IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 12-1466

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, (ACULM)

Plaintiff-Appellee

v.

UNITED STATES CONFERENCE OF CATHOLIC BISHOPS

Defendant-Appellant

KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services; GEORGE SHELDON, Acting Assistant Secretary for the Administration of Children and Families; ESKINDER NEGASH, Director of the Office of Refugee Resettlement

Defendants

No. 12-1658

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, (ACULM)

Plaintiff-Appellee

v.

KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services; GEORGE SHELDON, Acting Assistant Secretary for the Administration of Children and Families; ESKINDER NEGASH, Director of the Office of Refugee Resettlement

Defendants-Appellants

UNITED STATES CONFERENCE OF CATHOLIC BISHOPS,

Defendant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

REPLY BRIEF FOR DEFENDANTS KATHLEEN SEBELIUS, ESKINDER NEGASH, AND GEORGE SHELDON

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff concedes that HHS awarded the contract to USCCB at issue here for valid secular purposes, and the contract did nothing more than provide funding for secular services, leaving USCCB's subcontractors free to provide other services, including referral for abortion and contraceptive services, with their own funds. As we explained in our opening brief, the contract did not involve an endorsement of religion, nor did it involve the accommodation of the religious views of a private contractor. It simply reflected the agency's permissible judgment as to which of the available contract offers provided the best value for the provision of secular services. That does not violate the Establishment Clause. While *USCCB*'s reasons for not bidding to provide referral for abortion and contraceptive services were religious, no case holds that USCCB's religious motivations may be

attributed to the government, and to rule otherwise would generally preclude religious institutions from participating as providers of secular services under religiously neutral government programs, contrary to controlling Supreme Court precedent.

This Court, however, lacks jurisdiction to reach the merits because this case became moot when the contract at issue expired and because plaintiff lacks standing as a federal taxpayer to bring this action. Plaintiff's arguments to the contrary are not persuasive, and in fact are contrary to controlling Supreme Court precedent, see *Hein* v. *Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007), as well as the decisions of all of the other circuits that have interpreted and applied *Hein* in the context presented here. Under *Hein*, Establishment Clause taxpayer standing exists only where a statute's text expressly mandates or contemplates aid to religion or religious organizations, and no one argues that the statute at issue here contains any such language.

ARGUMENT

I. The Judgment Should Be Vacated As Moot.

This Court lacks jurisdiction to hear this case because the case became moot when the contract challenged by plaintiff expired by its own terms. Because the contract has expired, the Court cannot grant plaintiff any

effective relief on its Establishment Clause challenge to the contract. Plaintiff does not seek damages, there is nothing left to enjoin, and the law is clear that a request for declaratory relief does not make a case that is otherwise moot a live case or controversy. See Brief for Federal Appellants at 23-25 (citing cases).

The district court held that this case falls within the "voluntary cessation" exception to the mootness doctrine, but that is incorrect. Unlike the cases to which that exception applies, this case did not become moot because of any expediency on the part of the government or any intent to deprive the courts of jurisdiction, but because the contract at issue expired of its own terms. Under those circumstances, the voluntary cessation exception to the mootness doctrine does not apply, regardless of whether the controversy is likely to recur between the same parties. See Brief for Federal Appellants at 25-26.

Plaintiff argues that the voluntary cessation exception applies here because, while this case was pending, HHS "elected" not to renew the contract and instead issued a Funding Opportunity Announcement ("FOA"), ultimately deciding not to award a grant to USCCB to continue providing TVPA services to trafficking victims. See Brief for Appellee at 22. However, plaintiff cannot convert the simple expiration of a contract into

voluntary cessation by unilaterally characterizing it as an "election" not to renew the contract. Plainly, what mooted this case was the expiration of the TVPA contract plaintiff challenges, not HHS's issuance of the FOA or HHS's decision to award the grants issued under that FOA to other applicants. Under those circumstances, the case law recognizes that an Establishment Clause challenge to the contract is rendered moot. See Brief for Federal Appellants at 24-25, *citing*, *e.g.*, *Caldwell* v. *Caldwell*, 545 F.3d 1126 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1617 (2009); *Laskowski* v. *Spellings*, 443 F.3d 930 (7th Cir. 2006), *vacated and remanded on other grounds Univ. of Notre Dame* v. *Laskowski*, 551 U.S. 1160 (2007), and *Pub. Utils. Comm'n* v. *Fed. Energy Regulatory Comm'n*, 236 F.3d 708 (D.C. Cir. 2001).

Plaintiff attempts to distinguish *Caldwell* and *Laskowski* on the ground that those cases involved one-time grants that were unlikely to recur. The likelihood that a controversy will recur is relevant, however, only if the plaintiff can first show voluntary cessation (which plaintiff cannot show from the mere expiration of a contract). See, *e.g.*, *Conservation Law Found.* v. *Evans*, 360 F.3d 21, 24-25 (1st Cir. 2004) (only where a defendant voluntarily ceases the conduct challenged "must [that defendant] demonstrate that it is 'absolutely clear that the allegedly wrongful behavior

could not reasonably be expected to recur") (citation omitted). Neither *Caldwell* nor *Laskowski* rejected that settled rule.

Whether a case or controversy is likely to recur *is* relevant, of course, to whether a case falls into a different exception to the mootness doctrine, which applies to cases that are capable of repetition but will evade review. As our opening brief explained, however, that exception is inapplicable here because plaintiff did not seek preliminary relief that would have preserved the status quo. See Brief for Federal Appellants at 28 n.4, *citing Newdow* v. *Roberts*, 603 F.3d 1002, 1008-09 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1441 (2011). The Brief for Appellee leaves this point, which is dispositive concerning the applicability of that exception here, unchallenged.

Plaintiff also relies on *Conservation Law Foundation* v. *Evans*, *supra*, which is a voluntary cessation case, but that case merely held that "where a challenged regulation continues to the extent that it is only superficially altered by a subsequent regulation, we are capable of meaningful review." 360 F.3d at 26 (citation omitted). This case involves no such circumstances. Moreover, *Conservation Law Foundation* favorably cited another First Circuit decision, see *ibid.*, *citing The Gulf of Maine Fisherman's Alliance* v. *Daley*, 292 F.3d 84 (1st Cir. 2002), where this Court held that a challenge to government plans for regulating fishing in the Gulf of Maine was moot

because "every measure introduced in [those plans] . . . is now governed by a later Framework," which was "based on totally different data." *Id.* at 88. That is descriptive of this case, where the contract plaintiff challenges has expired of its own terms, and HHS is now distributing TVPA funds through grants that do not contain the contract provision plaintiff challenges here.

Plaintiff's reliance upon *Americans United for Separation of Church & State* v. *Prison Fellowship Ministries, Inc.*, 509 F.3d 406 (8th Cir. 2007), fares no better. In *Prison Fellowship Ministries*, a State government defendant argued that an Establishment Clause challenge to a government contract became moot when the State legislature decided to defund it. The Eighth Circuit rejected that argument, holding that the case was not moot because the private party to the contract had continued to perform the contract by using its own funds. See *id.* at 418, 421. Here, by contrast, the contract plaintiff challenges has expired, and USCCB has ceased operating under that contract.[1] For all the above reasons, therefore, and as explained in our opening brief, this Court should vacate the judgment below as moot and direct the district court to dismiss this suit on that basis.

[1] *United States* v. *Government of the Virgin Islands*, 363 F.3d 276 (3d Cir. 2004), on which plaintiff relies, also is distinguishable. There, the government of the Virgin Islands voluntarily terminated a contract two days before a hearing on plaintiff's challenge to that contract. See *id.* at 279. Here, the USCCB TVPA contract plaintiff challenges expired of its own terms.

II. Plaintiff Lacks Article III Standing To Bring This Action.

A. Plaintiff Lacks Taxpayer Standing Under the Supreme Court's Controlling Decision in *Hein* v. *Freedom From Religion Foundation, Inc.*

1a. As our opening brief explained, plaintiff lacks standing to bring this action as a federal taxpayer pursuant to *Hein* v. *Freedom from Religion Foundation, Inc.*, 551 U.S. 587 (2007). In *Hein*, as we explained, the Supreme Court held that federal taxpayer standing exists in an Establishment Clause case only where "the expenditures [a plaintiff] challenges" were "expressly authorized or mandated by [a] specific congressional enactment." *Id.* at 608 (plurality opinion).[2] Where, by contrast, federal funds are allegedly used by a religious entity or for religious purposes as a result of "executive discretion," *id.* at 605, "the requisite 'logical nexus' between taxpayer status 'and the type of legislative enactment attacked'" is missing, because the taxpayer's suit "is not directed at an exercise of congressional power." *Id.* at 608-09.

Plaintiff cannot meet the test for Establishment Clause taxpayer standing *Hein* plainly set out. Here, as in *Hein*, no statute expressly

[2] Because Justices Scalia and Thomas concurred in *Hein* on the ground that there is no Establishment Clause exception to the general rule against federal taxpayer standing, see *id.* at 618, the plurality opinion in *Hein* is controlling precedent. See Brief for Federal Appellants at 33 (citing cases). Plaintiff does not dispute this point.

authorizes or directs the particular expenditures about which respondents complain, and the decision to award the contract in question to USCCB resulted from executive discretion, rather than congressional direction.

b. The district court recognized that the TVPA "does not order HHS to include religious organizations among the service providers . . . nor does it specify the exact nature of the social services that are to be provided." Mem. & Op., p. 8 (JA 159). Plaintiff does not disagree with that conclusion, but contends that our reading of *Hein* "'is not supported by the text of the *Hein* decision.'" Brief for Appellee at 35 (citation omitted). Throughout the opinion in *Hein*, however, the Supreme Court repeatedly stated that federal Establishment Clause taxpayer standing exists only where a statute's text expressly mandates or contemplates federal funding of religious activity or religious organizations. For example, the Supreme Court made that point

- in discussing why there was Establishment Clause taxpayer standing in *Flast* v. *Cohen*, 392 U.S. 83 (1968), see *Hein*, 551 U.S. at 603 ("[t]he expenditures at issue in *Flast* were made pursuant to an express congressional mandate and a specific congressional appropriation"); *accord id.* at 604 (the Establishment Clause violation in *Flast* was "funded by a specific congressional appropriation and was undertaken pursuant to an express congressional mandate");

- in explaining why "[t]he link between congressional action and constitutional violation that supported *Flast* is missing here," *Hein*, 551 U.S. at 605 (noting that the appropriations at issue in

Hein "did not expressly authorize, direct, or even mention the expenditures of which respondents complain");

- in explaining why there was no Establishment Clause taxpayer standing in *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), *see Hein*, 551 U.S. at 605 ("*Flast* 'limited taxpayer standing to challenges directed "only [at] exercises of congressional power''''"), and in *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208 (1974), *see Hein*, 551 U.S. at 606 (plaintiffs lacked standing under *Flast* "because they 'did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status'");

- in explaining why there was taxpayer standing in *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), *see Hein*, 551 U.S. at 606-07 (taxpayer standing existed in *Kendrick* because the statute at issue there "expressly contemplated that [federal funds] might go to projects involving religious groups"); and

- in summarizing the taxpayer standing rule the Supreme Court applied in *Hein*, see 551 U.S. at 608 (respondents lacked taxpayer standing there "[b]ecause the expenditures that respondents challenge were not expressly authorized or mandated by any specific congressional enactment").

Thus, the Supreme Court in *Hein* could not have been clearer stating the test we have derived from that case, a test that plaintiff does not allege can be satisfied here.

c. Plaintiff also argues that we have misread *Hein* because the Supreme Court in *Hein* noted that it was not overruling *Flast* v. *Cohen*, 392 U.S. 83 (1968), but rather was "leav[ing] *Flast* as we found it." Brief for Appellee at 36, *citing Hein*, 551 U.S. at 615. Plaintiff argues that the

taxpayers in *Flast* had standing even though the statute at issue there made no mention of religious schools, see Brief for Appellee at 36, and that because *Hein* did not overrule *Flast*, we are wrong to suggest that *Hein* allows taxpayer standing only where a statute's text expressly mandates or contemplates aid to religion.

This argument overlooks the *Hein* Court's explicit discussion of *Flast*. *Hein* explained that there was taxpayer standing in *Flast* because the expenditures at issue there "were made pursuant to an express congressional mandate and a specific congressional appropriation." 551 U.S. at 603. *Accord id.* at 604. The lower courts are not free to ignore or dispute *Hein*'s description of why there was Establishment Clause taxpayer standing in *Flast*, as plaintiff suggests. See *Murray* v. *Dep't of Treasury*, 681 F.3d 744, 750 n.5 (6th Cir. 2012) (noting that "*Hein*'s construction of *Flast* – in other words, the scope of taxpayer standing the *Hein* court 'found' *Flast* to have fixed – is binding on lower courts") (citation omitted).

Moreover, even if it were permissible for the lower courts to ignore the Supreme Court's description of *Flast* in *Hein*, *Hein*'s reading of *Flast* is correct and fully supported by *Flast*'s facts. The statute at issue in *Flast* required local educational agencies to provide federal aid to private as well as public primary and secondary schools, *see Flast*, 392 U.S. at 86-87, and at

that time, a reference to private schools was tantamount to an express reference to religious schools - since almost all private schools were religious. See, *e.g.*, *Hein*, 551 U.S. at 604 n.3 (so noting). The TVPA contains no such express reference to religion or to the contract plaintiff challenges here.

Finally, the Supreme Court in *Hein* also noted that "in the four decades since its creation, the *Flast* exception has * * * largely been confined to its facts." 551 U.S. at 609. Thus, while *Flast* remains good law on the specific facts presented there, *Hein* makes clear that *Flast* no longer has any broader precedential value. See *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983) (describing effect of a decision's having been limited to its facts); *Bush v. Gore and the Uses of "Limiting,"* 117 Yale L. J. 1159, 1163-65 (Mar. 2007) (citing additional cases). [3]

d. Plaintiff also argues that our reading of *Hein* is "unsupported by the principles behind" the Supreme Court's Establishment Clause taxpayer standing jurisprudence. Brief for Appellee at 38. As explained above, however, the text of the *Hein* opinion is unambiguous, and lower courts are

[3] The points made above with respect to *Flast* also apply to the suggestion by plaintiff's *amici* that our reading of *Hein* conflicts with *Bowen* v. *Kendrick*, 487 U.S. 589 (1988). See Brief for Federal Appellants at 38-39. See also p. 10, *supra* (quoting *Hein*'s explanation for why there was taxpayer standing in *Kendrick*).

not free to disregard *Hein*'s plain language by adopting an alternate interpretation based upon their reading of the "principles behind" Establishment Clause jurisprudence. In any event, what *Hein* referred to as the "narrow" exception to the general rule against taxpayer standing recognized in *Flast*, *Hein*, 551 U.S. at 602, is grounded in the history pertaining to Madison's *Memorial and Remonstrance Against Religious Assessments*. See *Flast*, 392 U.S. at 103-04; *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1446 (2011). Madison's *Memorial and Remonstrance* concerned objections to *legislative* decisions to direct funds to religious organizations, not discretionary Executive Branch disbursements, such as the disbursements plaintiff challenges here. *See Arizona Christian*, 131 S. Ct. at 1446.

e. Plaintiff also notes that the plaintiffs in *Hein* cited "no statute whose application they challenged," *Hein*, 551 U.S. at 607, but pointed only to "unspecified, lump-sum 'Congressional budget appropriations' for the general use of the Executive Branch." *Ibid.* Plaintiff argues that this case differs from *Hein* in this respect because plaintiff is challenging Congress's authorization of funds under the TVPA. That argument lacks merit. No one disputes that the disbursements at issue here "resulted from executive discretion, not congressional action," *Hein*, 551 U.S. at 605, and *that* is

enough under *Hein* to render the "narrow" *Flast* exception to the general rule against taxpayer standing inapplicable. See p. 8, *supra*. The fact that the plaintiffs in *Hein* failed to identify *any* statutory authority for the expenditures they challenged rendered their taxpayer standing claim especially weak, but *Hein*'s reference to that fact does not justify concluding that proof of statutory authority to make an expenditure automatically gives rise to Establishment Clause taxpayer standing. That kind of interpretation would disregard *Hein*'s repeated statements that Establishment Clause taxpayer standing does not exist where the use of federal funds for religious purposes or by a religious organization resulted from executive discretion rather than an express statutory mandate. See pp. 9-10, *supra*.

f. Finally, plaintiff contends there is taxpayer standing here under *Hein* because Congress, in reauthorizing the TVPA and appropriating funds under that statute, would have been aware of reports submitted by the Attorney General mentioning the contract plaintiff challenges. That argument fails because under *Hein*, Establishment Clause taxpayer standing exists only when a statute's *text* expressly mandates or contemplates the grant of federal funds to a religious organization or for religious purposes. See pp. 8-10, *supra*. Footnote seven in the *Hein* opinion makes that point particularly clear by explaining that an "earmark" in a committee report is

insufficient to support Establishment Clause taxpayer standing. *See Hein*, 551 U.S. at 608 n.7; Brief for Federal Appellants at 32. Plaintiff fails to discuss this footnote or explain how, in light of this footnote and the other references we identified above, *Hein* could possibly be read differently than we understand it.

2. As our opening brief pointed out, all the other circuits to have considered the issue agree that after *Hein*, Establishment Clause taxpayer standing exists only when a statute's text mandates or contemplates aid to religion or religious activity. See Brief for Federal Appellants at 33 (citing cases). Plaintiff argues that those cases "rely on a misreading of *Flast*," Brief for Appellee at 37 n.7, but is incorrect, as we have explained.

Plaintiff also suggests this Court should ignore the rulings of the other circuits noted above because "the plaintiffs in those cases could not demonstrate that Congress had knowledge that religious groups would receive government funds." Brief for Appellee at 37. In fact, however, the opinions in several of the cases the plaintiffs show that the legislature *would* likely have known about the challenged expenditures there. See *Murray* v. *United States Department of Treasury*, 681 F.3d 744, 752 (6th Cir. 2012); *Sherman* v. *Illinois*, 682 F.3d 643, 645-47 (7th Cir. 2012); *Pedreira* v. *Kentucky Baptist Homes for Children*, 579 F.3d 722, 725 (6th Cir. 2009);

Hinrichs v. *Speaker*, 506 F.3d 584, 598 (7th Cir. 2008). In any event, in none of the cases we cite did the other circuits rule that Establishment Clause taxpayer standing exists if the legislature had notice of the religious expenditure being challenged. Rather, each of those cases rejected assertions of taxpayer standing there based on the same interpretation of *Hein* we argue here: that Establishment Clause taxpayer standing exists only if Congress acted expressly to authorize the expenditures at issue by enacting legislation in which the statute's *text* mandates or contemplates use of federal funds by a religious organization or for religious purposes.[4]

B. Plaintiff Also Lacks Article III Standing Here Under the Supreme Court's Decision in *Arizona Christian Tuition Organization v. Winn*.

Our opening brief pointed out that plaintiff also lacks taxpayer standing in this case under *Arizona Christian*, *supra*, because plaintiff is not alleging that its tax money is "being extracted and spent" on religious items or services. Brief for Federal Appellants at 42 (*quoting Arizona Christian*,

[4] Plaintiff's *amici* also wrongly urge this Court to ignore the rule *Hein* set out with respect to Establishment Clause taxpayer standing because the Supreme Court could have held that there was no standing in *Hein* because that case did not involve any disbursement of federal funds outside the Executive Branch. The Supreme Court in *Hein* did not adopt such a theory, and the lower courts may not ignore what the Supreme Court *did* hold in *Hein* because there may be a different ground upon which the Court could have held that the respondents in that case lacked taxpayer standing.

131 S. Ct. at 1446). To the contrary, plaintiff is complaining about how federal funds were *not* spent – specifically, that federal funds were not spent for referral for abortion and contraceptive services. The Supreme Court has never recognized Establishment Clause taxpayer standing to bring that kind of claim, and that kind of claim would go far beyond the "facts" and "results" of *Flast*, which mark the outer boundaries of the "narrow" Establishment Clause exception to the general rule against federal taxpayer standing. See p. 12, *supra*; Brief for Federal Appellants at 43-44. See also *id.* at 44 (noting that, unlike in *Arizona Christian*, the USCCB TVPA contract plaintiff challenges did not result in any "subsidy of religious activity," 131 S. Ct. at 1447). Plaintiff offers no effective response to these points. For all the above reasons, therefore, this Court should reverse the judgment below and dismiss this case for lack of Article III standing.

III. The USCCB TVPA Contract is Consistent With The Establishment Clause.

A. The Contract Did Not Have the Purpose or Primary Effect of Advancing Religion.

1. Our opening brief explained why the USCCB TVPA contract is fully consistent with the Establishment Clause. To begin, as we showed, the contract clearly had a lawful secular purpose. HHS awarded the contract to USCCB because USCCB's proposal was judged far superior, on strictly

secular terms, to the only other proposal HHS received for providing TVPA services at that time. See Brief for Federal Appellants at 5-10. The district court did not hold to the contrary, and plaintiff does not argue that the contract lacks a lawful secular purpose.

Commensurate with its secular purpose, the USCCB TVPA contract's primary effect was to provide what HHS at the time considered to be the best and most cost-effective package of benefits to trafficking victims available. The law is clear that religious institutions are not disqualified from participating as providers of secular services under religiously neutral government programs like the TVPA, see Brief for Federal Appellants at 47-48, and thus nothing in the Establishment Clause precluded HHS from awarding the contract to USCCB merely because USCCB happened to have religious motivations regarding the secular services it offered to provide or not to provide.

For example, in *Bowen* v. *Kendrick*, supra, the Supreme Court held that Congress did not violate the Establishment Clause by including religious institutions as eligible providers of sexual abstinence counseling services to adolescents. The district court in *Kendrick* concluded that the statute at issue there, the Adolescent Family Life Act ("AFLA"), had the primary effect of advancing religion because certain AFLA grantees were

"'religiously inspired and dedicated to teaching the dogma that inspired them.'" 487 U.S. at 599 (citation omitted). The Supreme Court rejected that conclusion, however, holding that the AFLA does not have the primary effect of advancing religion merely because a religious institution's religious motivations for providing secular AFLA services may coincide with the government's own secular reasons for funding those services. Thus, as the opinion explains, the Court in *Kendrick*

> disagree[d] with the District Court's conclusion that the AFLA is invalid because it authorizes "teaching" by religious grant recipients on "matters [that] are fundamental elements of religious doctrine," such as the harm of premarital sex and the reasons for choosing adoption over abortion. * * * On an issue as sensitive and important as teenage sexuality, it is not surprising that the Government's secular concerns would either coincide or conflict with those of religious institutions. But the possibility or even the likelihood that some of the religious institutions who receive AFLA funding will agree with the message that Congress intended to deliver to adolescents through the AFLA is insufficient to warrant a finding that the statute on its face has the primary effect of advancing religion.

487 U.S. at 612-13 (citations omitted). As our opening brief explained, the same reasoning applies here. The fact that USCCB was religiously motivated not to include referral for abortion and contraceptive services in its TVPA contract bid does not mean that the contract had the primary effect of advancing religion.

The Supreme Court applied the same principle in *Harris* v. *McRae*, 448 U.S. 297 (1980), in holding that the Hyde Amendment does not violate the Establishment Clause merely because its "funding restrictions [on certain abortion services] may coincide with the religious tenets of the Roman Catholic Church." *Id.* at 319-20. "Although neither a State nor the Federal Government can constitutionally 'pass laws which aid one religion, aid all religions, or prefer one religion over another,'" the Court noted in *Harris*, "it does not follow that a statute violates the Establishment Clause because 'it happens to coincide or harmonize with the tenets of some or all religions.'" *Id.* at 319 (citation omitted). For the same reasons, the USCCB TVPA contract is not unconstitutional merely because the contract's primary secular purpose and effect – of providing the best and most cost-effective package of benefits to trafficking victims then available (in HHS's judgment at that time) – happened to have coincided with USCCB's religious motivations.

Indeed, to conclude otherwise would require holding that the Establishment Clause generally disqualifies religious institutions from participating as providers of secular government benefits under religiously neutral federal programs. As one of the *amicus curiae* briefs in this case explains, religious institutions are generally guided by religious principles,

including in the contracting process. See Brief *Amicus Curiae* of the Association of Gospel Rescue Missions, *et al.*, at 28, 29 (noting that "[t]he very decision to operate a soup kitchen to feed the poor or to oversee an array of homeless shelters is often motivated by religious principles of charity," and that "[e]ven provisions such as determining a fair price to pay subcontractors . . . are inseparable from the religious considerations regarding the just treatment of workers").

As a result, to conclude that a contract is unconstitutional because of a religious entity's religious motivations for the services it offers to provide or not provide would render religious institutions generally ineligible to enter into government contracts, or receive government grants. That kind of rule would require abandoning more than 100 years of Supreme Court precedent, see *Kendrick*, *Harris v. McRae*, and *Bradfield* v. *Roberts*, 175 U.S. 291 (1899); conflict with regulations providing that religious organizations may not be disqualified from participating in HHS grant programs merely "because such organizations are motivated or influenced by religious faith to provide social services," 45 C.F.R. 87.1(f), see generally Executive Order 13279, § 2(c), *Equal Protection of the Laws for Faith-Based and Community Organizations*, 67 Fed. Reg. 77141 (Dec. 12, 2002); and raise serious questions under the Free Exercise Clause, by discriminating against religious

institutions because of their religious motivations. See, *e.g.*, *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993) ("[T]he protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons").

2a. Plaintiff describes this point as a "scare tactic," Brief for Appellee at 48, but fails to explain why its view of the Establishment Clause would not lead to the consequences we identify. Relatedly, plaintiff also wrongly contends that the rule we identify from *Kendrick* and *Harris*, *et al.*, relates only to whether the government has acted with the *purpose* of advancing religion, which is not at issue here, and not to *Lemon*'s primary *effect* inquiry. As explained above, *Kendrick* and *Harris* hold that government action does not have the primary purpose *or* effect of advancing religion merely because the government's actions happen to coincide with the religious motivations of religious institutions, including those that seek to participate as providers of secular government services. Contrary to what plaintiff imagines, then, we are not arguing that a secular reason for awarding a government contract completely insulates the contract from any Establishment Clause challenge. See Brief for Appellee at 46. *Lemon* also

requires a primary effect that does not advance religion, but the USCCB TVPA contract satisfies that requirement, for the above reasons.

b. Plaintiff's unfounded contention that we are ignoring *Lemon*'s primary effects prong also leads plaintiff to mistakenly argue that our view of the law would require upholding obvious Establishment Clause violations such as a hypothetical contract that requires beneficiaries to attend Mass in order to receive program benefits. See Brief for Appellee at 49. As our opening brief explained, government contracts may not provide direct funding for religious indoctrination, see Brief for Federal Appellants at 46, and the hypothetical contract plaintiff describes clearly would fall into that category. The USCCB TVPA contract involved no indoctrination of religion.[5]

c. Plaintiff also argues that the contract in question allowed USCCB to "further its religious beliefs" in opposing abortion and contraception. Brief for Appellee at 46. That, however, is just another way of arguing, mistakenly, that the contract had the effect of advancing religion

[5] Similarly, nothing we have said here or in our opening brief remotely leads to the conclusion that the government can lawfully place a nativity scene in a town hall "because it needs the money." Brief for Appellee at 48. A nativity scene is a "specifically religious activit[y]," *Kendrick*, 487 U.S. at 613, for which the government may not provide direct funding. The services USCCB provided under its TVPA contract were secular, not "specifically religious."

because its primary effect (providing secular services to trafficking victims) coincided with USCCB's religious beliefs. For example, in *Bowen* v. *Kendrick*, the Supreme Court noted that the facially neutral services that were authorized by the federal funding statute there were "not themselves 'specifically religious activities,' and they [were] not converted into such activities by the fact that they are carried out by organizations with religious affiliations." 487 U.S. at 613.

d. *Kendrick* also forecloses plaintiff's argument that a reasonable observer would view the USCCB TVPA contract as an endorsement of USCCB's religious beliefs. See Brief for Appellee at 48. The district court in *Kendrick* relied on similar reasoning in holding the statute at issue there unconstitutional, but the Supreme Court rejected that holding, noting that if the district court's reasoning were adopted, "it could be argued that any time a government aid program provides funding to a religious organization in an area in which the organization also has an interest, an impermissible 'symbolic link' could be created, no matter whether the aid was to be used solely for secular purposes." 487 U.S. at 613. "This would jeopardize government aid to religiously affiliated hospitals, for example, on the ground that patients would perceive a 'symbolic link' between that hospital – part of whose 'religious mission' might be to save lives – and whatever government

entity is subsidizing the purely secular medical services provided to the patient." *Ibid.*

Moreover, as our opening brief (p. 18) explained, the hypothetical reasonable observer is deemed to be aware of all the circumstances relating to the government action in question. Here, those circumstances include the USCCB TVPA contract's undisputed lawful purpose, as well as its primary, secular effect of obtaining the most effective overall package of services for trafficking victims that was offered in response to HHS's request for contract proposals. Armed with that knowledge, the hypothetical reasonable observer would have no choice but to conclude that the contract was not an endorsement of USCCB's religious motivations for the range of services it offered to provide. Plaintiff identifies no case holding that the reasonable observer would ignore the objective factors that render government action otherwise lawful under the primary purpose and effect factors identified in *Lemon* and *Agostini* v. *Felton*, 521 U.S. 203, 234 (1997), and are we aware of none.

e. Finally, plaintiff wrongly argues that the USCCB TVPA contract had the primary effect of advancing religion because, according to plaintiff, HHS did not need to award the contract to USCCB in order to provide the best possible TVPA services to trafficking victims. See Brief for

Appellee at 49. No case of which we are aware holds that government action has the primary effect of advancing religion merely because, in a court's view, the government could have achieved lawful, secular goals through some other means than what the government chose. In any event, the district court made no such finding here, and the record shows that USCCB's contract proposal was superior by far, on strictly secular terms, to the only other contract proposal HHS received at that time. See Brief for Federal Appellants at 7-10. See also *id.* at 5-6 (explaining HHS's valid, secular reasons for deciding to pursue a single, "per capita" contract for providing TVPA services to beneficiaries at that time).

B. The USCCB TVPA Contract Did Not Delegate Any Inherent Government Authority to USCCB.

Plaintiff also attempts to defend the district court's holding that the USCCB TVPA contract unconstitutionally delegated inherent government authority to a religious institution, but that effort fails. As our opening brief explained, the USCCB TVPA contract was a standard government contract, by which HHS provided funds in exchange for the secular services USCCB offered to provide, and it is hornbook law that the "receipt of government funds does not render the government responsible for a private entity's decisions concerning the use of those funds." *Genera* v. *Puerto Rico Legal Servs., Inc.*, 697 F.2d 447, 450 (1st Cir. 1983).

Plaintiff offers a number of arguments to support the district court's unconstitutional delegation holding, but each of those arguments suffers from the same fundamental flaw – treating a federal contractor as a state actor merely because of its receipt of federal contract funds. For example, plaintiff makes that error in suggesting that HHS "improperly handed over its statutory authority to USCCB to determine what services would be provided to trafficking victims with TVPA funds." Brief for Appellee at 50-51. An agency does not delegate inherent government authority merely by agreeing to provide federal funds to obtain secular services, see *Genera*, *supra*, and *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 841 (1982) (acts of private contractors "do not become acts of the government by reason of their significant or even total engagement in performing public contracts"), and HHS fully exercised its statutory authority under the TVPA by awarding a contract that, in HHS's judgment at the time, provided the best and most cost-effective package of services to TVPA beneficiaries.

Plaintiff makes the same mistake in arguing that the USCCB TVPA contract unlawfully delegated inherent government authority by giving USCCB "the power to overrule HHS's decision that trafficking victims should have access to [abortion services and contraceptive materials]." Brief for Appellee at 54 (emphasis deleted). A federal agency does not unlawfully

delegate inherent government authority by accepting a contract proposal that, in the agency's judgment at the time, provides the best package of services for the government's money, even if the proposal does not include other services. That much is part and parcel of the contracting process. Nothing more than that happened here.

For the same reasons, plaintiff also is wrong to suggest that the USCCB TVPA contract represented an "abdication" of HHS's statutory authority to determine what services TVPA victims should receive. The USCCB TVPA contract itself *reflected* HHS's exercise of that authority. Plaintiff may disagree with how HHS exercised its authority at that time (and the agency, of course, is free to reconsider its approach to the problem – as it has done with respect to the TVPA). But that does not render the USCCB TVPA contract an unlawful delegation of government authority.

Moreover, to the extent plaintiff may be suggesting that the TVPA *requires* HHS to provide funding for referrals for abortion and contraceptive services, and that HHS acted *ultra vires* by not so doing with respect to the USCCB TVPA contract, that suggestion finds no support in the TVPA's text or history. The TVPA does not mention referrals for abortion or contraceptive services, and leaves it to HHS's discretion to decide how to allocate the funds Congress has authorized under that statute for the benefit

of trafficking victims, which is exactly what HHS did in awarding the USCCB TVPA contract to USCCB.[6]

Moreover, even if Congress *were* to have required HHS to provide funding for referrals for abortion and contraceptive services in enacting the TVPA or 8 U.S.C. 1522(c)(1)(A), that would not mean the USCCB TVPA contract delegated inherent government authority to USCCB in violation of the Establishment Clause. At most, that would show a violation of a statutory duty under the Administrative Procedure Act, 5 U.S.C. 706(2), which plaintiff has not alleged here, and which plaintiff could not prove for the reasons explained above.

For similar reasons, the USCCB TVPA contract did not unlawfully delegate inherent government authority to USCCB merely because HHS did not forbid funding recipients from using TVPA funds for referrals for abortion and contraceptive services before and after the period of the USCCB TVPA contract. As we have explained, during the period that contract was in effect, HHS merely decided that USCCB's proposal was in the best interests of trafficking victims, because it was the strongest proposal HHS received at the time in terms of the overall package of services USCCB

[6] Plaintiff also relies upon 8 U.S.C. 1522(c)(1)(A) in this context, see Brief for Appellant at 50, but that statute also does not require HHS to provide funding for referrals for abortion or contraceptive services.

offered to provide. That kind of decision does not represent an unlawful delegation of inherent government authority, under the unlawful delegation cases plaintiff cites, *Board of Education of Kiryas Joel School District* v. *Grumet*, 512 U.S. 687 (1994), and *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116 (1982), or under any other decision.

Finally, plaintiff incorrectly argues that the USCCB TVPA contract improperly delegated inherent government authority to USCCB because it allowed USCCB to impose its religious beliefs on its subcontractors. The contract did not preclude any subcontractor from using its own funds to provide referrals for abortion and contraceptive services, and a decision not to fund certain activity does not infringe anyone's right to engage in that activity. See, *e.g.*, *Rust* v. *Sullivan*, 500 U.S. 173, 193 (1991). This case involves nothing more than that – an agency decision, for purely secular reasons, to fund the strongest package of secular services to meet trafficking victims' needs. The fact that HHS accepted USCCB's proposal and did not fund Plaintiff's preferred package of services did not constitute an improper delegation of authority to USCCB.

CONCLUSION

For the foregoing reasons and for the reasons set forth in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted,

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NOVEMBER 2012

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6705 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word processing software in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2012, I transmitted the foregoing Reply Brief for the Federal Appellants to the Clerk of the United States Court of Appeals for the First Circuit by use of the Court's CM/ECF system. I also certify that all counsel listed below will be served by that system.

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