# NO. 11-1063

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## UNITED STATES COURT OF APPEALS
## FOR THE
## SIXTH CIRCUIT

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**KEVIN MURRAY**,
*PLAINTIFF-APPELLANT*,

**V.**

**UNITED STATES DEPARTMENT OF TREASURY; FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS OF THE FEDERAL RESERVE**,
*DEFENDANTS-APPELLEES.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
HONORABLE LAWRENCE P. ZATKOFF
Civil Case No. 08-15147

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## APPELLANT'S REPLY BRIEF

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ROBERT J. MUISE, ESQ.
THOMAS MORE LAW CENTER
24 FRANK LLOYD WRIGHT DRIVE
P.O. BOX 393
ANN ARBOR, MICHIGAN 48106
(734) 827-2001

DAVID YERUSHALMI, ESQ.
LAW OFFICES OF DAVID YERUSHALMI, P.C.
P.O. BOX 6358
CHANDLER, ARIZONA 85246
(646) 262-0500

*Attorneys for Plaintiff-Appellant*

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## 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 Islamic religious indoctrination, which is unconstitutional, it has used those funds to gain and support its ownership and control (92%)[1] 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).

In light of the facts of this case, a reasonable and informed taxpayer could reach only one conclusion: the federal government's approval, endorsement, and financial support of—coupled with its ownership and control of a company engaged in—Islamic religious indoctrination is unconstitutional.

To avoid this inevitable conclusion, the U.S. Department of the Treasury ("Treasury Department") and the Board of Governors of the Federal Reserve System

[1] Defendants ask this court to take judicial notice of certain facts derived from publicly available documents. (Defs.' Mot. for Judicial Notice). This includes the exceedingly relevant fact that Defendants converted <u>all</u> preferred stock in American International Group, Inc. ("AIG"), including the U.S. Treasury stock acquired through Federal Reserve loans, to 92% common stock (with voting rights) held by the <u>Treasury Department</u>. (Defs.' Br. at 15-17). Plaintiff does not object to and, indeed, joins the request that this court consider these undisputed facts. Plaintiff has also asked this court to take judicial notice of two related AIG SEC filings, both of which are publicly available. (*See* Pl.'s Mot. for Judicial Notice).

("Fed") (collectively referred to as "Defendants") present in their answering brief numerous misstatements of fact and law. In the process, Defendants invite this court to dismiss Plaintiff's evidence (and Defendants' own evidence that AIG is owned and controlled by the government) and all the *reasonable* inferences drawn from that evidence, *see Siggers-El v. Barlow*, 412 F.3d 693, 699 (6th Cir. 2005) (requiring this court to consider the evidence and to draw all reasonable inferences in favor of the non-moving party), to ignore inconvenient facts, and to credit Defendants' self-serving contrary *assertions*, which are not supported by the record evidence and cannot provide a substitute for such evidence. This is an invitation for error.

Indeed, the following material assertions of fact by Defendants are not true and plainly refuted by the undisputed evidence:

**Defendants' Assertion**: That shariah-compliant financing is "not religious activity for purposes of the Establishment Clause." (Defs.' Br. at 1; *see also* Defs.' Br. at 19 (claiming that "Offering SCF involves study *about* religion. . . ." and that "no reasonable fact-finder could conclude that offering Shariah-compliant financing ('SCF') involves religious indoctrination or any other religious activity under the Establishment Clause")).

**Plaintiff's Response**: On the one hand Defendants make the absurd claim that SCF has absolutely nothing to do with religion, and on the other hand, they claim that it only involves the study *about* religion. The inescapable fact is that SCF is *all about*

religious indoctrination. The record is clear and undisputed: SCF is an activity (1) that is *strictly* guided by shariah, which AIG itself describes as "Islamic law based on Quran [sic] and the teachings of the Prophet (PBUH)" ("PBUH" is an acronym for "Peace Be Upon Him"—a religious expression used by some Muslims (notably, shariah-adherent Muslims) to refer to Mohammed, their prophet. *Murray v. Geithner*, 624 F. Supp. 2d 667, 670, n.1 (E.D. Mich. 2009)); (2) that requires the imposition of a religious tax (zakat); (3) that requires a special Islamic advisory board to ensure strict compliance and adherence with religious doctrine; and (4) that is publicly promoted to introduce people to a "new way of life" guided by a specific religious doctrine (*i.e.*, shariah). (R-60: Coughlin Decl., Ex.A (Pl.'s Ex.12) (emphasis added)). Moreover, Defendants have already conceded that AIG is fully engaged in religious indoctrination in their numerous responses to Plaintiff's Request for Admissions. Specifically, for every request for admission that sought a response relating to AIG's shariah-based business practices and to AIG's own statements about its SCF products and financial activities, Defendants responded by objecting to the request and stating that the request was "seeking to establish a theological proposition." (R-59-2: Defs.' Admis. at Nos. 110-15; 130; 132-38; 140-52; 158-69 (Pl.'s Ex.5) (emphasis added)). In this respect Defendants are correct: every day that AIG (and thus the government) are promoting or engaging in SCF, they are establishing a "theological proposition." For further support of Plaintiff's position, see the *un-rebutted* testimony of Plaintiff's

expert witnesses. (R-60: Coughlin Decl., Ex.A at ¶¶ 4-13 & Ex.B at ECF 19 of 29 (Pl.'s Ex.12); R-60-1: Spencer Decl., Ex.A at ¶¶ 1-21 (Pl.'s Ex.13); R-69: Coughlin Supp'l Decl. at ¶¶ 2-13 (Pl.'s Ex.38) at App.70-76). Defendants' position, in comparison, finds no record support—it is based merely on incorrect and self-serving assertions.

**Defendants' Assertion:** "Plaintiff contends that the SCF activities of certain AIG subsidiaries [are] attributable to the government because the government owns and controls AIG. This argument fails because the government has no right to control the day-to-day management of AIG or of its beneficiaries and because plaintiff is challenging only the Secretary's use of EESA funds, not the AIG Credit Facility, which transferred ownership of AIG to the AIG Credit Facility Trust." (Defs.' Br. at 46).

**Plaintiff's Response**: Defendants' assertions about control are facially wrong. First, as Plaintiff's opening brief makes clear, even before the Recapitalization Agreement, Defendants had control of AIG by virtue of the Trust Agreement, which provided Defendants absolute control to modify the Trust terms and even to terminate the Trust, leaving the all-important voting control granted by the Series C preferred shares with the U.S. Treasury as beneficiary, and thus squarely in the control of the Treasury Department. And, as Plaintiff's opening brief further shows, the *de facto* consideration for the Federal Reserve Bank of New York ("FRBNY") agreeing to

tender the Series C preferred shares to the U.S. Treasury was the $40 billion of EESA funds subsequently transferred to the FRBNY to replace the "placeholder" funds paid to AIG by the FRBNY.

With the Recapitalization Agreement, the placeholder scheme is now front and center. As made clear by Defendants' brief, an additional $20 billion of EESA funds were transferred to AIG to effect a total conversion of all pre-existing preferred shares, *including the Series C preferred shares*, into common voting stock held directly by the Treasury Department. And, as noted in AIG's latest proxy statement, "As a result of the Recapitalization, AIG is controlled by the Department of the Treasury." As will be detailed below, this control is absolute. Thus, any reasonable observer would conclude that AIG's actions are the government's actions, and this conclusion is inescapable in the face of the brute fact that the Treasury Department owns 92% of the voting common stock of AIG.[2]

**Defendants' Assertion**: "[T]he record shows that none of the few AIG subsidiaries that have engaged in SCF activity have ever received *any* EESA funds, for *any* purpose." (Defs.' Br. at 19; Defs.' Br. at 34 ("[T]he record contains no evidence upon which a reasonable fact finder could conclude that AIG or any of its

[2] While Defendants might argue that the Treasury Department agreed not to vote some of the common shares based upon the underlying warrants, there is no dispute that the common shares converted from the Series C preferred shares (31.3% of all AIG common shares) have full voting rights and amount to more than 79% of all voting common shares relative to the common shares held by non-government shareholders (7.9% of AIG common shares). (AIG Recapitalization, Summ. of Terms of 9/30/10).

subsidiaries ever used any EESA funds to support the offering of SCF products.”)).

**Plaintiff’s Response**: Defendants are mistaken. Indeed, even the district court had to concede that after cash-strapped AIG received billions of dollars in taxpayer money pursuant to EESA, it provided two of its SCF subsidiaries with *at least* $153 million, which was money received through EESA. (*See* R-92: Op. & Order at 17-19 & n.8).

**Defendants’ Assertion**: “There are in fact numerous safeguards in place to prevent the misuse of EESA funds for religious purposes.” (Defs.’ Br. at 20).

**Plaintiff’s Response**: Yet another erroneous assertion refuted by the record. Here, the record demonstrates, without contradiction, that there are absolutely no statutory, regulatory, or contractual safeguards in place to prevent taxpayer funds from being used to support SCF. Nothing in EESA, the TARP regulations, or the $30 billion Securities Purchase Agreement prohibits, at any time, AIG from applying taxpayer money to support SCF. Indeed, AIG has provided extensive testimony that there are “no [AIG] policies, whether required by the U.S. government or otherwise, created or implemented to prevent the use of any government funds from promoting, supporting, or funding [AIG’s shariah-based practices].” (R-58-5: Lexington-A.I. Risk Aff. at ¶ 10 (Pl.’s Ex.11) at App.50; R-58-3: ALICO Aff. at ¶ 11 (Pl.’s Ex.8) at App.26; R-58-2: AIA Takaful Aff. at ¶15 (Pl.’s Ex.7) at App.20; R-58-4: AIA Financial Aff. at ¶ 14 (Pl.’s Ex.9) at App.34; and R-58-5: Takaful-Enaya Aff. at ¶ 10

(Pl.'s Ex.10) at App.42).

Moreover, because AIG employs consolidated accounting, (R-58-1: AIG Treas. Aff. at ¶¶ 5-6 (Pl.'s Ex.4) at App.7; R-59: AIG 10K Filing (excerpts) at 19 at (Pl.'s Ex.2); R-59-1: AIG 10Q Filing (excerpts) at 12 (Pl.'s Ex.3)), such that cash flows move from AIG through a single port to its subsidiaries and from and through its subsidiaries to AIG—cash flows that are neither sourced in nor destined for segregated accounts, (R-59: AIG 10K at 19 (Pl.'s Ex.2); R-59-1: AIG 10Q at 12 (Pl.'s Ex.3); R-58-1: AIG Treas. Aff. at ¶¶ 5-7 (Pl.'s Ex.4) at App.7-8)—the requirement for constitutionally sufficient safeguards is compelling. No such safeguards exist here.

**Defendants' Assertion**: "The EESA does not earmark or specifically contemplate the use of federal funds to invest in AIG or any other particular company." (Defs.' Br. at 31).

**Plaintiff's Response**: To the contrary, the record reveals that when Congress passed EESA, it understood that AIG was in financial trouble and would be a direct beneficiary of EESA funds. (*See, e.g.*, R-61-10: Legislative History (Pl.'s Ex.24)). EESA itself (§ 129) required the Fed to report the exercise of its Section 13(3) authority as it applied to AIG. 12 U.S.C. § 5235(a) & (d); (*see also* R-61-2: Fed Rep. (Pl.'s Ex.16); R-62: AIG Nov. 2008 PR at 1 (Pl.'s Ex.25); R-62-1: SIGTARP Rep. (Pl.'s Ex.26)).

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. (R-92: Op. & Order at 6; R-60: Coughlin Decl., Ex.C at ECF 27-29 of 29 (Pl.'s Ex.12)). 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. (R-92: Op. & Order at 6; R-60: Coughlin Decl., Ex.C at ECF 27-29 of 29 (Pl.'s Ex.12)). 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 Defendants were unaware of AIG's SCF activities, and there is no dispute that AIG received billions of dollars in tax money.

## ARGUMENT

### I. PLAINTIFF HAS STANDING TO ASSERT HIS ESTABLISHMENT CLAUSE CHALLENGE.

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).

Federal taxpayers have standing to advance Establishment Clause challenges 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). Federal taxpayers also have

standing to advance "as applied" challenges 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*

[3] The Act did <u>not</u> "expressly authorize or contemplate," (*see* Defs.' Br. at 18), the appropriation of funds for <u>any</u> 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. Here, EESA plainly mandates, contemplates, and specifically appropriated funds to finance the operations of AIG, and these funds are being used in violation of the Establishment Clause.

> *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 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 (emphasis added).

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, Plaintiff has a stake in the outcome of this case sufficient to invoke the jurisdiction of this 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

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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 trifle amount compared with the billions of dollars of federal funds going *directly to AIG alone*.

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

The Supreme Court's decision in *Bowen v. Kendrick*, 487 U.S. 589 (1988), further supports Plaintiff's standing argument. In *Kendrick*, the Court rejected the argument 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]

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[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

*Id*. at 621 (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 with the Constitution and the statute."[6] *Kendrick,* 487 U.S. at 622 (emphasis added).

In this action, Plaintiff 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

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prohibition against teaching or promoting religion." *Kendrick,* 487 U.S. at 621-22 (emphasis added). Here, neither Congress nor the Treasury Secretary has prohibited AIG from using federal funds to support SCF. Defendants' claim that there are safeguards in place to prohibit taxpayer funds from supporting such use is nonsense. (*See* Defs.' Br. at 44-46). Indeed, on the one hand Defendants make the disingenuous claim that no one at the Treasury Department knew about AIG's SCF activities, (Defs.' Br. at 34), and then on the other ask this court to believe their incredible (and false) claim that they put in place constitutionally sufficient safeguards to ensure that federal tax money was not going to support SCF (Defs.' Br. at 44).

[6] There is simply no question that the federal government "allows" federal tax money to be used to support SCF. What Plaintiff 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.

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 light of *Flast* and *Kendrick*, it is evident that Plaintiff, 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.

Defendants' reliance on *Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007), is misplaced. (*See* Defs.' Br. at 21-31). Justice Alito's plurality opinion did not overrule *Flast*, as Defendants tacitly acknowledge. (*See* Defs.' Br. at 24). Instead, it reaffirmed the two-part nexus test discussed above. *See Hein*, 551 U.S. at 602-03. In his discussion of *Flast*, Justice Alito 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. Justice

[7] Defendants' claim that the funding at issue here is discretionary and thus similar to the funding at issue in *Hein* is patently incorrect. (Defs.' Br. at 26-27) (stating that "the Secretary's decision to use EESA funds to invest in AIG was the product of 'executive discretion, not congressional action'").

Alito 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. To avoid this inconvenient fact, Justice Alito states in a footnote that "Congress surely understood that much of the aid mandated by the statute would find its way to religious schools." *Id*. at n.3. Similarly here, Congress fully intended that EESA funding would go to AIG, and "Congress surely understood" that this federal aid would support AIG's operations, including its religious activities since AIG was well known as the world leader in SCF.[8] And if there were any doubt about that, around the time that EESA funds were being sent to AIG, the Treasury Department was hosting a conference on *Islamic* financing.[9]

In *Hein*, Justice Alito 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.[10] *Id.* at 606-07. He also noted

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[8] This is a reasonable inference that this court must consider in favor of Plaintiff.

[9] This conference is in addition to all of the other government-sponsored shariah-based programs set forth in the record. (*See generally* "Islamic Finance 101" presentation materials at R-64; R-65: Kiwan Dep. Ex.21 (Pl.'s Ex.35); *see also* R-63-2: May 2004 Treas. Dep't PR (Pl.'s Ex.33); R-63-3: Kiwan Dep. at 32-33 (Pl.'s Ex.34)).

[10] Defendants incorrectly claim that *Hein* stands for the proposition that a federal taxpayer will have standing to challenge the use of taxpayer funds under the Establishment Clause "only where a statute expressly directs or contemplates that

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). However, 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 Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 783 (1973). Similarly here, Plaintiff 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.

Justice Alito's opinion in *Hein* is rather unremarkable in light of *Flast* and *Kendrick*, and it does not alter Plaintiff'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

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government funds will be distributed to a religious entity or used for specifically religious purposes." (Defs.' Br. at 18). Defendants cite to page 605 of the *Hein* plurality opinion to support their claim. However, in this section of the opinion, Justice Alito was referring to whether an Act of Congress *expressly directed the challenged expenditures*, thereby distinguishing a challenge to a specific congressional spending provision from a challenge to the use of funds generally appropriated. *Hein*, 551 U.S. at 605. The first provides the proper nexus for standing, as in *Flast* and in this case, the second does not, as in *Hein*.

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 or to hold a Super Bowl party, it was within its discretion to do so. The same cannot be said here. Defendants 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*, Defendants could not use EESA funds to buy office furniture or to hold a Super Bowl party, 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, Plaintiff 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 Plaintiff, 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, Plaintiff meets all of the elements necessary to confer standing and to invoke this court's jurisdiction under Article III.[11]

[11] Because the Establishment Clause prohibits the government from engaging in any action that has the purpose or effect of endorsing religion, *see Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor J., concurring), the relevant inquiry requires the reviewing court to look at the broader context, including the history of the government's actions, *see McCreary Cnty. v. ACLU*, 545 U.S. 844, 863-64 (2005). Consequently, Defendants' efforts to erase context and history by asking this court to ignore the effect of the government's statements, presentations, and programs promoting SCF (and demonstrating that the government owned and controlled and was funding AIG with full knowledge of SCF) are unavailing. (*See* Defs.' Br. at 54-57). All of the evidence relied upon by Plaintiff was still presently available and offered to the public via the Treasury Department's official website throughout the funding of AIG. Indeed, Defendants' dismissive treatment of this evidence demonstrates their fundamental misapprehension of what the Establishment Clause requires. For example, Defendants claim that the "harmonization of *Shari'a* standards at the national and international level"—a goal that the federal government is expressly seeking—is "obviously [a] secular goal[]." (Defs.' Br. at 57). To the contrary, that "obviously secular goal" is no different than a state government's goal

Like their reliance on *Hein*, Defendants' reliance on *Am. Atheists v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278 (6th Cir. 2009), is misplaced. In *Am. Atheists*, the court explicitly held that *Hein*, *Flast*, and *Kendrick* were irrelevant because the taxpayers were challenging a municipal funding program. Municipal tax payers challenging a municipal funding program enjoy an exemption from the *Frothingham v. Mellon*, 262 U.S. 447 (1923), rule against taxpayer suits. As the court held:

> *Flast* and *Hein* have no application here. As *Frothingham* itself explained, and as we have since held, the general rule against taxpayer standing does not extend to municipal-taxpayer suits. . . . *Hein*'s potential application to state taxpayers . . . in the end makes no difference to a case filed by municipal taxpayers. Nor need we decide whether the city council's actions approving the program would satisfy *Hein*'s specific-legislative-appropriation requirement if *Flast* applied in this setting. All that matters is that American Atheists alleges that Detroit—a city—misspent taxes its members have paid.

*Am. Atheists*, 567 F.3d at 286.

Similarly, *Pedreira v. Ky. Baptist Homes for Children*, 579 F.3d 722 (2009), does not support Defendants' argument. In *Pedreira*, the plaintiffs' amended complaint "refer[red] to the Kentucky statutes authorizing the funding of services as KBHC. However, nowhere in the record before the district court did the plaintiffs explain what the nexus [was] between their suit and a *federal* legislative action." *Id.*

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to "harmonize" the definition of Kosher for purposes of its food laws—an action that violates the Establishment Clause. *See Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415 (2d Cir. 2002).

at 730. *Six years* after filing the original action, the plaintiffs sought leave to file a second amended complaint, that, *inter alia*, "added references to state and federal funding provisions in support of standing." *Id.* In particular, the plaintiffs invoked the Social Security Act's Title IV-E and Supplemental Security Income programs, which authorize federal funding to states to provide foster care and maintenance for children. *Id.* Nonetheless, the court noted that "[e]ven though the plaintiffs refer to specific federal programs and specific portions of these programs, they have failed to explain how these programs are related to the alleged constitutional violation," and concluded that "[w]hile the plaintiffs do challenge congressional legislation, as required by *Flast*, . . . the plaintiffs' claims are simply too attenuated to form a sufficient nexus between the legislation and the alleged violations." *Id.* at 730-31.

The factual differences between *Pedreira* and this case are obvious. As an initial matter, it appears that the plaintiffs in *Pedreira* simply cited federal funding programs in a second amended complaint without any explanation as to how they were related to the constitutional violation asserted in the complaint. Here, Plaintiff has set forth in great detail the nexus between the federal funding at issue and the alleged constitutional violation. Moreover, the federal funding programs invoked by the *Pedreira* plaintiffs are not open-ended money grants to fund KBHC's operations in general (or to acquire ownership and control of KBHC), as the funds are being used in this case with regard to AIG. If the federal funding at issue in *Pedreira* were

similar to the grants at issue here, there is little doubt that the plaintiffs would have had standing.

In sum, as the district court properly concluded, Plaintiff has standing to advance this Establishment Clause challenge. (R-12: Order Denying Mot. to Dismiss at 13).[12]

## II. DEFENDANTS CANNOT REFUTE THE OVERWHELMING EVIDENCE THAT THE FEDERAL GOVERNMENT AND AIG ARE "ENTWINED" AND HAVE CREATED A SYMBIOTIC RELATIONSHIP SUCH THAT THE ACTIONS OF AIG ARE ATTRIBUTABLE TO THE GOVERNMENT.

Plaintiff's claim that a reasonable observer would properly attribute the actions of AIG to the federal government is based on the overwhelming facts demonstrating the entwinement, excessive entanglement, and symbiotic relationship between AIG and the government, which has absolute ownership and control of AIG. Plaintiff's claim is not dependent upon the granting of his motion to amend to add AIG as a party, as Defendants incorrectly suggest.[13] (*See* Defs.' Br. at 49).

[12] Defendants' last argument against standing bears noting, if but in a footnote. Defendants assert that Plaintiff lacks standing because "this case does not involve a grant of taxpayer funds, but merely a for-value purchase of stock." (Defs.' Br. at 31-32). In other words, Defendants argue that a plaintiff has standing to challenge a statutory grant of taxpayer funds to an organization engaged in religious activities, but a plaintiff does not have standing if the government decides instead to buy and acquire ownership and control of the very same organization with these funds. The government's position on standing takes an *a fortiori* case of standing (*i.e.,* the use of taxpayer funds to actually acquire the organization engaged in religious activity) and stands it on its head, arguing that the government's acquisition insulates it from suit.

[13] As argued more fully in Plaintiff's opening brief, the district court abused its

Plaintiff's claim is further buttressed by the fact that *after* the Fed loans were repaid and the Credit Facility Trust terminated, the Treasury Department acquired 92% ownership of AIG. (Defs.' Br. at 15-17). This provides, at a minimum, a reasonable inference that the Fed loans served merely as a placeholder for the first $40 billion of EESA funds that replaced the like amount of Fed loans, and that the federal government's ownership and control of AIG is not and was not dependent upon these loans, contrary to Defendants' claim. (*See* Defs.' Br. at 20) (arguing "that ownership interest [in AIG] *initially* resulted from the FRBNY's Credit Facility Trust (which plaintiff does not challenge), not EESA") (emphasis added).[14]

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discretion by denying his motion to amend the complaint to add AIG as a defendant. Contrary to Defendants' claim, the parties did not explicitly foreclose amending the pleadings in this case. (*See* Defs.' Br. at 49-50). Indeed, in the July 23, 2009, "Case Summary" submitted jointly by the parties, Plaintiff stated, "[T]hrough the ownership and control of AIG as a result of the expenditure of taxpayer funds, the U.S. Government is now engaging in religious activities in violation of the Constitution." (R-18: Case Summary at 9). Defendants responded, in part, as follows, "Plaintiff is not entitled to discovery related to his novel legal theory that AIG's actions are 'state actions' . . . . AIG is not a state actor or a party to this lawsuit . . . ." (R-18: Case Summary at 11-12). Following a robust discussion of their respective positions, Plaintiff stated, "Plaintiff would like to reserve the right to amend the pleadings upon the completion of [his] discovery relating to the forensic accounting issues to expose the use of EESA funds invested in AIG." (R-18: Case Summary at 14). The district court's subsequent "Scheduling Order" filed on August 5, 2009, while claiming to establish a deadline for "amendments to pleadings," was silent on the date. (R-19: Scheduling Order). Plaintiff filed his motion for leave to amend the complaint on October 5, 2009—just 61 days after the Scheduling Order issued and more than 7 months before the close of discovery. This is hardly dilatory by any reasonable measure, particularly when leave to amend should be *freely* given. *See* Fed. R. Civ. P. 15(a).

[14] Defendants have never been able to explain why the FRBNY set up the Credit

Defendants' argument, which parrots the district court's opinion, is, at the end of the day, a straw man. Not challenging the Fed loans directly does not mean that AIG and the federal government are not entwined or excessively entangled, or have not engaged in a symbiotic relationship such that the actions of AIG are attributable to the government. Moreover, it cannot be gainsaid that the infusion of billions of taxpayer dollars through EESA promoted and further cemented this symbiotic relationship between AIG and the federal government—certainly, a reasonable observer would conclude that. Indeed, this court need look no further than the sworn congressional testimony of the CEO of AIG at the time, Mr. Edward Liddy, who stated, without equivocation, "The *infusion of substantial U.S. government capital to AIG* brought with it a substantial new set of relationships for the company: first and foremost, with the American taxpayer as AIG's largest single shareholder; with the taxpayers' representatives here in Congress; with the Federal Reserve and U.S. Treasury *as our primary day-to-day partners in government*; and more recently, with the trustees also appearing today." (R-61-4: Test. of Liddy on 5/13/09 at 5-6 (Pl.'s Ex.29) (emphasis added)).

Beyond the use of the original EESA funds to acquire the Series C preferred shares for the U.S. Treasury, the Recapitalization Agreement memorialized in the

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Facility Trust by naming the U.S. Treasury as the beneficiary of the Trust and therefore the beneficial owner of the Series C preferred shares, the very shares that transferred 77.9% of the ownership and voting rights to Defendants.

Master Transaction Agreement underscores the use of EESA funds to acquire ownership and control of AIG. The recapitalization was an "integrated" transaction that utilized another $22 billion of EESA funds ($20 billion paid per the Series F Securities Purchase Agreement and an additional $2 billion made available to AIG for "general corporate purposes") to convert all of the preferred shares held by the Treasury Department acquired via earlier EESA fund traunches *plus* the Series C preferred shares owned beneficially by the U.S. Treasury into voting common shares held by the Treasury Department. This increased Defendants' ownership and voting control from 77.9% to 92%. As expressly reported in the latest AIG proxy statement, approved by Defendants, we find that the government's ownership and control of AIG is absolute:

> **Effect of the Recapitalization**
> As a result of the Recapitalization, *AIG is controlled by the Department of the Treasury*. The interests of the Department of the Treasury may not be the same as the interests of AIG's other shareholders. *As a result of its ownership, the Department of the Treasury is able to elect all of AIG's directors and can, to the extent permitted by law, control the vote on substantially all matters* . . . .

(AIG SEC Form 14A at 9-10 (emphasis added); *see also* AIG Form 8k (9/30/10) at 5 (same)). Thus, Defendants' assertion that the federal government does not own or control AIG is patently false as a matter of fact and law. *See* Del. Code Ann. tit. 8, § 203(c)(4) (defining "control" and stating that "[a] person who is the owner of 20% or more of the outstanding voting stock of any corporation . . . shall be presumed to have

control of such entity”).

And beyond *de jure* and *de facto* control over the AIG board, Defendants admit a day-to-day supervisory role: “Similar to prior arrangements between AIG and the FRBNY Credit Facility Trust, the Master Transaction Agreement requires AIG and its Board [which the Treasury Department controls through elections] to ‘work in good faith with the [Treasury Department] to ensure corporate governance arrangements satisfactory to the UST.’” (Defs.’ Br. at 17).

In sum, the evidence plainly supports the conclusion that the challenged activity of AIG is attributable to the government for purposes of Plaintiff’s Establishment Clause claim. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 296 (2001) (identifying factors for holding that a challenged activity is government action for constitutional purposes, including, *inter alia*, “entwinement” between the government and the private actor).

## III. DEFENDANTS’ ACTIONS ARE SUFFICIENTLY LIKELY TO BE PERCEIVED AS AN ENDORSEMENT OF RELIGION IN VIOLATION OF THE ESTABLISHMENT CLAUSE.

The Supreme Court has admonished that “the Constitution . . . requires that [courts] keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded, and guard against other different, yet equally important, constitutional injuries.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000) (internal citation omitted). Such “constitutional injuries” occur when the government engages

in <u>any</u> activity that is "sufficiently likely to be perceived" as an endorsement of a particular religion or religious belief, *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 597 (1989), and this is certainly the case when "the sovereign" itself is involved in "religious activity," *Lemon*, 403 U.S. at 612.

Here, the federal government's use of taxpayer funds to endorse and promote SCF and its entwinement, symbiotic relationship, and excessive entanglement with the very company (AIG) that is publicly known as the market leader in SCF constitute activity that is "sufficiently likely to be perceived" by a reasonable taxpayer as a violation of the Establishment Clause. And this is particularly true, when, as here the federal government owns and controls AIG and yet refuses to place any safeguards on the expenditure of federal tax funds to ensure compliance with the Constitution, *knowing* that AIG and its subsidiaries, which rely on funding from AIG, engage in this religious indoctrination.

## CONCLUSION

Plaintiff respectfully requests that this court reverse the district court, declare that Defendants violated the Establishment Clause, enjoin the further illicit use of taxpayer funds, and order that all impermissibly used funds be disgorged from AIG.[15]

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[15] Defendants incorrectly claim that Plaintiff is not seeking "recovery" of funds impermissibly used in violation of the Establishment Clause. (*See* Defs.' Br. at 41, n.10). Indeed, one of the reasons Plaintiff sought to add AIG as a defendant was to ensure that this remedy remained available. *See Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 288 (6th Cir. 2009) ("As a party, [St. John's

Alternatively, Plaintiff respectfully requests that this court reverse the district court's grant of summary judgment in favor of Defendants, grant Plaintiff's motion to amend his complaint to add AIG and to include judicially noticeable facts, and remand the case.

Respectfully submitted,

THOMAS MORE LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq.

LAW OFFICES OF DAVID YERUSHALMI, P.C.

/s/ David Yerushalmi
David Yerushalmi, Esq.

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Episcopal Church] may be ordered to return the grants already made to it."). Nonetheless, this remedy is still available because the Treasury Department holds 92% of AIG.

## CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 6,971 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

THOMAS MORE LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq.

## CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2011, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

THOMAS MORE LAW CENTER

/s/ Robert J. Muise
Robert J. Muise (P62849)

## SUPPLEMENTAL ADDENDUM: DESIGNATION OF ADDITIONAL RELEVANT DISTRICT COURT DOCUMENTS

| Record No. | Description |
| --- | --- |
| R-18 | Discovery Plan (“Case Summary”) |
| R-19 | Scheduling Order |