UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 09-10038-RGS

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS

v.

KATHLEEN SEBELIUS, et al.

MEMORANDUM AND ORDER ON
CROSS-MOTIONS FOR SUMMARY JUDGMENT AND
DEFENDANT-INTERVENOR'S MOTION TO DISMISS

March 23, 2012

STEARNS, D.J.

In this case, plaintiff American Civil Liberties Union of Massachusetts (ACLU) claims that officials of the U.S. Department of Health and Human Services (HHS) violated the Establishment Clause of the First Amendment by allowing the United States Conference of Catholic Bishops (USCCB) to impose a religiously based restriction on the disbursement of taxpayer-funded services. Presently before the court are the parties' cross-motions for summary judgment, as well as defendant-intervenor USCCB's motion to dismiss for lack of subject matter jurisdiction. The court heard oral argument on October 18, 2011.

BACKGROUND

The undisputed facts are as follows. In 2000, Congress passed the Trafficking

[2] Pl.'s SOF ¶ 27; USCCB's Resp. to Pl.'s SOF ¶ 27.

[3] *About: Mission Statement*, The Salvation Army, http://www.salvationarmyusa.org/usn/www_usn_2.nsf/vw-local/About-us (last visited Mar. 23, 2012).

[4] This frank statement that the abortion/contraception restriction was motivated

from offering or subsidizing abortion services and contraceptives.[5] The panel members' reservations were conveyed to the USCCB in the form of written questions. Among the questions, the USCCB was asked: "Would a 'don't ask, don't tell' policy work regarding the exception? What if a subcontractor referred victims supported by stipend to a third-party agency for such services?" Gov. Defs.' SOF ¶ 43. The USCCB responded:

> [w]e can not be associated with an agency that performs abortions or offers contraceptives to our clients. If they sign the written [subcontract] agreement, the "don't ask, don't tell" wouldn't apply because they are giving an assurance to us that they wouldn't refer for or provide abortion service to our client using contract funding. The subcontractor will know in advance that we would not reimburse for those services.

Id. ¶ 52.

After receiving the answers, HHS reopened the RFP process to permit the USCCB and the Salvation Army to submit revised technical proposals, which both

[5] In enacting the TVPA, Congress made a finding that female trafficking victims are often forced into prostitution and subjected to rape and other forms of sexual abuse. *See* 22 U.S.C. § 7101(b)(6). The TVPA specifies that trafficking victims "shall be eligible for benefits and services under any Federal or State program or activity funded or administered by any official or agency . . . to the same extent as" refugees. *Id*. § 7105(b)(1)(A). "Medicaid and Refugee Medical Assistance pay for contraception and abortions in the case of rape, incest, and when the woman's life is in danger." Pl.'s SOF ¶ 59; USCCB's Resp. to Pl.'s SOF ¶ 59. The RFP made no reference to restrictions on the use of TVPA funds for contraception or abortion services. The USCCB apparently raised the issue on the understanding that abortions and contraceptives are among the clinical services that victims of human trafficking might request.

defendants awarded the USCCB an additional $2.9 million.[7] Pl.'s SOF ¶ 79; USCCB's Resp. to Pl.'s SOF ¶ 79. Before the contract was set to expire (on April 10, 2011), HHS approved a six-month extension by way of a "Task Order." The Task Order expired on October 10, 2011. While HHS no longer has the authority to obligate additional funds under the original master contract or the Task Order, it can continue to pay the USCCB for "services provided within the period of performance of the Task Order." Timmerman Decl. ¶¶ 6-11.

On January 12, 2009, the ACLU brought this lawsuit against HHS officials,[8] alleging that they "have violated and continue to violate the Establishment Clause of the First Amendment by permitting [the] USCCB to impose a religiously based restriction on the use of taxpayer funds." Compl. ¶ 71. On May 15, 2009, defendants filed a motion to dismiss the Complaint for lack of standing. This court denied the motion on March 22, 2010. In June of 2010, the USCCB intervened in the lawsuit as permitted by Rule 24 of the Federal Rules of Civil Procedure.

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[7] Of this $15.9 million, the USCCB allocated over $5.3 million to pay for its administrative services and expenses. Pl.'s SOF ¶ 79; USCCB's Resp. to Pl.'s SOF ¶ 79.

[8] The Complaint originally named Michael O. Leavitt, the former Secretary of HHS. Leavitt's successor, Kathleen Sebelius, has since been substituted as a defendant in Leavitt's place.

DISCUSSION

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A 'genuine' issue is one that could be resolved in favor of either party, and a 'material fact' is one that has the potential of affecting the outcome of the case." *Calero-Cerezo v. U.S. Dep't of Justice*, 355 F.3d 6, 19 (1st Cir. 2004), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-250 (1986).

I. Threshold Issues: Standing and Mootness

A. Standing

[9] I further reasoned that, for purposes of standing, "the TVPA expenditures at issue here appear more like the funds disbursed under the AFLA [the Adolescent

The government defendants and the USCCB now seek to revisit the issue of standing. The government defendants contend that "due to the further development of taxpayer standing principles in *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011), it is now clear that plaintiff lacks taxpayer standing in this case." Gov. Defs.' Reply at 6.[10] In *Winn*, the Supreme Court held that the taxpayer plaintiffs lacked standing to mount an Establishment Clause challenge to a dollar-for-dollar tax credit (up to $500) matched against contributions to scholarship funds

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Family Life Act, at issue in *Bowen v. Kendrick*, 487 U.S. 589 (1988)] than those spent to support the activities of the OFBCI [the White House Office of Faith-Based and Community Initiatives, at issue in *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007)]. The TVPA, like the AFLA, designated a group of intended beneficiaries – in the case of the TVPA, victims of human trafficking abuse, in the case of the AFLA, sexually active adolescents – and like the AFLA, the TVPA required the funding of services for the group." Mar. 22, 2010 Mem. & Order at 14.

[10] The USCCB offers the additional argument that "[s]ince [the] ACLU challenges only the failure to use appropriated funds to pay for abortion and contraception services, the interests of [the] ACLU's members as taxpayers will not support standing in this case." USCCB's Mem. in Support of its Mot. to Dismiss at 8. I question whether this framing of the case accurately characterizes the position taken by counsel for the ACLU, that the focus of the lawsuit is not on the defense of a right of access to abortion services, but instead on an objection to the use of taxpayer dollars to enforce a religiously based restriction on access to such services. At a hearing on December 3, 2009, I asked ACLU counsel directly whether this lawsuit would have been brought "if Congress had insisted the money be given to religious organizations that as a matter of faith believed in promoting abortion rights." Dec. 3, 2009 Hr'g Tr. at 24. She replied, "Yes, your Honor, I think to the extent that there is any sort of furthering of religion with taxpayer dollars, that rises to the level of an Establishment Clause claim, regardless of what the specific contours are, and it also means that taxpayers have standing to bring that case." *Id.* at 25.

Here, taxpayer members of the ACLU seek to challenge a governmental expenditure – the disbursement to the USCCB of funds appropriated by Congress under the TVPA. In contrast to *Winn*, this case does not involve any form of tax credit that allows plaintiffs and other dissenting citizens "to retain control over their own funds in accordance with their own consciences." *Id*. at 1447 (majority opinion).[12] Thus, the holding of *Winn* does not impeach this court's pre-*Winn* holding that the ACLU has standing to proceed.[13]

B. Mootness

The government defendants next argue that this case is moot in light of the

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or a tax measure." *Id*. at 1452.

[12] *See also id*. at 1448 ("[W]hat matters under *Flast* is whether sectarian [organizations] receive government funds drawn from general tax revenues, so that moneys have been extracted from a citizen and handed to a religious institution in violation of the citizen's conscience."). Here, a sectarian organization (the USCCB) has received government funds drawn from general tax revenues, implicating "*Flast*'s narrow exception to the general rule against taxpayer standing." *Winn*, 131 S. Ct. at 1440.

[13] It may be the case, as a prominent law journal suggests, that the Supreme Court will further restrict taxpayer standing in Establishment Clause cases at the next opportunity, or abolish it altogether (as Justice Scalia advocates). *See The Supreme Court, 2010 Term – Leading Cases*, 125 Harv. L. Rev. 172, 181-182 (2011). This court, however, does not have the freedom to blaze predictive trails. In the absence of any clear direction from higher authority, it must apply the law as the Supreme Court presently declares it to be.

expiration of the HHS-USCCB contract on October 10, 2011.[14] Both the ACLU and the USCCB disagree with this contention. "The doctrine of mootness enforces the mandate 'that an actual controversy must be extant at all stages of the review, not merely at the time the complaint is filed.'" *Mangual v. Rotger-Sabat*, 317 F.3d 45, 60 (1st Cir. 2003), quoting *Steffel v. Thompson*, 415 U.S. 452, 460 n.10 (1974). A case is moot when a court cannot give "'any effectual relief whatever'" to the potentially prevailing party. *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992), quoting *Mills v. Green*, 159 U.S. 651, 653 (1895). The distinction between standing and mootness is not always easily grasped. "The confusion is understandable, given [the Supreme Court's] repeated statements that the doctrine of mootness can be described as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal quotation marks omitted). *See*

[14] Although the HHS-USCCB contract and Task Order have expired, HHS is authorized to pay the USCCB for activities performed under the Task Order with federal taxpayer funds. *See* Timmerman Decl. ¶ 11 ("USCCB may submit invoices for services provided within the period of performance for the Task Order. On the basis of those invoices, HHS can pay for services rendered with the funds obligated under the Task Order."). At the hearing on October 18, 2011, counsel for the government defendants confirmed that "USCCB may still submit further invoices or have certain intellectual property transferred back to the federal government . . . ." Oct. 18, 2011 Hr'g Tr. at 24.

also Becker v. Fed. Election Comm'n, 230 F.3d 381, 387 n.3 (1st Cir. 2000) ("[W]hile it is true that a plaintiff must have a personal interest at stake throughout the litigation of a case, such interest is to be assessed under the rubric of standing at the commencement of the case, and under the rubric of mootness thereafter.").

"The burden of establishing mootness rests squarely on the party raising it, and '[t]he burden is a heavy one.'" *Mangual*, 317 F.3d at 60, quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). "Mere voluntary cessation of allegedly illegal conduct does not moot a case . . . . A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Exp. Ass'n.*, 393 U.S. 199, 203 (1968). *See also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice."); *Conservation Law Found. v. Evans*, 360 F.3d 21, 26-27 (1st Cir. 2004) (noting that the government defendant's "voluntary cessation of the challenged conduct does not render the challenge moot" where the government defendant has not shown that the challenged action "will not recur.").

Here, the government defendants have failed to meet their "heavy" burden of demonstrating that it is "absolutely clear" that the circumstances giving rise to this case

[15] "For example, HHS's Office of Refugee Resettlement administers a federal grant program to provide long-term foster care placements, transitional foster care services and related follow up services to unaccompanied undocumented children who have been apprehended and are in federal custody. USCCB has recently received grants under this program under terms that accept that USCCB will not participate in funding abortion or contraception services. USCCB's Migration and Refugee Services operation participates in several other similar programs. *See* http://nccbuscc.org/mrs/funding-sources.shtml. In all of them, USCCB has insisted on a conscience provision that stipulates that USCCB will not provide or fund abortion or contraception services." USCCB's Supplemental Mem. at 4 & n.1.

[16] Congress has not indicated that it will not continue funding the TVPA.

[17] The government defendants argue that the voluntary cessation exception to the mootness doctrine does not apply because "HHS did not voluntarily terminate the contract;" rather, "[t]he contract expired due to the operation of law – HHS had no further options to renew the contract or extend the life of task orders under the

church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against

[19] The coercion analysis does not apply here, as the ACLU does not argue that the government defendants have coerced support of or participation in a particular religion.

[20] In

governmental endorsement of religion 'preclude[s] government from conveying or

attempting to c).p83(c)-2(1r)-1rn)nm41rn-16.4(i).23(h 3Tc.0099 Tw[(a)--1.2(d2.9)-22.8(n(s)-26.3(e-

crèche in a county courthouse violated the Establishment Clause and stating that "[i]n recent years, we have paid particularly close attention to whether the *challenged governmental practice* either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence.") (emphasis added); *Hanover Sch. Dist.*, 626 F.3d at 10 (stating that under the "endorsement analysis, courts must consider whether the *challenged governmental action* has the purpose or effect of endorsing, favoring, or promoting religion.") (emphasis added).

[22] The government defendants state that "the endorsement test is most commonly applied in the context of religious displays and religious expression," and that "no Supreme Court majority opinion has applied the endorsement test to a funding case." Gov. Defs.' Reply at 4. However, defendants cite no authority that explicitly limits the applicability of the endorsement test to cases involving religious displays and expression, and there is no reason to assume that the endorsement analysis would not be equally applicable here. There are cases outside of the religious display context in which the endorsement test has been at least implicitly applied. *See, e.g.*, *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 305 (holding that a school's policy of allowing student-led "invocations" prior to football games "involve[d] both perceived and actual

The USCCB, for its part, argues that the government's acceptance of the abortion/contraception restriction is an accommodation of religious belief and not an endorsement of a sectarian view. In support of this argument, the USCCB cites case law holding that an accommodation of religion is not equivalent to an endorsement of religious belief. *See, e.g.*, *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987) (applying rational basis analysis to test the constitutionality of a statute exempting secular nonprofit activities of religious organizations from the requirements of Title VII). However, as counsel for the USCCB stated at oral argument, HHS's authorization of the abortion/contraception restriction is "strictly speaking, not an accommodation because the TVPA does not require the provision of abortion or contraceptive services. It permits it, but it doesn't require it. So the government, by accepting the conscience clause in this case, did not relieve [the] USCCB of a legal obligation." Oct. 18, 2011 Hr'g Tr. at 39.

Even if viewed as an accommodation of the USCCB's religious beliefs, the

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upon by the government defendants – *Bowen v. Kendrick*, *Harris v. McCrae*, and *McGowan v. Maryland* – all of which involved challenges to government actions that coincided with religious beliefs, but were not found to be explicitly motivated by the beliefs of a particular religious group. *See Bowen v. Kendrick*, 487 U.S. 589, 605 (1988) (upholding the eligibility of religious groups to receive funding under the Adolescent Family Life Act (AFLA), reasoning that AFLA's "approach is not inherently religious, although it may coincide with the approach taken by certain religions."); *Harris v. McCrae*, 448 U.S. 297, 319 (1980) (rejecting an Establishment Clause challenge to the Hyde Amendment, which limits federal funding for abortion, reasoning that "[t]he Hyde Amendment . . . is as much a reflection of 'traditionalist' values towards abortion, as it is an embodiment of the views of any particular religion."); *McGowan v. Maryland*, 366 U.S. 420, 444 (1961) (upholding Maryland's Sunday closing laws against an Establishment Clause challenge, reasoning that "[i]n light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather

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the USCCB's "moral and religious objections to facilitating abortion or contraception"); Gov. Defs.' Mem. at 1-2 (acknowledging that "the funding restriction on abortion services and contraceptive materials was proposed by [the] USCCB for religious reasons . . . .").

[24] The government defendants note that despite the restriction, "subcontractors may use their own funding to provide abortion and contraceptive services." Gov. Defs.' Reply at 5. The pertinent issue, however, is not the allocation of financial burdens among the service providers; rather, it is whether the shifting of costs based on religious dogma violates the Establishment Clause when taxpayer money is involved.

[25] Under the TVPA, and pursuant to the statutory authority for the RFP, 8 U.S.C. § 1522(c)(1)(A), the government defendants are charged with providing services to

branches, and inhibits religion, by effectively prohibiting other branches from using the kosher label in accordance with their religious beliefs, and (2) create an impermissible joint exercise of religious and civic authority that advances religion."); *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1345 (4th Cir. 1995) (stating that

York state statute that "ran counter to customary [school] districting practices in the State" and "delegat[ed] the State's discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally." 512 U.S. at 696, 700.

instead funding is provided through multiple grant awards that *give strong preference to organizations that will make referrals for the full range of legally permissible obstetrical and gynecological services, including abortion and contraception*." Gov. Defs.' Opp'n to USCCB's Supplemental Mem. at 7-8 (emphasis added).

As I stated in my March 22, 2010 Memorandum and Order, "I have no present allegiance to either side of the debate, only a firm conviction that the Establishment Clause is a vital part of the constitutional arrangement envisioned by the Framers, and perhaps a reason we have not been as riven by sectarian disputes as have many other societies." Mar. 22, 2010 Mem. & Order at 21. That conviction remains unshaken. To insist that the government respect the separation of church and state is not to discriminate against religion; indeed, it promotes a respect for religion by refusing to single out any creed for official favor at the expense of all others. *See Kiryas Joel*, 512 U.S. at 696 ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion, favoring neither one religion over others nor religious adherents collectively over

affiliate itself with religious beliefs or institutions, precisely in order to avoid discriminating among citizens on the basis of their religious faiths.").[26]

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[26] Let me add one final note. This case is not about government forcing a religious institution to act contrary to its most fundamental beliefs. No one is arguing that the USCCB can be mandated by government to provide abortion or contraceptive services or be discriminated against for its refusal to do so. Rather, this case is about the limits of the government's ability to delegate to a religious institution the right to use taxpayer money to impose its beliefs on others (who may or may not share them).