
**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS,
Plaintiff-Appellee,

v.

UNITED STATES CONFERENCE OF CATHOLIC BISHOPS,
Defendant-Appellant

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

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS,
Plaintiff-Appellee,

v.

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

On Appeal from the United States District Court
for the District of Massachusetts, No. 09-10038
Before the Honorable Richard G. Stearns

**BRIEF FOR AMICI CURIAE ORGANIZATIONS SERVING
TRAFFICKING VICTIMS IN SUPPORT OF THE AMERICAN CIVIL
LIBERTIES UNION OF MASSACHUSETTS AND IN SUPPORT OF
AFFIRMANCE**

COUNSEL LISTED ON INSIDE COVER

October 24, 2012

ANNE HARKAVY
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000

ELIZA M. SCHEIBEL
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

P. PATTY LI
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 S. Grand Avenue, Suite 2100
Los Angeles, CA 90071
(213) 443-5300

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amici Curiae the Asian American Legal Defense & Education Fund, the Sex Workers Project of the Urban Justice Center, Break The Chain Campaign at the Institute for Policy Studies, Matahari: Eye of the Day, and FAIR Girls certify that none of them are a nongovernmental corporate entity with a parent corporation or a publicly held corporation that owns 10% or more of its stock.

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**STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE AND
SOURCE OF AUTHORITY TO FILE**

Amici Curiae (“Amici”) are non-governmental organizations that serve victims of human trafficking. **The Asian American Legal Defense & Education Fund** is a national organization that combines litigation, advocacy, education, and organizing to secure human rights for all. It has provided assistance to victims of human trafficking and litigated cases seeking to vindicate the rights of trafficking victims. **Break The Chain Campaign at the Institute for Policy Studies** seeks to prevent and address the abuse and exploitation of migrant women workers through holistic direct services, leadership training, community engagement and survivor-driven outreach and training. **The Sex Workers Project at the Urban Justice Center** provides client-centered legal and social services to individuals who engage in sex work, regardless of whether they do so by choice, circumstance, or coercion. It was one of the first programs in the nation to assist survivors of human trafficking, and it has pioneered an approach to service grounded in human rights. **Matahari: Eye of the Day**, formerly known as Trafficking Victim and Outreach Services, is an organization dedicated to societal transformation, justice, and human rights which provides case management and survivor services, and advocacy and organizing on a number of human rights issues. Matahari has experience providing direct services to victims of human trafficking, sexual exploitation, and domestic violence. **FAIR Girls** prevents the exploitation of girls

in the United States and abroad through prevention education, compassionate care, and survivor-inclusive advocacy. FAIR Girls provides emergency response services and individualized care to domestic and foreign-born trafficked girls ages 11 to 21, including a comprehensive trafficking assessment and initial trauma response.

Part of Amici's mission is to provide a human rights, or client-centered, approach to assisting trafficking victims – meaning an approach that focuses on the needs of the trafficked individual, respects the individual's autonomy and strives to provide services in a non-judgmental manner that empowers the victim. Amici regularly assist, provide services to, and engage in litigation and advocacy efforts in support of survivors of human trafficking. Amici therefore respectfully submit that they possess a unique, informed perspective on the serious health issues facing trafficking victims, the services needed to address those issues, and the importance of client autonomy in choosing those services.

Pursuant to Federal Rule of Appellate Procedure 29(a), Amici Curiae file this brief with the consent of all parties.

STATEMENT OF AUTHORSHIP AND FUNDING

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), Amici represent that:

(A) no party's counsel authored this brief in whole or in part;

(B) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and

(C) no person – other than the amici curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

I. INTRODUCTION

Amici submit this brief in support of Plaintiff-Appellee to make two key points: (1) the religiously-based restrictions imposed by the United States Conference of Catholic Bishops (“USCCB”) in its performance of its contract with the U.S. Department of Health and Human Services (“HHS”) materially undermine the ability of trafficking victims to obtain, and service providers to provide, information and treatment necessary to address the health issues faced by trafficking victims, and (2) in enacting and subsequently reauthorizing the Trafficking Victims Protection Act of 2000 (“TVPA”), and in implementing the victim services called for by the TVPA, Congress and HHS recognized the significant and wide-ranging health risks associated with the sexual exploitation, rape, and forced prostitution inherent in trafficking in persons.

The District Court correctly determined that the Secretary of HHS violated the Establishment Clause by improperly permitting USCCB to impose a religiously based prohibition on the use of taxpayer funds designated by Congress to serve the

needs of trafficking victims. Evidence presented to Congress in connection with the passage or reauthorizations of the TVPA demonstrates that trafficking victims suffer physical, sexual and psychological abuse; are typically denied medical treatment during their enslavement; and have virtually no control over any aspect of their lives. The personal stories of victims and the research and observations of direct service providers bear out that, to address the severe health issues associated with trafficking, victims need referral for medical care that includes comprehensive consultation and offers options for treatment on all reproductive health issues. For female trafficking victims subjected to sexual exploitation, reproductive health and unplanned pregnancy are among their chief health concerns when they reach medical providers. Likewise, in Amici's experience, given the victim's lack of autonomy while being trafficked, an important element of the recovery process is the very act of providing victims all information about available services and options so that the victim can make his or her own decision. USCCB's restriction on using TVPA funds to "refer for abortion services or contraceptive materials" prevented service providers from addressing the devastating consequences of human trafficking that Congress intended to address through the TVPA. This religiously motivated refusal to permit the full and proper implementation of the TVPA constituted an improper establishment of religion in violation of the First Amendment.

II. VICTIMS OF HUMAN TRAFFICKING NEED COMPREHENSIVE INFORMATION ABOUT AND ACCESS TO REPRODUCTIVE HEALTH SERVICES INCLUDING CONTRACEPTIVE MATERIALS AND ABORTION SERVICES

A. Human Trafficking: Scope And Impact

Human trafficking “is a widespread form of modern-day slavery.” U.S. Dep’t of Justice, *Attorney General’s Annual Report to Congress on U.S. Governmental Activities to Combat Trafficking in Persons: Fiscal Year 2008*, at 1 (2009).¹ Although its hidden nature makes the prevalence of human trafficking difficult to know, recent estimates indicate that 20.9 million people worldwide are victims of trafficking in persons, including trafficking for commercial sex exploitation and labor. U.S. Dep’t of State, *Trafficking in Persons Report*, 45 (2012) (citing figures from the International Labor Organization). This pandemic disproportionately affects women and children: “55 percent of forced labor victims are women and girls, as are 98 percent of sex trafficking victims.” *Id.*; *see also* U.S. Dep’t of State, *Trafficking in Persons Report*, 6 (2006) (estimating that 80% of trafficking victims are women). Each year, an estimated 14,500-17,500 people are trafficked into the United States. Dep’t of Justice, *Attorney General’s Annual*

¹ U.S. law regarding “severe forms of trafficking in persons” covers sex trafficking “in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age” and labor trafficking which includes “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” TVPA § 103(8).

Report to Congress on U.S. Government Activities to Combat Trafficking in Persons: Fiscal Year 2005, at 3 (2006).

The conditions endured by most trafficking victims are horrific and degrading. Traffickers control victims by, among other things, denying freedom of movement, isolating them, confiscating identification and travel documents, controlling money, convincing victims that local law enforcement will arrest or harm them, using threats and intimidation against victims and their families, and engaging in physical and sexual violence. See Bales & Lize, *Trafficking in Persons in the United States: A Report to the National Institute of Justice*, 5, 37-39, 46-52 (2005), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/211980.pdf>. As a result, trafficking victims often have no control over any aspect of their lives while enslaved.

B. There Is A Specific Medical Need For Contraception And Abortion Services And Counseling Among Trafficking Survivors

The experiences of victims recounted here, which constitute only a very small number of the thousands of women trafficked in the United States, illustrate the need for inclusion of full reproductive health services and counseling—including contraceptive and abortion services—among the care provided to survivors.

Inez was 18 years old in September 1997 when she was taken to the United States from Mexico after learning about a job as a waitress. *Int'l Trafficking in*

Women and Children: Hearings Before the Subcomm. on Near Eastern and South Asian Affairs of the S. Comm. on Foreign Relations, 106th Cong. 26 (2000) (“*Int’l Trafficking in Women Hearings*”) (statement of Inez, a trafficking survivor).² Inez was told that the restaurant would take care of necessary immigration paperwork. *Id.* Instead, upon arriving in the U.S., Inez was taken to a trailer in Florida, where she was instructed that she owed a smuggling fee of \$2,500 and would have to repay it by “selling [her] body to men.” *Id.* Inez was told that resistance and escape were futile because her traffickers, the Cadena family, would find her, beat her, and retaliate against her family in Mexico.

Inez was held in a trailer with 3 other victims. She described her experience:

We worked 6 days a week and 12-hour days. We mostly had to serve 32 to 35 clients a day. Weekends were even worse. Our bodies were utterly sore and swollen. The bosses did not care. Often, when our work night was over, it was the bosses['] turn with us. If anyone got pregnant, we were forced to have abortions. The cost of the abortion was then added to our smuggling debt.

Int’l Trafficking in Women Hearing 27.

The traffickers responded to disobedience with beatings and rape; beatings from “customers,” who were often drunk or high and determined to get “their money’s worth,” were not unusual. *Int’l Trafficking in Women Hearings 26-27.*

Inez’s traffickers never let the women know where they were, transporting the

² Inez testified before Congress in 2000, appearing in disguise out of fear that her traffickers, some of whom were still at large, could recognize her, endangering her and her family. *Int’l Trafficking in Women Hearings 26.*

trailer to new locations every two weeks and forbidding the women to leave the trailer. Inez was enslaved for several months before a law enforcement raid broke up the trafficking ring; other victims had been under the control of the Cadenas for a year. Immediately after the raid, Inez and the other victims were placed in detention centers. They did not receive comprehensive medical care, including a gynecological exam and mental health counseling, until months later, when attorneys obtained the women's release to a domestic violence center. *Id.* at 27.

Trafficking victims frequently have no access to medical care during their enslavement. In one case, three Azerbaijani women trafficked into New York were forced to work from 4:00 p.m. to 4:00 a.m., seven days a week, servicing up to 10-12 men per day. The traffickers confiscated the victims' identification documents and kept all of the proceeds from selling the women. The women were subjected to severe physical and psychological abuse including "slapping, punching, kicking, cutting and burning." *United States v. Mammedov*, No. 06-2971-cr, Brief for Appellee, 2007 WL 6370255, Statement of Facts pt. A (2d Cir. Nov. 14, 2007). One of the traffickers also forcibly administered drugs to the victims and raped them. *Id.* The victims were denied medical attention during their captivity, despite injuries and other health conditions. For example, "[w]hen the Third Victim developed a vaginal cyst that caused swelling, pain and bleeding, [the trafficker] ridiculed her, told her it would pass and ordered her to continue

working.” *Id.*; see also *HHS and the Catholic Church: Examining the Politicization of Grants (Minority Day of Hearing): Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 112th Cong. 27 (2011) (“December 14, 2011 Hearing”) (relating story of victim of sex trafficking whose requests to go to the doctor were denied by the trafficker).

Victims of labor trafficking are also often subjected to sexual abuse and rape, giving rise to a specific need for information about and potentially access to abortion and contraceptive services. In one case of labor trafficking, for example, husband and wife traffickers forced 20 girls, aged 10 to 19, to work in hair-braiding salons for up to 14 hours per day, 6 or 7 days per week, and at least three of the girls were raped by the husband during their captivity. *United States v. Afolabi*, 455 F. App’x 184, 185 (3d Cir. 2011); *United States v. Afolabi*, No. 10-3287, Brief for Appellee, 2011 WL 491020 (3d Cir. Jan. 4, 2011).

Because most victims of trafficking have no control over the terms of sexual encounters and cannot insist on the use of condoms, many female trafficking victims are exposed to sexually transmitted diseases including HIV/AIDS³ and are

³ See generally TVPA § 102(b)(11) (“Women and children trafficked in the sex industry are exposed to deadly diseases, including HIV and AIDS.”); *Global Trends in Trafficking and the Trafficking in Persons Report Hearing Before the Subcomm. on Int’l Terrorism, Non-Proliferation and Human Rights of the H. Comm. on Int’l Relations*, 108th Cong. 33 (2003) (prepared statement of Holly Burkhalter, U.S. Policy Director, Physicians for Human Rights, regarding vulnerability of trafficking victims to sexually transmitted diseases); Clawson et

faced with unplanned pregnancies with no ability to decide what to do about the pregnancy.⁴ One survivor, a woman in her thirties, had been enslaved for six years as a domestic servant. *December 14, 2011 Hearing* 17 (prepared statement of Florrie Burke, expert on human trafficking). During that time, she was repeatedly raped by her employer, her employer's son, and friends of the employer, none of whom used condoms. *Id.* The woman described these events to caseworkers after she was freed and was referred for a complete gynecological exam. The exam showed that the woman had been infected with multiple STDs, and due to the lack of treatment during her captivity, she had sustained permanent damage and loss of fertility. *Id.*

In one trafficking operation in New Jersey, four victims from Mexico were forced to work in a brothel for 15 hours a day, 7 days a week. *United States v. Jimenez-Calderon*, No. 03-3738, Brief for Appellee, 2004 WL 4986150, at *8 (3d Cir. Jan. 22, 2004). “Because the decision whether to use a condom was left to the

al., HHS, *Human Trafficking Into and Within the United States: A Review of the Literature* (2009) (noting increased risk of HIV among trafficking victims and recommending further research concerning U.S. victims as existing literature focuses on international trafficking), available at <http://aspe.hhs.gov/hsp/07/HumanTrafficking/LitRev/>.

⁴ A 2001 study based on interviews of trafficking victims and service providers in the United States, reported “Many women became pregnant as a result of sexual exploitation by partner/pimps, other pimps, traffickers and buyers of commercial sex.” Raymond & Hughes, *Sex Trafficking of Women in the United States* 82 (2001).

customers, the girls were not afforded protection from sexually transmitted diseases or pregnancy.” *Id.* at *8-9. The victims suffered numerous reproductive health problems during their enslavement in the brothel. *Id.* at *9. Two became pregnant and were forced to take medication to induce abortion. *Id.*; *see also Int’l Trafficking in Women Hearings* 93 (victim testified that many of the men to whom she was sold did not wear condoms; when she eventually became pregnant her traffickers forced her to have an abortion and returned her immediately to the brothel).

When they reach service providers, some trafficking victims may specifically seek information about terminating unwanted pregnancies resulting from their enslavement, while others may have only a very limited understanding of available options. Information about all available services including termination of pregnancy, emergency contraception, and continuation with pregnancy and prenatal care, is vital to empowering survivors to make their own, informed decisions to aid their physical, mental, and emotional recovery. For example, Celia was enslaved in a trafficking ring for three months and was subjected to repeated rapes and beatings when she attempted to escape. After law enforcement broke up the trafficking operation, Celia was taken to a non-profit service provider in Los Angeles. Although abortion was not available in Celia’s home country, after receiving counseling about her options in the United States, Celia availed

herself of pregnancy termination services. Devastated by the repeated rapes she had endured, having access to abortion services helped Celia to recover physically and psychologically from the trauma she had suffered. Like Celia, many trafficking victims are unaware of the services available to them. The assistance of a caseworker who is able to provide information to the victim and help her navigate and access the available services cannot be overstated.

A.G., a victim of domestic trafficking when she was 17 years old, was passed among multiple pimps. The pimps prostituted her, raped her, and assaulted her, including “hit[ting her] in the head with an iron and sexually assault[ing her] with a hairbrush.” *December 14, 2011 Hearing* 43. The repeated assaults and knowledge that she was pregnant emboldened A.G. to escape, leading to brutal retaliation by her trafficker: he sent four women in steel-toed boots to assault her, resulting in miscarriage. *Id.* After the assault, A.G. was referred to a service provider and a counselor named Carol who helped her obtain physical and mental health services, including counseling for post-traumatic stress disorder. In 2011, seven years after the attack, A.G. told Congress:

Carol also took me to the doctor to make sure my sexual health was in good standing. I am relatively healthy, but doctors don’t know yet if I will ever be able to have children as a result of the beatings and assaults I suffered.

And had I not miscarried right after I escaped my traffickers, Carol would have given me information about options on pregnancy.

She would have helped me access prenatal care or abortion services, depending on what I decided was best for me.

Id.

A study of women in Europe who were trafficked for sex work, or who had been sexually abused while being trafficked for domestic labor, found that “women who have been trafficked often prioritiz[e] their sexual and reproductive health needs, and that women’s physical and psychological well-being can be positively affected by addressing these needs.” Zimmerman et al., London School of Hygiene & Tropical Medicine, *Stolen Smiles: A Summary Report on the Physical and Psychological Health Consequences of Women and Adolescents Trafficked in Europe*, 16 (2006). Indeed, “[p]regnancy testing and induced abortions were common first requests upon entering a service setting.” *Id.*⁵

⁵ In a study of trafficking victims in Europe, 5 of 22 women reported having at least one unwanted pregnancy from trafficking; all had terminated the pregnancies. “The preference for termination of unintended pregnancy was reiterated by respondents who had never been pregnant, the majority of whom stated that they would have sought an abortion had they become pregnant in the destination country.” Zimmerman et al., London School of Hygiene & Tropical Medicine, *The Health Risks and Consequences of Trafficking in Women and Adolescents: Findings from a European Study* 50 (2003).

C. Client-Focused Care For Trafficking Victims Requires Presentation Of Comprehensive Reproductive Health Care Options, Including Contraception And Abortion Services

Most trafficking victim service-providers, including Amici, follow a client-centered approach to care,⁶ which is based on a core principle that service providers do not determine what the client needs; instead, clients receive full information to make choices for themselves. Because deprivation of freedom is a fundamental element of the trafficker's method of controlling the victim, restoration of that freedom through access to information and the ability to make informed choices is at the heart of the client-centered approach to care. The State Department's annual *Trafficking In Persons Report* also recognizes this principle: "Ultimately, true protection means giving victims access to and a choice among options Sound policy both acknowledges that a crime has occurred and honors the victims' agency and autonomy." *Trafficking In Persons Report 2012*, at 9-11. With respect to health care, this entails giving clients comprehensive

⁶ Government agencies serving trafficking victims also acknowledge the importance of a victim-centered approach. See *Legal Options to Stop Human Trafficking: Hearing Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary*, 110th Cong. 4 (2007) (testimony of Assistant Attorney General, describing the Civil Rights Division's "victim-centered approach" to prosecuting trafficking cases); 153 Cong. Rec. H14,113 (Congresswoman Ros-Lehtinen refers to "our Nation's victim-centered approach to fight human trafficking . . .").

information about available reproductive health services, including abortion and contraception, and letting the client decide what to do.⁷

Client-centered care restores dignity and freedom to survivors by offering them support and services they have been denied by their traffickers. *December 14, 2011 Hearing* 24, 30. As demonstrated by the survivor stories, during their enslavement, most trafficking victims have no control over their lives, no access to medical care, and no information about health care options. Withholding information about relevant medical services only repeats the conditions and harm imposed by traffickers. Restoration of dignity and choice is especially important for prevention of future abuse and violence. In one study, victims of sex trafficking had a high incidence of subsequent abusive relationships after leaving the trafficking situation. Ditmore et al., Sex Workers Project at the Urban Justice Center, *The Road North: The Role of Gender, Poverty and Violence in Trafficking from Mexico to the U.S.*, 64 (2012). Being subject to trafficking may disrupt expectations of a normal relationship, making it more difficult to recognize danger

⁷ See *December 14, 2011 Hearing* 13-16 (prepared statement of Florrie Burke); London School of Hygiene and Tropical Medicine, *Caring for Trafficked Persons: Guidance for Health Providers* 149-150 (Zimmerman & Borland eds., 2009) (“*Handbook*”), available at http://publications.iom.int/bookstore/free/CT_Handbook.pdf (“Having some control over what happens to their bodies can be an empowering experience for people who have been trafficked, and trauma-informed care recognizes the tension between immediate benefit to the patient of a particular intervention and the long-term benefit of the patient’s autonomy and empowerment.”).

or risk. See Norris et al., *When a Date Changes from Fun to Dangerous: Factors Affecting Women's Ability to Distinguish*, 5 *Violence Against Women* 230 (1999); Witte & Kendra, *Risk Recognition and Intimate Partner Violence*, 25 *J. Interpersonal Violence* 2199 (2010). A client-centered approach would prioritize both the restoration of control and agency and the provision of reproductive healthcare options and contraception to minimize risk to the survivor in future relationships.

Experts agree that all trafficking survivors need access to reproductive health services. The 2009 Handbook, *Caring for Trafficked Persons: Guidance for Health Providers*, published by the Institute of Migration in connection with the UN Global Initiative to Fight Human Trafficking and the London School of Hygiene and Tropical Medicine,⁸ states:

Many people are trafficked for purposes of sexual exploitation; trafficked persons in other types of exploitation may also be sexually abused as a form of coercion and control. As a consequence, trafficked persons, regardless of gender or age, are at risk of developing complications relating to sexual and reproductive health. Addressing sexual and reproductive health issues is therefore an important component of caring for someone who has been trafficked. It is essential that every trafficked person receive timely, competent and comprehensive sexual and reproductive health services even if they were not trafficked explicitly for sexual exploitation.

Handbook 149.

⁸ The *Handbook* was developed with input from trafficking experts around the world. *Id.* at i-ii (listing over 30 experts who contributed to development of the *Handbook*).

The *Handbook* further recommends that service providers give trafficking victims complete information about options to continue or terminate a pregnancy, in accordance with local law, to “counsel every woman of reproductive age about which emergency contraceptive options are available locally; if appropriate, provide them with emergency contraception.” *Handbook* at 152-153. The handbook also recognizes that access to comprehensive reproductive health care aids emotional and psychological recovery: “sexual and reproductive health may be among the primary health concerns of those who have been sexually abused. Rapidly attending to a trafficked person’s sexual and reproductive health can contribute to their overall health, particularly mental health.” *Handbook* at 154. The restrictions imposed by USCCB are thus inconsistent with best practices for treatment of trafficking survivors.

III. THE LEGISLATIVE HISTORY OF THE TVPA SUPPORTS THE DISTRICT COURT’S FINDING OF AN ESTABLISHMENT CLAUSE VIOLATION

A. TVPA Legislative History And Congressional Findings

1. In enacting the Trafficking Victims Protection Act of 2000, Congress was aware of sexual risks affecting trafficking victims

On October 28, 2000, Congress enacted the Victims of Trafficking Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified at 22 U.S.C. §§ 7101 *et seq.*), more commonly known as the Trafficking Victims Protection Act of 2000 (“TVPA”). One of the overriding motivations behind the TVPA was a

concern with the sexual exploitation, forced prostitution, and rape associated with “trafficking in persons,” which the TVPA referred to as “a modern form of slavery.” TVPA § 102(b)(1). The TVPA’s Congressional findings explicitly and repeatedly recognize the forced or coerced sexual activity associated with human trafficking:⁹

- “Approximately 50,000 women and children are trafficked into the United States each year. Many of these persons are trafficked into the international sex trade, often by force, fraud, or coercion. The sex industry has rapidly expanded over the past several decades. It involves sexual exploitation of persons, predominantly women and girls, involving activities related to prostitution, pornography, sex tourism, and other commercial sexual services....” TVPA § 102(b)(1)-(2).
- “Victims are often forced through physical violence to engage in sex acts or perform slavery-like labor. Such force includes rape and other forms of sexual abuse, torture, starvation, imprisonment, threats, psychological abuse, and coercion.” *Id.* § 102(b)(6).
- “Trafficking includes all the elements of the crime of forcible rape when it involves the involuntary participation of another person in sex acts by means of fraud, force, or coercion.” *Id.* § 102(b)(9).

⁹ The TVPA also reflects Congressional recognition that labor trafficking commonly includes elements of sexual coercion or violence. Although one of the precursor bills to the TVPA, the Freedom from Sexual Trafficking Act of 1999, H.R. 1356, 106th Cong. (1999), focused solely on sex trafficking, the legislation that was ultimately enacted as the TVPA, H.R. 3244, 106th Cong. (2000), “recognizes that there are other forms of trafficking, such as trafficking into literal slavery or into forms of indentured servitude that amount to slavery, and in which trafficked women are often subjected to brutal treatment, including rape....” *Markup of H.R. 3244 et al. Before the H. Comm. on Int’l Relations*, 106 Cong. 2 (1999) (statement of Rep. Christopher Smith).

- “Current practices of sexual slavery and trafficking of women and children are similarly abhorrent to the principles upon which the United States was founded.” *Id.* § 102(b)(22).

As Senator Paul Wellstone (a sponsor of two of the precursors to the TVPA) explained, trafficking can involve “forced prostitution” and “sexual bondage”; trafficking victims are “sold into slavery, raped, locked up, physically and psychologically abused, with food and health care withheld”; and victims in the United States “wind up trapped in brothels, sweatshops, and other types of forced labor, abused and too fearful to seek help.” 146 Cong. Rec. S10,164, S10,167 (daily ed. Oct. 11, 2000) (statement of Senator Paul Wellstone). Trafficking victims are “imprison[ed]...in a world of economic and sexual exploitation.” *Id.* at S10,168.

Congress passed the TVPA as a means of fighting human trafficking and addressing the devastating effects of the physical abuse and sexual risk faced by trafficking victims. As Congress found in the TVPA, “Trafficking exposes victims to serious health risks. Women and children trafficked in the sex industry are exposed to deadly diseases, including HIV and AIDS.” TVPA § 102(b)(11). Congress also recognized that “adequate services and facilities do not exist to meet victims’ needs regarding health care, housing, education, and legal assistance, which safely reintegrate trafficking victims into their home countries.” *Id.* § 102(b)(18). Shortly before the passage of the Act, legislators emphasized the

adverse health consequences that trafficking victims suffer: “[W]e know that STDs ... go with this kind of abuse. When you’re raped 10 to 15 times a day in a brothel and you’ve been coerced and forced into it, the consequences are absolutely devastating.” News Conference by U.S. Senator Sam Brownback and Senator Paul Wellstone on Sexual Trafficking Victims Protection Act Conference Report, 2000 WL 1512324 (Oct. 11, 2000) (statement of Rep. Smith). In light of these findings, Congress directed the Secretary of HHS to provide benefits and services to victims of trafficking in the United States, and appropriated funds for this purpose.

2. Reauthorizations of the TVPA

Congress reauthorized the TVPA in 2003, 2005, and 2008, including reauthorization of programs and appropriations for protection and assistance to victims of trafficking in the United States. The Reauthorization Acts (“TVPRA”) also amended the TVPA to better combat human trafficking and protect victims. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875; Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044.¹⁰ A 2007 House Report leading to the passage of the TVPRA of 2008 recognized that a

¹⁰ Congressional efforts to pass the next TVPA Reauthorization Act are currently underway.

“key provision” of the Reauthorization Act was “ensuring assistance to US victims of trafficking in persons.” H.R. Rep. No. 110-430 pt. I, at 35 (2007). Throughout the reauthorizations, Congress continued to express concern about the physical and mental harm suffered by trafficking victims, the disproportionate effect of trafficking on women, and best practices for assistance and recovery of trafficking survivors. *See, e.g.*, Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164 § 2(2) 119 Stat. 3558, 3558 (2006) (citing estimate that 80 percent of the 600,000 to 800,000 victims trafficked “across international borders” are women and girls); *Combating Human Trafficking: Achieving Zero Tolerance, Hearing Before the Subcomm. on Africa, Human Rights and Int’l Operations of the H. Comm. on Intl Relations*, 109th Cong. 1 (2005) (citing figures on trafficking: “Eighty percent of the victims are women and girls. An estimated 14,500 to 17,500 foreign citizens are trafficked into the U.S. each and every year.”). The 2007 House Report associated with the TVPRA of 2008 described trafficking as a “human tragedy” and found that “Women and girls are sold into sexual slavery, with personal testimonials suggesting that they are forced to commit commercial sex acts day after day for little or no pay, and are subject to coercion and violence.” H.R. Rep. No. 110-430 pt. I, at 34.

3. TVPA benefits and services

The TVPA provides that the Secretary of HHS “shall expand benefits and services to victims of severe forms of trafficking in persons in the United States.” TVPA § 107(b)(1)(B). Specifically, qualifying trafficking victims are eligible for “benefits and services under any Federal or State program or activity funded or administered” by “the Secretary of Health and Human Services . . . and the heads of other Federal agencies” to the same extent as refugees.¹¹ TVPA § 107(b)(1)(A)-(B). Although the TVPA does not explicitly define the “benefits and services” that shall be made available to trafficking victims, it is clear that Congress recognized the need to help trafficking victims address the serious risks to their health and safety resulting from the sexual exploitation, rape, and forced prostitution that they so commonly experience. As Senator Wellstone explained, the TVPA “increases protections and services for trafficking victims by establishing programs designed to assist in the safe reintegration of victims into their communities and ensure that such programs address both the physical and mental health needs of trafficking victims.” 146 Cong. Rec. at S10,168 (statement of Sen. Wellstone).

The 2005 Request for Proposals (“RFP”)—through which USCCB received the contract at issue in this appeal—describes in more specific detail the benefits and services that HHS intended to fund under the TVPA, and the HHS-USCCB

¹¹ TVPA § 107(b)(1)(A) refers to “refugees” as defined in § 207 of the Immigration and Nationality Act.

contract (“HHS Contract”) repeats these requirements. The requirements set forth in the RFP and the HHS Contract are consistent with the Congressional intent evident in the legislative history: that the TVPA provide services to address the health consequences of rape, forced prostitution, and sexual brutality experienced by so many trafficking victims. The RFP and HHS Contract state that the contractor “will be responsible for providing services to all victims of human trafficking...as defined by the Act” (RFP 9 (JA0060), HHS Contract 11 (JA1499)), and that the contractor shall provide trafficking victims with “the support they need to rebuild their lives and re-establish their ability to live independently” (RFP 11 (JA0062), HHS Contract 13 (JA1501)). The RFP and the HHS Contract require the contractor to provide “counseling services” for all victims, which “at a minimum shall explain how the victim accesses the full range of federally funded benefits and obtains immigration relief.” RFP 11 (JA0062), HHS Contract 13 (JA1501). The “federally funded benefits” refer to what the TVPA calls “benefits and services under any Federal or State program or activity funded or administered” by “Federal agencies,” including HHS. TVPA § 107(b)(1)(B). This includes Medicaid and Refugee Medical Assistance, which cover family planning services (including contraception) and abortions in the case of rape, danger to the woman’s life, or incest. Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, §§ 507-508 123 Stat. 3034, 3150 (2009); 45 C.F.R. § 400.105. The RFP and

HHS contract list Medicaid as a federal program available to certified victims: “For example, trafficking victims who are certified or have eligibility letters are eligible for benefits such as Medicaid.” RFP 6, HHS Contract 8. The RFP and HHS Contract also provide that “[d]irect services which a victim may require include...health screening and medical care.” RFP 11 (JA0062), HHS Contract 13 (JA1501).

HHS has continued to recognize that trafficking victims face serious risks to their health and welfare. The TVPA benefits and services specified in the RFP and HHS Contract are consistent with HHS’s description of health issues commonly faced by trafficking victims, as set forth in an outreach publication intended to help identify trafficking victims:

Health issues seen in trafficking victims include the following:
Sexually transmitted diseases, HIV/AIDS, pelvic pain, rectal trauma and urinary difficulties from working in the sex industry; Pregnancy, resulting from rape or prostitution; Infertility from chronic untreated sexually transmitted infections or botched or unsafe abortions; Infections or mutilations caused by unsanitary and dangerous medical procedures performed by the trafficker’s so-called “doctor.”

Common Health Issues Seen In Victims of Human Trafficking, available at http://www.acf.hhs.gov/sites/default/files/orr/health_problems_seen_in_traffick_victims.pdf (last visited Oct. 22, 2012), *quoted in* Defendants’ Objections and Responses to Plaintiff’s First Set of Interrogatories 9 (“HHS Interrogatory Responses”) (Response to Interrogatory No. 6) (JA0303). HHS’s most recent RFP

for funding of TVPA-provided benefits and services explicitly calls for proposals that would provide “family planning services and the full range of legally permissible gynecological and obstetric care.” National Human Trafficking Victim Assistance Program, HHS-2011-ACF-ORR-ZV-0148, at 6 (JA0487).¹²

B. The USCCB Subcontract Conflicts With The TVPA And The Requirements Set Forth By HHS

Despite the repeated references in the TVPA and its legislative history to the sexual risk faced by trafficking victims, and despite the RFP’s clear directive that the contract be used to provide trafficking victims with the support required to rebuild their lives, including medical care, the subcontract administered by USCCB pursuant to its contract with HHS specified that “[f]unds shall not be used to advocate or provide referral for abortion services or contraceptive materials, pursuant to this contract.” Plaintiff’s Motion For Summary Judgment and Statement of Undisputed Material Facts ¶ 62 (citing Subcontract Between USCCB and Subcontractors (filed under seal)) (JA0217). This prohibition directly conflicts with one of the major legislative purposes of the TVPA—to assist victims of human

¹² With respect to “all grants, contracts, and funding streams authorized and/or funded by the TVPA since 2000,” HHS has not imposed prohibitions on “using TVPA funds . . . to pay for contraception referrals and services, abortion referrals, and abortion services for victims for rape, incest, and when the woman’s life is in jeopardy.” HHS Interrogatory Responses 2, 4 (Interrogatory Nos. 1 & 2 and responses thereto) (JA0296, 0298).

trafficking in recovering from the rape, forced prostitution, and sexual violence and exploitation they have experienced.¹³

The USCCB subcontract also made it impossible to use TVPA funds intended to provide the services essential to helping victims recover from their ordeals, forcing service providers to scrounge for additional resources, in some cases working on their own time to locate necessary reproductive counseling and services for survivors, and creating a real risk that survivors would not receive full reproductive medical attention.

In its appellate brief, the USCCB implies that its restrictions on funding for abortion and contraceptive services had no effect on the ability of victims to obtain such services, or the ability of service providers to provide them.¹⁴ A cursory review of the personal stories of survivors and the experience of the service providers who strive to help and protect them, makes clear that the need for

¹³ The USCCB subcontract also conflicts with the RFP's requirement that victims receive counseling explaining how to access all available federal benefits, including Medicaid and Refugee Medical Assistance, as counseling on access to such programs could be construed as a "referral for abortion services or contraceptive materials."

¹⁴ Brief for Appellant USCCB 9-10 (Aug. 16, 2012) ("There was no evidence whatever that any trafficking victim who sought contraceptives or an abortion was prevented from obtaining them because of USCCB's unwillingness to participate in reimbursing for such services. The USCCB did not in any way restrict which trafficking victims could be served under the program based on whether the victim sought contraception or abortion services. Similarly, there was no evidence that any contractor or service provider has been prevented from providing such services to trafficking victims using other resources.").

comprehensive reproductive health services is acute and often imminent. Imposing prohibitions on funding of such services, from the primary funding source for many victim-assistance organizations, runs the risk of denying victims necessary medical care.

C. HHS's Approval Of USCCB's Religiously-Motivated Restriction On TVPA Funding Violated The Establishment Clause

As described above, the legislative history and plain text of the TVPA display an overwhelming concern about the sexual violence that so many trafficking victims suffer, and the severe consequences to their health. Both before and after the USCCB contract, HHS recognized this Congressional concern and requested proposals to provide benefits and services that would help victims deal with these serious health consequences. This desire to assist trafficking victims stands in sharp contrast to the USCCB contract and subcontract, through which service providers were explicitly barred from using TVPA funds to provide referrals for services to address trafficking victims' most urgent health care needs. By permitting USCCB to impose a religiously-motivated prohibition on using TVPA funding to address the victim needs specifically recognized in the TVPA and HHS's own RFP, HHS advanced and endorsed USCCB's religious beliefs, as well as delegated its authority to determine the scope of benefits and services provided under the TVPA, all in violation of the Establishment Clause. *See* Brief for Appellee ACLU of Massachusetts 42-57 (Oct. 17, 2012).

IV. CONGRESS RECOGNIZED THAT TRAFFICKING SURVIVORS WOULD NOT HAVE THE ABILITY TO CHALLENGE USCCB'S RELIGIOUSLY-IMPOSED RESTRICTIONS

Amici service providers are concerned by statements made by the Government in its appellate brief, that taxpayer standing on the part of the ACLU is not necessary to rectify an Establishment Clause violation because trafficking victims would “be in a position to challenge the USCCB TVPA contract.” *See* Appellants’ Brief for Defendants Kathleen Sebelius, Eskinder Negash, and George Sheldon 41 (Aug. 16, 2012). This statement conflicts with Congressional findings and victim stories and statistics about the condition of trafficking survivors. To the contrary, as evidenced by the Congressional findings and survivor testimonials detailed above, the reality is that most survivors are not in a position to bring a constitutional challenge to administration of benefits under the TVPA. Victims are often emerging from torture-like conditions and for those in need of abortion or contraceptive services, the need is likely imminent. *See* Hopper & Hidalgo, *Invisible Chains: Psychological Coercion of Human Trafficking Victims*, 1 Intercultural Hum. Rts. L. Rev. 185, 191-192 (2006) (finding that human trafficking has many elements in common with hostages, prisoners in concentration camps, and battered women).

Congress and service providers have recognized the obstacles that victims face even seeking help from police and counselors to obtain assistance with basic needs. As part of the TVPA, Congress found that:

Because victims of trafficking are frequently unfamiliar with the laws, cultures, and languages of the countries into which they have been trafficked, because they are often subjected to coercion and intimidation including physical detention and debt bondage, and because they often fear retribution and forcible removal to countries in which they will face retribution or other hardship, *these victims often find it difficult or impossible to report the crimes committed against them or to assist in the investigation and prosecution of such crimes.*”

TVPA § 102(b)(20) (emphasis added); *see also, e.g., Legal Options to Stop Human Trafficking: Hearing Before the Subcomm. On Human Rights and the Law of the S. Comm. On the Judiciary, 110th Cong. 3 (2007) (statement of Sen. Durbin) (“If victims are able to break free, they are often reluctant to talk to law enforcement out of fear of deportation, arrest, or prison.”); id. (testimony of service provider relaying story of woman so frightened upon escape from traffickers, she did not seek help for several years).* In addition to being traumatized from the conditions of their enslavement, many victims do not speak English as a first language and are unfamiliar with the laws of the United States. Placing a further burden on trafficking survivors to right constitutional wrongs standing in the way of victim care is an unreasonable and impractical expectation, and one that is sure to insulate Establishment Clause violations from judicial review.

CONCLUSION

For the foregoing reasons, Amici urge affirmance of the District Court decision.

Respectfully submitted,

October 24, 2012

/s/ Eliza M. Scheibel
ANNE HARKAVY
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000

ELIZA M. SCHEIBEL
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

P. PATTY LI
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 S. Grand Avenue , Suite 2100
Los Angeles, CA 90071
(213) 443-5300

*Counsel for Amici The Asian
American Legal Defense &
Education Fund, Break The Chain
Campaign at the Institute for Policy
Studies, The Sex Workers Project at
the Urban Justice Center, Matahari:
Eye of the Day, and FAIR Girls*

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October, 2012, I filed the foregoing Brief for Amici Curiae Organizations Serving Trafficking Victims with the Clerk of the United States Court of Appeals for the First Circuit by use of the Court's CM/ECF system. Service of counsel listed below will be made by that system:

Dina Michael Chaitowitz
U.S. Attorney's Office

Matthew M. Collette
Lowell Vernon Sturgill, Jr.
Peter Joseph Phipps
U.S. Department of Justice

Henry C. Dinger
Catalina E. Azuero
Goodwin Procter LLP

Anthony C. Picarello, Jr.
Jeffrey Hunter Moon
U.S. Conference of Catholic Bishops

Deborah Jane Dewart
Deborah J. Dewart, Attorney at Law

James Leslie Hirschen
SBD Group Inc.

Eric C. Rassbach
The Becket Fund for Religious Liberty

Brigitte Amiri
Andrew D. Beck
Rose Ann Saxe
American Civil Liberties Union Foundation

Daniel Mach
Heather L. Weaver
American Civil Liberties Union

Sarah R. Wunsch
American Civil Liberties Union of Massachusetts

/s/ Eliza M. Scheibel
ELIZA M. SCHEIBEL
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

October 24, 2012

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 6,947 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(B), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Eliza M. Scheibel
ELIZA M. SCHEIBEL
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

October 24, 2012