



BECKET
Religious Liberty for All

1200 New Hampshire Ave. NW, Suite 700
Washington, DC 20036
202-955-0095 / [@BecketLaw](#)
www.becketlaw.org

Via CM/ECF

Ms. Patricia S. Dodszuweit
Clerk
Office of the Clerk
U.S. Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

October 17, 2018

**RE: *Fulton, et al. v. City of Philadelphia, et al.*, No. 18-2574
Supplemental Authority per Rule 28(j).**

Dear Ms. Dodszuweit,

Appellants alert the Court to the recent decision in *American Civil Liberties Union v. Azar*, No. 16-cv-03539-LB (N.D. Cal. Oct. 11, 2018). *Azar* rejected Establishment Clause arguments nearly identical to those made by Intervenors here. Invr.Br.39-44.

Azar challenged the government's ability to contract with the United States Conference of Catholic Bishops (USCCB), alleging that USCCB's religious objection to abortion and contraceptives disqualified it from caring for unaccompanied minors under a government contract like the one here. The ACLU argued that contracting with USCCB violated the Establishment Clause because "the government has provided millions of dollars ... to the Bishops Conference while allowing the Conference to impose its religious beliefs" on those it serves. Slip.Op.2. The court found this claim meritless. Slip.Op.34.

Applying *Lemon's* three-part analysis, *Azar* concluded that HHS's contract with USCCB has a secular purpose, does not have the primary effect of advancing religion, and does not foster excessive entanglement. Slip.Op.3.

Azar rejected ACLU's claim that HHS endorsed USCCB's beliefs. "If anything, the government acted in a manner that is in opposition to the Conference's religious beliefs" by transferring individuals to a different contractor if they requested services USCCB could not provide consistent



with its religious beliefs. Slip.Op.26. Thus, “[a] reasonable observer would not view the government’s taking affirmative steps to facilitate access to abortion as an endorsement of the Conference’s anti-abortion religious beliefs.” Slip.Op.26-27. Here, the City has taken affirmative steps to facilitate access to foster parenting for LGBT couples, making clear that it does not endorse Appellants’ beliefs. Appx.0183-85.

Even more telling, the court rejected the argument that USCCB’s inability to work with subgrantees who provide abortion services constituted improper delegation of a government function. As the court explained, USCCB’s actions did not “prevent subgrantees from receiving TVAP funding or providing services that the Conference might oppose,” as they could work with other HHS contractors. Slip.Op.29. Intervenors make the same argument in *Fulton* regarding foster parents. But, as in *Azar*, Catholic is not preventing same-sex couples from becoming foster parents; it is instead restrained by its religious beliefs from endorsing same-sex relationships. Appx.0305, 0497-98.

Respectfully submitted,

/s/ Lori Windham
Counsel for Appellants

Enclosure.

cc: All counsel of record (by ECF notification)

Word Count: 347



CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: October 17, 2018

/s/ Lori Windham _____

Lori Windham

The Becket Fund for Religious Liberty

1200 New Hampshire Ave. NW,

Suite 700

Washington, DC 20036

Telephone: (202) 955-0095

Facsimile: (202) 955-0090

lwindham@becketlaw.org

United States District Court
Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

AMERICAN CIVIL LIBERTIES UNION
OF NORTHERN CALIFORNIA,

Plaintiff,

v.

ALEX M. AZAR, II, Secretary of Health and
Human Services, et al.,

Defendants,

v.

U.S. CONFERENCE OF CATHOLIC
BISHOPS,

Defendant-Intervenor.

Case No. 16-cv-03539-LB

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
AND GRANTING DEFENDANTS'
CROSS-MOTIONS FOR SUMMARY
JUDGMENT**

Re: ECF No. 116, 120, 121

INTRODUCTION

The American Civil Liberties Union of Northern California brings this Establishment Clause action in connection with two government programs, one that provides services to undocumented minors who arrive in the United States without being accompanied by a parent or guardian (the Unaccompanied Alien Children Program, or "UACP") and one that provides services to victims of human trafficking (the Trafficking Victim Assistance Program, or "TVAP"). The ACLU claims that the government's UACP and TVAP grant funding of, and interactions with, religious organizations such as the U.S. Conference of Catholic Bishops (the "Bishops Conference" or

1 “USCCB”) — in the face of such organizations’ religious objection to providing access to
2 abortion or contraception — violates the Establishment Clause.

3 Discovery has clarified that this case is not about the government or any religious organization
4 denying access to abortion or contraception. There is no evidence in the record that any
5 unaccompanied minor or trafficking victim who wanted an abortion or contraception during the
6 time period relevant to this case was unable to obtain them.¹ While the ACLU claims that the
7 government has provided millions of dollars in grant funding to the Bishops Conference while
8 allowing the Conference to impose its religious beliefs and restrict access to abortion and
9 contraception services to the unaccompanied minors and trafficking victims in its care, the record
10 in this case does not bear this out. There is no evidence that any grant funding was used for any
11 religious purpose or that any unaccompanied minor or trafficking victim who wanted an abortion
12 or contraception was unable to obtain them.

13 The fact that certain government grantees like the Bishops Conference have religious
14 objections to abortion has, in three or four instances, led to unaccompanied minors being
15 transferred from one shelter to another. When an unaccompanied minor who is housed at a shelter
16 operated by an organization with such an objection asks for an abortion, the government facilitates
17 a transfer to another shelter that does not have objections to abortion so that the minor can obtain
18 an abortion. The ACLU argues that this transfer process harms the minor because (1) the transfer
19 delays her obtaining an abortion and (2) the transfer forces her to leave the support structure at her
20 original shelter. No unaccompanied minor is a party to this case, and the ACLU — which brings
21

22 ¹ In March 2017, the government allegedly promulgated new policies that prevent all shelters for
23 unaccompanied minors (religious and secular) from taking any actions facilitating access to abortions
24 (including transportation to medical appointments) without signed approval from defendant Scott
25 Lloyd, Director of the Office of Refugee Resettlement. Those policies are not at issue in this case. *See*
26 *ACLU of N. Cal. v. Burwell*, No. 16-cv-03539-LB, 2017 WL 4551492, at *1, *4–6 (N.D. Cal. Oct. 11,
27 2017) (Order – ECF No. 102) (denying motion to amend complaint to include claims that the
28 government itself blocking abortion access, as not closely related to the originally-pleaded
Establishment Clause claim). The government’s alleged blocking of abortion access is the subject of a
separate case pending in the District of Columbia, where the district court issued an order enjoining the
government from enforcing its new policies (a decision that is now on appeal). *Garza v. Azar*, 304 F.
Supp. 3d 145 (D.D.C. 2018), *appeal docketed sub nom., In re Azar*, No. 18-8003 (D.C. Cir. Apr. 12,
2018).

1 its claim solely in its capacity as a taxpayer — cannot base its claim on putative harms that it did
 2 not bear itself. The ACLU also argues that the government is endorsing the Conference’s religious
 3 views by participating in this process. A reasonable person would not view the government, which
 4 facilitated access to abortion by transferring unaccompanied minors who want abortions to shelters
 5 where they can obtain them, to be endorsing the Conference’s anti-abortion views.

6 The record in this case shows that the government’s UACP and TVAP grant relationships and
 7 interactions with religious organizations like the Bishops Conference (1) had a secular purpose,
 8 (2) did not have a principal or primary effect of advancing religion, and (3) did not foster an
 9 excessive entanglement with religion. *Cf. Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)
 10 (setting out three-part Establishment Clause test). The court therefore denies the ACLU’s motion
 11 for summary judgment and grants the defendants’ cross-motions for summary judgment.

12 STATEMENT

13 1. The Unaccompanied Alien Children Program

14 1.1 Overview

15 Each year, tens of thousands of undocumented minors² who are unaccompanied by their
 16 parents or any legal guardian are taken into federal custody after crossing the border into the
 17 United States.³ Pursuant to statute, the U.S. Department of Health and Human Services (“HHS”)
 18

19
 20 _____
 21 ² The government uses the terms “children” and “minors” interchangeably in the context of the UACP.
 22 *See, e.g.*, Office of Refugee Resettlement, Funding Opportunity Announcement: Residential Services
 for Unaccompanied Alien Children HHS-2014-ACF-ORR-ZU-0608 (“2013 UACP FOA”) – ECF No.
 120-1 at 4 (PRICE_PROD_00001704). Citations refer to material in the Electronic Case File (“ECF”);
 pinpoint citations are to the ECF-generated page numbers at the top of documents.

23 ³ Permanent Subcomm. on Investigations, S. Comm. of Homeland Sec. & Governmental Affairs,
 24 *Protecting Unaccompanied Alien Children from Trafficking and Other Abuses: The Role of the Office*
of Refugee Resettlement, at 1, 5 (2016), available at <https://www.hsgac.senate.gov/imo/media/doc/Majority%20&%20Minority%20Staff%20Report%20-%20Protecting%20Unaccompanied%20Alien%20Children%20from%20Trafficking%20and%20Other%20Abuses%202016-01-282.pdf> (last visited
 25 Oct. 11, 2018) (cited by First Amend. Compl. (“FAC”) – ECF No. 57 at 20 (¶ 71 & n.6)) (“PSI
 26 Report”); accord ACLU Mot. – ECF No. 116 at 8; Gov’t Cross-Mot. – ECF No. 120 at 7. The court
 27 may take judicial notice of information on government websites that is not reasonably subject to
 28 dispute, as a matter of public record. *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998–99 (9th Cir. 2010).

1 and its component agency the Office of Refugee Resettlement (“ORR”) are tasked with providing
 2 care and custody to those unaccompanied minors. 8 U.S.C. § 1232(b)(1) (“Consistent with section
 3 279 of Title 6, and except as otherwise provided under subsection (a), the care and custody of all
 4 unaccompanied alien children, including responsibility for their detention, where appropriate, shall
 5 be the responsibility of the Secretary of Health and Human Services.”); 6 U.S.C. § 279(b)(1)
 6 (assigning responsibilities to ORR). Subject to considerations of “danger to self, danger to the
 7 community, and risk of flight,” ORR is responsible for promptly placing unaccompanied minors in
 8 “the least restrictive setting that is in the best interests of the child.” 8 U.S.C. § 1232(c)(2)(A).

9 Most unaccompanied minors who are referred to ORR are eventually released from
 10 government custody to parents or sponsors who live in the United States.⁴ These unaccompanied
 11 minors often are held in short-term facilities or shelters while they await release to their parents
 12 and sponsors.⁵ For some unaccompanied minors, ORR cannot identify an individual who can
 13 serve as a viable sponsor.⁶ Unaccompanied minors who are expected to be in the government’s
 14 custody for an extended period or those who have special needs are sometimes transferred to a
 15 group home or a foster family.⁷ For others, ORR may determine that the unaccompanied minor
 16 must be placed in a more restrictive custodian setting.⁸

17 ORR is subject to the terms of the class-action settlement in *Flores v. Reno*, No. CV 85-4544-
 18 RJK (Px) (C.D. Cal.), that the government signed in 1997 (“*Flores Agreement*”).⁹ The *Flores*
 19 Agreement sets minimum standards for “licensed programs” — “program[s], agenc[ies] or
 20 organization[s] that [are] licensed by an appropriate State agency to provide residential, group, or
 21 _____

22 ⁴ FAC – ECF No. 57 at 8 (¶ 25); Gov’t Answer – ECF No. 60 at 4 (¶ 25).

23 ⁵ FAC – ECF No. 57 at 8 (¶ 25); Gov’t Answer – ECF No. 60 at 4 (¶ 25).

24 ⁶ FAC – ECF No. 57 at 8 (¶ 25); Gov’t Answer – ECF No. 60 at 4 (¶ 25).

25 ⁷ FAC – ECF No. 57 at 8 (¶ 25); Gov’t Answer – ECF No. 60 at 4 (¶ 25).

26 ⁸ FAC – ECF No. 57 at 8 (¶ 25); Gov’t Answer – ECF No. 60 at 4 (¶ 25).

27 ⁹ Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17,
 28 1997, as amended Dec. 7, 2001), available at https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf (last visited Oct. 11, 2018). The government filed the *Flores Agreement* on the docket at ECF No. 92-3 and also cites to the version of the *Flores Agreement* on the ACLU’s website as authoritative. Gov’t Cross-Mot. – ECF No. 120 at 8.

1 foster care services for dependent children” — where ORR can place unaccompanied minors.¹⁰
 2 Among other things, licensed programs must provide unaccompanied minors with living
 3 accommodations, food, clothing, personal grooming items, medical care, an individualized needs
 4 assessment, educational services, a recreation and leisure-time plan including daily outdoor
 5 activity, individual and group counseling sessions, access to religious services of the minor’s
 6 choice whenever possible, visitation and contact with family members (regardless of their
 7 immigration status), a reasonable right to privacy, family reunification services, and legal-services
 8 information.¹¹ Specifically with respect to medical care, the *Flores* Agreement states that licensed
 9 programs must provide “[a]ppropriate routine medical and dental care, family planning services,
 10 and emergency health care services[.]”¹²

11 **1.2 Grants**

12 **1.2.1 Funding opportunity announcement**

13 In 2013, ORR issued a “funding opportunity announcement” (“FOA”) to invite licensed non-
 14 governmental organizations to apply for government grant funding to provide residential custody-
 15 and-care services to unaccompanied minors.¹³ The FOA provided that services must include “a
 16 complete medical examination . . . ; family planning services[;] other appropriate and routine
 17 medical and dental care; emergency health care services; administration of prescribed medication
 18 and special diets; and appropriate mental health interventions when necessary.”¹⁴

19 Both faith-based and secular organizations were eligible to apply to participate as grantees.¹⁵
 20 Grantees are subject to federal regulations that provide that they may not engage in inherently
 21 religious activities, such as worship, religious instruction, or proselytization, as part of the
 22

23 ¹⁰ *Flores* Agreement – ECF No. 92-3 at 4–5 (pp. 4–5); *Flores* Agreement Ex. 1 – ECF No. 92-3 at 23–
 24 26 (pp. 1–4).

25 ¹¹ *Flores* Agreement Ex. 1 – ECF No. 92-3 at 23–26 (pp. 1–4).

26 ¹² *Id.* at 23 (p. 1).

27 ¹³ 2013 UACP FOA – ECF No. 120-1.

28 ¹⁴ *Id.* at 8 (PRICE_PROD_00001708).

¹⁵ *See id.* at 13 (PRICE_PROD_00001713).

1 programs or services funded with direct governmental financial assistance. 45 C.F.R. §§ 87.1(c),
 2 87.2(c) (2004) (amended Jan. 20, 2016); 45 C.F.R. §§ 87.1(c), 87.2(c) (Jan. 20, 2016) (amended
 3 May 4, 2016); 45 C.F.R. § 87.3(b) (May 4, 2016). Grantees remain independent from the
 4 government and may continue to express their religious beliefs, provided they do not use direct
 5 financial assistance from the government to support any inherently religious activities. 45 C.F.R.
 6 §§ 87.1(d), 87.2(d) (2004) (amended Jan. 20, 2016); 45 C.F.R. §§ 87.1 (d), 87.2(d) (Jan. 20, 2016)
 7 (amended May 4, 2016); 45 C.F.R. § 87.3(c) (May 4, 2016).

8 The FOA provided that ORR would use objective review panels comprised of experts with
 9 knowledge and experience in the area to review and evaluate grant applications.¹⁶

10 **1.2.2 Grant awards**

11 ORR selected and entered into grant agreements with numerous grantees.¹⁷ One of these
 12 grantees was the Bishops Conference.¹⁸ The Bishops Conference in turn entered into subgrant
 13 agreements with various organizations (including Catholic Charities, His House, and Youth for
 14 Tomorrow) that operate facilities and shelters that provide services to unaccompanied minors.¹⁹
 15 The Bishops Conference, Catholic Charities, His House, and Youth for Tomorrow received UACP
 16 grants of approximately \$42.9 million in fiscal year 2015, \$54.7 million in fiscal year 2016, and
 17 \$72.7 million in fiscal year 2017.²⁰

18 There is no evidence in the record that ORR or any government actor selected the Bishops
 19 Conference as a grantee to promote Catholicism, Catholic religious views, or Catholic social
 20

21 ¹⁶ *Id.* at 33 (PRICE_PROD_00001733).

22 ¹⁷ According to a U.S. Senate subcommittee report, HHS awarded 56 grants to over 30 care providers
 23 in fiscal year 2016. PSI Report at 11. Currently, ORR has agreements with just over 100 shelters in 17
 24 states. Office of Refugee Resettlement, Fact Sheet: Unaccompanied Alien Children Program (June 15,
 25 2018), *available at* <https://www.hhs.gov/sites/default/files/Unaccompanied-Alien-Children-Program-Fact-Sheet.pdf> (last visited Oct. 11, 2018). As a matter of public record, the court may take judicial
 notice of information on government websites that is not reasonably subject to dispute. *Daniels-Hall*,
 629 F.3d at 998–99.

26 ¹⁸ *See* Gov't Suppl. Interrog. Resps. – ECF No. 116-1 at 11.

27 ¹⁹ FAC – ECF No. 57 at 8–9 (¶¶ 26–27); Gov't Answer – ECF No. 60 at 5 (¶¶ 26–27); Bishops Conf.
 Answer – ECF No. 59 at 9 (¶ 26).

28 ²⁰ Gov't Suppl. Interrog. Resps. – ECF No. 116-1 at 11.

1 teaching.²¹ There is no evidence in the record that the Bishops Conference or any of its
 2 subgrantees used any government-grant money to promote Catholicism or for religious education
 3 or proselytization, to maintain or improve churches or religious facilities, to purchase religious
 4 items, or to distribute religious literature.²² There is no evidence in the record that the Bishops
 5 Conference required any subgrantee to adopt its religious views in order to receive a subgrant.²³

6 **1.3 Access to Abortion**

7 **1.3.1 Generally**

8 The Catholic Church and the Bishops Conference have moral and religious objections to
 9 abortion and contraception.²⁴ Consequently, the Conference will not provide access to abortion or
 10 contraception services or refer individuals to such services.²⁵

11
 12
 13
 14 ²¹ Cf. HHS Rule 30(b)(6) Dep. (White) – ECF No. 120-1 at 84–85 (pp. 97–98) (“Q. As deputy
 15 direct[o]r of ORR, are you aware of any preferential treatment that HHS or ORR has given to any
 16 faith-based grantee or faith-based applicant for the care and custody of unaccompanied alien children?
 17 A. No.”); Bishops Conf. Bishops Conf. Rule 30(b)(6) Dep. (Kuennen) – ECF No. 121-1 at 45 (p. 69)
 (“Q. Was the primary effect of the grant, as administered by USCCB, to provide funding for the
 Catholic Church? A. No. Q. Was the primary effect of the grant, as administered by USCCB, to
 promote Catholic religious views? A. No. Q. Was the primary effect of the grant, as administered by
 USCCB, to promote Catholic social teaching? A. No.”).

18 ²² Cf. Bishops Conf. Bishops Conf. Rule 30(b)(6) Dep. (Kuennen) – ECF No. 121-1 at 45 (p. 68)
 19 (“Q. Okay. Does USCCB use any funds from the grant to promote Catholicism? A. No. Q. Does
 20 USCCB use any funds from the grant for proselytization? A. No. Q. Does USCCB use any funds from
 21 the grants for religious education purposes? A. No. Q. Does USCCB use any funds from the grant to
 maintain or improve churches or other religious facilities? A. No. Q. Does USCCB use any funds from
 the grant to purchase religious items? A. No. Q. Does USCCB use any funds from the grant to
 purchase or distribute religious literature? A. No.”).

22 ²³ Cf. ACLU Interrog. Resps. – ECF No. 116-1 at 60–61 (“Plaintiff states that Plaintiff’s First
 23 Amended Complaint does not make such an allegation [that the Bishops Conference’s subgrantees
 24 were compelled to adopt religious objections to abortion and/or contraception]. Plaintiff does not
 allege that USCCB’s subgrantees were compelled to adopt religious objections but rather that they are
 prohibited through funding agreements and [memorandums of understanding] from providing abortion
 or contraception care or referrals.”).

25 ²⁴ See, e.g., Bishops Conf., Proposal for Trafficking Victim Assistance Program – ECF No. 116-1 at
 26 182 (ACF_000105) (“This grantee is affiliated with a program of the Catholic Church, which has
 moral and religious objections to direct sterilization, contraception, and abortion.”); HHS Rule
 30(b)(6) Dep. (White) – ECF No. 120-1 at 81 (p. 44).

27 ²⁵ See, e.g., Bishops Conf., Proposal for Trafficking Victim Assistance Program – ECF No. 116-1 at
 28 182 (ACF_000105).

1 If an unaccompanied minor in the custody of a Bishops Conference subgrantee asks for an
2 abortion, the subgrantee notifies ORR and the Conference.²⁶ ORR then arranges to transfer the
3 unaccompanied minor to another provider that does not have an objection to providing abortion
4 access.²⁷

5 The government has stated in sworn interrogatory responses that in the three-year period
6 between fiscal year 2014 and fiscal year 2016, four unaccompanied minors that had been placed in
7 the care of faith-based grantees asked for an abortion.²⁸ Of the four, three were transferred to other
8 care providers to provide them with access to abortion services, and one was discharged to her
9 sponsor, who moved forward with her request for an abortion.²⁹ There is no evidence in the record
10 that any unaccompanied minor who asked for an abortion was unable to obtain one because of the
11 religious objections of the Conference or any subgrantee.³⁰

12 _____
13 ²⁶ HHS Rule 30(b)(6) Dep. (White) – ECF No. 120-1 at 76 (p. 38); Bishops Conf. Rule 30(b)(6) Dep.
(Kuennen) – ECF No. 121-1 at 41 (pp. 28–29); Lloyd Dep. – ECF No. 116-1 at 45 (pp. 60–61).

14 ²⁷ Gov’t Suppl. Interrog. Resps. – ECF No. 116-1 at 9 (“[T]here are no published criteria governing
15 transfer of UCs when a UC requests abortion services, but, when a UC requested abortion services,
16 and where the religiously-affiliated grantee or subgrantee had objections to such services, the federal
17 field specialist, in conjunction with the central office, effectuated the transfer of the UC. The UCs were
18 transferred to a facility that did not have an objection and that had available space.”); HHS Rule
19 30(b)(6) Dep. (White) – ECF No. 120-1 at 76 (p. 38); Lloyd Dep. – ECF No. 116-1 at 46 (pp. 75–76).

20 ²⁸ Gov’t Interrog. Resps. – ECF No. 120-1 at 58–59.

21 ²⁹ *Id.*

22 ³⁰ *Cf.* HHS Rule 30(b)(6) Dep. (White) – ECF No. 120-1 at 75, 84 (pp. 37, 97) (“Q. Are you aware of
23 any instance where a minor was unable to obtain an abortion because of the religious affiliation of the
24 shelter within which she resided? A. I am not aware of any such instance. . . . Q. Are you aware of any
25 instance in which any grantee shelter has made the final decision that an unaccompanied alien child in
26 its custody may not receive access to an abortion? A. No.”); Lloyd Dep. – ECF No. 116-1 at 46 (pp.
27 76–77) (“Q. . . . Do you know whether any minor has been unable to receive abortion or contraception
28 because of the religious entity’s objection to providing that service? A. No. Q. No, you don’t know, or
no, that hasn’t happened? A. I don’t recall that happening. . . . Q. So during that period of time that
you’ve been at ORR, are you aware of whether any minor has been unable to receive abortion or
contraception because of the religious objection of the shelter within which she resides? A. I, I am
aware. I have a pretty firm recollection. Q. You are aware that that has happened? A. No, that that has
not happened. Q. Okay. So just to clarify, you — it is your recollection that no minor has been unable
to receive abortion or contraception because of the religious objection of a grantee? A. Yes, in my
recollection.”); Gov’t Suppl. Interrog. Resps. – ECF No. 116-1 at 9 (“[W]hen a UC requested abortion
services, and where the religiously-affiliated grantee or subgrantee had objections to such services, the
federal field specialist, in conjunction with the central office, effectuated the transfer of the UC. The
UCs were transferred to a facility that did not have an objection and that had available space.”); *accord*
ACLU 2d Amend. Interrog. Resps. – ECF No. 116-1 at 59 (“At this time, Plaintiff has not identified
particular UCs who have been prevented from obtaining an abortion because of USCCB’s policies.”).

1 **1.3.2 Specific examples**

2 The ACLU cites four specific examples of unaccompanied minors who asked for abortion
3 services.

4 The first, “Rosa,”³¹ was apparently raped on her journey to the United States and became
5 pregnant.³² While residing at a shelter in Miami run by a Bishops Conference subgrantee, Catholic
6 Charities Boystown, Rosa requested an abortion.³³ Catholic Charities notified ORR of Rosa’s
7 request on September 24, 2014, and asked that Rosa be transferred to another facility.³⁴ Rosa was
8 hospitalized, and following her treatment, was not placed back at her original shelter at Catholic
9 Charities because of her request for an abortion.³⁵ ORR reached out on September 26 to another
10 provider, the Children’s Home Society of Florida, which accepted Rosa on September 29.³⁶ Rosa
11 appears to have obtained an abortion on October 14, 2014.³⁷

12 The second, “Maria,” was a victim of rape who became pregnant.³⁸ ORR was holding Maria at
13 a temporary shelter (possibly in Texas).³⁹ Maria’s sponsors (her parents) were in Florida.⁴⁰ At
14

15 ³¹ Rosa’s real name, and the real names of the other three unaccompanied minors whose examples the
16 ACLU cites, were redacted in the documents submitted to the court and therefore are not part of the
17 record.

18 ³² See E-mail from Catholic Charities to HHS (Sept. 24, 2014 1:39 PM) – ECF No. 116-1 at 87
(ORRFOIA2015_000016).

19 ³³ *Id.*

20 ³⁴ *Id.*; Email from HHS to HHS (Sept. 24, 2014 9:50 PM) – ECF No. 116-1 at 86 (ORRFOIA2015_
21 000015).

22 ³⁵ Email from HHS to Children’s Home Soc’y of Fla. (Sept. 29, 2014 8:35 AM) – ECF No. 116-1 at 85
(ORRFOIA2015_000014). The ACLU states that the reason for Rosa’s hospitalization was because
23 she had become suicidal at the prospect of not being able to obtain an abortion, ACLU Reply – ECF
24 No. 124 at 9, but the email chain it cites does not contain any discussion that supports this
25 characterization, see Email Chain – ECF No. 116-1 at 85–87 (ORRFOIA2015_000014–16).

26 ³⁶ Email from Children’s Home Soc’y of Fla. to HHS (Sept. 29, 2014 8:36 AM) – ECF No. 116-1 at 85
(ORRFOIA2015_000014).

27 ³⁷ See Gov’t Interrog. Resps. – ECF No. 120-1 at 58.

28 ³⁸ Email from HHS to HHS (Apr. 17, 2014 7:57 PM) – ECF No. 116-1 at 78 (ORRFOIA2015_
000007).

³⁹ See ACLU Reply – ECF No. 124 at 9.

⁴⁰ Email from HHS to HHS (Apr. 18, 2014 10:27 AM) - ECF No. 116-1 at 78 (ORRFOIA2015_
000007).

1 some point on or before April 17, 2014, Maria said that she wanted an abortion.⁴¹ Maria did not
 2 want her parents to know that she was pregnant.⁴² Two ORR field specialists looked into the
 3 abortion laws in both Texas and Florida and reported that the general rule in both states was that
 4 minors could not have abortions without parental consent (absent exceptions, such as obtaining a
 5 waiver from a judge).⁴³ The Texas field specialist emailed other ORR staff members to say, “This
 6 is why termination of pregnancies are done in New Mexico due to the fact that currently (by law)
 7 there is no parental consent requirement.”⁴⁴ The Florida field specialist emailed to say, “both of
 8 the shelters in Florida are faith-based and will not take the child to have this procedure.”⁴⁵ It
 9 appears that as of April 28, 2014, Maria had not received an abortion.⁴⁶ There is nothing in the
 10 record that indicates that Maria was ever placed with a Bishops Conference subgrantee or that the
 11 Conference was involved in this discussion. The record does not clearly indicate what ultimately
 12 happened to Maria, but there is no evidence in the record that she was ultimately denied access to
 13 abortion services.⁴⁷

14 The third, “Michelle,” arrived at a short-term shelter referred to as “IES Shelter” and found out
 15 there that she was pregnant.⁴⁸ On June 2, 2014, Michelle told her clinician that she wanted to
 16

17
 18 ⁴¹ *Id.*

19 ⁴² *Id.*

20 ⁴³ Email from HHS to HHS (Apr. 17, 2014 7:57 PM) – ECF No. 116-1 at 78 (ORRFOIA2015_000007); Email from HHS to HHS (Apr. 21, 2014 9:07 PM) - ECF No. 116-1 at 77 (ORRFOIA2015_000006).

21 ⁴⁴ Email from HHS to HHS (Apr. 17, 2014 7:57 PM) – ECF No. 116-1 at 78 (ORRFOIA2015_000007) (spacing corrected).

22 ⁴⁵ Email from HHS to HHS (Apr. 21, 2014 9:07 PM) - ECF No. 116-1 at 77 (ORRFOIA2015_000006).

23 ⁴⁶ *See* Email (unknown date, sender, and recipient – header not included) – ECF No.116-1 at 76 (ORRFOIA2015_000005).

24 ⁴⁷ *Cf.* Gov’t Interrog. Resps. – ECF No. 120-1 at 58–59.

25 ⁴⁸ Email from HHS to HHS (June 12, 2014 7:56 PM) – ECF No. 116-1 at 83–84 (ORRFOIA2015_000012–13). It is not clear from the email chain what the “IES Shelter” is, but it may refer to a shelter
 26 run by International Educational Services. The parties do not point to any evidence in the record
 27 suggesting that the “IES Shelter” was run by a Bishops Conference subgrantee. *Cf.* ACLU Reply –
 28 ECF No. 124 at 10 (describing the IES Shelter as a “short-term shelter”).

1 explore terminating her pregnancy.⁴⁹ Michelle expressed that she did not want to be transferred to
 2 a new shelter where she would have to “re-tell” her story to another clinician, case manager, and
 3 attorney.⁵⁰ An ORR field specialist sent an email recommending that Michelle be transferred to
 4 San Antonio so that she could explore the option of terminating her pregnancy.⁵¹ Once the
 5 procedure was completed, the field specialist wrote, Michelle could be transferred back to IES.⁵²
 6 Various HHS staff members discussed transferring Michelle to “Seton Home” (but rejected the
 7 idea because Seton Home was a shelter for pregnant women who want to keep their babies and
 8 was full) or transferring her to “SW Key Casa Blanca” or “BCFS San Antonio Campus” (but
 9 rejected the latter proposal because it also was full).⁵³ It appears that as of June 25, 2014, Michelle
 10 had not received an abortion.⁵⁴ There is nothing in the record that indicates that Michelle was ever
 11 placed with a Bishops Conference subgrantee or that the Conference was involved in this
 12 discussion. The record does not clearly indicate what ultimately happened to Michelle, but there is
 13 no evidence in the record that she was ultimately denied access to abortion services.⁵⁵

14 The fourth, “Zoe,” was placed at a shelter run by Youth for Tomorrow, a faith-based Bishops
 15 Conference subgrantee.⁵⁶ On January 28, 2015, Zoe told her doctor that she did not want to have
 16 the baby because the father was her cousin.⁵⁷ Zoe said on multiple occasions that she wanted to
 17 terminate the pregnancy and did not want to disclose the pregnancy or the decision to terminate
 18

19 ⁴⁹ *Id.* at 84 (ORRFOIA2015_000013).

20 ⁵⁰ *Id.*

21 ⁵¹ *Id.*

22 ⁵² *Id.*

23 ⁵³ Email Chain – ECF No. 116-1 at 79–82 (ORRFOIA2015_000008–11).

24 ⁵⁴ *See* Email from HHS to HHS (June 25, 2015 11:28 AM) – ECF No. 116-1 at 79 (ORRFOIA2015_00000008).

25 ⁵⁵ *Cf.* Gov’t Interrog. Resps. – ECF No. 120-1 at 58–59.

26 ⁵⁶ Email from HHS to HHS (Feb. 17, 2015 3:54 PM) – ECF No. 116-1 at 88 (ORRFOIA_000017); *see*
 27 FAC – ECF No. 57 at 8–9 (¶ 26) (alleging that Youth for Tomorrow is a Bishops Conference
 28 subgrantee); Gov’t Answer – ECF No. 60 at 5 (¶ 26) (admitting); Bishops Conf. Answer – ECF No. 59
 at 9 (¶ 26) (admitting).

⁵⁷ Email from HHS to HHS (Feb. 17, 2015 3:54 PM) – ECF No. 116-1 at 88 (ORRFOIA_000017).

1 the pregnancy to her parents.⁵⁸ It appears that as of February 17, 2015, Zoe had not received an
 2 abortion.⁵⁹ The record does not clearly indicate what ultimately happened to Zoe, but there is no
 3 evidence in the record that she was ultimately denied access to abortion services.⁶⁰

4 **1.4 Access to Contraception**

5 If an unaccompanied minor in the custody of a Bishops Conference subgrantee asks for
 6 contraception, the subgrantee is referred to a medical provider who is independent of the
 7 subgrantee.⁶¹ The medical provider then addresses the unaccompanied minor's request
 8 independent of the Bishops Conference or its subgrantee.⁶²

9 The government has stated in sworn interrogatory responses that in the three-year period
 10 between 2014 and 2016, seventeen unaccompanied minors in the care of faith-based grantees
 11 asked for birth-control medication.⁶³ All seventeen received that medication — most the same day
 12 or the next day after they made their requests.⁶⁴ There is no evidence in the record that any
 13 unaccompanied minor who asked for contraception was unable to obtain it because of the religious
 14 objections of the Conference or any subgrantee.⁶⁵

18 ⁵⁸ *Id.*

19 ⁵⁹ *Id.*

20 ⁶⁰ *Cf.* Gov't Interrog. Resps. – ECF No. 120-1 at 58–59.

21 ⁶¹ Bishops Conf. Rule 30(b)(6) Dep. (Kuennen) – ECF No. 121-1 at 42 (pp. 30–31).

22 ⁶² *Id.*

23 ⁶³ Gov't Interrog. Resps. – ECF No. 120-1 at 60.

24 ⁶⁴ *Id.*

25 ⁶⁵ *Cf.* HHS Rule 30(b)(6) Dep. (White) – ECF No. 120-1 at 84 (p. 97) (“Q. First, are you aware of any
 26 instance in which any grantee shelter has made a final decision that an unaccompanied alien child in its
 27 custody may not receive contraception? A. No.”); *accord* ACLU 2d Amend. Interrog. Resps. – ECF
 28 No. 116-1 at 59 (“As of now, Plaintiff has not identified particular UCs who have been prevented from
 obtaining contraceptives because of USCCB’s policies.”); *see also* Bishops Conf. Rule 30(b)(6) Dep.
 (Chester) – ECF No. 120-1 at 140–41 (pp. 69–70) (Bishops Conference reimburses for contraception
 in some cases); Bishops Conf. Rule 30(b)(6) Dep. (Chester) – ECF No. 116-1 at 249 (pp. 88–89)
 (Bishops Conference does not prohibit subgrantees from using TVAP funds to pay for contraception,
 although individual subgrantees can make a request to opt out of paying for contraception).

1 **2. The Trafficking Victim Assistance Program**

2 **2.1 Overview**

3 In 2000, Congress passed the Trafficking Victims Protection Act (“TVPA”). Pub. L. No. 106-
4 386, div. A, 114 Stat. 1464, 1466–91 (2000). Congress found that “[t]rafficking in persons is a
5 modern form of slavery, and it is the largest manifestation of slavery today. At least 700,000
6 persons annually, primarily women and children, are trafficked within or across international
7 borders. Approximately 50,000 women and children are trafficked into the United States each
8 year.” 22 U.S.C. § 7101(b)(1). Congress enacted the TVPA “to combat trafficking in persons, a
9 contemporary manifestation of slavery whose victims are predominantly women and children, to
10 ensure just and effective punishment of traffickers, and to protect their victims.” 22 U.S.C.
11 § 7101(a). Among other things, the TVPA tasked HHS with expanding benefits and services to
12 trafficking victims. 22 U.S.C. § 7105(b)(1)(B)(i).

13 To that end, HHS and its component agency the Office of Trafficking in Persons (“OTIP”)
14 oversee the Trafficking Victim Assistance Program, a grant program that funds time-limited
15 comprehensive victim services to foreign trafficking victims who have received or are seeking
16 HHS certification, and certain family members.⁶⁶ (OTIP was established in June 2015.⁶⁷ Before
17 OTIP was established, ORR handled certain aspects of the TVAP, including issuing a Funding
18 Opportunity Announcement in early 2015.⁶⁸)

19 **2.2 Grants**

20 **2.2.1 2006–2011**

21 In 2005, HHS decided to select a general contractor to administer TVAP funds. *ACLU of*
22 *Mass. v. Sebelius*, 821 F. Supp. 2d 474, 476 (D. Mass. 2012) (“*ACLU of Mass. I*”), *vacated as*
23 *moot sub nom. ACLU of Mass. v. U.S. Conf. of Catholic Bishops*, 705 F.3d 44 (1st Cir. 2013)

25 ⁶⁶ HHS Rule 30(b)(6) Dep. (Chon) – ECF No. 116-1 at 153 (p. 33); *see also* Office of Refugee
26 Resettlement, Funding Opportunity Announcement: Trafficking Victim Assistance Program HHS-
2015-ACF-ORR-ZV-0976 (“2015 TVAP FOA”) – ECF No. 116-1 at 97–147.

27 ⁶⁷ HHS Rule 30(b)(6) Dep. (Chon) – ECF No. 116-1 at 154 (p. 37).

28 ⁶⁸ *Id.*

1 (“*ACLU of Mass. II*”). HHS entered into a master contract with the Bishops Conference in 2006.
2 *Id.* at 477. The Conference was the only TVAP grantee selected. *See id.*

3 The Conference, in turn, entered into subcontracts with over 100 service providers. *Id.* The
4 Conference’s subcontracts included a restriction that “funds shall not be used to provide referral
5 for abortion services or contraceptive materials, pursuant to this contract.” *Id.*

6 The ACLU sued, alleging that the government was violating the Establishment Clause by
7 allowing a religiously based restriction on the use of taxpayer funds. *Id.* at 478. On cross-motions
8 for summary judgment, the District Court for the District of Massachusetts held that the
9 government’s arrangement with the Bishops Conference violated the Establishment Clause by
10 effectively endorsing the Conference’s religious views in allowing the Conference to place a
11 religiously motivated restriction on TVAP funding that subcontracting organizations could not opt
12 out of and in delegating to the Conference the authority to decide which services the TVAP would
13 fund and which services (e.g., abortion) it would not. *Id.* at 486–88.

14 HHS’s master contract with the Bishops Conference expired in 2011. *ACLU of Mass. II*, 705
15 F.3d at 48. After the expiration of its contract with the Conference, HHS awarded grants to three
16 separate organizations. *Id.* at 50–51. The Conference applied for a grant, but its proposal was not
17 selected. *Id.* at 51. Because the Conference’s grant agreement had ended, the First Circuit on
18 appeal vacated the *ACLU of Massachusetts I* decision as moot. *Id.* at 52–54.

19 The government’s 2006–2011 arrangement with the Conference is not at issue in this action.

20 **2.2.2 2015 funding opportunity announcement**

21 In 2015, the ORR issued a new Funding Opportunity Announcement to invite organizations to
22 apply to enter into TVAP grant agreements.⁶⁹ The FOA provided that grantees must provide
23 services that included “direct services and/or community referrals for housing, mental health
24 screening and therapy, employability services, legal services, counselling, health screening and
25 medical care, including treatment for sexually transmitted infections, family planning services and
26

27 _____
28 ⁶⁹ 2015 TVAP FOA – ECF No. 116-1 at 99.

1 the full range of legally permissible gynecological and obstetric care, including but not limited to
 2 exams, tests, pre-natal services and non-directive health-related counselling.”⁷⁰ The FOA further
 3 provided that “[n]o HHS funds may be expended for an abortion, except in cases where pregnancy
 4 is a result of rape or incest or where the woman suffers from a physical condition that would place
 5 her life in danger unless an abortion is performed.”⁷¹ (This restriction applied equally to religious
 6 and secular grantees.⁷²)

7 Both faith-based and secular organizations were eligible to apply to participate as grantees.⁷³

8 The FOA provided that:

9 If an applicant has a religious objection to providing any of the services or referrals
 10 required in the program, it must explicitly describe the approach to meeting its
 11 grant obligations consistent with [the ORR’s Administration for Children and
 12 Families]’s faith-based policy. The alternative approach must be one that
 13 accomplishes the goal of ensuring that trafficking victims understand the full range
 14 of services available to them, including reproductive health services, and that there
 15 is a mechanism by which victims requesting such services can receive appropriate
 16 referrals. The alternative approach must ensure timely referrals to all services for
 17 which the individual is eligible, not be burdensome to the client, and be
 18 operationally feasible for ORR.⁷⁴

19 As discussed above, federal regulations provide that faith-based grantees may not engage in
 20 inherently religious activities. 45 C.F.R. §§ 87.1(c), 87.2(c) (2004) (amended Jan. 20, 2016); 45
 21 C.F.R. §§ 87.1(c), 87.2(c) (Jan. 20, 2016) (amended May 4, 2016); 45 C.F.R. § 87.3(b) (May 4,
 22 2016).

23 The FOA provided that ORR would use objective review panels comprised of experts with
 24 knowledge and experience in the area to review and evaluate grant applications.⁷⁵

25 _____
 26 ⁷⁰ *Id.* at 100–01.

27 ⁷¹ *Id.* at 131.

28 ⁷² HHS Rule 30(b)(6) Dep. (Chon) – ECF No. 120-1 at 111 (p. 161).

⁷³ 2015 TVAP FOA – ECF No. 116-1 at 109.

⁷⁴ *Id.* at 120.

⁷⁵ *Id.* at 136; *accord* HHS Rule 30(b)(6) Dep. (Chon) – ECF No. 120-1 at 97 at 104 (p. 80).

1 **2.2.3 Grant awards**

2 OTIP selected and entered into grant agreements with three grantees: the Bishops Conference,
3 Tapestri, and the U.S. Committee for Refugees and Immigrants (“USCRI”).⁷⁶ The Conference is a
4 faith-based organization, whereas Tapestri and USCRI are secular.⁷⁷ The Conference received
5 TVAP grants of approximately \$2.1 million in fiscal year 2015, \$1.6 million in fiscal year 2016,
6 and \$0 in fiscal year 2017.⁷⁸ USCRI received TVAP grants of approximately \$3.8 million in fiscal
7 year 2015, \$4.4 million in fiscal year 2016, and \$6.0 million in fiscal year 2017.⁷⁹

8 The Bishops Conference’s original grant proposal in 2015 stated that “USCCB/MRS is
9 committed to acting in accordance with Catholic teaching in administering the program, including
10 the determination of allowable and unallowable costs. In carrying out the program, sub-recipients
11 will not provide or refer for abortion, sterilization, or artificial contraceptives and no project funds
12 will be used for that purpose.”⁸⁰ In response to that provision, OTIP emailed the Bishops
13 Conference and asked:

14 Per the FOA requirements, “a grantee may not take any steps to discourage
15 program participants from making a request for a service available under the
16 program, nor may a grantee direct subcontractor to refrain from providing services
17 when the subcontractor has no religious objection to providing such services.”
18 Consistent with these requirements, no program-related documents, including, but
19 not limited to, sub-recipient agreement documents, memoranda of understanding,
20 program guidelines, or work plans, may limit the subcontractor’s ability to provide
21 any services, as specified in the TVAP FOA, for which victims are eligible.

- 22 • Will USCCB be able to meet this FOA requirement?
- 23 • USCCB stated: “...sub-recipients will be directed to contact USCCB/MRS
24 immediately in any cases that cannot be accommodated through existing program
25

26 _____
27 ⁷⁶ HHS Rule 30(b)(6) Dep. (Chon) – ECF No. 120-1 at 97, 103 (pp. 34, 79)

28 ⁷⁷ See HHS Rule 30(b)(6) Dep. (Chon) – ECF No. 121-1 at 78 (p. 168) (re Tapestri); Bishops
Conference Rule 30(b)(6) Dep. (Chester) – ECF No. 116-1 at 244 (p. 51) (re USCRI).

⁷⁸ Gov’t Suppl. Interrog. Resps. – ECF No. 116-1 at 12.

⁷⁹ *Id.* at 13. The ACLU’s interrogatories apparently did not ask for the grant levels for Tapestri, and
hence this information was not included in the government’s interrogatory responses that the parties
filed with the court. *See id.* at 12–13.

⁸⁰ Bishops Conf., Proposal for Trafficking Victim Assistance Program – ECF No. 116-1 at 182 (ACF_
000105).

1 guidance.” What is USCCB’s plan for cases involving a request for services that
USCCB or a subcontractor cannot provide due to religious objection?⁸¹

2 The Conference responded:

3 If awarded a contract for the Trafficking Victim Assistance Program (TVAP),
4 USCCB intends to include in its subcontracts with its sub-recipients the following
language:

5 “In administering the program, USCCB/MRS is committed to acting in
6 accordance with Catholic teaching which has moral and religious objections to
7 direct sterilization, artificial contraception, and abortion. In carrying out the
8 program, Sub-recipients will not provide or refer for abortion, sterilization, or
artificial contraceptives and no project funds will be used for that purpose. Sub-
recipients will provide all newly enrolled clients with a brochure that indicates
all services for which they are eligible. . . .”⁸²

9 The Conference noted that all of its subcontractors were affiliates of Catholic agencies or Bethany
10 Christian Services that shared its religious objection to providing abortion or contraception.⁸³ The
11 Conference said that it understood that there might be other social-services agencies that did not
12 have a religious objection to providing abortion or contraception and that those agencies would
13 have the opportunity to subcontract directly with one of the other TVAP grantees.⁸⁴ The
14 Conference further said that in the event that one of its subcontractors could not provide a service
15 (e.g., abortion) to a trafficking victim due to a religious objection, it would contact other TVAP
16 grantees and/or OTIP to facilitate a transfer of the victim to another grantee.⁸⁵ The Conference
17 said that unlike in the 2006–2011 time period — when the Conference was the only TVAP grantee
18 — there were now other TVAP grantees, so any potential subgrantee that did not share the
19 Conference’s religious objections could apply for TVAP funding through the other grantees.⁸⁶

20
21
22 _____
23 ⁸¹ Email from HHS to Bishops Conf. (Sept. 17, 2015 6:02 PM) – ECF No. 116-1 at 226
(USCCB00000532).

24 ⁸² Email from Bishops Conf. to HHS (Sept. 18, 2015 5:42 PM) – ECF No. 116-1 at 222
(USCCB00000529).

25 ⁸³ *Id.*

26 ⁸⁴ *Id.*

27 ⁸⁵ *Id.* at 223 (USCCB00000530).

28 ⁸⁶ Email from Bishops Conf. to HHS (Sept. 25, 2015 4:29 PM) – ECF No. 116-1 at 235
(USCCB00000980).

1 OTIP responded that the language that the Bishops Conference proposed to include in its
 2 subgrant agreements would not meet the FOA requirements.⁸⁷ Citing *ACLU of Massachusetts I*,
 3 OTIP asserted that “grantees may not adopt rules, based on their own moral or religious beliefs,
 4 governing sub-grantee use of funds for a federal program.”⁸⁸ In an effort to accommodate the
 5 Conference, OTIP proposed revising its proposed language to read, “Sub-recipients **sharing these**
 6 **religious objections may elect** ~~will~~ not to provide or refer for abortion, sterilization, or artificial
 7 contraceptives and **not to use** ~~no~~ project funds ~~will be used~~ for that purpose.”⁸⁹ OTIP also stated
 8 that if potential subgrantees were referred to other TVAP grantees instead of the Conference, the
 9 Conference’s budget would likely have to be adjusted.⁹⁰

10 Following a call with OTIP, the Conference proposed removing that sentence entirely and
 11 instead adding a new sentence in its agreements with subgrantees that would state, “the (named
 12 agency) voluntarily agrees that it shares the religious objections of USCCB to providing or
 13 referring clients for abortion, sterilization and artificial contraception, and to the use of program
 14 funds for those purposes.”⁹¹ Following another call, the Conference agreed to removing its newly
 15 proposed sentence as well.⁹² The Conference instead proposed including a statement in a program
 16 brochure that would be provided to both subgrantees and trafficking victims that would state,
 17 “This grantee (USCCB) is affiliated with the Catholic Church, which has moral and religious
 18
 19
 20

21 ⁸⁷ Email from HHS to Bishops Conf. (Sept. 22, 2015 11:47 AM) – ECF No. 116-1 at 222
 22 (USCCB0000528); Email from HHS to Bishops Conf. (Sept. 28, 2015 12:30 PM) – ECF No. 116-1 at
 23 233–34 (USCCB00000978–79).

24 ⁸⁸ Email from HHS to Bishops Conf. (Sept. 28, 2015 12:30 PM) – ECF No. 116-1 at 234
 25 (USCCB00000979).

26 ⁸⁹ *Id.* (blacklining added).

27 ⁹⁰ *Id.*; Email from HHS to Bishops Conf. (Sept. 22, 2015 11:47 AM) – ECF No. 116-1 at 221
 28 (USCCB0000528).

⁹¹ Email from Bishops Conf. to HHS (Sept. 28, 2015 4:18 PM) – ECF No. 121-1 at 103 (PRICE_
 PROD_00008569).

⁹² Email from Bishops Conf. to HHS (Sept. 29, 2015 10:12 AM) – ECF No. 121-1 at 102 (PRICE_
 PROD_00008568).

1 objections to direct sterilization, contraception, and abortion. You are free to discuss all health
2 matters with your medical provider.”⁹³

3 OTIP and the Bishops Conference exchanged emails reconfirming that (1) both of the
4 sentences the Conference had proposed for subgrant agreements — that subgrantees “will not
5 provide or refer for abortion, sterilization, or artificial contraceptives and no project funds will be
6 used for that purpose” and that subgrantees “voluntarily agree[] that [they] share[] the religious
7 objections of USCCB to providing or referring clients for abortion, sterilization and artificial
8 contraception, and to the use of program funds for those purposes” — would be removed from any
9 TVAP-related documents and (2) the Conference would “refrain from including any language in
10 any program-related documents, including sub-agreements, limiting the ability of subcontractors
11 to provide any services, as provided in the TVAP FOA, for which victims are eligible.”⁹⁴ With
12 that agreement, OTIP went forward with evaluating the Bishops Conference’s grant application
13 and ultimately selected it as a grantee (along with Tapestri and USCRI).⁹⁵

14 There is no evidence in the record that OTIP or any government actor selected the Bishops
15 Conference as a grantee to promote Catholicism, Catholic religious views, or Catholic social
16 teaching.⁹⁶ There is no evidence in the record that the Bishops Conference or any of its

17
18 ⁹³ *Id.*

19 ⁹⁴ Email from HHS to Bishops Conf. (Sept. 29, 2015 10:15 AM) – ECF No. 121-1 at 101–02 (PRICE_
20 PROD_00008567–68); Email from Bishops Conf. to HHS (Sept. 29, 2015 11:00 AM) – ECF No.
21 121-1 at 101 (PRICE_PROD_00008567).

22 ⁹⁵ *See* HHS Rule 30(b)(6) Dep. (Chon) – ECF No. 122-1 at 9 (p. 105) (confirming that the Bishops
23 Conference had removed from its subgrant agreements the language prohibiting subgrantees from
24 providing or referring for abortion or contraception).

25 ⁹⁶ *Cf.* HHS Rule 30(b)(6) Dep. (Chon) – ECF No. 120-1 at 110 (p. 160) (“Q. Okay. Was any TVAP
26 grant awarded to any religiously affiliated grantee for the purpose of promoting religion? A. No.
27 Q. Was any TVAP grant awarded to any religiously affiliated grantee for the purpose of promoting any
28 specific religion or religious belief? A. No.”); Bishops Conf. Rule 30(b)(6) Dep (Chester) – ECF No.
121-1 at 89 (pp. 98–99, 101) (“Q. Was the primary effect of the grant, as administered by USCCB, to
promote or advance Catholicism? A. No. Q. Was the primary effect of the grant, as administered by
USCCB, to provide funding for the Catholic Church? A. No. Q. Was the primary effect of the grant, as
administered by USCCB, to promote Catholicism? A. No. Q. Was the primary effect of the grant, as
administered by USCCB, to promote Catholic religious views? A. No. Q. Was the primary effect of
the grant, as administered by USCCB, to promote Catholic social teaching? A. No. . . . Q. . . . In the
course of the negotiations over the grant, did anyone at HHS ever communicate to you or anyone else
at USCCB that one of the government’s purposes in giving the grant to USCCB was to promote

1 subgrantees used any TVAP grant money to promote Catholicism or for religious education or
 2 proselytization, to maintain or improve churches or religious facilities, to purchase religious items,
 3 or to distribute religious literature.⁹⁷

4 There is no evidence in the record that the Bishops Conference required any subgrantee to
 5 adopt its religious views.⁹⁸ This may be in part because, at the time the Conference was selected
 6 pursuant to the 2015 TVAP FOA, all of the Conference's network of would-be subgrantees
 7 already shared its religious views to begin with.⁹⁹ At one point, one organization that did not share
 8 the Conference's religious views applied to be a Conference subgrantee.¹⁰⁰ The Conference
 9 referred the organization to USCRI, one of the other national TVAP grantees, because (1) "it" was
 10
 11

12 Catholicism? A. No. Q. Did they communicate that it was the government's purpose to promote
 13 religion generally? A. No. Q. Did they communicate that it was the purpose to promote a specific
 14 religious belief with respect to abortion and contraception? A. No.").

15 ⁹⁷ Cf. HHS Rule 30(b)(6) Dep. (Chon) – ECF No. 120-1 at 110–11 (p. 160–61) (“Q. Are you aware of
 16 any grantee using TVAP grant funds for religious proselytization? A. Not that I’m aware of. Q. Are
 17 you aware of any grantee using TVAP grant funds for religious instruction? A. Not that I’m aware of.
 18 Q. Are you aware of any grantee using TVAP grant funds for the purpose — oh, excuse me. Scratch
 19 that. Are you aware of any grantee using TVAP grant funds for the purchase of religious items? A. Not
 20 that I’m aware of. Q. Are you aware of any grantee using TVAP grant funds for the purpose of
 21 purchasing or distributing religious literature? A. Not that I’m aware of.”); Bishops Conf. Rule
 22 30(b)(6) Dep. (Chester) – ECF No. 120-1 at 154 (p. 97) (“Q. Okay. Does USCCB use any funds from
 23 the grant to promote Catholicism? A. No. Q. Does USCCB use any funds from the grant for
 24 proselytization? A. No. Q. Does USCCB use any funds from the grant for religious education
 25 purposes? A. It is possible for a case manager, during the time that they are spending with the client,
 26 which would be presumably covered by the funds for the administrative reimbursement, to make
 27 referrals to a client’s preferred religious organization or faith community for something like”);
 28 Bishops Conf. Rule 30(b)(6) Dep. (Chester) (cont’d) – ECF No. 121-1 at 89 (p. 98) (“ . . . religious
 education, but they can’t technically pay for any courses or any curriculum or cost associated with a
 religious education. Q. Okay, and that would be the client’s preferred provider, not USCCB’s preferred
 provider? A. Correct. Q. Does USCCB use any funds from the grant to maintain or improve churches
 or other religious buildings? A. No. Q. Does USCCB use any funds from the grant to purchase
 religious items? A. No. Q. Does USCCB use any funds from the grant to purchase or distribute
 religious literature? A. No.”).

⁹⁸ Cf. ACLU 2d Amend. Interrog. Resps. – ECF No. 116-1 at 61 (“Plaintiff does not allege that
 USCCB’s subgrantees were compelled to adopt religious objections but rather that they are prohibited
 through funding agreements and MOUs from providing abortion or contraception care or referrals.”).

⁹⁹ See Bishops Conf., Proposal for Trafficking Victim Assistance Program app’x F – ECF No. 116-1 at
 215 (ACF_000138); accord Bishops Conf. Rule 30(b)(6) Dep. (Chester) – ECF No. 121-1 at 85 (pp.
 48–49).

¹⁰⁰ Bishops Conf. Rule 30(b)(6) Dep. (Chester) – ECF No. 116-1 at 244 (p. 51).

1 secular,¹⁰¹ and (2) the Conference did not have the staffing necessary to vet the organization.¹⁰²
 2 (Any organization is free to apply to be a subgrantee of any of the three TVAP grantees — the
 3 Bishops Conference, Tapestri, and USCRI — provided that they contract with only one of the
 4 grantees.¹⁰³)

5 **2.3 Access to abortion and contraception**

6 The record does not reveal any instance of a trafficking victim who was receiving services
 7 from a Bishops Conference subgrantee asking the Conference or its subgrantee for an abortion or
 8 contraception. This may be because trafficking victims receiving TVAP services, unlike
 9 unaccompanied minors, are generally not in the physical custody of the federal government, the
 10 Conference, or its subgrantees, and thus can seek and obtain an abortion or contraception
 11 independently.¹⁰⁴

12
 13 ¹⁰¹ *Id.* It is unclear from the deposition testimony whether “it” refers to the prospective subgrantee or to
 14 USCRI.

15 ¹⁰² *Id.* at 250–51 (pp. 93–95).

16 ¹⁰³ 2015 TVAP FOA – ECF No. 116-1 at 104 (“A TVAP grantee may subcontract with service
 17 provider organizations outside of the ACF Region(s) in which it provides full coverage. A
 18 subcontractor organization must work with only one primary TVAP grantee.”); *accord* HHS Rule
 19 30(b)(6) Dep. (Chon) – ECF No. 116-1 at 158 (p. 58); Bishops Conf. Rule 30(b)(6) Dep. (Chester) –
 20 ECF No. 116-1 at 242, 244, 245 (pp. 11, 51, 55–56).

21 ¹⁰⁴ *See* HHS Rule 30(b)(6) Dep. (Chon) – ECF No. 120-1 at 111–12 (pp. 161–62) (“Q. The trafficking
 22 victims who receive care under this program, they are not in federal custody; is that correct? A. They
 23 — I can’t know for every single victim, but generally they are not in federal custody. Q. And that
 24 generally means that wherever they live, they’re free to come and go as they please, correct? A. It’s a
 25 voluntary program. Q. So can any, can any grantee prevent a trafficking victim from independently
 26 seeking contraception? A. No. Q. Can any grantee prevent a trafficking victim from independently
 27 seeking access to an abortion? A. No.”); Bishops Conf. Rule 30(b)(6) Dep. (Chester) – ECF No. 121-1
 28 at 89–90 (pp. 100–01, 103) (“Q. . . . So for the trafficking victims for whom USCCB is providing care
 under the grant, does USCCB believe it has been delegated the authority to make ultimate
 determinations as to whether these trafficking victims are allowed to get an abortion or contraception?
 A. Because the clients actually reside in the community and we are providing the clients with, at the
 local level, referrals to a service, a medical service provider, again they are often given bus passes or
 funds to ride the bus or use public transportation, it isn’t possible for our local case managers to
 prevent or prohibit a client from seeking those kinds of services. . . . Q. If a client met with their doctor
 and requested an abortion, would that information be reported back to the case worker? A. I don’t
 believe so. Q. If the client had an abortion, would the case worker be informed of that procedure? A. I
 can’t think of an official way that that would be communicated from a medical provider back to the
 case manager. Q. So is it entirely possible that a client could have an abortion without the case worker
 ever knowing about it? A. It’s possible. Q. And would USCCB be aware of any client that has ever
 requested an abortion? A. Not that I’m aware of.”).

1 If a trafficking victim were to ask the Conference or its subgrantee for an abortion or
 2 contraception, the Conference or the subgrantee would notify HHS.¹⁰⁵ Unlike with unaccompanied
 3 minors (who are in custody), trafficking victims (who are generally not in custody) who ask for an
 4 abortion are not required to be transferred to another subgrantee.¹⁰⁶

5 There is no evidence in the record that any trafficking victim who asked for an abortion or
 6 contraception was unable to obtain either because of the religious objections of the Conference or
 7 any subgrantee.¹⁰⁷

8 9 STANDARD OF REVIEW

10 The court must grant a motion for summary judgment if the movant shows that there is no
 11 genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of
 12 law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). Material
 13 facts are those that may affect the outcome of the case. *Anderson*, 477 U.S. at 248. A dispute about
 14

15
16
17 ¹⁰⁵ HHS Rule 30(b)(6) Dep. (Chon) – ECF No. 116-1 at 162 (p. 74).

18 ¹⁰⁶ Bishops Conf. Rule 30(b)(6) Dep. (Chester) – ECF No. 121-1 at 90 (p. 104–05) (“Q. If a client
 19 requested an abortion and did happen to notify the case worker about it, would the subrecipient be
 20 required to transfer that client to another subrecipient? A. No. What we’re advising the case managers
 21 to do is to redirect clients back to the medical provider that they have already been connected to or to
 22 connect them — if they haven’t yet been connected — to a medical provider, and to have the client
 23 understand that those are the kind of conversations and discussions that need to be held between the
 24 client and the medical provider.”).

25 ¹⁰⁷ HHS Rule 30(b)(6) Dep. (Chon) – ECF No. 120-1 at 106–08, 112–13 (pp. 132–34, 162–63)
 26 (“Q. Okay. Do you recall any cases during the implementation of the 2015 grant where a trafficking
 27 survivor requested access to abortion or contraception, and a subgrantee refused to provide on
 28 religious grounds? A. No, I’m not aware. . . . Q. . . . Do you recall a circumstance in which a
 beneficiary requested access to abortion and contraception and had issues accessing abortion or
 contraception because of a subgrantee’s objection to providing those services? A. No. . . . Q. Okay.
 Are you aware of any trafficking victim being provided care by a TVAP grantee who sought
 contraception but was unable to obtain it due to the religious beliefs of the grantee? A. Not to my
 knowledge. Q. Are you aware of any trafficking victim being provided care by a TVAP grantee who
 sought an abortion but was unable to obtain it due to the religious beliefs of the grantee? A. Not to my
 knowledge.”); *accord* ACLU 2d Amend. Interrog. Resps. – ECF No. 116-1 at 62 (“At this time,
 Plaintiff has not identified particular trafficking victims who have been prevented from obtaining
 contraceptives because of USCCB’s policies. . . . As of now, Plaintiff has not identified particular
 trafficking victims who have been prevented from obtaining abortion because of USCCB’s policies.”).

1 a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for
2 the non-moving party. *Id.* at 248–49.

3 The party moving for summary judgment bears the initial burden of informing the court of the
4 basis for the motion, and identifying portions of the pleadings, depositions, answers to
5 interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material
6 fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To meet its burden, “the moving party
7 must either produce evidence negating an essential element of the nonmoving party’s claim or
8 defense or show that the nonmoving party does not have enough evidence of an essential element
9 to carry its ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz*
10 *Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000); *see Devereaux v. Abbey*, 263 F.3d 1070, 1076
11 (9th Cir. 2001) (“When the nonmoving party has the burden of proof at trial, the moving party
12 need only point out ‘that there is an absence of evidence to support the nonmoving party’s case.’”) (quoting *Celotex*, 477 U.S. at 325).

13
14 If the moving party meets its initial burden, the burden then shifts to the non-moving party to
15 produce evidence supporting its claims or defenses. *Nissan Fire & Marine*, 210 F.3d at 1103. The
16 non-moving party may not rest upon mere allegations or denials of the adverse party’s evidence,
17 but instead must produce admissible evidence that shows there is a genuine issue of material fact
18 for trial. *See Devereaux*, 263 F.3d at 1076. If the non-moving party does not produce evidence to
19 show a genuine issue of material fact, the moving party is entitled to summary judgment. *See*
20 *Celotex*, 477 U.S. at 323.

21 In ruling on a motion for summary judgment, the court does not make credibility
22 determinations or weigh conflicting evidence. Instead, it views the evidence in the light most
23 favorable to the non-moving party and draws all factual inferences in the non-moving party’s
24 favor. *E.g., Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986);
25 *Ting v. United States*, 927 F.2d 1504, 1509 (9th Cir. 1991).

1 **ANALYSIS**

2 The three-pronged test articulated in the Supreme Court’s decision in *Lemon v. Kurtzman*, 403
 3 U.S. 602 (1971), remains the dominant mode of Establishment Clause analysis. *Freedom From*
 4 *Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1149 (9th
 5 Cir. 2018) (citing *Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286,
 6 1299 n.7 (9th Cir. 2015)). To avoid violating the Establishment Clause, (1) a government practice
 7 “must have a secular legislative purpose,” (2) “its principal or primary effect must be one that
 8 neither advances nor inhibits religion,” and (3) “it must not foster ‘an excessive entanglement with
 9 religion.’” *Id.* (internal brackets omitted) (quoting *Lemon*, 403 U.S. at 612–13). “Context is critical
 10 when evaluating the government’s conduct.” *Id.*

11
 12 **1. Secular Purpose**

13 The legislative purposes underlying the UACP and the TVAP, and the government’s grant
 14 awards to the Bishops Conference to provide UACP and TVAP services, satisfy the first prong of
 15 the *Lemon* test. The ACLU concedes that the UACP and the TVAP as a whole have secular
 16 purposes,¹⁰⁸ and there is no evidence in the record that the government’s UACP or TVAP grants to
 17 the Conference were made for any non-secular purpose.¹⁰⁹

18
 19 **2. Principal or Primary Effect of Advancing Religion**

20 **2.1 Grants to Religious Organizations**

21 The ACLU acknowledges that the mere fact that a religiously affiliated organization like the
 22 Bishops Conference receives government grants, without more, does not have the principal or
 23 primary effect of advancing religion.¹¹⁰ The Supreme Court’s decision in *Bowen v. Kendrick*, 487

24
 25 _____
 25 ¹⁰⁸ ACLU Reply – ECF No. 124 at 16–17.

26 ¹⁰⁹ See *supra* notes 21–22, 96–97.

27 ¹¹⁰ ACLU Reply – ECF No. 124 at 25 (“Plaintiff has never taken the position in this litigation or in the
 28 *ACLU of Massachusetts v. Sebelius* litigation that USCCB or other religiously affiliated entities should
 be prohibited from receiving grants.”).

1 U.S. 589 (1988), is instructive on this point. That case involved a statutory government program
 2 that provided grants to organizations for services and research in the area of adolescent sexual
 3 relations and pregnancy. *Id.* at 593. Both religious and secular organizations were eligible to apply
 4 for and receive government grant funding. *Id.* at 608. The statute was neutral with respect to
 5 applicants’ religious or secular statuses. *Id.* The Supreme Court held that the fact that religious
 6 institutions were allowed to participate as recipients of federal funds, without more, did not violate
 7 the Establishment Clause. *Id.* at 608, 613 (“The facially neutral projects authorized by the [Act] —
 8 including pregnancy testing, adoption counseling and referral services, prenatal and postnatal care,
 9 educational services, residential care, child care, consumer education, etc. — are not themselves
 10 ‘specifically religious activities,’ and they are not converted into such activities by the fact that
 11 they are carried out by organizations with religious affiliations.”). The Court declined to adopt an
 12 argument that the government’s funding of a religious organization creates a per se “symbolic
 13 link” between government and religion where the government funding is used solely for secular
 14 purposes. *Id.* at 613–14.¹¹¹

15 The fact that religiously affiliated organizations like Bishops Conference received government
 16 UACP and TVAP funding, standing alone, does not establish that the government’s actions had
 17 the principal or primary effect of advancing religion.

21 ¹¹¹ The Supreme Court noted that a neutral statute could nonetheless have the effect of advancing
 22 religion if government funding, even if designated for specific secular purposes, flowed to an
 23 institution that is “pervasively sectarian,” i.e., “. . . an institution in which religion is so pervasive that
 24 a substantial portion of its functions are subsumed in the religious mission.” *Bowen*, 487 U.S. at 609–
 25 10 (internal ellipsis omitted) (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)). Organizations
 26 whose purpose is “to advance their particular religions” are “pervasively sectarian.” *Agostini v. Felton*,
 27 521 U.S. 203, 218 (1997). But it is not enough to show that an organization “is affiliated with a
 28 religious institution” or that it is “religiously inspired” to show that it is “pervasively sectarian.”
Bowen, 487 U.S. at 621. The fact that an organization might have explicit corporate ties to a particular
 religious faith and by-laws or policies that prohibit any deviation from religious doctrine are relevant
 but not conclusive to the question of whether an organization is “pervasively sectarian.” *Id.* at 620
 n.16. Rather, the Court indicated, a pervasively sectarian organization is one whose secular purpose
 and religious mission are “inextricably intertwined.” *Id.* The ACLU does not argue here, and does not
 identify evidence to support, that the Bishops Conference is “pervasively sectarian.”

1 **2.2 Endorsement of Religious Beliefs**

2 The ACLU argues that the government violates the Establishment Clause when it goes beyond
3 being neutral and “convey[s] or attempt[s] to convey a message that religion or a particular
4 religious belief is *favored or preferred*.”¹¹² The ACLU asserts that the government, in entering
5 into grant agreements with the Bishops Conference despite the Conference’s religious objections
6 to abortion and contraception services, has effectively endorsed the Conference’s religious
7 views.¹¹³

8 “Governmental action has the primary effect of advancing or disapproving of religion” — and
9 thus fails the second prong of the *Lemon* test — “if it is ‘sufficiently likely to be perceived by
10 adherents of the controlling denominations as an endorsement, and by the nonadherents as
11 disapproval, of their individual religious choices.’ . . . from the point of view of a reasonable
12 observer who is ‘informed and familiar with the history of the government practice at issue.’”
13 *Vasquez v. Los Angeles Cty.*, 487 F.3d 1246, 1256 (9th Cir. 2007) (internal brackets and ellipsis
14 omitted) (quoting *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1378 (9th Cir.
15 1994)). The government’s grant relationship and interactions with the Bishops Conference in the
16 record in this litigation are not sufficiently likely to be perceived as an endorsement of the
17 Conference’s religious beliefs.

18 If anything, the government acted in a manner that is in opposition to the Conference’s
19 religious beliefs. The Conference has a moral and religious objection to abortion. In the UACP,
20 the government took affirmative steps to transfer unaccompanied minors who wanted abortions to
21 other UACP shelters that did not have objections to abortion and appears to have arranged for
22 every such minor to have access to abortion services.¹¹⁴ A reasonable observer would not view the
23 government’s taking affirmative steps to facilitate access to abortion as an endorsement of the
24

25 _____
26 ¹¹² ACLU Mot. – ECF No. 116 at 16 (emphasis in original) (quoting *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989)).

27 ¹¹³ ACLU Reply – ECF No. 124 at 20–21.

28 ¹¹⁴ See *supra* notes 28–30.

1 Conference’s anti-abortion religious beliefs. Similarly, in the TVAP, the government told the
 2 Conference that the various religious provisions that the Conference had proposed to include in its
 3 subgrant agreements did not comply with government requirements and made the Conference
 4 remove them.¹¹⁵ A reasonable observer would not view the government’s requirement that the
 5 Conference remove religious requirements as an endorsement of the Conference’s religious
 6 beliefs.

7 **2.3 Delegation of Governmental Functions**

8 The ACLU argues that “delegating a government function to a religious entity
 9 unconstitutionally advances religion.”¹¹⁶ The ACLU asserts that the government delegated to the
 10 Bishops Conference (1) “the ability to determine which health services unaccompanied minors are
 11 permitted to access” in the UACP, and (2) “the ability to create its own network of subgrantees,
 12 and . . . to select those subgrantees based on their shared religious opposition to providing and
 13 referring to abortion and contraception, and to prohibit those subgrantees from using grant funds
 14 to pay for abortion counseling and services and abortive prescriptions” in the TVAP.¹¹⁷ The
 15 ACLU’s assertions are not supported by the evidence in the record.

16 **2.3.1 The UACP and the purported ability to determine which health services 17 unaccompanied minors are permitted to access**

18 The record does not support the ACLU’s assertion that the government delegated to the
 19 Bishops Conference the ability to determine which health services, including abortion or
 20 contraception services, that unaccompanied minors are permitted to access. To the contrary, the
 21 record shows that (1) if unaccompanied minors wanted access to abortion services to which the
 22 Conference or its subgrantees objected on religious grounds, the government transferred them to
 23 other shelters where they could access those services, and (2) if unaccompanied minors wanted
 24 access to contraception services, they could obtain them directly from their medical providers
 25

26 ¹¹⁵ See *supra* notes 80–93.

27 ¹¹⁶ ACLU Mot. – ECF No. 116 at 19.

28 ¹¹⁷ *Id.* at 20.

1 without the involvement of or denial by the Conference or its subgrantees.¹¹⁸ There is no evidence
 2 in the record that any unaccompanied minor was denied access to any abortion or contraception
 3 services or that the government delegated to the Bishops Conference any power to determine
 4 whether or not unaccompanied minors would have access to any services.¹¹⁹

5 **2.3.2 The TVAP and the purported ability to select subgrantees based on shared**
 6 **religious views and to prohibit subgrantees from using grant funds to pay for**
 7 **abortion services**

8 The record does not support the ACLU’s assertion that the government delegated to the
 9 Bishops Conference the ability to prohibit TVAP subgrantees from using grant funds to pay for
 10 abortion counseling and services and abortive prescriptions. The government did not delegate to
 11 the Conference the ability to prohibit subgrantees from using grant funds to pay for services such
 12 as abortion or contraception. Instead, the government required the Conference to agree to “refrain
 13 from including any language in any program-related documents, including sub-agreements,
 14 limiting the ability of subcontractors to provide any services, as provided in the TVAP FOA, for
 15 which victims are eligible.”¹²⁰

16 The Bishops Conference’s alleged power to prohibit TVAP subgrantees from using grant
 17 funds to pay for certain services is further limited by the presence of the other two secular TVAP
 18 grantees, Tapestri and USCRI. At most, the Conference has the ability to select or veto the
 19 organizations that serve as its subgrantees. The Conference does not have the ability to select or
 20 veto organizations that serve as TVAP subgrantees generally, or to control the TVAP funding
 21 those organizations receive or what services they provide. Subgrantees with views that run
 22 contrary to the Conference’s religious beliefs can enter into subgrant agreements with Tapestri and
 23

24 _____
 25 ¹¹⁸ See *supra* notes 26–29, 61–64.

26 ¹¹⁹ See *supra* notes 30, 65.

27 ¹²⁰ See *supra* notes 94–95. The government itself prohibited all TVAP grantees (religious and secular)
 28 from using TVAP funds for certain services, including for abortions other than in the case of rape,
 incest, or where the woman’s life is in danger, *see supra* notes 71–72, but that was a government
 decision that involved no delegation of a governmental function to a religious organization.

1 USCRI.¹²¹ The Conference thus cannot prevent subgrantees from receiving TVAP funding or
2 providing services that the Conference might oppose.¹²²

3 This distinguishes the government’s arrangement here from the arrangement in *ACLU of*
4 *Massachusetts I*. There, the Bishops Conference was the only TVAP grantee. The Conference thus
5 could exercise the government’s full power to exclude certain subgrantees and services from
6 receiving any TVAP government funding at all. The District of Massachusetts held that this was
7 an unconstitutional delegation of a governmental function to a religious organization. *See ACLU*
8 *of Mass. I*, 821 F. Supp. 2d at 487 (“[T]he government defendants’ delegation of authority to the
9 USCCB to exclude certain services from government funding ‘provides a significant symbolic
10 benefit to religion,’ in violation of the Establishment Clause.”). Here, by contrast, the Conference
11 cannot exclude subgrantees or services from government funding.

12 *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116 (1982), another case the ACLU cites, is
13 distinguishable for the same reason. That case involved a law that gave churches an unqualified
14 right to veto liquor-license applications for any premise located within 500 feet of the church. *Id.*
15 at 117. The Supreme Court held that the law was unconstitutional, as the “power to veto certain
16 liquor license applications . . . is a power ordinarily vested in agencies of the government,” and
17 delegation of that power to churches — which could employ that power “for explicitly religious
18

19 ¹²¹ *See supra* note 103.

20 ¹²² While not dispositive, it is worth noting that the government provided USCRI with more TVAP
21 funding than it did the Bishops Conference for each of fiscal years 2015, 2016, and 2017, *supra* notes
22 78–79, and the Conference has no control over how USCRI might allocate its funding.

23 The ACLU argues that the Bishops Conference has the highest reimbursement rate of the three
24 grantees, and thus that “prospective subgrantees that are prohibited from subcontracting with USCCB
25 because they do not share USCCB’s religious beliefs are penalized.” ACLU Mot. – ECF No. 116 at 18
26 (citing HHS Rule 30(b)(6) Dep. (Chon) – ECF No. 116-1 at 165 (p. 157)). The parties do not
27 definitively articulate how the three TVAP grantees’ reimbursement rates are set. It appears that each
28 grantee determines its own reimbursement rates. *See* HHS Rule 30(b)(6) Dep. (Chon) – ECF No.
116-1 at 165 (p. 157). It also appears that reimbursement rates to subgrantees differ based on differing
levels of service. *See* Bishops Conf. Rule 30(b)(6) Dep. (Chester) – ECF No. 116-1 at 244 (p. 52).
There is nothing in the record that suggests that the Conference has any control over setting Tapestri’s
or USCRI’s reimbursement rates. This record, and the record of the government’s requiring the
Conference not to include any language in subgrant agreements limiting the services that subgrantees
can provide, cannot be fairly characterized as the government’s delegating to the Conference the
power to “penalize” subgrantees who do not share the Conference’s religious views.

1 goals, for example, favoring liquor licenses for members of that congregation or adherents of that
 2 faith” — violated the Establishment Clause. *Id.* at 122, 125–26. Here, by contrast, the Conference
 3 has no similar veto power over what organizations can be TVAP subgrantees, what funding they
 4 might receive, or what services they might provide.¹²³

5 **2.4 Harm to Third Parties**

6 The ACLU argues that the government violates the Establishment Clause when it “authoriz[es]
 7 religiously affiliated grantees to impose their faith on marginalized populations in the context of a
 8 government program.”¹²⁴ Citing the examples of Rosa, Maria, Michelle, and Zoe, the ACLU
 9 argues that (1) the Bishops Conference’s objections to abortion has resulted in a “marginalized
 10 population” of unaccompanied minors having to be transferred away from faith-based shelters,
 11 and (2) these transfers have imposed harms on the minors, such as delays in receiving abortion
 12 services, the loss of connections with family members, attorneys, social workers, and others at the
 13 original shelter location, and shame and stigma.¹²⁵ This argument fails because the ACLU lacks
 14 standing to advance a claim based on the harms imposed on unaccompanied minors.

17 ¹²³ The ACLU’s citation to *Board of Education of Kiryas Joel School District v. Grumet*, 512 U.S. 687
 18 (1994), does not change that outcome. That case involved an ad hoc “special” statute passed by the
 19 New York State Legislature that delegated the powers to control a school district to a village populated
 20 by “vigorously religious” residents. *Id.* at 691, 693. The issue there was less the village’s exercise of
 21 the power to control the school district, as opposed to the government’s ad hoc decision to delegate
 22 this power to this one religiously dominated village, without providing any assurances that the
 23 government would treat other future groups the same way. *See id.* at 703 (“[W]hereas in *Larkin* it was
 24 religious groups the Court thought might exercise civic power to advance the interests of religion (or
 25 religious adherents), here the threat to neutrality occurs at an antecedent stage. The fundamental source
 26 of constitutional concern here is that the legislature itself may fail to exercise governmental authority
 27 in a religiously neutral way. The anomalously case-specific nature of the legislature’s exercise of state
 28 authority in creating this district for a religious community leaves the Court without any direct way to
 review such state action for the purpose of safeguarding a principle at the heart of the Establishment
 Clause, that government should not prefer one religion to another, or religion to irreligion. Because the
 religious community of Kiryas Joel did not receive its new governmental authority simply as one of
 many communities eligible for equal treatment under a general law, we have no assurance that the next
 similarly situated group seeking a school district of its own will receive one”) (internal citation
 omitted). Here, there is no evidence that the government engaged in any ad hoc decision to favor the
 Bishops Conference over any other grant applicant.

¹²⁴ ACLU Mot. – ECF No 116 at 17.

¹²⁵ *Id.*

1 To establish standing, “[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly
2 traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a
3 favorable judicial decision.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v.*
4 *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). “It requires allegations — and, eventually, proof
5 — that the plaintiff ‘personally’ suffered a concrete and particularized injury in connection with
6 the conduct of which he complains.” *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018) (internal
7 brackets omitted) (citing *Spokeo*, 136 S. Ct. at 1547–48). “In a case arising from an alleged
8 violation of the Establishment Clause, a plaintiff must show, as in other cases, that [it] is ‘directly
9 affected by the laws and practices against which [its] complaints are directed.’” *Id.* (quoting *Sch.*
10 *Dist. v. Schempp*, 374 U.S. 203, 224 n.9 (1963)).

11 The ACLU has not suffered a concrete and particularized injury and is not directly affected by
12 the practice of transferring unaccompanied minors or trafficking victims. The ACLU is not itself
13 an unaccompanied minor or trafficking victim (and does not represent any unaccompanied minor
14 or trafficking victim in this case). It thus does not have standing to bring a claim for any injuries
15 that unaccompanied minors or trafficking victims might have suffered (e.g., injuries from any
16 purported delays in receiving abortions) that it did not suffer itself.

17 The only injuries the ACLU alleges in this case that it suffered itself were putative injuries
18 borne in capacity as a taxpayer. *ACLU of N. Cal. v. Burwell*, No. 16-cv-03539-LB, 2016 WL
19 6962871, at *1 (N.D. Cal. Nov. 29, 2016) (*ACLU of N. Cal. I*); *ACLU of N. Cal. v. Burwell*, No.
20 16-cv-03539-LB, 2017 WL 4551492, at *1 (N.D. Cal. Oct. 11, 2017) (*ACLU of N. Cal. II*).¹²⁶ The
21 Supreme Court “explain[ed] that individuals suffer a particular injury for standing purposes when,
22 in violation of the Establishment Clause and by means of ‘the taxing and spending power,’ their
23 property is transferred through the Government’s Treasury to a sectarian entity.” *Ariz. Christian*
24 *Sch. Tuition Org. v. Winn*, 563 U.S. 125, 139–40 (2011) (citing *Flast v. Cohen*, 392 U.S. 83, 105–

25

26

27

28

¹²⁶ Orders – ECF Nos. 25, 102; see FAC – ECF No. 57 at 5 (¶ 11), 21–22 (¶¶ 76–77, 80).

1 06 (1968)).¹²⁷ “[T]he ‘injury’ alleged in [taxpayer] Establishment Clause challenges to federal
2 spending [is] the very ‘extraction and spending’ of ‘tax money’ in aid of religion[.]” *Id.* at 140
3 (internal brackets omitted) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 348 (2006)). A
4 taxpayer can bring an Establishment Clause claim if there is “a resulting subsidy of religious
5 activity . . . traceable to the government’s expenditures.” *Id.* at 143. There is nothing in the record
6 here that supports that there was a subsidy of religious activity traceable to the government’s
7 spending of taxpayer dollars.

8 The record here shows that the government’s UACP and TVAP grant money was used to
9 provide general secular care services to unaccompanied minors and that no government money
10 was used for proselytization, religious education, religious facilities, religious items, religious
11 literature, or other religious activity.¹²⁸ There is no evidence that the ACLU, or any taxpayer, was
12 forced to monetarily subsidize the Bishops Conference’s religious beliefs. To the extent that the
13 Conference declined to provide unaccompanied minors with access to abortion or contraception
14 services, it did not use any government tax money to do so, and thus its actions are not properly
15 the subject of a taxpayer-standing suit. *See Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 794
16 (9th Cir. 1999) (en banc) (“Taxpayer standing protects against only one type of injury, namely the
17 ‘misuse of public funds.’ If a plaintiff identifies no public funds that were spent solely on the
18 challenged activity, then the plaintiff has not alleged a taxpayer injury.”) (citations omitted). To
19 the extent the government then had to spend additional taxpayer money to transfer unaccompanied
20 minors to non-Conference-affiliated shelters in order to provide unaccompanied minors with
21 access to abortion and contraception services, such money did not subsidize religious activity. To
22 the contrary, that additional money was money used to achieve an outcome in opposition to the
23 Conference’s religious views.

24
25
26 ¹²⁷ The *Flast* taxpayer-standing doctrine for cases involving Establishment Clause claims is a “narrow
27 exception” to the general rule that “[a]bsent special circumstances, . . . standing cannot be based on a
28 plaintiff’s mere status as a taxpayer.” *Winn*, 563 U.S. at 134, 138.

¹²⁸ *See supra* notes 22, 97.

1 The court expresses no opinion about whether an unaccompanied minor who may have
 2 suffered harm from being transferred or being delayed abortion services might be able to bring a
 3 claim. *Cf. Winn*, 563 U.S. at 145 (“[I]f a law or practice . . . disadvantages a particular religious
 4 [party] or a particular nonreligious [party], the disadvantaged party would not have to rely on *Flast*
 5 [taxpayer standing] to obtain redress for a resulting injury. . . . If an establishment of religion is
 6 alleged to cause real injury to particular individuals, the federal courts may adjudicate the
 7 matter.”). But the ACLU cannot fit an unaccompanied minor’s challenge to harm she suffered into
 8 a taxpayer-standing suit. Because there is no evidence that government tax money has been used
 9 to subsidize religion, the ACLU’s third-party-harm theory fails and cannot serve as the basis for
 10 the its Establishment Clause claim.¹²⁹

11 12 **3. Excessive Entanglement With Religion**

13 The Supreme Court has held that “grant monitoring” by the government of programs set up by
 14 recipients of federal grants, including “a review of . . . materials that a grantee proposes to use” or
 15 “hav[ing] Government employees visit the clinics or offices where [the grantee’s] programs are
 16 being carried out to see whether they are in fact being administered in accordance with statutory
 17 and constitutional requirements. . . . does not amount to ‘excessive entanglement,’ at least in the

18 _____
 19 ¹²⁹ At the motion-to-dismiss stage, the court allowed the ACLU’s taxpayer-standing claim to go
 20 forward because the factual record was still unclear. For example, at the pleading stage, it was not
 21 clear whether the government’s awarding of grants was intended to benefit religious organizations. *See*
 22 *ACLU of N. Cal. I*, 2016 WL 6962871, at *10. At summary judgment, however, the ACLU must
 23 support its taxpayer-standing claim with evidence that tax money was used to subsidize religion. *See*
 24 *Trump*, 138 S. Ct. at 2416. This it has failed to do.

25 The cases the ACLU cites in support of its “harm to third parties” theory are inapposite. Each case
 26 involved a party that was directly affected by the government practice at issue. *Cf. Larkin*, 459 U.S. at
 27 117–18 (involving a restaurant whose liquor license was denied under a government law that gave
 28 churches and schools the right to veto applications); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 6 (1989)
 (plurality op.) (involving a magazine publisher whose magazines were subject to a sales tax that the
 government imposed on secular but not religious periodicals); *Estate of Thornton v. Caldor, Inc.*, 472
 U.S. 703, 705–06 (1985) (involving an employer whose employee refused to work on Sundays, citing
 a government Sabbath law); *ACLU of N.J. v. Black Horse Pike Reg’l Bd. of Educ.*, 84 F.3d 1471, 1475
 (3d Cir. 1996) (en banc) (involving a student at a public high school regarding prayer at his school’s
 graduation ceremony). The cases were not taxpayer-standing suits. The court expresses no opinion
 about whether those cases support an unaccompanied minor’s claim about direct harm, but they do not
 support the taxpayer-standing claim that the ACLU advances here.

United States District Court
Northern District of California

1 context of a statute authorizing grants to religiously affiliated organizations that are not necessarily
2 ‘pervasively sectarian.’” *Bowen*, 487 U.S. at 616–17.

3 The ACLU points to no evidence in the record and makes no real argument that the
4 government’s grant relationship and interactions with the Bishops Conference fosters an excessive
5 entanglement with religion. To the extent that the government had to monitor the Conference to
6 review whether it was acting in compliance with statutory and constitutional requirements, there is
7 no evidence that it rose to the level of fostering excessive entanglement.

8 * * *

9 As the undisputed evidence presented to the court in this case shows that all three *Lemon*
10 factors were satisfied with respect to the UACP and the TVAP, summary judgment for the
11 defendants is appropriate.¹³⁰

12
13 **CONCLUSION**

14 The court denies the ACLU’s motion for summary judgment and grants the defendants’ cross-
15 motions for summary judgment.

16
17 **IT IS SO ORDERED.**

18 Dated: October 11, 2018



19
20 LAUREL BEELER
United States Magistrate Judge

21
22
23
24
25
26
27 ¹³⁰ In light of this determination, it is unnecessary to reach the Bishop Conference’s arguments about
28 religious accommodation or the Religious Freedom Restoration Act.