

# Case illustrates church-state questions in public/private partnerships

Across the country, churches and other religiously affiliated entities are engaged in community service. In many communities, religious organizations are uniquely positioned to provide effective social services. In some instances, they do so in cooperation with government. Religious entities can and do compete for government funding to provide secular social services. Because such collaboration involves taxpayer dollars, important legal considerations come into play. These partnerships can enjoy great success, but they must also meet constitutional standards that require separation of church and state. A recent case in a Massachusetts federal district court illustrates the Establishment Clause concerns that arise when private organizations impose religious restrictions in a tax-funded program. The case, *ACLU of Massachusetts v. Sebelius*, arose in the context of federal legislation intended to assist victims of human trafficking.

Congress passed the Trafficking Victims Protection Act (TVPA) in 2000 to address the problem of domestic human trafficking, considered to be a form of modern-day slavery. Congressional findings noted that traffickers primarily target women and girls, who are usually trafficked for the purpose of sexual exploitation including prostitution, commercial pornography, rape and other abuses. Among other things, the legislation directed the U.S. Health and Human Services Department (HHS) and other agencies to “expand benefits and services to victims of severe forms of trafficking in persons in the United States,” and it appropriated funding for that purpose.

For several years, HHS carried out this directive by making grants to individual nonprofit service providers, but the agency later decided to select a general contractor to administer the funding. It sought and received proposals from prospective contractors, including the United States Conference of Catholic Bishops (USCCB). During the bidding process, USCCB made clear that if selected by HHS it would not permit grant funds to subsidize victim services that it considered “contrary to [its] moral convictions or religious beliefs.” Specifically, USCCB stated that neither it nor its subcontractors could use contract funds to provide or refer clients for abortion services or contraceptive materials.

Because, as the TVPA recognized, most human trafficking involves female victims subjected to severe physical and sexual abuse, access to comprehensive reproductive health services is highly relevant to achieving stated TVPA goals such as victim rehabilitation, safety, and future self-sufficiency. Indeed, TVPA grants had pre-



By Nan Futrell  
BJC Staff Counsel

viously supported a range of victim services that included contraceptives and referrals for abortion and contraceptive services. Still, religious restriction notwithstanding, HHS awarded the contract to USCCB in 2006 and renewed it annually until it expired in October 2011. Over

that period, USCCB allegedly received more than \$15 million from HHS, and distributed the money to more than 100 service providers. All subcontracts, as well as subcontractor operating manuals and other staff instructions, included the USCCB’s restriction on services.

The American Civil Liberties Union of Massachusetts sued the government, alleging that federal officials improperly delegated its statutory authority to USCCB, resulting in religious restrictions on public funding. This, the ACLU argued, led to unconstitutional endorsement and advancement of religion and created excessive government entanglement with religion. For its part, USCCB pointed to the fact that nothing in the TVPA or formal HHS policy required service providers to cover abortion or contraception, and it maintained that no trafficking victim had complained about the lack of funding for those services under the government contract.

The district court concluded that the HHS-USCCB contract violated the Establishment Clause as a matter of law. The court emphasized that outside the contract, HHS had authorized TVPA funding to pay for the services USCCB refused to cover. According to the court, allowing USCCB to exclude certain (otherwise available) services from government funding for solely religious reasons led to a symbolic — and unconstitutional — union of church and state.

In the wake of the district court opinion, which USCCB plans to appeal, headlines on both sides of the case painted starkly different interpretations of the court’s holding. The ACLU called it a decision prohibiting religious restrictions on a government program, while USCCB characterized it as concluding that the U.S. Constitution forbids religious accommodation. The disagreement is more than semantic. As in the context of religious discrimination in hiring for federally funded positions, tough questions remain about how the government can partner with private religious entities in ways that meet pressing social needs while respecting the constitutional boundaries that separate church and state.

*The “Hollman Report” will return in next month’s Report from the Capital.*