No. _____

In the Supreme Court of the United States

KEVIN MURRAY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF TREASURY; FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS OF THE FEDERAL RESERVE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents an Establishment Clause challenge to the exercise of Congress' taxing and spending power under Article I, § 8, of the Constitution. More specifically, Petitioner Kevin Murray is challenging the expenditure of federal taxpayer funds to American International Group, Inc. ("AIG") that were used to support Sharia, which, as the Sixth Circuit panel acknowledged, "refers to Islamic law based on the teachings of the Quran. It is the Islamic code embodying the way of life for Muslims and is intended to serve as the civic law in Muslim countries." App. 2. The funding to AIG was authorized by Congress pursuant to the Emergency Economic Stabilization Act of 2008 ("EESA"), 12 U.S.C. §§ 5201-61.

The district court held that Petitioner had standing as a federal taxpayer to advance his constitutional claim. App. 57-67. The Sixth Circuit, relying principally on *Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007), disagreed and dismissed the case. App. 6-17.

Does a federal taxpayer have standing to advance an as-applied Establishment Clause challenge to the expenditure of federal taxpayer funds made pursuant to a congressional spending program?

PARTIES TO THE PROCEEDING

The Petitioner is Kevin Murray (hereinafter referred to as "Petitioner").

The Respondents are the United States Department of Treasury and the Board of Governors of the Federal Reserve System ("Fed") (collectively referred to as "Respondents").

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JURISDICTION

The judgment of the court of appeals was entered on June 1, 2012. App. 1-17. A petition for rehearing and suggestion for rehearing en banc was denied on July 12, 2012. App. 71-72. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Establishment Clause of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I.

Relevant portions of the Emergency Economic Stabilization Act of 2008 ("EESA"), 12 U.S.C. §§ 5201-61, are reprinted in the appendix to this petition. App. 73-85.

INTRODUCTION

This case presents an Establishment Clause violation that is as historic as it is egregious. Here, the federal government has not only appropriated and expended taxpayer funds pursuant to Congress' taxing and spending power to support religious indoctrination, which is unconstitutional, it has used those funds to gain and support its ownership and control (92%) of the very company that is engaged in this impermissible activity. Consequently, this case also involves the "active involvement of the sovereign in religious activity," which is an "excessive entanglement" that is fatal for the government. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

The panel incorrectly held that Petitioner lacked standing as a federal taxpayer to make an as-applied challenge to this impermissible use of federal tax funds.[1] The panel's ruling directly conflicts with *Flast v. Cohen*, 392 U.S. 83 (1968), and *Bowen v. Kendrick*, 487 U.S. 589 (1988); it is inconsistent with *Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007); and it effectively immunizes congressional spending from an as-applied constitutional challenge under the Establishment Clause.

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[1] The district court properly held that Petitioner had standing to advance this as-applied Establishment Clause challenge to the impermissible use of congressionally-authorized taxpayer funds. App. 57-67.

In sum, the Sixth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10(c).

STATEMENT OF THE CASE

In 2008, the federal government "obtained a controlling stake in AIG" through the expenditure of significant federal taxpayer funds authorized by EESA. App. 2. At the time, AIG was known as the market leader in "Sharia-compliant financing ('SCF') products." App. 2, 23. "SCF insurance and financial products are designed to comply with Sharia law." App. 2. "AIG subsidiaries ensure the Sharia-compliance of its SCF products by obtaining consultation from 'Sharia Supervisory Committees.' The members of these committees are authorities in Sharia law and oversee the implementation of SCF products by reviewing AIG's operations, supervising the development of SCF products, and evaluating the compliance of these products with Sharia law." App. 2-3. AIG publicly markets and promotes its Sharia business practices to introduce people to a "new way of life" guided by a specific religious doctrine (*i.e.*, Sharia). *See, e.g.,* App. 2 (noting that Sharia is the "Islamic code embodying the way of life for Muslims").

Through EESA, the federal government acquired a majority and thus controlling ownership interest in AIG by purchasing stock with taxpayer funds. App. 2. "In November 2008, the Treasury Secretary used his

TARP authority[2] to buy $40 billion worth of AIG preferred stock." App. 4. In April 2009, "the Treasury Department made another capital commitment to AIG . . . in the amount of $30 billion, in exchange for more shares of AIG preferred stock." App. 4.

"AIG's subsidiaries received a significant portion of the funds AIG received from the federal government," and "[s]ix AIG subsidiaries have marketed and sold SCF products since AIG began receiving capital injections from the federal government. . . ." App. 3. "*Neither party disputes that Treasury Department financing supported all of AIG's business, including the subsidiaries that marketed SCF products*. Plaintiff contends that AIG disbursed $153 million to two subsidiaries that marketed and sold SCF products. . . ." App. 4 (emphasis added).

"Plaintiff is a Michigan resident, a Marine veteran of Operation Iraqi Freedom, a devout Catholic, and a federal taxpayer." App. 4. "The sale of SCF products allegedly harms him by promoting Sharia law, which his complaint contends 'forms the basis for the global jihadist war against the West and the United States,' and 'sends a message to Plaintiff, who is a non-adherent to Islam, that he is an outsider.'" App. 4.

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[2] EESA gave the Treasury Secretary the power to purchase "troubled assets" pursuant to the Troubled Asset Relief Program ("TARP"). App. 3.

REASON FOR GRANTING THE PETITION

I. The Sixth Circuit's Decision Directly Conflicts with Controlling Court Precedent, which Holds that a Federal Taxpayer Has Standing to Advance an As-Applied Establishment Clause Challenge to the Impermissible Use of Federal Tax Funds Made Pursuant to a Congressional Appropriation.

To invoke federal court jurisdiction under Article III, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

Pursuant to controlling Court precedent, a federal taxpayer has standing to advance an Establishment Clause challenge to the exercise of Congress' taxing and spending power under Article I, § 8, of the Constitution. *Flast v. Cohen*, 392 U.S. 83, 88 (1968). Controlling precedent also establishes that a federal taxpayer has standing to advance an "as applied" challenge to the impermissible use of such funds by individual grantees. *Bowen v. Kendrick*, 487 U.S. 589, 619 (1988).

In *Flast v. Cohen*, 392 U.S. 83 (1968), the Court addressed the question of whether the plaintiffs had standing as taxpayers to advance a constitutional challenge to the expenditure of federal funds under the Elementary and Secondary Education Act of 1965. The Act established, *inter alia*, "a program of federal grants for the acquisition of school library resources, textbooks, and other printed and published

instructional materials 'for the use of children and teachers in public and private elementary and secondary schools.'"[3] *Id*. at 86-87 (quoting the Act). The plaintiffs alleged that federal funds were being used to finance instruction in reading, arithmetic, and other subjects, and to purchase textbooks and other instructional materials for use in religious schools in violation of the Establishment Clause. *Id*. at 87-88.

In its decision, the Court articulated the following test to determine whether a litigant can show a *taxpayer's stake* in the outcome sufficient to invoke federal court jurisdiction:

> The nexus demanded of federal taxpayers [to satisfy standing] has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional

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[3] The Act did not expressly authorize the appropriation of funds for any specific religious activity. Nevertheless, the plaintiffs had standing based on their allegation that federal funds flowing from the Act were being impermissibly used to finance religious education.

> taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.

Id. at 102-03.

Applying this test, the Court concluded that the plaintiffs satisfied both nexuses to support standing because (1) "[t]heir constitutional challenge [was] made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare, and the challenged program involve[d] a substantial expenditure of federal tax funds,"[4] and (2) the challenge [was] brought under the Establishment Clause, which "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8." *Id*. at 103-04.

As a federal taxpayer, Petitioner has a stake in the outcome of this case sufficient to invoke the jurisdiction of a federal court because (1) this case is a constitutional challenge to a substantial expenditure of federal tax funds made pursuant to the exercise of Congress' taxing and spending power under Art. I, § 8, and (2) the challenge is brought under the Establishment Clause, which is a specific limitation on such power. *Compare Frothingham v. Mellon*, 262 U.S. 447 (1932) (holding that the taxpayer lacked standing because she did not base her constitutional challenge on an allegation that Congress exceeded a *specific*

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[4] The Court noted that Congress appropriated "[a]lmost $1,000,000,000" to implement the Act, *see Flast*, 392 U.S. at 103, n.23, which is a fraction of the amount of federal funds going directly to AIG alone.

limitation on its taxing and spending power, such as the Establishment Clause).

The Court's decision in *Bowen v. Kendrick*, 487 U.S. 589 (1988), further supports Petitioner's standing in this case. In *Kendrick*, the Court rejected the position taken by the panel here*:* that the plaintiffs lacked standing to assert their "as applied" challenge to the Adolescent Family Life Act ("AFLA") because such a challenge was to executive action, not to an exercise of congressional authority under the Taxing and Spending Clause. In doing so, the Court stated, "We do not think, however, that [plaintiffs'] claim that AFLA funds are being used improperly by individual grantees is any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary." *Id*. at 619 (emphasis added). The Court held that the federal taxpayers had standing to assert their Establishment Clause claim and remanded the case, in part, so that the district court could consider "whether in particular cases AFLA aid has been used to fund 'specifically religious activit[ies] in an otherwise substantially secular setting.'"[5] *Id*. at 621

[5] The Court remanded the case to determine whether funds in particular cases were being used in violation of the Establishment Clause even though Congress "expressed the view that the use of [AFLA] funds by grantees to promote religion, or to teach religious doctrines of a particular sect, would be contrary to the intent of the statute" and the Secretary had "promulgated a series of conditions to each grant, including a prohibition against teaching or promoting religion." *Kendrick,* 487 U.S. at 621-22. Here, neither Congress nor the Treasury Secretary has prohibited AIG from using federal funds to support SCF, and there are no constitutionally sufficient safeguards to ensure that federal tax

(quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)) (emphasis added). The Court concluded that the district court "should consider on remand whether particular AFLA grants have had the primary effect of advancing religion," stating further that if the court should "conclude that the Secretary's current practice does allow such grants, it should devise a remedy to insure that grants awarded by the Secretary comply

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money was not going to support SCF. Simply put, when the government provides open-ended money grants without effective safeguards against the diversion of such funds for religious purposes, as in this case, the government violates the Establishment Clause. *See Tilton v. Richardson*, 403 U.S. 672, 682-84 (1971) (finding that "the statute's enforcement provisions are inadequate to ensure that the impact of the federal aid will not advance religion"); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 774 (1973) (striking down the "maintenance and repair" provisions of a New York statute that permitted aid to nonpublic schools, finding that the grants were "given largely without restriction on usage," and concluding that "[a]bsent appropriate restrictions on expenditures . . , it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools"); *see also Mitchell v. Helms*, 530 U.S. 793, 861 (2000) (O'Connor J., concurring) (concluding that "[t]he safeguards employed by the [funding] program are constitutionally sufficient"); *cf. Bowen v. Kendrick*, 487 U.S. 589, 621-22 (1988) (remanding to determine whether funds in particular cases were being used in violation of the Establishment Clause even though Congress "expressed the view that the use of [government] funds by grantees to promote religion, or to teach religious doctrines of a particular sect, would be contrary to the intent of the statute" and the Secretary had "promulgated a series of conditions to each grant, including a prohibition against teaching or promoting religion").

with the Constitution and the statute."[6] *Kendrick,* 487 U.S. at 622 (emphasis added).

In this action, Petitioner asserts that federal funds appropriated and authorized by EESA are being used for improper purposes (to finance SCF) by an individual grantee (AIG). And based on controlling precedent, it makes little difference that the challenged funding flowed through and is administered by the Secretary of the Treasury, who, by the way, was given express authority by Congress to administer the spending program.[7] *See* 12 U.S.C. § 5211. As the Court in *Kendrick* noted, "*Flast* itself was a suit against the Secretary of HEW, who had been given the authority under the challenged statute to administer the spending program that Congress had created." *Kendrick*, 487 U.S. at 619. In short, the panel's decision directly conflict with relevant decisions of this Court. This is an as-applied challenge to a congressional spending program; it is not a challenge to an executive branch decision on how to spend generally appropriated funds. *See, e.g., Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 210, n.5 (6th Cir. 2011) (recognizing the distinction between suits which "challenge congressional expenditures alleged to violate the Establishment Clause" and those which challenge

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[6] There is simply no question that the federal government "allows" federal tax money to be used to support SCF. What Petitioner is asking here is precisely what the Court in *Kendrick* required on remand: a judicial remedy to ensure that the very large sums of tax money going to AIG comply with the Constitution.

[7] The funding at issue here is not discretionary and thus not similar to the funding at issue in *Hein,* as discussed *infra*.

expenditures made by the Executive from funds "appropriated to the Executive's discretionary budget by Congress").

In light of *Flast* and *Kendrick*, it is evident that Petitioner, a federal taxpayer, has standing to challenge as a violation of the Establishment Clause the congressional appropriation and expenditure of federal funds that are not only being used by a grantee to finance religious activities, but by the government itself to acquire ownership and control of the company engaged in such activities.

Consequently, the panel's reliance on *Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007), is incorrect. App. 7-12. Indeed, the Court's plurality opinion did not overrule *Flast*. Instead, it reaffirmed the two-part nexus test discussed above. *See Hein*, 551 U.S. at 602-03. In its discussion of *Flast*, the Court pointed out that the challenged disbursements "were made pursuant to an express congressional mandate and a specific congressional appropriation" in that the challenged Act expressly provided funding to support education, including funding to support "library resources, textbooks, and other instructional materials" for both public and private schools. *Id*. at 603. The Court stated parenthetically that the "private" schools also included "religiously affiliated schools," *id*. at 604; however, the Act itself did not expressly mandate funds for "religious" schools, which was the gravamen of the plaintiffs' challenge, nor did it expressly mandate funds to finance religious education or any other religious activities. Similarly here, Congress fully intended that EESA funding would go to AIG. The record unequivocally reveals that when Congress passed

EESA, it understood that AIG was in financial trouble and would be a direct beneficiary of EESA funds. EESA itself requires the Fed to report to Congress the exercise of its Section 13(3) authority, which was applied specifically to AIG. 12 U.S.C. § 5235(a) & (d). Consequently, the panel's claim that "[i]t was only through executive discretion that TARP funds were transferred to AIG and, in turn, its subsidiaries," App. 12, is incorrect. This case is not *Hein*.

Moreover, prior to the enactment of EESA and certainly before taxpayer money was sent to AIG (and even to this present day while AIG remains on the public dole), AIG was known as a market leader in SCF. App. 23. In fact, shortly after the federal government acquired its majority ownership interest in AIG and infused the company with the first tranche of billions in federal tax dollars, AIG issued a press release from its main headquarters in New York City announcing the expansion of its SCF businesses in the United States. App. 24. Consequently, it is incorrect to say that AIG (and thus the government) itself is not actively involved in promoting SCF, it is unreasonable to argue that Respondents (or Congress) were unaware of AIG's SCF activities, and there is no dispute that AIG received billions of dollars in tax money.[8]

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[8] And if there were any doubt about AIG's very public, national, and international leadership role in SCF, around the time that EESA funds were being sent to AIG, the Treasury Department was hosting a conference on Islamic financing. And this conference is in addition to all of the other government-sponsored Sharia-based programs set forth in the record. App. 15, 44.

In *Hein*, the Court also highlighted the obvious fact that the plaintiffs had standing in *Kendrick* to mount an as-applied challenge to AFLA because it was "at heart" a spending program authorized by Congress. *Hein,* 551 U.S. at 606-07. The Court also noted that AFLA contemplated that some of the funds might go to projects involving religious groups. *Id*. at 607. This point, however, is unremarkable because religious groups are not *per se* excluded from receiving federal grants. *Mitchell v. Helms*, 530 U.S. 793 (2000). Indeed, the plaintiffs' as-applied challenge was allowed to proceed not because religious organizations were receiving funds, but because the plaintiffs alleged that some of the money was being used for impermissible purposes by these organizations, such as funding religious activities. *See Hunt*, 413 U.S. at 743 (holding that federal aid will have "a primary effect of advancing religion . . . when it funds a specifically religious activity in an otherwise substantially secular setting"). Similarly here, Petitioner alleged (and has shown) that the funds appropriated and spent pursuant to EESA—a specific congressional mandate—are being used to fund SCF in violation of the Establishment Clause. Thus, "[t]he link between congressional action and constitutional violation" plainly exists. *Hein*, 551 U.S. at 605.

Indeed, the Court's opinion in *Hein* is rather unremarkable in light of *Flast* and *Kendrick*, and it does not alter Petitioner's standing in this case. In *Hein*, the plaintiffs did not base their claims on any congressionally enacted spending program. Rather, the money used to fund the challenged activities came from general appropriations provided to the Executive Branch to support its day-to-day activities. *Id*.

Consequently, the use of these funds resulted from executive discretion, not congressional action. If, for example, the Executive Branch wanted to use these general funds to purchase office furniture, it was within its discretion to do so. The same cannot be said here. Respondents do not have unfettered discretion to determine how EESA funds could be used. *See* 12 U.S.C. §§ 5211, 5225 (limiting use of funds). Rather, Congress specifically appropriated and expressly mandated that the funds be used to purchase assets from critical financial institutions, such as AIG, to support the operations of these institutions. Thus, unlike the funds at issue in *Hein*, Respondents could not use EESA funds to buy office furniture, for example—these funds had to be used pursuant to the express mandate of Congress, and pursuant to this mandate, they are being impermissibly used to fund SCF. Thus, Petitioner has a sufficient stake as a federal taxpayer in the outcome of this controversy.

In sum, the *Flast* decision, which remains controlling authority even after *Hein*, makes clear that an Establishment Clause challenge to the exercise of congressional taxing and spending power is an established exception to the general rule prohibiting taxpayer suits. Unlike actions challenging congressional taxing and spending powers generally, the Establishment Clause is a specific limitation imposed upon the exercise of this congressional power. Thus, as *Flast* held, plaintiffs with an Establishment Clause claim can "demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements." *Flast*, 392 U.S. at 102.

In the final analysis, a federal taxpayer, such as Petitioner, has an independent right under the Establishment Clause to challenge the impermissible use of federal funds appropriated and expended pursuant to Congress' taxing and spending power. When such funds are being used to support religious activities (and the government's ownership and control of a company engaged in such activities), as in this case, a federal taxpayer suffers a concrete injury. And this injury is indisputably "traceable" to the challenged spending and "likely to be redressed by" an injunction prohibiting it. *See Allen*, 468 U.S. at 751. Consequently, Petitioner meets all of the elements necessary to confer standing to invoke the jurisdiction of a federal court under Article III.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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