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 REPLY IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

The indisputable facts demonstrate that the government Defendants ("Defendants") violated the Establishment Clause by allowing the United States Conference of Catholic Bishops ("USCCB") to step into their shoes and dictate which reproductive health services trafficking victims should receive with federal funds based on USCCB's Catholic beliefs. Defendants' and USCCB's contrary arguments are unsupported by facts, law, and common sense. They should be rejected, and this Court should deny their motions and enter summary judgment for Plaintiff.

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

As discussed in Plaintiff's opening brief, an "objective observer" would unquestionably recognize that by allowing USCCB to restrict the types of services its

subcontractors could provide to trafficking victims expressly on account of USCCB's religious beliefs, Defendants have impermissibly endorsed those beliefs. *See* Pl.'s Mem. in Supp. of Its Mot. for Summ. J., Docket # 65 ("Pl.'s Br."), at 7-10; Pl.'s Opp. to Defs.' Mot. for Summ. J. and to USCCB's Mot. for Summ. J. and Mot. to Dismiss, Docket # 88 ("Pl.'s Opp. Br."), at 6-7. Defendants' and USCCB's contrary arguments are essentially the same ones made in their prior pleadings, but none have merit. Because Plaintiff has previously addressed these arguments in its prior pleadings, Plaintiff only briefly addresses them here.

First, Defendants and USCCB once again make the unsupported claim that the Constitution only prohibits impermissible government endorsement of religion arising out of religious displays and expression. But the law is unquestionably to the contrary—courts have not hesitated to analyze whether government action constitutes an unconstitutional endorsement of religion outside the context of religious displays and expression.[1] *See* Pl.'s Opp. Br. at 6-7.

Second, and similarly unsustainable, is Defendants' and USCCB's repeated frivolous argument that there is no endorsement of religion in this case because the restrictions on abortion and contraception that Defendants authorized USCCB to impose merely "coincide[d]" with USCCB's religious beliefs.[2] Mem. of Def.-Intervenor U.S.

[1] Moreover, it is well settled that "every government practice must be judged in its unique circumstances to determine either it constitutes an endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring).

[2] USCCB's attempt to claim that that the abortion/contraception prohibition was motivated by USCCB's moral rather than religious beliefs should be rejected as pure semantics. It is undisputed that USCCB imposed the prohibition because of its Catholic beliefs. Pl.'s Statement of Undisputed Material Facts, Docket # 64, ("Pl.'s SOF") ¶ 28 (USCCB's Technical Proposal, which was incorporated into the final contract, says, "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).

Conference of Catholic Bishops in Opp. to Mot. for Summ. J., Docket # 84 ("USCCB's Opp. Br."), at 3; Defs.' Mem. in Opp. to Mot. for Summ. J., Docket # 89 ("Defs.' Opp. Br."), at 5. As USCCB's own arguments make abundantly clear, this is not a case where the government's policy just happened to align with some religious beliefs. As USCCB argues repeatedly, Defendant accepted USCCB's proposal *in spite of* the abortion/contraception prohibition, not because of it.[3] *See, e.g.*, USCCB's Opp. Br. at 4. Indeed, Defendants admit that that the abortion/contraception prohibition was "based on USCCB's 'moral and religious beliefs.'" Defs.' Resp. to Pl.'s Statement of Undisputed Material Facts, Docket # 91, at 17. Therefore the undisputed facts, and USCCB's and Defendants' admissions, make clear that the restrictions on abortion and contraception were only imposed *because of* USCCB's religious beliefs. *See* Pl.'s Opp. Br at 4-5.

Third, Defendants again repeat their misguided argument that no Establishment Clause violation occurred here because some of USCCB's subcontractors had to resort to "us[ing] their own non-contract funding to pay for abortion and contraceptive services." Defs.' Opp. Br. at 5. Once again, Defendants can point to no authority – because there is none – supporting their contention that the Constitution tolerates governmental endorsement of religious beliefs when private parties are able to mitigate the damage caused by the endorsement.[4] *See* Pl.'s Opp. Br. at 8-9.

[3] This is precisely why *Harris v. McRae* is inapposite. 448 U.S. 297 (1980) (cited in USCCB's Opp. Br. at 3). In that case, the restriction on government funding for abortion emanated from the government, not a religious group on religious grounds as is the case here. *See* Pl.'s Opp. Br. at 5.

[4] Defendants and USCCB also repeat the unavailing argument that because Defendants awarded USCCB the contract "in spite of, and not because of, its unwillingness to participate in the funding of abortion or contraception," USCCB's Br. at 4, Defendants did not impermissibly endorse USCCB's religious beliefs. *See also* Defs.' Opp. Br. at 5-6. But it would be a strange rule of law that shielded the government from scrutiny because it has proceeded in the face of a *known* Establishment Clause violation, and neither Defendants nor USCCB cite any authority to support such a proposition.

Fourth, Defendants focus on the overall contract rather than the specific prohibition at issue to claim that in this "context" there has been no endorsement of religion. Defs.' Opp. Br. at 4-7. But this argument takes the concept of "context" too far. Indeed, the overall contract cannot mitigate the fact that Defendants have authorized a religiously based prohibition in that contract. If Defendants' overly broad reading of "context" were correct, it would mean that the government could award a contract to a religious soup kitchen to feed the hungry, but allow the contractor to require its clients to recite a Bible verse to receive food. Although the Bible recitation would be a small part of the contract, such a situation would undoubtedly be an unconstitutional endorsement of religion, as is the case here.

Fifth, and finally, the Court should reject the argument that Defendants were free to endorse USCCB's religious beliefs because it was simply an "accommodation of government-created burdens on religious practice." USCCB's Opp. Br. at 5. To be clear, USCCB does not argue that the Free Exercise Clause *required* Defendants to allow it to carve out abortion and contraception, merely that Defendants had the discretion to do so. *Id.* at 4-5 & n.3. But as the Supreme Court has repeatedly recognized, "[a]t some point, accommodation may devolve into an unlawful fostering of religion."[5] *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-35 (1987) (internal quotation marks and citations omitted); *see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 710 (1994) (holding that the statute at issue crossed "the line from permissible accommodation to impermissible

[5] As this Court has recognized, "to insist that government respect the separation of church and state is not to discriminate against religion, indeed it promotes a respect for religion by refusing to single out one or two creeds for official favor at the expense of all others." *Amanico v. Town of Sumerset*, 28 F. Supp. 2d 677, 681 (D. Mass. 1998) (Stearns, J.).

establishment"). That is precisely the case here. As an initial matter, contrary to USCCB's claims, USCCB's Op. Br. at 4-5 & n.3, the TVPA does include a generally applicable legal requirement that trafficking victims must be eligible for the same programs as refugees, which include contraception and abortion, in limited but very relevant circumstances.[6] Moreover, courts have found that the government has crossed the line between permissible and impermissible accommodation particularly where, as here, the so-called accommodation itself imposes burdens on third parties. *See, e.g.*, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985); *ACLU of New Jersey v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1488 (3d Cir. 1996) (en banc) (holding unconstitutional school board policy of allowing students to vote on whether to have a prayer at graduation, and noting that the policy cannot be justified as an accommodation because "it seeks to accommodate the preference of some at the expense of others and thereby crosses the required line of neutrality"). Indeed, USCCB's government-sanctioned abortion/contraception prohibition detrimentally affects trafficking victims and the nonprofit organizations that serve them. *See, e.g.*, Pl.'s SOF ¶¶ 65-67. There can be no real dispute that trafficking survivors need access to reproductive health care,[7] and that the abortion/contraception provision has burdened

[6] The TVPA says that trafficking victims must be 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. Pl.'s SOF ¶ 59. As discussed *infra*, for pre-certified trafficking victims, Defendants have invoked their statutory authority under the TVPA to expand benefits to meet the needs of that population, and historically Defendants have recognized that those needs include abortion and contraception.

[7] USCCB purports to dispute this fact because it claims "as a matter of principle that abortion and contraception are [not] 'medical services' that any person 'needs.'" USCCB's Statement of Disputed Facts In Supp. of Its Opp. to ACLU's Mot. for Summ. J., Docket #85, at 3. An organization's religious principles are not a proper basis for disputing factual evidence. Moreover, USCCB's expert's anecdotal comment that she has not personally discovered trafficking victims who need abortion or contraception in her limited academic research, *id.*, cannot be the basis for disputing this fact either. To the contrary, Plaintiff's expert testified that based on her experience providing medical care to trafficking victims, her

nonprofit organizations and the trafficking victims they serve by making them pay out of pocket for services the government previously paid for, particularly when these organizations are strapped for resources.[8] *Id.* at ¶¶ 8, 15.

It is undisputed that Defendants accepted USCCB's religiously based prohibition on the use of TVPA funds to pay for abortion and contraception referrals and services, and incorporated this restriction into the final contract. The endorsement test prohibits the government from placing its imprimatur on religion in the context of a government program. That is precisely what Defendants have done, and they have therefore violated the Constitution.

II. Defendants Have Advanced USCCB's Religious Goals, and Excessively Entangled Themselves with Religion.

As Plaintiff discussed in its opening brief, Pl.'s Br. at 11, 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. Pl.'s SOF ¶ 21. Defendants improperly handed over this statutory authority to USCCB to determine which reproductive health services would be provided to trafficking victims with TVPA funds, and allowed USCCB to make this determination based on USCCB's religious beliefs.

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research, and the relevant literature, that trafficking victims need a range of reproductive health care, including abortion and contraception. *See* Expert Report of Dr. Susie Baldwin ¶¶ 6-7, Ex. C to Pl.'s SOF; Deposition of Dr. Susie Baldwin 105:1-107:5 (attached as Ex. A).

[8] Defendants also set up straw men by reciting a host of Establishment Clause concerns that are not relevant here. Defs.' Br. at 6. The fact that there was no "indoctrination, proselytization, or . . . purchase of religious items," and that the technical panel members were not motivated by religion, does not, of course, mean that Defendants did not endorse USCCB's religious beliefs by permitting USCCB to restrict the scope of victim services based solely on those beliefs.

This Establishment Clause violation is therefore even more pronounced than it was in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 117 (1982). Rather than just the fear that USCCB would use its delegated power to further "religious goals," as was the case in *Larkin*, Defendants *explicitly authorized* USCCB to wield its delegated power to dictate that TVPA funds should not be used for abortion or contraception because of USCCB's Catholic beliefs. *Id.* at 125.

Defendants and USCCB attempt to deflect attention away from the constitutional violation by either invoking broad legal or factual principles which, while generally correct, have no bearing on the constitutional argument in this case, or by making arguments that defy common sense and have no basis in law. In any event, Defendants' and USCCB's arguments should be rejected.[9]

First, they argue that the government may contract with religious organizations without violating the Constitution, and that such a contract does not mean an unconstitutional delegation of government power has occurred. Defs.' Br. at 8. Defendants' statement is correct as a general principle, but that principle does not excuse what happened here. The government cannot delegate to religious organizations the ability to dictate government policy based on their religious beliefs. *See* Pl.'s Br. at 10-15. Moreover, contrary to Defendants' and USCCB's argument – Defs.' Opp. Br. at 8, USCCB's Opp. Br. at 9-10 – Defendants did indeed give standardless discretion to USCCB to decide which reproductive health services trafficking victims should receive

[9] Moreover, contrary to Defendants' claims, and as made clear by the very cases Defendants cite, Defs.' Opp. Br. at 9, the proper inquiry in the "effects" test is the *challenged* governmental action. Plaintiff does not challenge the overall award of the contract to USCCB. Rather, Plaintiff challenges the delegation of statutory authority to USCCB to determine which reproductive health services trafficking should receive with TVPA funds, and the authorization to USCCB to make that determination based on USCCB's Catholic beliefs. If Defendants' alternative "test" were correct, it would insulate from review the hypothetical contract to the religious soup kitchen discussed *supra* – the purpose of that contract is to feed the hungry, but obviously requiring clients to recite Bible verses violates the Establishment Clause.

with government funds, Pl.'s Br. at 11, but in some ways that is beside the point. The *Larkin* Court was concerned with standardless delegation of governmental power to religious entities because of the fear that that power "could be employed for explicitly religious goals." 459 U.S. at 125. Here, that fear immediately materialized when Defendants expressly authorized USCCB to further its religious goals by giving USCCB the power to carve out abortion and contraceptives referrals and services from all other medical care provided to trafficking victims with TVPA funds.

Second, they argue that the government itself could impose restrictions on the use of TVPA funds to pay for abortion and contraception. USCCB's Br. at 10. Again, while that is true, that is not what happened here. To the contrary, as discussed above, it is the government's policy to allow TVPA funds to be used for abortion and contraception, but Defendants authorized USCCB to carve out abortion and contraception from all other medical services paid for by TVPA funds because of USCCB's religious beliefs. *See* Pl.'s Opp. Br. at 4-5. Thus again this case is on all fours with *Larkin*. 459 U.S. at 123-24 (noting that the government could have banned liquor outlets in close proximity to churches, but holding that delegating to churches the ability to veto such licenses is unconstitutional).

Third, Defendants' argument that because they agreed to the restriction, there is no constitutional violation, Defs.' Opp. Br. at 10, turns the Establishment Clause on its head. Under this logic, an Establishment Clause violation could only exist if the government did not know about it. As *Larkin* (and common sense) make clear, that is not the law. Indeed, like the government's authorization of the restriction here, in *Larkin*, the

government ratified the church's decision to veto the liquor license to Grendel's Den. 459 U.S. at 118.

Fourth, the government incredibly argues that there is no evidence that USCCB has used the contract to "promote goals beyond" those of the Defendants. Defs.' Opp. Br. at 8. This is demonstrably false. As discussed above, it is Defendants' policy to allow TVPA funds to be used to pay for abortion and contraception referrals and services, but USCCB prohibited its subcontractors from using TVPA funds for these services because of its religious beliefs.[10]

Fifth, they claim that restricting the use of government funds to pay for abortion and contraception referrals and services is not inherently religious. Defs.' Br. at 10, USCCB's Br. at 9. Again, whatever the truth of that statement as a general matter, it has no bearing on this case. In *Larkin*, there was nothing inherently religious about the church's objection to the liquor license; instead, the church objected for secular reasons, namely, that there were so many licenses close together. 459 U.S. at 118. Nevertheless, the Court found a constitutional violation in that case, for the same reasons this Court should so find. Moreover, there can be no question in this case that the abortion and contraception prohibition was imposed for purely religious reasons.

Finally, USCCB claims that the work they perform under the contract is not inherently governmental or political. USCCB's Opp. Br. at 9. While that may be generally true, as discussed above, and in Plaintiff's other briefs, *Defendants* are charged with determining how TVPA funds should be spent, including which health needs should

[10] Defendants also argue that they monitored USCCB's contract. Defs.' Opp. Br. at 10. As a factual matter, that is true, but the post-award monitoring cannot cure the constitutional defect that occurred at the outset of the contract when Defendants authorized USCCB to impose its religiously based restrictions on the use of TVPA funds.

be addressed. *See, e.g.*, Pl.'s Br. at 11. This statutory authority to determine how the health needs of trafficking victims should be met is a *governmental* power that Defendants delegated to USCCB. USCCB's day-to-day work is not the problem; rather, authorizing USCCB to set governmental policy is the problem. In other words, by allowing a religious entity to substitute its religious doctrine for reasoned government policy, Defendants have advanced religion and created an excessive entanglement with religion in violation of the Establishment Clause.[11] And contrary to Defendants' claims, Defs.' Opp. Br. at 9, this is precisely the same type of symbolic benefit to religion that *Larkin* said was impermissible. 459 U.S. at 125 (holding that the "mere appearance" of a joint exercise of a governmental authority between a religious entity and the government "provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred").

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. As the undisputed facts show, that is precisely what occurred here. Accordingly, and for the foregoing reasons and those in Plaintiff's prior pleadings, this Court should deny Defendants' and USCCB's motions, and grant Plaintiff's motion for summary judgment.

[11] Moreover, USCCB's attempt to distinguish the kosher fraud cases is unavailing. USCCB's Br. at 11. The government's involvement in resolving the definition of "kosher" was not the only reason that those laws were unconstitutional. Instead, like here, the incorporation of religious goals and standards into government policy creates "an impermissible symbolic union of church and state." *Barghout v. Bureau of Kosher Meat and Food Control*, 66 F.3d 1337, 1345 (4th Cir. 1995*); see also Commack Self-Service Kosher Meats v. Weiss*, 294 F.3d 415, 429, 430-31 (2d Cir. 2002) (holding same, and that the "combined exercise of civil and religious authority . . . violate[s] the fundamental principle underlying the Establishment Clause"); *see also* Pl.'s Br. at 12-14.

Dated: September 23, 2011

Respectfully Submitted,

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*Motion for *pro hac vice* admission granted

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2011, I caused a copy of Plaintiff's Reply In Further 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: September 23, 2011

/s/ Brigitte Amiri
BRIGITTE AMIRI