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21 **UNITED STATES DISTRICT COURT**
22 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
23 **SAN FRANCISCO DIVISION**

24 AMERICAN CIVIL LIBERTIES UNION
25 OF NORTHERN CALIFORNIA

26 Plaintiff,

27 v.

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

Defendants,

v.

U.S. CONFERENCE OF CATHOLIC
BISHOPS,

Defendant-Intervenors.

Case No. 3:16-cv-3539-LB

**PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AND MEMORANDUM IN
SUPPORT**

Date: August 9, 2018

Time: 9:30 a.m.

Courtroom: 15th Fl., Courtroom C

Judge: Hon. Laurel Beeler

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1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **NOTICE OF MOTION**

3 PLEASE TAKE NOTICE that on August 9, 2018, at 9:30 a.m., or as soon thereafter as the
4 matter can be heard, before the Honorable Laurel Beeler at the San Francisco Courthouse,
5 Courtroom C, 450 Golden Gate Avenue, 17th Floor, San Francisco, California, 94102, Plaintiff
6 American Civil Liberties Union of Northern California will and hereby does move for summary
7 judgment under Rule 56 of the Federal Rules of Civil Procedure. Through this motion, Plaintiff
8 seeks a declaration from the Court that Defendants have violated the Establishment Clause of the
9 Constitution by authorizing taxpayer-funded entities to interfere with access to reproductive
10 health care for marginalized populations, and Plaintiff seeks a permanent injunction prohibiting
11 such conduct.

12 This motion is based on this Notice of Motion; the attached Memorandum of Points and
13 Authorities and materials cited therein; the Declaration of Brigitte Amiri in Support of Plaintiff's
14 Motion for Summary Judgment; the concurrently filed evidentiary materials, oral argument of
15 counsel, and such other materials and argument as may be presented in connection with the
16 hearing on the motions.¹

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27 ¹ For efficiency, Plaintiff refers to "Defendants" throughout as shorthand for government
28 Defendants, and "USCCB" for Defendant-Intervenor United States Conference of Catholic
Bishops.

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13 *Larkin v. Grendel’s Den, Inc.*,
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15 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
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16 *Santa Fe Indep. Sch. Dist. v. Doe*,
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24 22 U.S.C. § 7105(b)(1), (b)2), (b)(6), (b)(11) 7

25 22 U.S.C. § 7105(b)(1)(A) 8

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 3 Pub. L. No. 115-31 2, 8

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 9 American Bar Association Commission on Immigration, *Standards for the Custody,
 Placement and Care; Legal Representative; and Adjudication of Unaccompanied
 10 Alien Children in the United States*, August 2004 available at
[https://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocume
 11 nts/Immigrant_Standards.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/Immigrant_Standards.authcheckdam.pdf). 5
 12 *Children Entering the United States Unaccompanied*, available at
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 14 USCCB Trafficking Victim Assistance Program, About the TVAP, available at
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1 **I. INTRODUCTION**

2 Defendants have violated the Establishment Clause by using taxpayer dollars to advance
3 religion to the detriment of two extremely vulnerable populations. Defendants are legally
4 obligated to provide access to services—including reproductive health care—to minors who come
5 to the United States without their parents, and to trafficking survivors in the United States. Both
6 populations experience some of the most horrific conditions imaginable. Unaccompanied minors
7 are often fleeing abuse or violence in their home country, and many are sexually assaulted on the
8 journey to the United States. Trafficking survivors have endured forced labor and/or been forced
9 into the sex trade. Both populations have an acute need for access to medical care, which
10 Defendants are obligated to provide.

11 Rather than providing care directly to these populations, Defendants provide multi-million
12 dollar grants to private entities to do so. Some of these grantees are religiously affiliated
13 organizations that oppose abortion and contraception on religious grounds. Merely providing a
14 grant to a religiously affiliated entity would not necessarily run afoul of the Establishment Clause.
15 But here, Defendants have authorized these grantees to impose their faith on unaccompanied
16 minors and trafficking survivors in a way that causes the minors and survivors real harm. For
17 example, Defendants allow religiously affiliated shelters to kick minors out of their programs for
18 merely requesting abortion, which means that the minors are uprooted from their only support
19 system in this country. Similarly, Defendants authorize Defendant-Intervenor U.S. Conference of
20 Catholic Bishops (“USCCB”) to select subgrantees for the federal trafficking program based on
21 the subgrantees’ opposition to abortion and contraception, and further allow USCCB to prohibit
22 its subgrantees from using grant funds to pay for abortion.² This means that both unaccompanied
23 minors and trafficking survivors will not be able to obtain access to the full range of reproductive
24 health care that they are legally entitled to receive unless they are also uprooted and transferred to
25 different programs run by entities that do not have a religious objection to abortion and
26 contraception.

27 _____
28 ² Were it not for this restriction, federal funds could be used to pay for abortion in the case of rape, incest or life
endangerment. *See* Consolidated Appropriations Act, 2017, Pub. L. No. 115-31 §§ 506-507.

1 Defendants' actions violate the Establishment Clause in two ways. First, Defendants have
2 impermissibly advanced religion while harming the beneficiaries of federal programs in violation
3 of well-settled Supreme Court precedent. Second, Defendants have delegated to religious entities
4 the ability to dictate which services will be provided to vulnerable populations, allowing them to
5 effectively override existing law that mandates access to medical care. Accordingly, this Court
6 should grant Plaintiff's motion, and permanently enjoin Defendants from furthering religion with
7 taxpayer dollars.

8 **II. ISSUE PRESENTED**

9 Is the federal government violating the Establishment Clause of the First Amendment to
10 the Constitution by granting millions of taxpayer dollars to religiously affiliated entities, and
11 authorizing them to impose their religious beliefs on marginalized grant beneficiaries by
12 restricting access to critical reproductive health care?

13 **III. STATEMENT OF FACTS**

14 **A. Unaccompanied Immigrant Minors' Program**

15 There are thousands of unaccompanied immigrant minors (also referred to as
16 unaccompanied children ("UC")) in the legal custody of the federal government, many of whom
17 have been abused or tortured in their home countries, or trafficked for labor or prostitution, and
18 separated from their families. Defs.' Answer to Pl.'s Am. Compl., ECF No. 60, (hereinafter
19 "Defs.' Answer") ¶ 1. Congress charged Defendants with providing care to these young people
20 after they are detained in the U.S. *See* 8 U.S.C. § 1232(b)(1). To do this, Defendants provide
21 millions of dollars in taxpayer funds to private entities, including religiously affiliated entities
22 such as USCCB and its subgrantee shelters (\$10,702,218 in FY 2017); various Catholic Charities
23 (over \$19 million collectively in FY 2017); His House (\$11,458,899 in FY 2017); and Youth for
24 Tomorrow (\$12,251,684 in FY 2017). Defs.' Answer ¶ 3; *id.* ¶ 26; Defs.' Suppl. Resp. to Pl.'s
25 First Set of Int. No. 8 (attached as Ex. A to the Declaration of Brigitte Amiri in Support of
26 Plaintiff's Motion for Summary Judgment (hereinafter "Amiri Dec.")).

27 Defendants are statutorily required to "ensur[e] that the interests of the child are
28

1 considered in decisions and actions relating to the care and custody of an unaccompanied
2 [immigrant] child.” 6 U.S.C. § 279(b)(1)(B). Defendants and their subgrantees are also required
3 to provide a certain level of care to UC pursuant to the settlement agreement in *Flores v. Reno*,
4 CV-85-4544-RKJ (Jan. 17, 1997), including providing or arranging for “appropriate routine
5 medical . . . care . . . family planning services [] and emergency health care services.”
6 Defendants’ subgrantees are also subject to Defendants’ regulations under the Prison Rape
7 Elimination Act (PREA), which requires them to provide “unimpeded access to . . . emergency
8 contraception” and access to abortion if a minor is a victim of sexual assault while in Defendants’
9 care. 45 C.F.R. § 411.92(a); *id.* § 411.93(d); Ex. A to Amiri Dec., No. 2. Defendants’ policies and
10 guidelines mirror the *Flores* agreement and PREA regulations. *See, e.g., Children Entering the*
11 *United States Unaccompanied*, 3.4 Medical Services (ORR provides access to “[f]amily planning
12 services, including . . . comprehensive information about and access to medical reproductive
13 health services and emergency contraception”).³ Furthermore, Defendants will pay for emergency
14 contraception for UC who are sexually assaulted while in ORR care; contraception for medical
15 indications; and abortion in the case of rape, incest, or life-endangerment.⁴ Defs.’ Resp. to Pl.’s
16 First Requests for Admission No. 9 (Ex. B to Amiri Dec.); White Dep. 25:2 – 26:18 (Ex. C to
17 Amiri Dec.).

18 As implicitly recognized by the sources cited above, unaccompanied minors need timely
19 access to reproductive health care, including access to abortion, especially given the high
20 incidence of rape during their journey. Amnesty International, *Invisible Victims*, at 15 (2010).⁵
21 Indeed, a minor will often discover she is pregnant during her initial medical exam while in
22 Defendants’ custody. Lloyd Dep. 60:15-22 (Ex. D to Amiri Dec.). But these minors are very
23 isolated, generally do not speak English, cannot leave the shelter on their own, and may not know
24 that abortion is a legal option in the United States. *See American Bar Association Commission on*

25 ³ Available at <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied>.

26 ⁴ In March 2017, ORR adopted a new policy designed to coerce pregnant minors who had requested abortions to
27 carry their pregnancies to term, and, if those coercion tactics failed, ORR prevented access to abortion altogether. On
28 March 30, 2018, a District of Columbia district court preliminarily enjoined that policy. *Garza v. Azar*, 1:17-cv-
02122-TSC (ECF No. 126).

⁵ Available at <https://fusiondotnet.files.wordpress.com/2014/09/amr410142010eng.pdf>.

1 Immigration, *Standards for the Custody, Placement and Care; Legal Representative; and*
2 *Adjudication of Unaccompanied Alien Children in the United States*, August 2004, Section II,
3 (noting that a large percentage of UCs “do not speak English and/or are of limited education” and
4 thus “require substantial assistance in understanding and asserting their rights”);⁶ Amiri Dec., Ex.
5 D at 102:10 – 103:25 (maintaining that a UC cannot be released from a shelter to obtain an
6 abortion on her own recognizance); Pl.’s Second Amended Resp. to USCCB’s First Set of Int.
7 No. 16 (Ex. E to Amiri Dec.).

8 Nevertheless, Defendants have delegated to religious entities the authority to dictate
9 which services they will provide to minors. Amiri Dec., Ex. B, No. 1. For example, Defendants
10 approved the Catholic Charities of the Archdiocese of Galveston-Houston’s application for a
11 three-year \$8 million grant, which stated: “Due to our religiously-affiliated institution’s
12 philosophy and policies, family planning practices are not discussed with clients . . . [i]n cases
13 where the pregnancy has been the result of a rape, the Clinical and Pregnancy Support Specialist .
14 . . . explor[e] the decision of whether to keep the baby or plan an adoption.” Defs.’ Answer ¶¶ 39–
15 40.

16 Similarly, Defendants have provided USCCB with more than \$25 million over the last
17 three fiscal years to care for unaccompanied minors. Amiri Dec., Ex. A, No. 8. In 2011, ORR
18 proposed language in USCCB’s cooperative agreement to ensure that minors would receive
19 access to reproductive health care, but capitulated to USCCB’s demand that it be removed due to
20 USCCB’s religious beliefs. That provision said:

21 Family planning services are already required by the Flores
22 settlement agreement . . . The grantees will refer female
23 [unaccompanied immigrant minors] to medical care providers who
24 can provide a broad range of acceptable and effective medically
25 approved family planning methods and services . . . [and] who offer
26 pregnant [unaccompanied minors] the opportunity to be provided
27 information and counseling regarding prenatal care and delivery . . .
28 and pregnancy termination.

27 ⁶ Available at
28 https://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/Immigrant_Standards.authcheckdam.pdf.

1 USCCB’s Answer to Pl.’s Amended Complaint, ECF. No. 59 (hereinafter “USCCB’s Answer”)
2 ¶¶ 33–34; Defs.’ Answer ¶¶ 33–35. After ORR awarded the grant to USCCB, USCCB entered
3 into a memorandum of understanding with its subgrantees that says that, based on the “authentic
4 teaching of the Catholic Church,” subgrantees may “not provide, refer, encourage, or in any way
5 facilitate access to contraceptives or abortion services.” USCCB’s Answer ¶ 37.

6 Furthermore, Defendants have explicitly authorized grantees to transfer out of their
7 program young women who have requested abortion. Defs.’ Answer ¶ 41; Amiri Dec., Ex. B,
8 Nos. 4, 5; *id.* Ex. D at 75:21 – 76:3. Indeed, Defendants admit that “when a UC requested
9 abortion services, and where the religiously-affiliated grantee or subgrantee had objections to
10 such services, the federal field specialist, in conjunction with the central office, effectuated the
11 transfer of the UC.” Amiri Dec., Ex. A, No. 3. Defendants have also made decisions about where
12 to place a young person based on whether she has had an abortion or is seeking an abortion, so as
13 not to place her with a shelter that has a religious objection to abortion. Defs.’ Answer ¶ 42.

14 Defendants’ actions cause minors harm. Defendants admit they authorize religiously
15 affiliated shelters to kick minors out of their programs for merely requesting an abortion, even if
16 that means that the minor is uprooted from her only support network such as her immigration
17 counsel, her social worker, and possibly her family with whom she is hoping to reunite. *See, e.g.*,
18 Amiri Dec., Ex. E, Nos. 17, 20–25, and accompanying FOIA documents,
19 ORRFOIA2015_000001–19 (Ex. F to Amiri Dec.); PRICE_PROD_000005875, 5880–82 (Ex. G
20 to Amiri Dec.).

21 These transfers also cause delay in access care. *See* Amiri Dec., Ex. F at
22 ORRFOIA2015_000005–7 (minor who had requested abortion before April 17 could not be
23 transferred to Florida because of shelters’ religious objections and had still not received care as of
24 April 28); *id.* at ORRFOIA2015_000008–13 (minor who had first expressed desire to explore
25 abortion on June 2 and did not wish to be transferred was delayed for weeks as Defendants
26 attempted to facilitate transfer amidst various shelters’ religious objections); *id.* at
27 ORRFOIA2015_000017–19 (minor who requested abortion on January 28 delayed through
28

1 February as Youth For Tomorrow shelter requested she be transferred). Time is of the essence in
2 accessing abortion: although abortion is very safe, the risk of complications increase as the
3 pregnancy progresses. *Williams v. Zbaraz*, 442 U.S. 1309, 1314–15 (1979) (Stevens, J., sitting as
4 Circuit Justice) (finding that increased risk of “maternal morbidity and mortality” associated with
5 delay of abortion supports claim of irreparable injury); *H.L. v. Matheson*, 450 U.S. 398, 412
6 (1981) (“[T]ime is likely to be of the essence in an abortion decision.”).

7 Furthermore, Defendants have made placement decisions based not on the minor’s best
8 interest—including where her family might be located—but instead on whether a particular
9 shelter does not have a religious objection to abortion. *See Amiri Dec.*, Exs. F and G. For
10 example, a minor whose family was in Florida could not be placed in a shelter in Florida near her
11 family because all of the shelters in the area had a religious opposition to abortion access. *See id.*,
12 Ex. F at ORRFOIA2015_000006–7.

13 **B. Trafficking Victims’ Program**

14 Human trafficking is a form of modern-day slavery. 22 U.S.C. § 7101(a). It is estimated
15 that tens of thousands of women and children are trafficked into the U.S. each year. *Id.* §
16 7101(b)(1). Many victims are trafficked into the sex trade and are forced to engage in sex acts,
17 raped, or subjected to other forms of sexual abuse. *Id.* § 7101(b)(2), (6). As a result, some
18 experience unintended pregnancy and may be at risk for sexually transmitted infections. *Id.* §
19 7101(b)(11); Defs.’ Answer ¶ 56. To rebuild their lives and re-establish their ability to live
20 independently, trafficking survivors need timely access to benefits and services, including
21 medical services such as STI and HIV-treatment, family planning services, and the full range of
22 legally permissible gynecological and obstetric care, which includes abortion and contraception.
23 ORR 2015 TVAP FOA, HHS-2015-ACF-ORR-ZV-0977, Chon Dep. Ex. 2, at 2–3 of 49 (Ex. H
24 to Amiri Dec.); Chon Dep. 43:21 – 45:16 (Ex. I to Amiri Dec.).

25 Pursuant to their responsibilities under the Trafficking Victims Protection Act (TVPA),⁷
26 22 U.S.C. § 7105(b)(1), Defendants operate the Trafficking Victim Assistance Program (TVAP),

27 _____
28 ⁷ The TVPA was reauthorized in 2003, 2005, 2008, and 2013. *See* Pub. L. No. 108-193; Pub. L. No. 109-164; Pub. L.
No. 110-457; Pub. L. No. 113-4.

1 through which they award private entities millions of dollars in taxpayer funds to provide
2 comprehensive case management services to trafficking survivors. Amiri Dec., Ex. A, No. 14; *id.*
3 Ex. I at 31:3 – 34:14. Defendants’ 2015 TVAP Funding Opportunity Announcement (FOA)
4 sought to fund organizations to provide such services, including “family planning services and the
5 full range of legally permissible gynecological and obstetric care.” Amiri Dec., Ex. H at 1–3 of
6 49. The FOA specified that survivor beneficiaries must receive the same level of benefits and
7 services as refugees, which includes access to contraception, as well as abortion in certain cases.
8 *Id.* at 1, 3 of 49; Amiri Dec., Ex. I at 32:14–24; 43:21 – 45:16; *see also* 22 U.S.C. §
9 7105(b)(1)(A); Consolidated Appropriations Act, 2017, Pub. L. No. 115-31 §§ 506–507
10 (Medicaid covers contraception and abortions in the case of rape, incest, and when the woman’s
11 life is in danger); 45 C.F.R. § 400.105 (refugee medical assistance must mirror state Medicaid
12 benefits).

13 USCCB submitted an initial proposal, making clear that it is “committed to acting in
14 accordance with Catholic teaching in administering the [TVAP] program,” and that “[USCCB’s]
15 sub-recipients will not provide or refer for abortion, sterilization, or artificial contraceptives, and
16 no project funds will be used for that purpose.” USCCB/MRS Proposal for TVAP, Chon Dep. Ex.
17 3, ACF_000105, ACF_000139 (Ex. J to Amiri Dec.); USCCB’s Answer ¶ 9.⁸ USCCB also
18 objected to assisting with visas for spouses of trafficking survivors unless “they are in a legal
19 union of one man and one woman.” *See* Amiri Dec., Ex. J at ACF_000100, n.2; USCCB’s
20 Answer ¶ 9. USCCB’s proposal outlined an “Alternative Approach,” under which USCCB,
21 through its subgrantees, would provide survivor beneficiaries with a brochure indicating the
22 services for which they are eligible and disclaiming that, “as a Catholic institution, [USCCB] will
23

24 ⁸ In 2006, Defendants awarded USCCB a multi-year, multi-million dollar TVAP contract. In
25 2012, a federal district court found that this contract violated the Establishment Clause. *ACLU of*
26 *Mass. v. Sebelius*, 821 F. Supp. 2d 474, 488 (D. Mass. 2012), *vacated sub nom. ACLU of Mass. v.*
27 *USCCB*, 705 F.3d 44 (1st Cir. 2013). During litigation, ORR issued a new FOA, and did not
28 select USCCB to receive a grant. Accordingly, the First Circuit dismissed the case as moot,
concluding that “we can safely assume that for the foreseeable future the challenged contract
terms will not recur.” *ACLU of Mass. v. USCCB*, 705 F.3d 44, 56 (1st Cir. 2013). Clearly,
Defendants did award a new TVAP contract to USCCB in the “foreseeable future,” necessitating
the instant action.

1 not directly assist in facilitating those specific procedures that are contrary to Catholic teaching:
2 abortion, sterilization, and artificial contraception.” Amiri Dec., Ex. J at ACF_000105.

3 Defendants asked USCCB to explain how its proposal would satisfy the FOA’s
4 requirements of ensuring that trafficking survivors both understand the full range of reproductive
5 health services available to them and are able to access those services in a timely and non-
6 burdensome manner. *See* September 2015 Email Exchange Re USCCB Alternative Approach,
7 Chon Dep. Ex. 4, USCCB00000528–29, 33, 37 (Ex. K to Amiri Dec.); September 2015 Email
8 Exchange Re USCCB Alternative Approach, Chon Dep. Ex. 5, USCCB00000979, 82 (Ex. L to
9 Amiri Dec.). USCCB responded that its brochure would “direct clients to consult with a medical
10 provider,” and that USCCB program guidance would require “that all clients [be] referred to
11 medical providers upon initial enrollment.” Amiri Dec., Ex. K at USCCB00000537. USCCB also
12 stated that if a subgrantee could not provide a service due to religious objection, USCCB would
13 contact other grantees and/or Defendants to facilitate a transfer of the client to another grantee. *Id.*
14 at USCCB00000530. But, there are some parts of the country in which a USCCB subgrantee is
15 the only provider of services, which means that a trafficking survivor could experience delays in
16 accessing the care she needs while a transfer is arranged, and would unnecessarily be uprooted
17 from her community. Chester Dep. 83:3-12 (Ex. M to Amiri Dec.); Amiri Dec., Ex. I at 59:1-17.

18 Defendants eventually awarded USCCB with a multi-million dollar contract to serve as
19 the primary grantee in two regions of the country, which include Arkansas, Louisiana, New
20 Mexico, Oklahoma, Texas, West Virginia, Virginia, Pennsylvania, Maryland, D.C. and Delaware.
21 *See* USCCB TVAP, About the TVAP, *available at* [http://www.usccb.org/about/anti-trafficking-](http://www.usccb.org/about/anti-trafficking-program/mrstvap.cfm)
22 [program/mrstvap.cfm](http://www.usccb.org/about/anti-trafficking-program/mrstvap.cfm); Amiri Dec., Ex. M at 12:12-19. Two other organizations also received
23 grants to provide services, primarily in other parts of the country.⁹ Amiri Dec., Ex. A, No. 15; *id.*,

24 _____
25 ⁹ In 2015, Defendants awarded USCCB a grant of over \$2 million dollars. Amiri Dec., Ex. A, No. 14; Defs.’ Answer
26 ¶ 66. In September 2016, Defendants renewed USCCB’s program contract and awarded it another \$1.6 million dollar
27 grant. *Id.* Defendants also renewed USCCB’s contract for FY17, but did not award USCCB any additional money for
28 that fiscal year. Amiri Dec., Ex. A, No. 14. USCCB instead used awards from FY15 and FY16 to carry out program
activities in FY16 and FY17. *Id.* This indicates that USCCB likely did not serve the projected number of trafficking
survivors. *See, e.g., id.* No. 16 (noting that funding amounts in subsequent years were based on, among other things,
“the number of individuals receiving services, updated projections on the number of individuals to be served, and

1 Ex. M at 11:13 – 12:15; *id.*, Ex I at 57:24 – 58:11.

2 Defendants have authorized USCCB to select its subgrantees, including allowing USCCB
3 to select subgrantees based on their religious opposition to abortion and contraception. Amiri
4 Dec., Ex. I at 65:12 – 67:23. All 28 subgrantees listed in USCCB’s 2015 proposal are either
5 Catholic Charities agencies, Bethany Christian Services, or are otherwise affiliated with the
6 Catholic Church. Amiri Dec., Ex. J, Appendix F, ACF_000138. And in implementing the
7 program, USCCB has turned away prospective subgrantees who do not share its religious
8 opposition to contraception and abortion. *Id.*, Ex. M at 51:4 – 56:23; 93:14 – 96:1. But it is
9 advantageous to be a USCCB subgrantee because USCCB has the highest reimbursement rate of
10 the three grantees. *Id.*, Ex. I at 157:23–25.

11 Defendants have also authorized USCCB to prevent its subgrantees from using grant
12 funding to pay for reproductive services to which they have a religiously based opposition.
13 Indeed, Defendants approved USCCB’s Program Operations Manual (POM) that provides sub-
14 recipients with direction on how funds may be used in the course of implementing the grant
15 program. Amiri Dec., Ex. M at 64:5 – 65:1; 88:3 – 91:21. The POM states: “This grantee is
16 affiliated with a program of the Catholic Church, which has moral and religious objections to
17 direct sterilization, contraception, and abortion.” USCCB FY2016 POM, Chester Dep. Ex. 14,
18 USCCB00000273 (Ex. N to Amiri Dec.). The POM further classifies “[a]bortion
19 counseling/services; abortive prescriptions” as an “unallowable” cost that will not be reimbursed
20 with federal grant money. *Id.* at USCCB00000301.

21 **IV. ARGUMENT**

22 A court “shall grant summary judgment if the movant shows that there is no genuine
23 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
24 Civ. P. 56(a). “Only disputes over facts that might affect the outcome of the suit . . . will properly
25 preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
26 (1986). When “the record taken as a whole could not lead a rational trier of fact to find for the

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28 consideration of supplemental requests”); *id.*, Ex. K at USCCB00000528; *id.*, Ex. L at USCCB00000979; *id.*, Ex. I at
72:10 – 74:11; 149:5 – 150:4.

1 nonmoving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith*
2 *Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted).

3 **A. Defendants Violate the Establishment Clause by Advancing Religious Beliefs**
4 **to the Detriment of Others.**

5 Under *Lemon v. Kurtzman* a court evaluating an Establishment Clause claim must
6 consider three factors: 1) whether the government acted with a predominantly secular purpose; 2)
7 whether the principal or primary effect of the government action advances or inhibits religion;
8 and 3) whether the government action fosters an excessive entanglement with religion. 403 U.S.
9 602, 612–13 (1971). The government may not “convey[] or attempt[] to convey a message that
10 religion or a particular religious belief is *avored or preferred.*” *Cnty. of Allegheny v. ACLU*
11 *Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989) (internal citations and quotation marks
12 omitted). At the very least, the Establishment Clause prohibits the government from “appearing to
13 take a position on questions of religious belief.” *Id.* at 594.

14 The Supreme Court has long held that the government unconstitutionally advances
15 religion when it favors religion, especially to the point of forcing unwilling third parties bear the
16 burden, or suffer harm, as a result of this favoritism. In *Estate of Thornton v. Caldor, Inc.*, 472
17 U.S. 703 (1985), for example, the Court struck down a statute that granted employees a blanket
18 right not to work on a day they observed as their Sabbath. Concluding that the statute
19 “impermissibly advance[d] a particular religious practice,” in violation of the Establishment
20 Clause, the Court explained that under the challenged law, “those who observe a Sabbath any day
21 of the week as a matter of religious conviction must be relieved of the duty to work on that day,
22 *no matter what burden or inconvenience this imposes on the employer or fellow workers.*” *Id.* at
23 708–10 (emphasis added). According to the Court, the unacceptable harms to third parties
24 included the “substantial economic burdens” that might be placed on employers as a result of the
25 accommodation and the “significant burdens on other employees required to work in place of the
26 Sabbath observers” on the observers chosen day of rest. *Id.* at 709. The Court embraced a similar
27 principle in *Texas Monthly, Inc. v. Bullock*, invalidating a sales tax exemption available only for
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1 religious periodicals, in part because the exemption “burden[e]d nonbeneficiaries markedly” by
2 increasing their tax bills. 489 U.S. 1, 15, 18 n.8 (1989) (plurality opinion); *see also* *ACLU of*
3 *Massachusetts*, 821 F. Supp. 2d at 486 n.24 (“The pertinent issue . . . is whether the shifting of
4 costs based on religious dogma violates the Establishment Clause when taxpayer money is
5 involved”).

6 Here, no less than in those cases, Defendants impermissibly advance particular religious
7 beliefs by authorizing religiously affiliated grantees to impose their faith on marginalized
8 populations in the context of a government program. For the unaccompanied minors’ program,
9 Defendants have allowed religiously affiliated shelters to kick minors out for merely requesting
10 access to abortion based on the shelters’ religious beliefs. *See e.g.*, Amiri Dec., Ex. E, Nos. 17,
11 20–25, and accompanying FOIA documents, ORRFOIA2015_000001–19 (Ex. F to Amiri Dec.);
12 PRICE_PROD_000005875, 5880–82 (Ex. G to Amiri Dec.). Moreover, while Defendants
13 initially sought to include language in USCCB’s grant about access to reproductive health care to
14 mirror existing law, Defendants eventually allowed USCCB’s religious objection to dictate the
15 terms of the language of the federal grant. *See* Amiri Dec., Ex. B, No. 1. Defendants’ actions
16 therefore “impermissibly advance[] a particular religio[n]” by allowing “religious concerns [to]
17 automatically control,” even over existing law. *Thornton*, 472 U.S. at 709-10.

18 It is the young people in Defendants’ care that bear the burden of Defendants’
19 advancement of religion. Indeed, Defendants uproot minors who request abortion at religiously
20 affiliated shelters, which means delaying their access to abortion to the detriment of their health;
21 robbing them of their immigration attorney, social worker, and other ties made in their
22 community; moving them away from their family members; and imposing shame and stigma on
23 them. *See e.g.*, Amiri Dec., Ex. E, Nos. 17, 20–25, and accompanying FOIA documents,
24 ORRFOIA2015_000001–19 (Ex. F to Amiri Dec.); PRICE_PROD_000005875, 5880–82 (Ex. G
25 to Amiri Dec.). Defendants also make initial placement decisions based on whether a shelter has a
26 religious objection to providing access to abortion, which means Defendants are impermissibly
27 allowing a minor’s best interest to be trumped by a shelter’s religion. *Id.* “This unyielding
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1 weighting in favor of [religion] over all other interests contravenes a fundamental principle of the
2 Religion Clauses.” *Thornton*, 472 U.S. at 710.

3 Similarly, in the context of the TVAP, Defendants have authorized USCCB to select
4 subgrantees based on religious beliefs. *See e.g.*, Amiri Dec., Ex. I at 65:12 – 67:23; *id.* Ex. J,
5 Appendix F, ACF_000138. Indeed, Defendants allow USCCB to exclude from its subgrantee
6 network any entity that does not share USCCB’s religious opposition to abortion and
7 contraception. *Id.*, Ex. M at 51:4 – 56:23; 93:14 – 96:1. This is true despite the fact that USCCB
8 is the primary grantee for certain regions of the country. *See* USCCB TVAP, About the TVAP,
9 *available at* <http://www.usccb.org/about/anti-trafficking-program/mrstvap.cfm>; Amiri Dec., Ex.
10 M at 12:12-19. Moreover, because USCCB provides a higher reimbursement rate than the other
11 primary grantees, prospective subgrantees that are prohibited from subcontracting with USCCB
12 because they do not share USCCB’s religious beliefs are penalized. Amiri Dec., Ex. I at 157:23–
13 25. Defendants also advance USCCB’s religion by allowing USCCB to prohibit its subgrantees
14 from using federal grant funds to pay for abortion counseling and services, and abortive
15 prescriptions. Under the Establishment Clause, Defendants are not permitted to “put an
16 imprimatur” on religion in this manner. *Texas Monthly*, 489 U.S. at 8 (internal citations and
17 quotation marks omitted).

18 The burden of Defendants’ advancement of religion falls to the trafficking survivors.
19 USCCB and its subgrantees have a monopoly on service provision in certain parts of the country.
20 *See supra*, USCCB TVAP and Amiri Dec., Exhibit M at 12:12-19. Trafficking survivors served
21 by USCCB will be unable to access and pay for the full range of reproductive health services that
22 they are legally entitled to (and would otherwise) receive in a timely and non-burdensome
23 manner, if at all. Furthermore, transferring survivors to another grantee delays them from
24 accessing the care they need and uproots them from their support systems, just like
25 unaccompanied minors. By authorizing these religiously based restrictions, Defendants “take[] no
26 account of the convenience or interests of” trafficking survivors. *Thornton*, 472 U.S. at 709.

27 Simply put, Defendants’ actions in both the UC program and the TVAP amount to “state
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1 sponsorship of religion” in violation of the Establishment Clause. *Texas Monthly*, 489 U.S. at 15.
2 “The First Amendment . . . gives no one the right to insist that in pursuit of their own interests
3 others must conform their conduct to his own religious necessities.” *Thornton*, 472 U.S. at 710
4 (internal citations and quotations omitted). Moreover, by favoring religion, Defendants have sent
5 the “message to . . . nonadherents that they are outsiders, not full members of the political
6 community, and an accompanying message to adherents that they are insiders, favored members
7 of the political community.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000)
8 (internal citations and quotation marks omitted).

9 **B. Defendants Violate the Establishment Clause By Delegating to Religious**
10 **Entities Government Functions.**

11 The Supreme Court and numerous Courts of Appeals have repeatedly held that delegating
12 a government function to a religious entity unconstitutionally advances religion. The seminal case
13 is *Larkin v. Grendel’s Den, Inc.*, which held unconstitutional a Massachusetts statute that gave
14 schools and churches “the power effectively to veto applications for liquor licenses within a five
15 hundred foot radius of the church or school.” 459 U.S. 116, 117 (1982); *see also Bd. of Educ. of*
16 *Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994) (holding that the legislature
17 impermissibly delegated its authority to define a local school district to a religious sect).

18 The *Larkin* Court held that although the government had a secular purpose in delegating
19 licensing authority to churches, it nonetheless violated the Establishment Clause because it
20 advanced religion under the second prong of the *Lemon* test. The Court reasoned that although it
21 could “assume that churches would act in good faith,” there was no “effective means of
22 guaranteeing that the delegated power will be used exclusively for secular, neutral, and
23 nonideological purposes.” *Larkin*, 459 U.S. at 125 (internal citations and quotations omitted). The
24 Court thus held the law unconstitutional because that veto power “*could* be employed for
25 explicitly religious goals.” *Id.* (emphasis added). In addition, the *Larkin* Court held that “the mere
26 appearance” of a joint exercise of authority between the government and the church provided a
27 “significant symbolic benefit to religion in the minds of some.” *Id.* at 125–26. Accordingly, the
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1 Court concluded, “[i]t does not strain our prior holdings to say that the statute can be seen as
2 having a ‘primary’ or ‘principal’ effect of advancing religion.” *Id.* at 126; *see also Barghout v.*
3 *Bureau of Kosher Meat and Food Control*, 66 F.3d 1337, 1345 (4th Cir. 1995) (striking down
4 ordinance that allowed Orthodox rabbis to establish and enforce kosher food standards in part
5 because it was an “impermissible symbolic union of church and state”).

6 Here, in the unaccompanied minor program, Defendants delegated to USCCB, Catholic
7 Charities, and other religiously affiliated entities the ability to determine which health services
8 unaccompanied minors are permitted to access. In other words, Defendants allowed these entities
9 to effectively override the law requiring shelters to provide access to reproductive health services
10 based solely on the entities’ religious beliefs. Similarly, in the TVAP program, Defendants
11 delegated to USCCB the ability to create its own network of subgrantees, and Defendants further
12 allowed USCCB to select those subgrantees based on their shared religious opposition to
13 providing and referring for abortion and contraception, and to prohibit those subgrantees from
14 using grant funds to pay for abortion counseling and services and abortive prescriptions. And, as
15 in *Larkin*, Defendants’ decision to allow USCCB to impose its religious beliefs on beneficiaries
16 of a federal program unquestionably provided a “symbolic benefit to religion in the minds of
17 some.” *Id.* at 125–26.

18 But the constitutional violation here goes a step further than the one at issue in *Larkin*. In
19 *Larkin*, the Court was concerned that religious entities *might* use their power to further “religious
20 goals,” despite the fact that the church in that case objected to the liquor license for secular
21 reasons – namely, that there were so many licenses close together. *Id.* at 125. Here, there is no
22 need for speculation that religious entities might wield their power to further their “religious
23 goals”: They *in fact* did so. *Id.* Indeed, Defendants explicitly allowed religious entities to dictate
24 the terms of their grants based on their religion. In the TVAP program, Defendants also explicitly
25 allowed USCCB to select its subgrantees based on religion. As the *Larkin* Court explained, the
26 “Framers did not set up a system of government in which important, discretionary governmental
27 powers would be *delegated to or shared with* religious institutions.” *Id.* at 127 (emphasis added).
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1 But that is precisely what has happened here. As the district court in the *ACLU of Massachusetts*
2 case held, the government’s delegation of authority to USCCB to exclude certain services from
3 government funding “‘provides a significant symbolic benefit to religion’ in violation of the
4 Establishment clause.” 821 F. Supp. 2d at 487 (quoting *Larkin*, 459 U.S. at 125–26).

5 **V. CONCLUSION**

6 For the foregoing reasons, this Court should grant Plaintiff’s motion for summary
7 judgment.

8 Dated: April 20, 2018

Respectfully submitted,

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