

obligations,[6] and its future intentions.[7] *See, e.g.*, Pl.'s SOF ¶¶ 17, 20-21, 52. Defendants' assertion that the prohibition is permissible under the Establishment Clause because its "'reason or effect merely happens to coincide or harmonize with the tenets of some . . . religions,'" *see* Defs.' Br. at 8 (quoting *McGowan*), is therefore wholly devoid of merit. For this reason, the cases relied upon by Defendants – which involved policies that emanated from the government that happened to coincide with religious beliefs – are inapposite. *See, e.g.*, *McGowan v. Maryland*, 366 U.S. 420, 442 (1961) (holding that where the government "conclude[s] that the general welfare of society, wholly apart from any religious considerations, demands" a particular regulation, the Establishment Clause does not prohibit such regulation simply because its "reason or effect merely happens to coincide or harmonize with the tenets of some or all religions"); *Harris v. McRae*, 448 U.S. 297, 319-20 (1980) (holding that governmental policy that "may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause").[8]

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[6] The Request for Proposals ("RFP") for the contract 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); SOF ¶¶ 20-21.

[7] Moreover, Defendants' policy of allowing TVPA funds to be used to pay for abortion and contraception referrals, contraceptive materials, and abortion in cases of rape, incest, or life endangerment is consistent with other federal programs such as Medicaid that also allow federal funds to be used for those services. Pl.'s SOF ¶ 59.

[8] *Bowen v. Kendrick* is likewise inapposite, although for slightly different reasons. 487 U.S. 589 (1988). In *Bowen*, the Court held that the statute at issue was not facially invalid because it provided money to religious organizations, but it remanded for the district court to consider the plaintiffs' as-applied challenge. *Id*. at 620-22. Here, Plaintiffs do not argue that the mere award of the contract to USCCB violates the Establishment Clause. Rather, it is the acceptance of the religiously motivated prohibitions that impermissibly advances and endorses USCCB's religious beliefs.

Second, Defendants and USCCB argue that the endorsement test applies only in the context of religious displays and expressive activity. But this is demonstrably false, and neither Defendants nor USCCB present any principled reason as to why the test should be so limited. For example, in *Santa Fe Independent School District v. Doe*, the Court held that the school's *policy* of allowing nonsectarian "invocations" at football games itself constituted unconstitutional endorsement of religion, *regardless of whether the actual invocation conveyed a religious message*. 530 U.S. 290, 306-07, 314-16 (2000) (noting that "we guard against . . . the mere passage by the District of a policy that has the purpose and perception of government establishment of religion") (cited in Defs.' Br. at 17). Similarly, in *Mitchell v. Helms*, Justice O'Connor's controlling concurrence[9] held that if the government provides direct aid to a religious school, which then uses the aid to inculcate religion in its students, "the government has communicated a message of endorsement." 530 U.S. 793, 842-43 (2000) (O'Connor, J., concurring). Other federal courts have also used the endorsement test to strike down unconstitutional government action in contexts other than religious displays or public prayer. *See, e.g., 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); *Freedom From Religion Found., Inc. v. Thompson*, 920 F. Supp. 969, 974 (D. Wis. 1996) (holding

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[9] *See, e.g., Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1058 (9th Cir. 2007) (recognizing that Justice O'Connor's opinion in *Mitchell* is controlling); C*olumbia Union College v. Oliver*, 254 F.3d 496, 503 (4th Cir. 2001) (same); *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 419 (2d Cir. 2001) (same); *Johnson v. Econ. Dev. Corp. of Oakland*, 241 F.3d 501, 510 n.2 (6th Cir. 2001) (same).

unconstitutional a state law that designated Good Friday as a state holiday because it endorsed Christianity); *see also Stratechuk v. Bd. of Educ.*, 587 F.3d 597, 608-09 (3d Cir. 2009) (rejecting the argument that the endorsement test applies only in the context of religious displays, and applying it to a prohibition on the performance of religious music at school events). Thus, the endorsement test is properly invoked here, and as discussed in Plaintiff's opening brief, by authorizing USCCB to prohibit TVPA funds from being used for abortion or contraception referrals and services because of USCCB's religious beliefs, Defendants send the message to trafficking victims, the anti-trafficking community, and to taxpayers that the government favors and endorses USCCB's religious beliefs.[10] Pl.'s Br. at 8-10.

Third, in noting that they monitored USCCB's service work, Defendants attempt to avoid the conclusion that they delegated to USCCB standardless discretion to decide which reproductive health services should be provided to trafficking victims. Defs.' Br. at 15. But the impermissible delegation had already occurred by the time the government undertook post-award monitoring. In awarding the contract to USCCB, Defendants were fully aware that USCCB intended to prohibit its subcontractors from providing reproductive health care referrals and services based on its religious views. Pl.'s SOF ¶¶ 28, 30-51. Thus, any post-award monitoring is irrelevant.

[10] While the context of a government action that endorses religion is undoubtedly relevant, Defendants overlook relevant factors here. 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." Pl.'s SOF ¶ 28. To the detriment of trafficking survivors, Defendants allowed USCCB to impose this prohibition on its subcontractors and even memorialized it in the final contract. Moreover, Defendants have never previously prohibited TVPA funds from being used in this manner. Defendants cannot ignore these key aspects of the context within which USCCB's prohibition arose. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 315 ("We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer.").

As explained in Plaintiff's Motion for Summary Judgment, Defendants are charged with providing services to individuals trafficked into the United States based on specific health needs recognized by the Director of ORR, 8 U.S.C. § 1522(c)(1)(A), which have historically included reproductive health care.[11] By permitting USCCB to decide which reproductive health services should be provided with TVPA funds, Defendants impermissibly handed over to USCCB their statutory authority and responsibility to ensure that trafficking victims receive appropriate, and statutorily mandated, benefits. *See* Pl.'s Br. at 10-15.

Finally, in a last-ditch attempt to avoid the implications of their actions, Defendants and USCCB suggest that the fact that some subcontractors used other resources to assist trafficking victims to obtain abortion and contraception somehow obviates a violation of the Establishment Clause. Defs.' Br. at 7; USCCB's Br. at 7. But this suggestion does not withstand scrutiny.[12] Indeed, using this logic the government could allow a religious government contractor to refuse to provide services to those of a

[11] Moreover, the RFP mentions that trafficking victims will need access to health care, and that the contractor must provide counseling on how trafficking survivors can access the full range of federal entitlement programs. Pl.'s SOF ¶ 23. One of these programs is Medicaid, which covers contraception and, in limited circumstances including rape, and "certified" trafficking victims are eligible for Medicaid. 22 U.S.C. §§ 7105(b)(1)(A), (C); SOF ¶¶ 58-59.

[12] Defendants and USCCB claim, as a factual matter, that USCCB does not impose its religious beliefs on its subcontractors. Defs.' Statement of Material Facts as to Which There is No Genuine Issue to Be Tried, Docket #74 ("Defs.' SMF") ¶ 102; Def.-Intervenor USCCB's Statement of Undisputed Material Facts in Supp. of Its Mot. for Summ. J. ¶ 36. But this is a legal conclusion. Moreover, that "fact" it is contrary to the undisputed facts that demonstrate that Defendants allowed USCCB to impose its religious beliefs on subcontractors by prohibiting TVPA funds from being used for reproductive health care services and referrals. No comment in anyone's deposition testimony could change these undisputed facts, and the legal conclusion which follows: that Defendants violated the Establishment Clause.

different faith by simply pointing to the availability of privately funded services elsewhere.[13] Such a situation would be unconstitutional, as is the situation here.[14]

II. This Court Has Already Determined That Plaintiff Has Standing.

This Court has already determined that Plaintiff has taxpayer standing to raise an Establishment Clause challenge, and nothing has happened since the Court's decision that changes that result. Contrary to Defendants' and USCCB's claims, the Court did not leave open a standing question for factual development, such as whether USCCB spent government funds on "religious items, proselytizing, or religious programming." USCCB's Mem. in Supp. of Mot. to Dismiss at 3-4; Defs.' Br. at 18. Rather, the Court's colloquy with Plaintiff's counsel makes clear that the Court was seeking to ascertain whether this case is about requiring the government to fund abortion and contraception, or whether this case was about "the delegation of Congress's spending power to a religious organization to enforce its doctrinal views." *Am. Civil Liberties Union of Mass. v. Sebelius*, 697 F. Supp. 2d 200, 212 & n.22 (D. Mass. 2010). Plaintiff has always alleged, and now has proven, the latter. As a result, there is no open question, and the Court's decision should not be disturbed.[15]

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[13] Moreover, it is undisputed that nonprofit organizations have limited resources, and the lack of resources is an obstacle to providing trafficking victims with all the services they need. Pl.'s SOF ¶ 15.

[14] USCCB suggests that perhaps the restriction was not religiously motivated but rather a financial decision or "triage" based on lack of resources. This suggestion is beyond the pale. Not only is it belied by USCCB's explicit statement that the reason for the restriction was the organization's religious beliefs, Pl.'s SOF ¶ 28, but it is also unsupported by any evidence about the resources available under the TVPA. Indeed, it ignores the fact that USCCB could spend $6 million each year, but never spent the full amount. Defs.' SMF ¶ 80; SOF Ex. D. at 13-14 (in each contract year, the amount billed by USCCB to the federal government was never more than $4.01 million).

[15] To be sure, other courts considering whether there has been an unconstitutional delegation of governmental authority to religious organizations have held that the plaintiffs may proceed as taxpayers. *See, e.g.*, *Kiryas Joel*, 512 U.S. at 695 n.2.

Moreover, nothing in the Supreme Court's recent decision in *Arizona Christian School Tuition Organization v. Winn* has any bearing on this case. 131 S. Ct. 1436 (2011). In *Winn*, 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 funds at issue were private, not the government's. *Id*. at 1447. Specifically, the Court reasoned that, because the monies at issue never reached the coffers of government, they did not constitute taxpayer dollars. *Id.* As a result, the Court concluded that the plaintiff taxpayers did not have standing to pursue the case. Here, there is no question that Plaintiff challenges the government's expenditure of taxpayer funds: The monies were deposited into the coffers of government and the government exercises control over the allocation and expenditure of these funds — in this case to further USCCB's religious goals. Any attempt to invoke *Winn* here is thus a red herring. Accordingly, Defendants' and USCCB's attempt to revive the standing issue should be rejected.

III. Defendants' Mootness Argument Is Premature and Incorrect.

Defendants alert this Court to the possibility that, in their opinion, this case may become moot. Any discussion of potential mootness is, however, premature as the contract is still in effect and may be unilaterally extended as it has been in the past. Pl.'s SOF ¶ 52. Additionally, USCCB may be awarded government money through the new funding announcement. As Defendants' brief makes clear, Defs.' Br. at 4, there were only two qualified bidders for the contract at issue here, making it likely that USCCB will be one of a small number of bidders again. If USCCB is awarded a new grant, it will undoubtedly place the same restriction on its subgrantees that it placed on its

subcontractors in this case, and, indeed, on all of its subcontractors and subgrantees as discussed *infra*. *Id*. ¶ 77.

But even if neither of those events happens, this lawsuit is a classic example of an issue that is capable of repetition yet evading review. As the First Circuit has held, an issue is not moot if: 1) there is a reasonable expectation that the same complaining party will be subjected to the same action again; and 2) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration. *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 4 (1st Cir. 1986) (internal citations and quotations omitted); *see also Courtemanche v. Gen. Servs. Admin.*, 172 F. Supp. 2d 251, 263-64 (D. Mass. 2001).

As to the first prong, USCCB has a long history of being awarded numerous government contracts. In fiscal year 2009 alone, for example, USCCB received over $29 million in federal grants and contracts.[16] And USCCB has admitted that in all subcontract agreements – with both Catholic and non-Catholic entities – it imposes the same restriction on the use of abortion and contraceptive referrals and services. Pl.'s SOF ¶ 77. For example, in addition to the contract that is at issue in this case, USCCB receives additional funding from Defendant HHS to care for refugees and unaccompanied immigrant children, and places the same reproductive health restriction on its subcontractors. Deposition of Anastasia Brown 52:20-54:11 (attached as Ex. A). Thus, ACLU members who object to their tax dollars being used to promote religion are likely

[16] *See* http://www.usaspending.gov/search?query=&searchtype=&formFields=eyJSZWNpcGllbnROYW1lTGNhc2UiOlsiVW5pdGVkIFN0YXRlcyBDb25mZXJlbmNlIE9mIENhdGhvbGljIEJpc2hvcHMgSW5jIl19; and http://www.usaspending.gov/search?query=&searchtype=&formFields=eyJSZWNpcGllbnROYW1lTGNhc2UiOlsiVW5pdGVkIFN0YXRlcyBDb25mZXJlbmNlIE9mIENhdGhvbGljIEJpc2hvcHMiXX0=.

to be subjected to the same injury again. As to the second prong, the duration of the contract was too short for the instant action to be fully litigated. Indeed, in other circumstances involving time-limited government contracts, courts have held that the case is capable of repetition yet evading review. *See, e.g., Great Lakes Dredge & Dock Co. v. Ludwig*, 486 F. Supp. 1305, 1308-09 (W.D.N.Y. 1980) (holding case not moot because underlying work at issue would continue and other contracts would be available). Here, government funding for the provision of services to trafficking victims and other similar vulnerable populations will continue, and it is extremely likely that USCCB will apply for and receive some of those contracts and grants.

Moreover, Plaintiff has requested nominal damages and, therefore, continues to have a redressable injury preventing this case from becoming moot. As other courts have recognized, nominal damages are an appropriate award in Establishment Clause cases brought by taxpayer plaintiffs, *see, e.g., Pelphrey v. Cobb County*, 547 F.3d 1263, 1282 (11th Cir. 2008), and when nominal damages are claimed, the plaintiff's claim does not become moot, *see, e.g., O'Connor v. Washburn University*, 416 F.3d 1216, 1222 (10th Cir. 2005).

Accordingly, this Court should not address the mootness issue unless and until monies are no longer due to USCCB under the contract, and until it becomes apparent that USCCB has not been awarded the latest contract. Even if those events come to pass, however, the Court should hold that the issue is not moot because it is capable of repetition yet evading review and because Plaintiff has requested nominal damages.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' and USCCB's motions, and grant Plaintiff's motion for summary judgment.

Dated: September 9, 2011

Respectfully Submitted,

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*Motion for *pro hac vice* admission granted

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2011, I caused a copy of Plaintiff's Opposition to Defendants' Motion for Summary Judgment and Defendant-Intervenor USCCB's Motions for Summary Judgment and To Dismiss 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: September 9, 2011

/s/ Brigitte Amiri
BRIGITTE AMIRI