No. 12-1466

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS
Plaintiff-Appellee,

v.
UNITED STATES CONFERENCE OF CATHOLIC BISHOPS
Defendant-Appellant

and

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

Appeal from the United States District Court for the District of Massachusetts in Civil Action No. 09-10038-RGS

REPLY BRIEF FOR APPELLANT UNITED STATES CONFERENCE OF CATHOLIC BISHOPS

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Introduction

In the Trafficking Victims Protection Act ("TVPA"), Congress approved a relatively modest appropriation for the Department of Health and Human Services ("HHS") to provide social services to victims of human trafficking. Congress plainly meant for this funding to supplement other public and private funds because the amounts appropriated concededly fell far short of the amounts needed to meet all of the needs of such victims. In this context, HHS decided — for entirely secular reasons — to forgo federal funding of abortion and contraception services under the TVPA to obtain the benefit of the superior case management capabilities of the United States Conference of Catholic Bishops ("USCCB"), a national organization with a long history of effectively serving the needs of refugees and immigrants in need.

HHS was not happy about accommodating USCCB's moral and religious commitments in this regard. Indeed, it weighed USCCB's unwillingness to participate in the funding of abortion and contraception against its proposal and tried to talk USCCB out of that unwillingness. But in the end, HHS accepted that accommodation because it decided that USCCB's proposal best achieved the overall objectives of the TVPA. The record reflects that this decision by HHS led to considerable improvement in

the efficiency of the funding program. It also prompted ACLU, on behalf of its taxpayer members, to challenge that decision on Establishment Clause grounds.

In its opening brief, USCCB demonstrated that ACLU's members lack standing as taxpayers to bring that challenge and that HHS did not violate the Establishment Clause. Neither ACLU, nor its supporting *amici*, offer any persuasive response to USCCB's arguments.

ACLU's arguments in support of taxpayer standing never come to grips with the facts that (i) Congress neither directed nor contemplated that tax dollars appropriated under the TVPA for trafficking victims would be spent "in aid of religion," *i.e.*, on religious worship or proselytization, and (ii) no tax dollars have in fact been spent on such activities. Every dollar that Congress appropriated to provide secular social services to trafficking victims has been spent for that purpose.

ACLU suggests that for standing purposes it suffices to show that federal funds have been paid to a religious organization, but that is certainly incorrect. There is no taxpayer standing unless federal funds are actually spent "in aid of religion." Retaining and paying a religious organization to perform secular tasks for the government by itself presents no Establishment Clause issue. The federal government obviously can enter into contracts

with religious as well as non-religious organizations *to carry out secular tasks*, as HHS did in this case, without running afoul of the Establishment Clause, as ACLU concedes. ACLU Br. at 55 n.19. To bar religious organizations from performing secular services for the government would constitute religious discrimination in violation of the Free Exercise Clause.

Neither *Flast v. Cohen* nor *Bowen v. Kendrick*, on which ACLU primarily relies, hold that taxpayer standing can be based solely on the payment of taxpayer funds to a religious organization without regard to the use to which the organization puts those funds. In both cases, the taxpayer challenged the payment of federal funds to religious organizations *to support religious instruction or indoctrination.* Not so here. That ACLU does not challenge any actual expenditure of taxpayer dollars in aid of religion directed or contemplated by Congress is fatal to its invocation of taxpayer standing.

On the merits, ACLU essentially concedes that a reasonable objective observer, fully informed of the relevant circumstances, would not conclude that HHS endorsed any of USCCB's moral or religious beliefs. The evidence was clear and undisputed that HHS retained USCCB as its national case manager in spite of, and not because of, those beliefs. As a result, under this Court's *Hanover School District* decision, ACLU's

"endorsement" theory must fail. ACLU's only response is to suggest that some government decisions can violate the Establishment Clause even where there is no apparent government endorsement of religious belief. While this may theoretically be true, it is also a concession that ACLU's "endorsement" theory must be rejected under the controlling law of this circuit as a basis for finding an Establishment Clause violation.

ACLU's "delegation" argument fares no better. ACLU insists that HHS "delegated" to USCCB the "power" to decide for what services subcontractors would be reimbursed, and that USCCB exercised this "power" by imposing a religious restriction. That is simply not what happened. Subject to the restrictions imposed by the Hyde Amendment, HHS was at all times free to use some or all of the funds that Congress appropriated under TVPA for abortion or contraception services. Subject to the obligations imposed on it by the Religious Freedom Restoration Act, *see* USCCB Br. at 14, 40 n.8, HHS could have required its national case manager to reimburse service providers for the provision of such services to trafficking victims. But what HHS could not do was to obtain the superior case management services of USCCB if it imposed such a requirement. As a result, HHS exercised its executive discretion to make the arrangements that resulted in the most efficient method for distributing a limited

appropriation, *i.e*. it chose not to require USCCB to reimburse for abortion and contraception services. In exercising its own governmental power in this fashion, HHS did not delegate *any* government power, much less the standardless, discretionary power involved in *Larkin*. HHS simply exercised its own power in a manner with which ACLU disagrees.

Further, ACLU never comes to grips with the many cases that permit the government to accommodate the religious beliefs of the persons and organizations with which it interacts, even where such accommodation is not constitutionally required. The Supreme Court has rejected such accommodations only when they discriminate on the basis of religion, or when they impose extreme and unreasonable burdens on third parties, as in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). Neither is true here. There is no plausible suggestion that HHS would not have made a similar accommodation to obtain similar services from another religious organization, or from a secular organization. Nor was there any evidence at all that HHS's decision to accommodate USCCB imposed any real burdens on third parties.

ACLU, and several of its supporting *amici*, point to the undeniable fact that some trafficking victims face horrific sexual exploitation, and argue that such victims would benefit from being given abortion and contraception

services along with food, shelter, legal assistance, and employment. But it has been clear ever since *Harris v. McCrae* that the federal government has no obligation to pay for such services no matter how great the claimed need. Congress has not mandated that such services be provided under TVPA. Nor has Congress appropriated nearly enough money under the TVPA to supply all of the social services that trafficking victims may want. Many other sources of public and private assistance are available to such victims. Neither HHS nor USCCB has prohibited any of these victims from obtaining abortion or contraception services. Nor have either of them prohibited any public or private agency from providing such services. There is no evidence whatever that any trafficking victim has been unable to obtain such services because of HHS's accommodation of USCCB's beliefs.

Argument

I. Because ACLU challenges no expenditure of taxpayer dollars in violation of the Establishment Clause, and because Congress contemplated no such use, ACLU lacked standing to pursue its Establishment Clause challenge on behalf of its taxpayer members.

In its opening brief, USCCB demonstrated that taxpayers lacked standing to challenge HHS's accommodation for two reasons. ACLU did not challenge any spending legislation as to which Congress directed or contemplated expenditures of federal funds in aid of religion, and there has

been no expenditure of taxpayer dollars in aid of religion. Under the Supreme Court's standing decisions, the District Court should have dismissed ACLU's complaint for lack of subject matter jurisdiction.

A. *Flast* does not support standing in this case.

ACLU's response is to wrap itself in the mantle of *Flast v. Cohen*, 392 U.S. 83 (1968), insisting that the instant case is "virtually indistinguishable" from *Flast.* ACLU Br. at 32. In fact, this case is far removed from *Flast*, different in at least two critical ways.

1. In this case, unlike *Flast*, there is no allegation of federal spending in aid of religion.

The Supreme Court in *Flast* stressed that taxpayer standing in Establishment Clause cases will be found only where the taxpayer alleges that "his tax money is being extracted *and spent* in violation of specific constitutional protections against … abuses of legislative power." 392 U.S. at 106 (emphasis added). *Accord, Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 , 1446 (2010). Such an allegation was made in *Flast*. Congress enacted legislation that appropriated tax money to provide grants to private elementary and secondary schools with services to support their educational programs. *Flast*, 392 U.S. at 86. As the Supreme Court later explicitly recognized, Congress undoubtedly knew at the time it enacted the legislation challenged in *Flast* that the overwhelming majority of private

elementary and secondary schools in the U.S. were religious schools. *See Hein v. Freedom From Religion Found.*, 551 U.S. 587, 604 n.3 (2007) ("Congress surely understood that much of the aid mandated by the statute [in *Flast*] would find its way to religious schools.") Moreover, the Supreme Court also believed at the time that the provision of educational services to students in "pervasively sectarian" schools — *i.e.*, schools "in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission," *Hunt v. McNair*, 413 U.S. 734, 743 (1973) — would "inescapably" promote that mission of religious indoctrination. *See, e.g.*, *Meek v. Pittenger*, 421 U.S. 349, 364-66 (1975).[1] Thus, in *Flast* the Court approved taxpayer standing where the taxpayer challenged an appropriation that Congress understood would provide economic support for the mission of religious schools to indoctrinate their students with religious beliefs and values.

That is also how the Supreme Court currently understands *Flast*. In the Court's most recent Establishment Clause decision, the Court firmly

[1] The presumption that aid to a "pervasively sectarian" school will inevitably be used for sectarian purposes has virtually disappeared from the Supreme Court's more recent Establishment Clause decisions. *See, e.g., Mitchell v. Helms*, 530 U.S. 793, 826-29 (2000) (plurality opinion); *Agostini v. Felton*, 521 U.S. 203, 224-25 (1997) (noting the Court's rejection of a rule that government aid that directly assists the education function of religious schools is invalid).

grounded the *Flast* rule in the Founders' belief that the Establishment Clause prevents the government from "extracting" revenues from taxpayers and then using such funds to pay for "sectarian activities." *Winn*, 131 S. Ct. at 1446-47. Similarly, in *Bowen v. Kendrick*, 487 U.S. 589, 599 (1988), the plaintiffs alleged, and the trial court found, that federal funds had been used "for education and counseling that 'amounts to the teaching of religion.'" *See id.* at 620 ("there is no dispute that the record contains evidence of specific incidents of impermissible behavior by … grantees …."). Neither ACLU nor its *amici* cite any case in which taxpayer standing was found without actual expenditure on "sectarian activities."[2]

But in this case, ACLU has not even alleged, much less demonstrated, that *any* federal funds were spent on any sectarian activities. The makes clear that all of the funds appropriated under the TVPA program were spent on secular services for trafficking victims and USCCB's costs of administering the program under its contract with HHS (essentially the

[2] Americans United for the Separation of Church and State ("AUSCS") acknowledges in its *amicus* brief that the "core historical concern justifying taxpayer standing in Establishment Clause cases has been to prevent public funds from being distributed to religious institutions or ministers *to support propagation of their beliefs*." AUSCS Br. at 17 (emphasis added). *See id.* at 20 (identifying the taxpayer's injury sufficient to support standing as "the government['s] transfer[of] public funds to a religious entity that *that uses those funds for religious purposes*") (emphasis added).

salaries of the persons charged with providing the case management services and reporting to HHS).[3] Because no taxpayer can complain that any tax revenues were spent on religious instruction, worship or proselytization, *i.e.*

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[3] ACLU tries in vain to argue that because the USCCB employees assigned to the case management contract included among their duties monitoring the eligibility of reimbursement requests from subcontractors, government funds were employed to "enforce" a religious requirement. ACLU Br. at 50-55. But the decision to make abortion and contraception services ineligible for reimbursement with TVPA funds was made by HHS, not USCCB, as demonstrated by HHS's later contrary decision. As the Supreme Court ruled long ago in *Harris v. McCrae*, 448 U.S. 297 (1980), the government was free to preclude public funding for such services without violating the Establishment Clause. It is certainly not a "sectarian activity" for USCCB to monitor compliance with the terms of a contract to ensure that reimbursement is limited to what *the government had the constitutional authority to specify as* eligible expenditures.

Nor did the refusal to reimburse subcontractors for abortion or contraception services "enforce" any religious beliefs. It is undisputed in the record that no subcontractor was excluded from the contract because of their beliefs regarding abortion or contraception (JA 646-647); that the majority of USCCB's subcontractors under this contract were not Catholic (JA 646); that no subcontractor was forbidden from using its own (or any other non-TVPA) funds to pay for abortion or contraception (JA 647); and that no one ever complained for lack of access to abortion or contraception (JA 648). It strains credulity to claim in this context that HHS "enforced" any belief at all regarding abortion or contraception, least of all an exclusively religious belief. All the contract did was make such services ineligible for reimbursement under the TVPA program. *Harris* established that the federal government's refusal to pay for such services neither denied anyone's right to obtain or provide them, nor established any religion.

spent in aid of religion, ACLU's members have no taxpayer standing in this case.

2. In this case, unlike *Flast*, Congress neither directed nor contemplated federal expenditures in aid of religion.

Even if one ignored the illogic of the argument that taxpayer funds spent on secular social services for trafficking victims were nevertheless expenditures on "sectarian activities" because they did not fund abortion or contraception services, ACLU would still lack standing because it failed to prove that Congress *mandated or contemplated* that the funds it appropriated would be spent in aid of religion. The Supreme Court in *Hein* made clear that there is no taxpayer standing to challenge an Executive Branch expenditure of funds for religious activities under an appropriation that neither directs nor contemplates such an expenditure. *See* 551 U.S. at 608 ("It cannot be that every legal challenge to a discretionary Executive Branch action implicates the constitutionality of the underlying congressional appropriation."). The controlling plurality opinion squarely held that "[b]ecause the expenditures that [the taxpayer plaintiffs] challenge were not expressly authorized or mandated by any specific congressional enactment, [their] lawsuit is not directed at an exercise of congressional power, … and

thus lacks the requisite 'logical nexus' between taxpayer status 'and the type of legislative enactment attacked ….'" *Id.* at 608-09.

Hein controls this case. The TVPA simply directed HHS to expend appropriated funds "to expand benefits and services to victims of severe forms of trafficking." 22 U.S.C. § 7105(b)(1)(B). The TVPA itself did not even mention abortion, contraception, or participation by religious organizations. The contract with USCCB came about because HHS exercised its own executive discretion to devise an efficient means to distribute the relatively modest sums (as compared to the needs) that Congress chose to appropriate to assist trafficking victims. Like *Hein*, and unlike *Flast* and *Bowen*, there is absolutely nothing to suggest that Congress contemplated, much less mandated, the conduct that is alleged to constitute the Establishment Clause violation alleged in this case.

ACLU argues that *Hein* does not control because the Attorney General notified Congress that HHS had awarded USCCB a contract "to provide comprehensive support services to victims of human trafficking."[4] Both ACLU and amicus Americans United for the Separation of Church and

[4] Attorney General's Annual Report to Congress and Assessment of the U.S. Government Activities to Combat Trafficking in Persons Fiscal Year 2007 (hereinafter "AG Report") at 5 (found at http://www.justice.gov/archive/ag/annualreports/tr2007/agreporthumantrafficing2007.pdf) .

State ("AUSCS") contend that this notification demonstrates that Congress contemplated the transfer of federal funds to a religious organization. ACLU Br. at 13-14, 37; AUSCS Br. at 23-26.

Initially, the reports on which ACLU relies were submitted to Congress after the enactment of TVPA, and so cannot shed any light on Congress' intent when it authorized the use of taxpayer funds to provide services to trafficking victims. Nor have ACLU or AUSCS cited any cases that find a Congressional statutory mandate to spend federal funds in aid of religion from the mere reference to an agency's decision to pay federal funds to a religious organization under a federal contract in a report to Congress concerning the implementation of the statute.

But the fundamental problem with ACLU's argument is that ACLU has not challenged as a violation of the Establishment Clause the engagement of a religious organization as a contractor to carry out secular tasks under the TVPA.[5] The Attorney General's report made no suggestion that the funds paid to USCCB under the contract were used for any religious

[5] Nor could such a claim be made. As the Supreme Court noted in *Bowen*, "this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored welfare programs." 487 U.S. at 609. ACLU admits in its brief that *Bowen* holds that "religious organizations can contract with the government for the provision of services." ACLU Br. at 55 n.19.

purpose or that any particular services were excluded under the contract with USCCB. On the contrary, the Attorney General merely advised Congress that the contract with USCCB had "streamlined support services to help victims gain access to shelter, job training, and health care, and provided a mechanism for victims to receive vital emergency services prior to receiving certification." *See* AG Report at 5. Nothing in this notification gave any indication whatever that funds paid to USCCB under the contract were used for religious worship, proselytization or instruction. (In fact, they were not so used.) In short, nothing placed Congress on notice that taxpayer money would be spent "in aid of religion."

The report is therefore insufficient to establish the required "logical nexus" between taxpayer status and congressional spending activity. In *Pedreira v. Ky. Baptist Homes for Children*, 579 F.3d 722 (6th Cir. 2009), the State allocated funds that it had received from the federal government under the Social Security Act to a "pervasively sectarian" institution that cared for abused or neglected children and included in its mission the proselytization of the children under its care. *Id.* at 725-26, 731 n.4.[6]

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[6] In this sense, *Pedreira* was much closer to *Flast* than this case because in both *Pedreira* and *Flast* the alleged Establishment Clause violation was the provision of federal funds to support the explicitly religious activities of the ultimate recipient of the funds. Here, the ultimate

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Nevertheless, the court found no federal taxpayer standing to challenge the use of federal funds to support the institution's mission. Even though the taxpayers identified the specific federal program and appropriation that provided the funds, there was no evidence that Congress contemplated use of the funds for religious indoctrination, as opposed to secular foster care. *Id.* at 730-31. "Even though the plaintiffs refer to specific federal programs and specific portions of these programs, they have failed to explain how these programs are related to the alleged constitutional violation. These statutes are general funding provisions for childcare; they do not contemplate religious indoctrination." *Id.* [7]

The same is true here. Even if Congress became aware that HHS had contracted with USCCB to distribute the funds to private service providers,

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recipients of the funds were social services agencies providing purely secular social services to trafficking victims.

[7] AUSCS stresses that the *Pedreira* court ruled that plaintiffs had standing as state taxpayers to challenge state appropriations for the benefit of the sectarian institution. AUSCS Br. at 30. But this does not help ACLU's standing argument in this case. First, in contrast to this case, the Kentucky legislature knew very well what it was doing in appropriating funds to a pervasively sectarian child care institution. Indeed, the legislature issued a citation "thanking" the institution for its work for children. 579 F.3d at 731. More important, the Sixth Circuit stressed that it was not applying the *Flast* standard because it considered the standing of *state* taxpayers to challenge *state* expenditures in aid of religion to be governed by a different, and more lenient, standard. *See id.* at 732.

there is nothing to suggest that Congress was aware of, much less that it mandated or contemplated, the alleged constitutional violation in this case. In both *Flast* and *Bowen*, Congress contemplated that taxpayer dollars would be spent on religious activity. Here, by contrast, the Attorney General simply reported to that TVPA funds had been spent on "shelter, job training, and health care."

As demonstrated in our opening brief, other circuits have denied standing on the authority of *Hein* where there was no evidence that the legislature directed or contemplated expenditure of taxpayer funds in aid of religion. USCCB Br. at 24-29. *Amicus* AUSCS argues that the denial of standing in many of the circuit cases on which we rely turns on the distinction, on which the District Court relied, between expenditures from general appropriations and those from more specific appropriations. But AUSCS ignores what those decisions actually say.

Thus, in *Hinrichs v. Speaker of the House*, 506 F.3d 584, 599-600 (7th Cir. 2007), the Seventh Circuit emphasized that an alleged improper use of federal funds is insufficient to support standing without "the appropriation of those funds for the allegedly unconstitutional purpose." Similarly, in *Freedom from Religion Found. v. Nicholson*, 536 F.3d 730, 743 (7th Cir. 2008), the same court denied taxpayers standing to challenge the assignment

of VA hospital chaplains to perform pastoral care because "Congress does not require, and has made no express appropriations for, the provision of pastoral care." In *Sherman v. Illinois*, 682 F.3d 643, 645 (7th Cir. 2012), a taxpayer challenged the application of funds from an appropriation intended to fund "pork-barrel projects of [an]individual legislator[]" to repair a large Christian cross that served as a minor tourist attraction. Even though the individual legislator clearly knew the money would be used to repair a religious display, the court ruled, as it did in *Hinrichs* and *Nicholson*, that the claims did "not fall within the narrow sliver of situations that survives *Hein*" because the appropriation itself reflected no legislative mandate for or contemplation of expenditure for religious purposes. *Id.* at 646-47. [8] Neither does the TVPA.

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[8] AUSCS makes the additional argument that at least some of the cases from other circuits on which USCCB involve "internal government operations and not payments to outside religious groups," AUSCS Br. at 32, citing *In re Navy Chaplaincy*, 534 F.3d 756, 762 n.3 (D.C. Cir. 2008). But the D.C. Circuit merely speculated that taxpayer standing under *Flast* might be even more difficult to assert if the taxpayer were challenging an expenditure for internal operations. The court's rejection of taxpayer standing was grounded squarely in the absence of any Congressional authorization or awareness of the alleged Establishment Clause violation (preference for Catholic Navy chaplains over chaplains of other faiths), that *Hein* required. *Id*. at 762. Neither the D.C. Circuit nor any other case suggests that the *Hein* does not apply where the violation involves grants to outside religious groups.

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The only cases that AUSCS cites to support its view are *Pedreira* and *Ams. United for the Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406 (8th Cir. 2007). As demonstrated above, *Pedreira* in fact supports the denial of taxpayer standing in this case. *See* pp. 14-15 *supra*. So does *Prison Fellowship Ministries*. In that case, as AUSCS acknowledges, the legislature appropriated funds for a "value-based treatment program" at a state prison, knowing that the program was being run as a "faith-based program of work and study within a loving community that promotes transformation from the inside out through the miraculous power of God's love," and that "is committed to Christ and the Bible." 509 F.3d at 413-14. As in *Pedreira*, the legislature specifically contemplated that its appropriation would be spent in support of religious instruction and proselytizing. Because it is undisputed that no TVPA funds are spent on such activities at all, much less that Congress contemplated such spending,

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But even if it did, it would not support standing in this case. The alleged violation here consists of HHS's accommodation of USCCB's moral and religious beliefs in performing a contract to provide services to HHS that HHS itself would otherwise have to provide. The government's goal in entering into that contract was not to support USCCB's religious mission, but rather to retain an outside contractor to help carry out HHS's own mission. The management and accommodation of government contractors is plainly an "internal government operation."

these two cases do not support the District Court's grant of standing in this case.

Finally, ACLU argues *Hein* should not be read to require that Congress mandate or contemplate the religious use of appropriated funds because *Flast* did not impose such a requirement, and the *Hein* Court did not overrule *Flast*. ACLU Br. at 35-36. ACLU makes this argument even though *Hein* plainly did impose precisely that requirement. We demonstrated above that Congress did contemplate the challenged religious use of taxpayer funds in *Flast*, so ACLU's argument fails because it rests on a mischaracterization of *Flast.*

But ACLU's argument fails for an additional reason. While the plurality opinion in *Hein* did not overrule *Flast* (as two concurring Justices urged), Justice Alito made it abundantly clear that *Flast* was limited to its facts, *i.e.*, taxpayer standing to challenge an appropriation that contemplated funding to support the educational mission of religious schools. The facts here are very different. Here, HHS exercised its executive discretion to hire USCCB as a contractor to carry out the purely secular mission that Congress gave to HHS in purely secular legislative terms. It would be manifestly improper to ignore the explicit requirements imposed by *Hein* in 2007, in favor of an expansive reading of *Flast*, a 1968 decision that *Hein* criticized

and explicitly limited to its facts. *See Hein*, 551 U.S. at 609 (plurality opinion); *id.* at 618 (Scalia, J., concurring in the judgment).

B. There was no taxpayer standing even if the expiration of the case management contract would have rendered any controversy moot.

The government argued below, and renews its argument on appeal, that this case became moot before the District Court's decision in this case because the USCCB's case management contract expired before that decision, and HHS selected other grantees to assist in distributing TVPA funds to organizations serving trafficking victims in the future. USCCB opposed the government's argument below (Dkt. 101, JA1589-1592), and will not repeat its arguments here.

There is no reason for this Court to reach the mootness argument. Because there was never any basis for taxpayer standing, there was never any justiciable case or controversy to become moot. This Court should recognize the absence of taxpayer standing *ab initio* and vacate the District Court's judgment on that basis.

However, if this Court reaches the mootness issue and concludes that the expiration of the case management contract between USCCB and HHS mooted the controversy, this Court must vacate the District Court's judgment. It is well settled that if a federal claim becomes moot before final

judgment, the proper response of a federal appeals court reviewing that final judgment is to vacate it. *See, e.g.*, *In re Scruggs*, 392 F.3d 124, 129 (5th Cir. 2004); *Nome Eskimo Cmty. v. Babbitt*, 67 F.3d 813, 816 (9th Cir. 1995); *Flynt v. Weinberger*, 762 F.2d 134, 135-36 (D.C. Cir. 1985); 13 C. Wright, *et al.*, FEDERAL PRACTICE & PROCEDURE § 3533.10, at 2-3 (3d ed. 2012).

II. ACLU proved neither a government endorsement of religion nor an impermissible delegation of government power to a religious organization in HHS's accommodation of USCCB's moral and religious commitments.

A. Under the standards articulated by this Court, the District Court erred as a matter of law in finding any government endorsement of Catholic religious beliefs.

Under this Court's quite recent decision in *Freedom from Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1, 11 (1st Cir. 2010), no "endorsement" of religion sufficient to support an Establishment Clause violation can be found as a matter of law unless the plaintiff proves that a reasonable, objective observer, fully informed of the relevant facts, would conclude that the government has endorsed a religion or some religious belief. As USCCB demonstrated in its opening brief, ACLU utterly failed to make such a showing.[9]

[9] ACLU also ignores the Supreme Court's ruling that government action that passes muster under the *Lemon/Agostini* standard as a matter of law

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ACLU does not seriously dispute its failure in this regard. ACLU advances no argument that a reasonable, objective, and fully informed observer would infer a government endorsement of USCCB's beliefs.[10] Nor does ACLU point to any change in controlling Supreme Court authority since the *Hanover* decision. Instead it attempts to persuade this Court that the legal principles embraced only two years ago are wrongheaded and should be ignored.

ACLU's argument turns entirely on a hypothetical in which a municipality permits the erection of a crèche on municipal property because the religious sponsor of the display is willing to pay a fee for the display and the city needs the money. ACLU posits that even if everyone in town knows that the city did it for the money and did not intend to endorse belief in the

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cannot constitute an impermissible endorsement of religion. *See Agostini*, 521 U.S. at 235.

[10] Oddly, ACLU argues in a footnote that whatever a reasonable, objective observer would conclude, a trafficking victim unable to obtain abortion or contraception services funded by the TVPA because of HHS's decision not to require their funding would conclude that HHS "endorsed" USCCB's moral and religious beliefs, *even if that trafficking victim also knew HHS disagreed with those beliefs.* ACLU Br. at 48 n.14. That makes no sense. There is no evidence whatever to support ACLU's bizarre speculation. Nor is there any case law to support ACLU's attempt to rewrite this Court's informed objective observer standard.

Christian nativity story, the display would nonetheless violate the Establishment Clause. ACLU Br. at 47-78.

ACLU's fanciful analogy is flawed for many reasons. First, an accommodation by government of religious and moral beliefs, as in this case, is quite different from religious speech by the government, or even government endorsement of private religious speech, as with the crèche in ACLU's hypothetical. The former is constitutionally permitted, generally favored, and sometimes required[11]; while the latter is constitutionally problematic. The former has government allowing religion to advance itself; while the latter has government itself advancing religion. *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987). ACLU's refusal to acknowledge this basic distinction is a fundamental flaw underlying its entire case.

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[11] *See Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136, 144-45 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices, and that it may do so without violating the Establishment Clause."); *Zorach* v. *Clausen*, 343 U.S. 306, 314 (1952) (religious accommodation "follows the best of our traditions … [f]or it … respects the religious nature of our people and accommodates the public service to their spiritual needs."). *See also Emplt. Div. v. Smith*, 494 U.S. 872, 890 (1990) ("[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well."). *Cf. County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

Second, even on the assumption that ACLU's hypothetical were germane to this case, if the municipality really did make its property a platform for any sponsor prepared to pay a fee to convey its message on public property, *and everybody knew that public space could be leased by the highest bidder* (including atheists, radical Muslims, and other politically unpopular groups), it is difficult to see how one could find a violation of the Establishment Clause *based on an endorsement theory*. Here again, ACLU ignores another fundamental distinction under the First Amendment between governmental and private speech. *See Capitol Square Rev. and Adv. Bd. v. Pinette*, 515 U.S. 753, 765 (1995) ("[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.") (plurality opinion). Indeed, if a government were to transform its property into a forum open to the highest bidder, it might be compelled by the First Amendment's prohibition against viewpoint discrimination from denying the space to the highest bidder on the grounds that the bidder was religious. *See id.* at 761-63.

ACLU makes no other argument to avoid the rejection of its "endorsement" theory that *Hanover School District* requires. The argument it makes is plainly not enough to sustain the District Court's decision. [12]

B. The case management contract delegated no standardless, discretionary government power to USCCB.

ACLU summarizes its delegation argument by observing: "By allowing USCCB to prohibit TVPA funds from being used to pay for [abortion and contraception] services, HHS improperly handed over its statutory authority to USCCB to determine what services would be provided to trafficking victims with TVPA funds, and allowed USCCB to make that determination based on its religious beliefs." ACLU Br. at 50-51. This argument fails both factually and legally.

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[12] Even if ACLU had demonstrated that HHS had "endorsed" USCC B's conscientious objection to participating in the funding of abortion or contraception services, it would not follow that HHS had endorsed a "religious" as opposed to a moral position. ACLU merely waves its hands when it asserts that the District Court's finding that USCCB's position was purely religious was "amply supported by the record." ACLU Br. at 45 n.12. This assertion was unaccompanied by the citation of any record evidence because there was no such evidence. The only evidence in the record on this point — evidence that the District Court wholly ignored — was that USCCB's beliefs are based in part on principles of morality that do not require adherence to any particular theological principles. (JA606-607) Even if one could infer HHS's "endorsement" of USCCB's viewpoint regarding abortion or contraception, the Supreme Court in *Harris* recognized that it could signify no more than the government's acceptance of "traditionalist" values. 448 U.S. at 319-20.

Factually, ACLU's statement is completely inaccurate. USCCB has not "prohibited" TVPA funds from being used for abortion or contraception services; nor could it do so. All USCCB did, or could do, was make it clear that it would not participate in reimbursing providers for such services, and leave it to HHS to decide whether or not it would select USCCB as its contractor. HHS could have selected another contractor, or fashioned a different mechanism for distributing TVPA funding. That HHS made a different decision does not mean that it delegated any of its power, much less that USCCB "overrule[d]" HHS as ACLU incorrectly states. ACLU Br. at 54. HHS decided to forego the funding of abortion and contraception under TVPA — funding it was under no obligation to provide — in the interests of greater overall efficiency. That constitutes an exercise, not a delegation, of its government powers.[13]

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[13] The sequence of events on which ACLU relies only underscores that HHS never "delegated" its statutory authority to devise ways to distribute funds that Congress appropriated under TVPA in the manner that best serves the statutory goals. Before the USCCB contract, HHS apparently did not prohibit grant recipients from using TVPA funding for abortion or contraception services. It accepted such a limitation for several years in order to obtain what it considered the superior case management services of USCCB. More recently, HHS has elected to place greater reliance on organizations that do not share USCCB's categorical unwillingness to participate in the funding of abortion or contraception. At no time did HHS ever surrender its authority to decide how best to use a limited appropriation to augment the social services

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Nor did HHS "abdicate" what ACLU says is the agency's "statutory authority to determine the needs of a vulnerable population." ACLU Br. at 55. ACLU conceded that Congress did not appropriate nearly enough money to satisfy all of the needs of that population. ACLU nowhere disputes that the services for which USCCB reimbursed service providers were services that trafficking victims desperately needed and actively sought. HHS merely decided not to add an additional category of services — services that Congress never mandated — in the interests of securing the most efficient service provider.[14]

ACLU's argument also ignores the substantial body of case law that permits, and often requires, the government to accommodate religious beliefs. *See* USCCB Br. at 39-47. ACLU insists that HHS' decision was not an accommodation because the agency did not relieve USCCB of any legal obligation. ACLU fails to recognize, however, that that distinction actually weakens its argument. If the government may relieve a person of

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available to trafficking victims. That HHS has chosen multiple mechanisms at different times makes that clear.

[14] ACLU does not even address, much less answer, the argument that *Larkin* has only been applied when the government delegates authority that only the government can exercise. *See* USCCB Br. at 57-58. Unlike liquor licenses, the government does not control access to abortion or contraception services and government permission is not necessary to obtain such services.

burdens imposed by a legal obligation in order to accommodate the person's religious beliefs without violating the Establishment Clause, *a fortiori* the government can choose not to impose the obligation in the first place and thus avoid the conflict. The accommodation cases are thus directly on point.

And those cases provide no support for the District Court's ruling. Initially, the cases in which courts have upheld accommodations are far from "rare," as ACLU posits without citing any authority. ACLU Br. at 56. Indeed, courts have upheld the constitutionality of statutes that mandate such accommodations. *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 423 (2006); *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (upholding Religious Land Use and Institutionalized Persons Act against Establishment Clause challenge); *In re Young*, 141 F.3d 854, 861-63 (8th Cir. 1988) (upholding RFRA as applied to federal government against Establishment Clause challenge). What *is* rare is the invalidation of a genuine religious accommodation. As the *Cutter* Court noted, such invalidations have occurred only where the accommodation imposes severe and unreasonable burdens on third parties, *e.g.*, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), or is not administered in a religiously neutral manner, *e.g.*, *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v.*

Grumet, 512 U.S. 687, 702-03 (1994). *See generally Cutter*, 544 U.S. at 720; *Boyajian v. Gatzunis*, 212 F.3d 1, 7-9 (1st Cir. 2000).

Neither the District Court in its opinion, nor ACLU in its brief, make any serious attempt to distinguish HHS's accommodation from the many accommodations of religious beliefs that courts have repeatedly upheld. There was no evidence below, and no contention made, that third parties are unreasonably burdened (or, indeed, burdened at all). ACLU identified not a single trafficking victim who sought abortion or contraception services but was unable to obtain those services because of the challenged accommodation of USCCB's beliefs. Very tellingly, neither the various organizations that claim to provide services to trafficking victims nor Attorney General Coakley in their *amicus* briefs did so either. Nowhere in their extra-record stories of the horrendous sexual abuse that some trafficking victims have suffered is a single victim identified who was prevented from obtaining any abortion or contraception services as a result of HHS's decision to accommodate USCCB.[15] Nor did ACLU make any

[15] AUSCS indulges in pure speculation that some service providers might have been discouraged from providing abortion or contraception services using other resources because of the restrictions in their subcontracts with USCCB. AUSCS Br. at 35 -36. First, there is absolutely no support in the record for such speculations, and the handful of pages cited do not provide such support. Second, the fact remains that in the

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suggestion that HHS's accommodation reflected any preference for Catholicism in either the selection of USCCB or the acceptance of USCCB's conscience limitations.

Conclusion

The Court should vacate the judgment below and remand with instructions to dismiss the complaint for want of subject matter jurisdiction because ACLU lacked standing to assert its Establishment Clause claim. If this Court reaches the merits, it should reverse the judgment below on the ground that HHS's decision to accommodate USCCB's moral and religious principles did not violate the Establishment Clause.

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entire record in this case not one example exists of a trafficking victim who sought an abortion or contraception but was unable to obtain such services because of HHS's accommodation of USCCB's moral and religious commitments.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6897 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2012 word processing software in 14 point Times New Roman font.

Dated: November 20, 2012 /s/ Henry C. Dinger

CERTIFICATE OF SERVICE

I hereby certify pursuant to Fed. R. App. P. 25(d) that on November 20, 2012, I transmitted the foregoing "Reply Brief for Appellant United States Conference of Catholic Bishops" in the above-captioned matter to the Clerk of the United States Court of Appeals for the First Circuit through the Court's CM/ECF filing system. Also on that date, I certify that I served the counsel listed below, who are Filing Users, through the CM/ECF system.

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