No. 87-462

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHAN KENDRICK, *et al.*,
Cross-Appellants

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*

On Conditional Cross-Appeal from the United States District Court for the District of Columbia

MEMORANDUM FOR CROSS-APPELLEE UNITED FAMILIES OF AMERICA IN RESPONSE TO CONDITIONAL CROSS-APPELLANTS' JURISDICTIONAL STATEMENT

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MEMORANDUM FOR CROSS-APPELLEE UNITED FAMILIES OF AMERICA IN RESPONSE TO CONDITIONAL CROSS-APPELLANTS' JURISDICTIONAL STATEMENT

This is a conditional cross-appeal, pursuant to 28 U.S.C. 1252, from a final order of the district court issued August 13, 1987 (J.S. App. 1a-5a). The final order incorporates an earlier interlocutory decision, rendered April 15, 1987, that the Adolescent Family Life Act, 42 U.S.C. (& Supp. III) 300z *et seq.* (the "AFLA"), is unconstitutional insofar as it involves "religious organizations" in its programs (No. 87-431 J.S. App. 2a n.2, 46a). The final order additionally holds that the

AFLA's references to "religious organizations" and the involvement of religious organizations in the program are severable from the remainder of the statute and permits continued AFLA funding to non-religious organizations. The final order also denies the government's motion, under Fed. R. Civ. P. 59(e), for clarification of the term "religious organizations."

Cross-appellee United Families of America is an organization with members who are parents of minor children eligible for services provided under the AFLA. United Families of America was a defendant-intervenor in the proceeding below, where it defended the constitutionality of the AFLA. On September 11, 1987, United Families of America filed a notice of appeal from the final judgment of August 13, 1987, and will file a jurisdictional statement, in accord with Sup. Ct. Rules 12 and 15, within the time limits set by 28 U.S.C. 2101(a).

In this conditional cross-appeal, plaintiffs Chan Kendrick, *et al.*, challenge the district court's severability decision, and contend that the Secretary should be enjoined from funding even non-religious organizations under the AFLA. This issue would not be substantial, if presented independently of the appeals filed by the Secretary and to be filed by United Families of America in this case. The district court's severability ruling is fully consistent wtih this Court's precedents. See *Alaska Airlines, Inc. v. Brock*, 107 S. Ct. 1476 (1987); *Buckley v. Valeo*, 424 U.S. 1, 108 (1976). While we contend that Congress properly considered that the social welfare programs funded by the AFLA would be more diverse and effective if they involved the full range of public and private service providers, religious as well as non-religious, the district court correctly concluded that there is nothing in the statute or its legislative history to suggest that Congress "would not have enacted" the AFLA (*Alaska Airlines*, 107 S. Ct. at 1481) if it had known that religious organizations could not be involved in the program (J.S. App. 5a).

Conditional cross-appellants' theory that even non-religious organizations are fostering religion under the AFLA in violation of the Establishment Clause by promoting adolescent self-discipline, adoption, and alternatives to abortion is without merit. Their "statement of the case" argues that "[t]he provisions of the AFLA opposing abortion and promoting adoption and abstinence reflect 'fundamental tenet[s] of many religions,'" and that this indicates a "congressional intent to subsidize the 'fundamental religious mission' of certain organizations" (J.S. 12-13, twice quoting No. 87-431 J.S. App. 30a). This argument takes the district court's words out of context, ignores its clear holding to the contrary (No. 87-431 J.S. App. 19a-22a), and flatly contradicts this Court's holding in *Harris v. McRae*, 448 U.S. 297, 318-20 (1980). The congressional purpose to promote sexual self-discipline and adoption as alternatives to abortion "'happens to coincide or harmonize with the tenets of some or all religions,'" but this does not make the purpose constitutionally suspect. (*Id.* at 319, quoting *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961)).

Contrary to conditional cross-appellants' argument (J.S. 38-45), in Establishment Clause cases this Court has frequently invalidated those portions of a statutory program that constitute unconstitutional aid to religious organizations, while upholding the remainder. See, *e.g.*, *Wolman v. Walter*, 433 U.S. 229, 248 (1977) (upholding some sections of Ohio Rev. Code Ann. Sec. 3317.06, and striking down others); *Tilton v. Richardson*, 403 U.S. 672, 684 (1971). In *Aguilar v. Felton*, 473 U.S. 402 (1985), for example, this Court affirmed an injunction against the provision of remedial services on the premises of parochial schools, while leaving the remainder of Title I—including aid delivered in non-religious settings—intact.

This Court has refused to sever only when the permissible applications of the statute are such a small portion of the program as a whole that it is unlikely that the legislative branch would have enacted them alone. See *Meek v. Pittenger*, 421 U.S. 349, 371 n.21 (1975) (speech and hearing services "constitute a minor portion of the 'auxiliary services' authorized by the Act, [therefore] we cannot assume that the Pennsylvania General Assembly would have passed the law solely to provide such aid"); *Sloan v. Lemon*, 413 U.S. 825, 834 (1973) (tuition reimbursement for non-religious, non-public students not severable from general program, where "so substantial a majority of the law's designated beneficiaries were affiliated with religious organizations"). Under the AFLA, religious organizations are only a minority of the grantees and subgrantees. As the district court found, "[t]here are numerous secular organizations that can fulfill the AFLA's purpose without transcending the separation of church and state required by the Establishment Clause" (J.S. App. 5a).

Nonetheless, assuming the Court notes probable jurisdiction of appeals filed by the Secretary and by United Families of America, it will have jurisdiction over the entire case, including questions raised by the conditional cross-appeal. 28 U.S.C. 1252. While the Court may wish to consider summarily affirming the district court's severability ruling, judicial economy may support consolidation of all appeals into a single proceeding.

Respectfully submitted,

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