NO. 11-1063

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

KEVIN MURRAY,
PLAINTIFF-APPELLANT,

V.

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

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

APPELLANT'S BRIEF

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 6th Cir. R. 26.1, Plaintiff-Appellant Kevin Murray, a non-corporate party, states the following:

There are no publicly owned corporations, not a party to the appeal, that have a financial interest in the outcome.

REASONS WHY ORAL ARGUMENT SHOULD BE PERMITTED

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and 6th Cir. R. 34(a), Plaintiff respectfully requests that this court hear oral argument. This case presents for review a constitutional issue that has national implications. Specifically, the court is being asked to decide whether the use of taxpayer funds to approve, endorse, and support shariah-based Islamic religious activities and indoctrination, including the use of such funds to acquire government ownership and control of America International Group, Inc. ("AIG"), a company that engages in such activities, violates the Establishment Clause of the First Amendment to the U.S. Constitution.

This constitutional challenge to the use of taxpayer funds to support Islamic religious activities arises out of the passage by Congress of the "Emergency Economic Stabilization Act of 2008" (12 U.S.C. § 5201 et seq.), which appropriated $70 billion of taxpayer money and expended, to date, $47.5 billion of that money to financially support the federal government's majority ownership interest in AIG and to fund AIG's Islamic activities.

Oral argument will assist this court in reaching a full understanding of the issues presented and the underlying facts. Moreover, oral argument will allow the attorneys for both sides to address any outstanding legal or factual issues that this court deems relevant.

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STATEMENT OF JURISDICTION

On December 15, 2008, Plaintiff Kevin Murray ("Plaintiff") filed a complaint against Timothy Geithner in his official capacity as the Secretary of the U.S. Department of Treasury ("Treasury Department") and the Board of Governors of the Federal Reserve System ("FED") (collectively referred to as "Defendants"), challenging the appropriation and expenditure of taxpayer funds to American International Group, Inc. ("AIG") under the "Emergency Economic Stabilization Act of 2008" (hereinafter "EESA" or "Act") (12 U.S.C. § 5201 *et seq*.), which was enacted by Congress pursuant to its taxing and spending power.

Pursuant to the Act, Congress appropriated $70 billion in taxpayer money and expended, to date, $47.5 billion of that money, which supported the federal government's majority ownership interest in AIG and funded AIG's shariah-based Islamic religious activities in violation of the Establishment Clause. (R-1: Compl.).

On February 27, 2009, Defendants filed a motion to dismiss (R-6: Mot. to Dismiss), which the district court denied in a published opinion issued on May 26, 2009 (R-12: Order Denying Mot. to Dismiss); *see Murray v. Geithner*, 624 F. Supp. 2d 667 (E.D. Mich. 2009).

On October 5, 2009, Plaintiff filed a motion to amend his complaint, (R-26: Mot. to File Am. Compl.), which the district court granted in part and denied in part on February 5, 2010, (R-44: Order Regarding Mot. to File Am. Compl.).

On February 8, 2010, Plaintiff filed his amended complaint, as modified by the district court's order. (R-45: Am. Compl.).

On June 7, 2010, the parties filed cross-motions for summary judgment. (R-57: Pl.'s Mot. for Summ. J.; R-67: Defs.' Mot. for Summ. J.).

On January 13, 2011, the district court filed a sealed order denying Plaintiff's motion and granting Defendants' motion. (R-87: Sealed Order). Judgment was subsequently entered in Defendants' favor. (R-88: J.).

On January 14, 2011, Plaintiff filed a notice of appeal. (R-89: Notice of Appeal). That same day and following the filing of Plaintiff's notice of appeal, the district court entered an order striking his Sealed Order, (R-87), and associated judgment, (R-88). The court then entered a revised, un-sealed opinion and order denying Plaintiff's summary judgment motion and granting Defendants' motion. (R-92: Op. & Order). Judgment was entered in favor of Defendants. (R-93: J.).

Plaintiff subsequently filed a timely amended notice of appeal, seeking review of (1) the district court's order denying Plaintiff's summary judgment motion and granting Defendants' motion and (2) the district court's order denying, in part, Plaintiff's motion to amend his complaint. (R-94: Am. Notice of Appeal).

This appeal is from a final order and judgment that disposes of all parties' claims. This court has jurisdiction pursuant to 28 U.S.C. § 1291.

PRELIMINARY STATEMENT

This case challenges the federal government's approval, endorsement, and financial support of shariah-based Islam.[1] To that end, Plaintiff seeks to enjoin the government's official endorsement of shariah-based Islam and the use of taxpayer funds to support Islamic religious activities and indoctrination.

In an unprecedented move, the FED authorized the Federal Reserve Bank of New York ("FRBNY") to loan billions of dollars to AIG, a company that engages in shariah-compliant financing, an Islamic religious activity, in exchange for the federal government's ownership and control of the company. Immediately following this infusion of capital and in further support of the government takeover of AIG, Congress, through EESA, appropriated $70 billion and authorized, to date, the expenditure of $47.5 billion in taxpayer dollars to further fund AIG. These taxpayer dollars were used to fund and financially support the federal government's ownership interest in AIG, and, in addition to the FED loan funds, they were used to support Islamic religious activities—activities that the federal government officially endorses and promotes.

The district court's decision denying Plaintiff's motion for summary judgment

[1] The government's actions are particularly egregious here in that they promote a *particular sect* of Islam (*i.e.*, shariah-based Islam). *Larson v. Valente*, 456 U.S. 228, 244 (1982) (preferring one religious denomination over another violates the Establishment Clause); *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 427 (2d Cir. 2002) (suggesting a "preference for the views of one branch" of a religion violates the First Amendment).

and granting Defendants' motion treated the Establishment Clause inquiry as if it "were so naive that any transparent claim to secularity would satisfy it," and it further "cut context out of" this inquiry to the point of ignoring undisputed material facts. *See McCreary Cnty. v. ACLU*, 545 U.S. 844, 863-64 (2005).

Indeed, James Madison, the principal author of the First Amendment, famously objected to "*three pence*" being used by the government to promote religion. *See Flast v. Cohen*, 392 U.S. 83, 103 (1968). Here, the federal government used, *at a minimum*, $153 million in taxpayer funds to support AIG's shariah-based Islamic activities. Thus, contrary to the district court's conclusion, this is not a *de minimis* amount of taxpayer money that can be ignored under our Constitution.

In sum, the relevant facts and applicable law compel one conclusion: the Establishment Clause prohibits the federal government from officially endorsing and supporting with taxpayer funds Islamic religious activities and indoctrination.

In the final analysis, there is little dispute that in 2008 this country was facing possibly the worst financial crisis since the Great Depression. And while our federal government may be compelled to act in unprecedented ways during these difficult times, times of crisis do not justify departure from the Constitution.

STATEMENT OF THE ISSUES FOR REVIEW

I. Whether the use of taxpayer funds to approve, endorse, and support shariah-based Islamic religious activities and indoctrination, including the use of such

funds to acquire government ownership and control of a company (AIG) that engages in such activities, violates the Establishment Clause of the First Amendment to the United States Constitution.

II. Whether the government's ownership and control of a company (AIG) that engages in Islamic religious activities and indoctrination violates the Establishment Clause of the First Amendment to the United States Constitution.

III. Whether the government's approval and support of shariah-based Islam is sufficiently likely to be perceived as conveying a message of endorsement of religion in violation of the Establishment Clause of the First Amendment to the United States Constitution.

IV. Whether the trial court erred by denying Plaintiff's motion for leave to amend his complaint to add AIG as a named defendant.

STATEMENT OF THE CASE

On December 15, 2008, Plaintiff filed his complaint, challenging the federal government's use of taxpayer funds to approve, endorse, and support shariah-based Islamic religious activities and indoctrination, including the use of such funds to acquire government ownership and control of a company (AIG) that engages in such activities. (R-1: Compl.).

On February 27, 2009, Defendants filed a motion to dismiss (R-6: Mot. to Dismiss), which the district court denied in a published opinion issued on May 26,

2009 (R-12: Order Denying Mot. to Dismiss); *see Murray v. Geithner*, 624 F. Supp. 2d 667 (E.D. Mich. 2009). In its opinion denying Defendants' motion, the court stated, quite correctly, the following:

> In this case, the fact ***that AIG is largely a secular entity is not dispositive***: The question in an as-applied challenge is not whether the entity is of a religious character, but ***how it spends its grant***. The circumstances of this case are historic, and the pressure upon the government to navigate this financial crisis is unfathomable. Times of crisis, however, do not justify departure from the Constitution. In this case, the United States government has a majority interest in AIG. AIG utilizes consolidated financing whereby all funds flow through a single port to support all of its activities, including Sharia-compliant financing. Pursuant to the EESA, ***the government has injected AIG with tens of billions of dollars, without restricting or tracking how this considerable sum of money is spent***. At least two of AIG's subsidiary companies practice Sharia-compliant financing, one of which was unveiled after the influx of government cash. . . . Finally, after the government acquired a majority interest in AIG and contributed substantial funds to AIG for operational purposes, the government co-sponsored a forum entitled "Islamic Finance 101." These facts, taken together, raise a question of whether the government's involvement with AIG has created the effect of promoting religion and sufficiently raise Plaintiff's claim beyond the speculative level, warranting dismissal inappropriate at this stage in the proceedings.

Id. at 676-77 (emphasis added).

On October 5, 2009, Plaintiff filed a motion to amend his complaint, (R-26: Mot. to File Am. Compl.), which the district court granted in part and denied in part on February 5, 2010, (R-44: Order Regarding Mot. to File Am. Compl.). Specifically, the district court denied Plaintiff's request to add AIG as a defendant. (R-44: Order Regarding Mot. to File Am. Compl. at 3). As argued in Plaintiff's motion, through its

joint action, entwinement, and symbiotic relationship with the federal government, AIG had become a government actor and thus a proper party-defendant. (R-44: Order Regarding Mot. to File Am. Compl. at 3) ("Plaintiff also seeks to add AIG as a party-defendant, and his allegations insinuate that AIG is liable as a governmental entity.").

On February 8, 2010, Plaintiff filed his amended complaint, as modified per the court's order. (R-45: Am. Compl.).

On June 7, 2010, the parties filed cross-motions for summary judgment. (R-57: Pl.'s Mot. for Summ. J.; R-67: Defs.' Mot. for Summ. J.). Due to the fact that a protective order was issued in this case, many of the supporting documents were filed under seal.[2]

On January 13, 2011, the district court filed a sealed order denying Plaintiff's motion for summary judgment and granting Defendants' motion. (R-87: Sealed Order). Judgment was subsequently entered in favor of Defendants. (R-88: J.).

On January 14, 2011, Plaintiff filed a notice of appeal. (R-89: Notice of Appeal). That same day and following the filing of Plaintiff's notice of appeal, the district court entered an order striking his Sealed Order, (R-87), and associated judgment, (R-88). The court then entered a revised, un-sealed opinion and order denying Plaintiff's summary judgment motion and granting Defendants' motion, (R-92: Op. & Order). Judgment was entered in favor of Defendants. (R-93: J.).

[2] The relevant documents filed under seal are provided in Appellant's Sealed Appendix (cited throughout as "App.__").

Plaintiff filed an amended notice of appeal, seeking review of (1) the district court's decision denying Plaintiff's summary judgment motion and granting Defendants' motion and (2) the district court's order denying, in part, Plaintiff's motion to amend his complaint to add AIG as a defendant. (R-94: Am. Notice of Appeal). This appeal follows.

STATEMENT OF FACTS

I. AIG IS PUBLICLY KNOWN AS THE WORLD LEADER IN SHARIAH-COMPLIANT FINANCIAL PRODUCTS.

A. AIG's Operations.

AIG owns directly and indirectly (through its direct subsidiaries) a myriad of domestic and foreign insurance and insurance-related companies. AIG exercises control over these subsidiaries through its direct and indirect ownership interests in these companies, represented typically by 100% of the equity and voting rights of the subsidiaries. (*See* R-58: AIG GC Aff. at ¶ 5 (Pl.'s Ex.1) at App.3; R-92: Op. & Order at 5; *see also* R-59: AIG 10K Filing (excerpts) at 3, 19, 372-78 (Pl.'s Ex.2); *see generally* R-59-1: AIG 10Q Filing (excerpts) at 12 (Pl.'s Ex.3)).

B. AIG's Consolidated Accounting.

AIG employs consolidated accounting, and it "manages liquidity at both the parent and subsidiary levels." This means that AIG provides funds to its subsidiaries when necessary, and subsidiaries similarly provide money to AIG and to other AIG subsidiaries as liquidity requirements dictate. (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)). Cash flows move from AIG through a single port to its subsidiaries and from and through its subsidiaries to AIG. Specifically, the cash flows from AIG to its subsidiaries relevant to this litigation 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).

C. AIG's Promotion of SCF Products.

AIG promotes and provides shariah-compliant finance ("SCF") products worldwide, with a specific focus on SCF insurance products known as "takaful." In addition to marketing and promoting SCF products as a market leader, AIG itself, through several of its wholly-owned subsidiaries, engages in SCF, which subjects aspects of its financial activities to the dictates of Islamic law. (R-59-2: Defs.' Admis. at No. 110 (Pl.'s Ex.5); R-59-3: AIG Takaful at 1 (Pl.'s Ex.6); R-58: AIG GC Aff. at ¶¶ 2, 4, 6 (Pl.'s Ex.1) at App.2-4; R-58-2: AIA Takaful Aff. at ¶¶ 7, 9-10 (Pl.'s Ex.7) at App.17-19; R-58-3: ALICO Aff. at ¶ 5 (Pl.'s Ex.8) at App.24-25; R-58-4: AIA Financial Aff. at ¶ 7 (Pl.'s Ex.9) at App.31-32; R-58-5: Takaful-Enaya Aff. at ¶ 5 (Pl.'s Ex.10) at App.39-41; R-58-6: Lexington-A.I. Risk Aff. at ¶ 5 (Pl.'s Ex.11) at App.48-49). SCF products and finance in general, and AIG's SCF activities in particular, are different from other financial products and activities in that they are

developed, funded, and maintained according to the religious tenets and dictates of Islamic law.[3] (R-60: Coughlin Decl., Ex.A at ¶¶ 7-9 (Pl.'s Ex.12); R-60-1: Spencer Decl., Ex.A at ¶¶ 1, 5, 17 (Pl.'s Ex.13); R-69: Coughlin Supp'l Decl. at ¶¶ 2-13 (Pl.'s Ex.38) at App.70-76 (providing additional detailed expert analysis of specific AIG SCF insurance products and the intimate control of these products by shariah religious doctrine)). AIG, through its wholly-owned subsidiaries, complies with shariah by employing or otherwise engaging shariah authorities who collectively act as "Shariah Supervisory Committees" for their SCF subsidiaries. These shariah authorities issue authoritative legal rulings (fatawa, singular fatwa) pursuant to Islamic legal tenets, which mandate certain behavior by AIG (or by AIG's shariah-compliant subsidiaries). (R-58: AIG GC Aff. at ¶ 4 (Pl.'s Ex.1) at App.2-3; R-58-2: AIA Takaful Aff. at ¶¶ 9-10 (Pl.'s Ex.7) at App.18-19; R-58-3: ALICO Aff. at ¶ 7 (Pl.'s Ex.8) at App.25; R-58-4: AIA Financial Aff. at ¶ 9 (Pl.'s Ex.9) at App.32-33; R-58-5: Takaful-Enaya Aff. at ¶ 7 (Pl.'s Ex.10) at App.41; R-58-6: Lexington-A.I. Risk Aff. at ¶ 7 (Pl.'s Ex.11) at App.49; R-60-1: Spencer Decl., Ex.A at ¶¶ 15-16 (Pl.'s Ex.13)). The role of shariah authorities is central to all shariah adherents. Indeed, the role of AIG's shariah authorities "is to review [AIG's] operations, supervise its development of Islamic products, and determine Shariah compliance of these products and [AIG's]

[3] *See generally* David Yerushalmi, *Shariah's "Black Box": Civil Liability and Criminal Exposure Surrounding Shariah-Compliant Finance*, 2008 Utah L. Rev. 1019 (2008).

investments." (R-61: AIG Takaful-FAQs at 3 (Pl.'s Ex.14); R-58: AIG GC Aff. at ¶ 4 (Pl.'s Ex.1) at App.2-3; R-58-2: AIA Takaful Aff. at ¶¶ 9-10 (Pl.'s Ex.7) at App.18-19; R-58-3: ALICO Aff. at ¶ 7 (Pl.'s Ex.8) at App.25; R-58-4: AIA Financial Aff. at ¶ 9 (Pl.'s Ex.9) at App.32-33; R-58-5: Takaful-Enaya Aff. at ¶ 7 (Pl.'s Ex.10) at App.41; R-58-6: Lexington-A.I. Risk Aff. at ¶ 7 (Pl.'s Ex.11) at App.49; R-60-1: Spencer Decl., Ex.A at ¶¶ 15-16 (Pl.'s Ex.13)). Thus, AIG's SCF business is pervasively sectarian in that its "secular" business purposes and its Islamic religious mission are inextricably intertwined. (R-60: Coughlin Decl. at Ex.A at ¶ 13 (Pl.'s Ex.12); R-69: Coughlin Supp'l Decl. at ¶¶ 2-13 (Pl.'s Ex.38) at App.70-76).

D. SCF: Shariah-Based Islamic Religious Indoctrination.

AIG's shariah-compliant financial activities and products are religious and Islamic in content and in practice. More particularly, they serve the theological purposes of shariah-based Islam. In fact, the court below found the following undisputed facts:

> AIG has advertised itself as the market leader in Sharia-compliant financing ("SCF"), *i.e.*, financial and insurance products that comply with certain dictates of Islamic law, such that Islamic adherents are not prohibited from purchasing the products for religious reasons. AIG defines "Sharia" as "Islamic law based on *Quran* [sic] and the teachings of the Prophet (PBUH)." A prominent example of SCF is Takaful—a form of insurance acceptable to purchase by certain Islamic adherents because: (1) policyholder funds are separated from shareholder funds; (2) funds are not invested in anything that is *haram*, *i.e.*, prohibited elements in Islam according to Sharia; (3) a certain percentage of any net surplus, if any, derived from the collection of premiums is paid to charitable organizations, and (4) policyholder funds are not used to

> borrow, lend, or enter into any financial transaction that is "unislamic." AIG, through several of its subsidiaries, offers products that comply with Sharia by employing or otherwise engaging individuals knowledgeable in Sharia ("Sharia authorities"), who act as "Sharia Supervisory Committees." The role of the Sharia authorities is to review AIG's operations, supervise its development of SCF, and determine whether AIG's products comply with Sharia. In December 2008, AIG issued a press release announcing the "First Takaful Homeowners Products for U.S." The press release stated that "[a]ccording to Ernst & Young's 2008 World Takaful Report, Takaful was estimated to be a $5.7 billion market globally with over 130 providers in 2006. The Takaful market is estimated to be in excess of $10 billion by 2010." Of AIG's approximate 290 subsidiaries, six have engaged in SCF since the enactment of the EESA.

(R-92: Op. & Order at 5-6) (footnotes omitted).

When AIG chooses to engage in and promote shariah-based Islamic practices to Muslims and non-Muslims as "a new way to life," it is by necessity selecting among competing theological perspectives on shariah and promoting the role of shariah in Islam for Muslims and for non-Muslims. (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). Thus, AIG describes "Sharia" as "Islamic law based on Quran [sic] and the teachings of the Prophet (PBUH)."[4] (R-61: AIG Takaful-FAQs at 1 (Pl.'s Ex.14); R-59-2: Defs.' Admis. at No. 131 (Pl.'s Ex.5)). This in itself is taking a theological position on an ongoing debate among Muslims and between Muslims and non-Muslims—notably including Plaintiff. (R-60: Coughlin Decl., Ex.A at ¶¶ 4-13 & Ex.B at ECF 19 of 29

[4] An acronym for "Peace Be Upon Him." *See Murray*, 624 F. Supp. 2d at 670, n.1.

(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; R-61-1: Murray Decl. at ¶¶ 1-5 (Pl.'s Ex.15)). Specifically, the Quran is considered by the majority but not all of Islamic adherents to be the perfect expression of Allah's will for man. Presumably, most non-Muslims, and this is certainly true of Plaintiff, don't accept the Quran as divine or as an expression—perfect or otherwise—of Allah or of any divinity. (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; R-61-1: Murray Decl. at ¶¶ 1-5 (Pl.'s Ex.15)). Further, AIG states that shariah is also based upon the "teachings of the Prophet," which is a reference to the canonized Sunnah. Again, many Muslims and non-Muslims, including Plaintiff, do not consider the Sunnah as authentic teachings of Mohammed or of any other purported prophet. (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; R-61-1: Murray Decl. at ¶¶ 1-5 (Pl.'s Ex.15)). AIG, and by clear extension and implication Defendants on behalf of the government, are taking a particular theological position by supporting a specific interpretation of shariah-based Islam.[5]

[5] Defendants in effect concede that AIG is fully engaged in theologically-driven behavior in their numerous responses to Plaintiff's Request for Admissions. Specifically, for every request for admission that sought a response relating to AIG's

This intimate and profound relationship between AIG's promotion of SCF and religious doctrine, all blessed by the government's imprimatur, is further evidenced by the promotion of SCF through a Treasury Department sponsored conference entitled "Islamic Finance 101." The program, which took place immediately following the acquisition of AIG by Defendants, was specifically designated for government policy makers, and the published materials are replete with theological propositions that implicitly and explicitly inform the objective audience that the federal government is promoting, endorsing, and encouraging the religious premises of shariah-based Islam. (R-59-2: Defs.' Admis. at Nos. 170-72 (Pl.'s Ex.5); R-63-3: Kiwan Dep. at 32-33 (Pl.'s Ex.34); *see also* "Islamic Finance 101" presentation materials at R-64; R-65: Kiwan Dep. Ex.21 (Pl.'s Ex.35)).

Not surprisingly, the moderator chosen by the government for its "Islamic Finance 101" program was Harvard Professor Samuel Hayes III, someone the government holds out as an expert in SCF. (R-64: Kiwan Dep. Ex.21 at ECF 1-2 of 65 (Pl.'s Ex.35)). In his still seminal work on SCF, co-authored with fellow Harvard Professor Frank E. Vogel, Hayes explains at the outset that SCF is an assertion of religiosity within commerce: "The structure of Islamic finance is firmly rooted in the

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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)). Indeed, AIG—and by extension the federal government—establishes theological propositions by word and by deed every day they engage in SCF business practices.

Qur'an and the teachings of Muhammad and the interpretations of these sources of revelation by his followers. . . . One of the more striking facts about the rise of Islamic banking and finance is that it represents an assertion of religious law in the area of commercial life, where secularism rules almost unquestioned throughout the rest of the world. . . . [Islamic finance] challenges the secular separation of commerce from considerations of religion and piety." (R-72-2: Yerushalmi Decl. at ¶¶ 6(a) & (f) (Pl.'s Ex.41)). The remainder of this groundbreaking and still quite authoritative text is devoted to a study of how Islamic religious dictates infuse SCF with its characteristics, meaning, and operational demands. (*See* R-72-2: Yerushalmi Decl. at ¶¶ 6 (a)-(m) (Pl.'s Ex.41) (providing quotations from the text demonstrating SCF's deeply religious grounding)).

E. AIG Is Known to the Public as a Market Leader in SCF.

Shortly after the federal government acquired its majority ownership interest in AIG and infused the company with billions of dollars in federal money, AIG issued a press release announcing the "First Takaful Homeowners Products for U.S." This announcement was released by AIG's public relations manager in New York City. The release was on AIG letterhead, with the large, bold "AIG" logo appearing prominently. The AIG address on the release was "70 Pine Street, New York, NY 10270"—AIG's corporate headquarters. The press release informs the general public that AIG employs a "Shari'ah Supervisory Board." The "Global Head of AIG Takaful

Enaya" proudly proclaimed, "This is truly a global effort on the part of AIG." The press release stated further that "[a]ccording to Ernst & Young's 2008 World Takaful Report, Takaful was estimated to be a $5.7 billion market globally with over 130 providers in 2006. The Takaful market is estimated to be in excess of $10 billion by 2010." And if the reader wants "more information on" AIG's SCF products, they are directed to contact Jim Crain at aig.com. (R-92: Op. & Order at 6; R-60: Coughlin Decl., Ex.C at ECF 27-29 of 29 (Pl.'s Ex.12)).

II. DEFENDANTS' OWNERSHIP AND CONTROL OF AIG.

A. Defendants Take Ownership and Control of AIG.

In mid-September 2008, in response generally to a crisis in the financial markets in 2008 and, in particular, to AIG's impending debt- and liquidity-driven demise, Defendant Geithner, as then-President of FRBNY, met and consulted with Henry Paulson, who was at the time the Secretary of the Treasury Department, and Ben Bernanke, who was and is the Chairman of the FED. Defendant Geithner, Paulson, and Bernanke agreed that the government must prevent AIG's collapse. (R-61-2: FED § 129 EESA Rep. ("FED Rep.") at 1-2 (Pl.'s Ex.16); R-61-3: FED Mins. of Sep. 16, 2008 ("FED Mins.") at 3-4 (Pl.'s Ex.17); R-61-4: Millstein Dep. at 10-11 (Pl.'s Ex.18); R-61-5: Bernanke Ltr. to Paulson of Nov. 9, 2008 (Greenlee Dep. Ex.8) ("Bernanke Ltr.") (Pl.'s Ex.19)). At the time, there was no statutory or other legal authority for the Treasury Department to provide debt or equity financing to AIG. (R-

61-4: Millstein Dep. at 20-21 (Pl.'s Ex.18).

Thus, at the FED meeting on September 16, 2008, Defendant Geithner formally proposed to the FED that AIG be provided massive financial assistance by having the FED invoke the "unusual and exigent circumstances clause" of Section 13(3) of the Federal Reserve Act ("FRA") in order to permit AIG to obtain "discount" (*i.e.*, loan) funds from the FRBNY.[6] (R-61-6: Greenlee Dep. at 31-32 (Pl.'s Ex.20)). As a result, the FED immediately authorized the FRBNY to (1) provide a credit facility of up to $85 billion; (2) secure collateralization through all of AIG's assets; (3) obtain a 79.9 % equity interest in AIG; and (4) reserve for itself the right to veto the payment of dividends to common and preferred shareholders. (R-61-3: FED Mins. at 3-4 (Pl.'s Ex.17)). By September 22, 2008, the FRBNY had implemented the FED's directives by negotiating, drafting, and executing the Credit Agreement. (*See* R-6-3: Defs.' Mot. to Dismiss, Ex.A (Credit Agreement); *see also* R-61-7: Credit Agreement (excerpts) (Pl.'s Ex.21)).

[6] Sections 13(1) and (2) of the FRA provide that only "member banks" may obtain loan funds from one of the regional Federal Reserve banks through discounted commercial paper. 12 U.S.C. §§ 342 & 343. AIG was not and is not a member bank. Section 13(3) provides, in relevant part, that under "unusual and exigent circumstances" the FED may "authorize any Federal Reserve bank" to provide funds to "any individual, partnership, or corporation . . . [p]rovided, that before" providing such funds, "the Federal Reserve bank shall obtain evidence that such individual, partnership, or corporation is unable to secure adequate credit accommodations from other banking institutions. All such [funds] shall be subject to such limitations, restrictions, and regulations as [the FED] may prescribe." 12 U.S.C. § 343 (emphasis added).

The Credit Agreement tracked the FED's mandate and provided for the FRBNY to provide AIG with an $85 billion loan ("Credit Facility"). In exchange, the FRBNY obtained collateral in the form of a security interest in effectively all of AIG's assets, and AIG agreed to issue preferred shares ("Series C Preferred Shares"), providing equity upon conversion equal to 79.9% of the total equity in AIG and voting rights in AIG equal to 79.9% of the total voting rights allotted to the common shareholders. (Subsequent amendments to the Credit Agreement reduced the total amount available under the Credit Facility to $60 billion and reduced the 79.9% equity and voting rights to 77.9%.)[7]

Under the Credit Agreement, however, AIG did not issue the Series C Preferred Shares to the FRBNY. Instead, AIG issued the legal ownership interest of the Series C Preferred Shares to a trust ("Trust") established pursuant to the AIG Credit Facility Trust Agreement ("Trust Agreement") and issued the beneficial interest to the U.S. Treasury.[8] According to the Trust Agreement, the FED (not the FRBNY) retains absolute and unilateral control over the existence of the Trust itself and the terms of

[7] See list of amendments to Credit Agreement and references to respective SEC filings in which they appear at R-59: AIG 10K Filing (excerpts) at 352 (Pl.'s Ex.2).

[8] The Trust was required because there is no authority under the FRA for the FED or the Federal Reserve regional banks to provide equity financing or to obtain equity as consideration for discount funds. In addition, there are conflict-of-interest issues for a Federal Reserve regional bank acting as both lender through a credit facility and controlling shareholder. (R-61-5: Bernanke Ltr. at 2 (Pl.'s Ex.19); R-61-9: Geithner Test. to Senate Banking Comm. at 13 (Pl.'s Ex.23); R-61-4: Millstein Dep. at 50-51 (Pl.'s Ex.18); R-61-6: Greenlee Dep. at 91-92 (Pl.'s Ex.20)).

the Trust Agreement.[9] (R-61-8: Trust Agreement (Pl.'s Ex.22)).

In sum, the federal government acquired a majority interest in AIG and effectively took control of the company.

B. $40 Billion of Credit Facility Funds Replaced by TARP Funds.

As a result of the failures and impending failures of several major financial institutions, including AIG, Congress exercised its authority under the Taxing and Spending Clause and passed EESA on October 3, 2008.[10] EESA established legislative authority for the Troubled Asset Relief Program ("TARP"), which authorized the Treasury Secretary to expend up to $700 billion in taxpayer funds "to purchase, and to make fund commitments to purchase, troubled assets from any financial institution." 12 U.S.C. §5211(a)(1). Pursuant to this express congressional mandate and specific congressional appropriation, AIG, as the single largest recipient of TARP funds, received $40 billion in November 2008. These funds were used to replace $40 billion of the Credit Facility funds provided to AIG just a few weeks earlier—funds that were used to support SCF. At that time, AIG had already drawn

[9] Section 1.03 of the Trust Agreement expressly permits the FED to terminate or amend the Trust pursuant to its Section 13(3) authority of the FRA. (R-61-8: Trust Agreement at 3 (Pl.'s Ex.22)).

[10] 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); *see generally* R-62-1: SIGTARP Rep. (Pl.'s Ex.26)).

down approximately $62 billion.[11] As a result of this infusion of taxpayer funds, AIG's debt to the FRBNY under the Credit Facility was reduced by $40 billion and AIG issued the Treasury Department non-voting, preferred shares ("Series D Preferred Shares"). (R-59: AIG 10K at 309 (Pl.'s Ex.2)).

As a result of the Series D Preferred Shares and the replacement of $40 billion of the Credit Facility funds with TARP funds, the federal government as a whole, using both FED funds and EESA funds, became the majority and controlling owner of AIG. Consequently, the federal government has a vested interest in ensuring the success of AIG and stands to profit by that success, creating a government entanglement with AIG. And by supporting its ownership interest with taxpayer money, maintaining a vested interest in the success of AIG, and standing to profit from that success, the federal government has insinuated itself into a position of interdependence so that it is in effect a joint participant in AIG's activities, thereby creating a symbiotic relationship such that AIG's activities can be fairly attributed to the government. (*See* R-61-4: Millstein Dep. at 48-49 (Pl.'s Ex.18); *see also* R-62-2: Test. of Foshee (Trustee) at 1 (Pl.'s Ex.27); R-62-3: Test. of Feldberg (Trustee) at 3, 5 (Pl.'s Ex.28); R-61-4: Test. of Liddy on 5/13/09 at 5-6 (Pl.'s Ex.29) ("The *infusion of*

[11] Prior to the execution of the Credit Agreement on Sept. 22, 2008, the FED loaned AIG approximately $37 billion in four traunches evidenced by four separate demand promissory notes. Pursuant to the Credit Agreement, this sum of $37 billion was converted to debt under the Credit Facility. (R-61-7: Credit Agreement (excerpts) (Pl.'s Ex.21)).

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.") (emphasis added)).

Moreover, the federal government's insinuation into the day-to-day management of AIG is evidenced not only by the shareholder control the FED exercises through the Trust it controls, but also by the fact that federal officials, including certain Defendants, acted directly to force the resignation of board members and the appointment of other board members. (*See, e.g.*, R-59-2: Defs.' Admis. at Nos. 74-75 (Pl.'s Ex.5); R-62-5: Test. of Liddy on 3/18/09 at 1 (Pl.'s Ex.30)).

C. Defendants Invest Additional TARP Funds Used to Support SCF.

On April 17, 2009, AIG and the Treasury Department entered into the Securities Purchase Agreement, which, *inter alia*, provided that the Treasury Department would provide AIG with up to $30 billion in equity financing.[12] (R-92: Op. & Order at 4). AIG would be able to draw down on this equity line as needed. While the Securities Purchase Agreement requires that AIG provide an "expected uses" for each drawdown, there is no requirement that AIG in fact use the drawdown

[12] The exact sum available under the Securities Purchase Agreement was $29.835 billion.

proceeds as "expected"—nor any prohibition on using the funds to support SCF. (R-71-3: Sec. Purchase Agreement (excerpts), ¶ 1.6(c) at ECF 12 of 28 (Ex.13 to Defs.' Resp.); *see also* R-67-2: Millstein Decl. at ¶ 22 (Ex.1 to Defs.' MSJ (redacted)); 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). AIG has drawn down more than $7.5 billion under the Securities Purchase Agreement.[13] (R-92: Op. & Order at 4).

D. AIG Promotes SCF without Safeguards.

As set forth above, AIG, through its wholly-owned subsidiaries, engages in, practices, and promotes SCF, which is a form of Islamic religious observance. AIG would not have survived its financial crisis without the financial support provided by Defendants on behalf of the federal government. This financial "life-support" included, *inter alia*, (1) FED funds (authorized by the FED) provided by the FRBNY through the Credit Facility, which provided the federal government with its majority and controlling ownership interest in AIG (Credit Facility-Series C Preferred Shares transaction); (2) the replacement of $40 billion of Credit Facility funds with TARP funds (Series D Preferred Shares transaction), which further supported the federal government's ownership interest in AIG and AIG's SCF activities; and (3) the most

[13] For the dates and amounts of the specific drawdowns see R-58-1: AIG Treas. Aff. at ¶ 11 (Pl.'s Ex.4) at App.13.

recent $30 billion TARP funds equity draw down agreement. Each of these transactions was and continues to be essential and necessary for AIG's continued survival.[14] Without the direct support of the federal government through the investment of taxpayer funds, AIG would not and could not survive as a corporate entity—consequently, AIG could not engage in its SCF businesses. Thus, taxpayer funds have been and continue to be used to support AIG's shariah-based Islamic religious activities.

Further, to date AIG has directly and indirectly provided financial support in excess of one billion dollars to its SCF businesses while receiving taxpayer funds.[15]

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[14] There can be no credible argument that AIG would have survived without financial support from the federal government. This is demonstrated at every level of government involvement and by AIG's government filings. Defendants concede this point. (R-61-6: Greenlee Dep. at 110 (Pl.'s Ex.20); R-61-4: Millstein Dep. at 13-16, 25, 28-29, 45-47 (Pl.'s Ex.18); *see also* R-67-2: Millstein Decl. at ¶¶ 3-14 (Ex.1 to Defs.' MSJ (redacted); R-61-5: Bernanke Ltr. (Pl.'s Ex.19)). Indeed, pursuant to Section 13(3) of the FRA, the FED may only open its discount window to non-member banks after a determination that the financial institution has no private financing available. 12 U.S.C. § 343.

[15] The details of AIG's financial transactions are covered by a protective order. For specific examples of transactions funding SCF, see "Exhibit 39—Financial Support to SCF," which was filed under seal. (R-69-1: AIG SCF Fin./Bus. Transactions (Pl.'s Ex.39) at App.83-87). It is undisputed that AIG subsidiaries engaged in SCF have received no less than $153 million in EESA funds. (R-92: Op. & Order at 18, n.8). It is also undisputed that AIG SCF subsidiaries have received in excess of one billion dollars from combined EESA funds and FED funds funneled through the FRBNY. (R-69-1: AIG's SCF Fin./Bus. Trans. (Pl.'s Ex.39) at App.83-87). The court below simply ignores non-EESA government funding based on a too narrow view of the import of the FED funding of AIG's SCF subsidiaries. For a discussion of the trial court's error on this point, see *infra* § III. At the end of the day, however, the reality is that neither AIG nor Defendants can refute the fact that taxpayer funds have and

Because AIG uses consolidated accounting and receives and funnels money through a non-segregated single port, taxpayer funds have been effectively diverted to support AIG's shariah-based Islamic activities and are divertible in the future for such uses with no meaningful restrictions or safeguards.

The court below, even after accepting that $153 million of EESA funds went to AIG's SCF subsidiaries (choosing to ignore non-EESA funds provided by the FED), concluded that these funds were *de minimus* or could not be traced directly into specific SCF activities. (R-92: Op. & Order at 18, n.8). While the *de minimus* argument is addressed *infra*, the court's ruling regarding the tracing of funds ignores the fact that AIG's consolidated accounting prevents even AIG from determining how these funds were used, and it ignores the fact that the government has not put in place any measures to prevent such expenditures.[16] (R-58-1: AIG Treas. Aff. at ¶¶ 5-6 (Pl.'s

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will continue to be used to support SCF. As AIG's Treasurer candidly admitted, "The tracing of whether and which funds from [the government] were used to support [SCF] activities would entail a compilation and analysis of thousands of transactions for each month over the period in question, an effort which would require a significant deal of time and would require the allocation of substantial additional resources, ***if even possible***." (R-58-1: AIG Treas. Aff. at ¶ 7 (Pl.'s Ex.4) at App.7-8) (emphasis added). And the reasons for this *impossibility* are obvious: (1) As a general rule, AIG uses consolidated financing to manage the liquidity of its subsidiaries, pushing the cash flow downstream through a single port; (2) Defendants do not prohibit the use of taxpayer money to support SCF; and (3) there are no constitutionally sufficient safeguards in place to ensure that taxpayer money is not being used to support SCF. Consequently, no reasonable and objective taxpayer would be convinced that his tax dollars are not being used to support SCF in violation of the Establishment Clause.

[16] Additionally, there is no dispute that these large sums of taxpayer dollars went into AIG's "sectarian side" of its operations. *See infra* § IV.C.4.

Ex.4) at App.7); 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, the court found that $109 million of EESA funds were traced to ALICO, one of AIG's SCF subsidiaries operating out of Saudi Arabia. The court concluded, however, that these funds were provided to ALICO offices in locations other than Saudi Arabia. The court ignored, however, the fact that these "offices" were not discreet corporate entities, and did not maintain segregated bank accounts. Thus, ALICO officials testified that there could very well have been intra-company transactions that are impossible for ALICO to trace precisely because ALICO operates its various branch offices as a single corporate entity with consolidated financing and accounting using non-segregated bank accounts. (R-58-3: ALICO Aff. at ¶¶ 2, 4, 13 (Pl.'s Ex.8) at App.23-24, 27-28; *see also* R-58-8: ALICO Supp'l Aff. at ¶¶ 2-3 (Pl.'s Ex.37) at App.66 (indicating that funds received into ALICO bank accounts were not only non-segregated, but they were not even at a zero-balance at the time of the AIG deposit of EESA funds, further preventing any tracing of monies subsequently distributed from that account to SCF activities)).

The future diversion of taxpayer funds in support of AIG's SCF businesses and shariah-based Islamic practices is more than theoretical for two reasons. One, under

the TARP program, approximately $215 billion remained available to distribute, of which the Treasury Department had contractually committed to providing AIG with an additional $22.5 billion under the $30 billion Securities Purchase Agreement. (*See* R-59-2: Defs.' Admis. at No. 69 (Pl.'s Ex.5)). And two, there are absolutely no statutory, regulatory, or contractual safeguards in place to prevent such diversions. Nothing in EESA, the TARP regulations, or the $30 billion Securities Purchase Agreement prohibits, at any time, AIG from applying TARP money to support its shariah-based Islamic activities. 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 Islamic 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).

E. Defendants Officially Endorse SCF.

Beyond financial support, Defendants actively promote and endorse both SCF generally and in particular AIG's involvement in SCF. This is evidenced by the Treasury Department's active endorsement of SCF through published writings posted on its website (publications actually edited with updates by Treasury Department

Staff);[17] providing for and publicly announcing the official position at the Treasury Department of the "Islamic Finance Scholar-in-Residence Program,"[18] published presentations by senior Treasury Department officials lauding SCF and stating explicitly that the federal government "places significant importance on promoting . . . Islamic finance" and has "recently deepened [its] engagement in Islamic finance in a number of ways," including "call[ing] for harmonization of Shari'a standards at the national and international levels."[19] And, as detailed above, all of this was followed by a promotion of SCF through the Treasury Department's "Islamic Finance 101" program, which took place immediately following the acquisition of AIG by Defendants and which provided published materials replete with theological propositions that implicitly and explicitly inform the objective audience that the federal government is promoting, endorsing, and encouraging the religious premises of shariah-based Islam.[20]

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[17] "Overview of Islamic Finance: Occasional Paper No. 4 (August 2006)" published by the Treasury Department and posted at its Web site at http://www.ustreas.gov/offices/international-affairs/occasional-paper-series/08042006_OccasionalPaper4.pdf. (*See* R-63: Treas. Dep't Islamic Finance Paper (Pl.'s Ex.31)).

[18] June 2, 2004, Treasury Department Press Release posted at the Treasury Department Web site at http://www.ustreas.gov/press/releases/js1706.htm. (*See* R-63-1: June 2004 Treas. Dep't PR (Pl.'s Ex.32)).

[19] May 8, 2004, Treasury Department Press Release posted at the Treasury Department's Web site at http://www.ustreas.gov/press/releases/js1543.htm. (*See* R-63-2: May 2004 Treas. Dep't PR (Pl.'s Ex.33)) (emphasis added).

[20] (Defs.' Admis. at Nos. 170-72 at Ex.5; Kiwan Dep. at 32-33 at Ex.34; *see also* "Islamic Finance 101" presentation materials (Kiwan Dep. Ex.21) at Ex.35).

ARGUMENT

I. STANDARDS OF REVIEW

A. Decision Granting Summary Judgment.

This court reviews the district court's grant of summary judgment *de novo*. *Watkins v. City of Battle Creek*, 273 F.3d 682, 685 (6th Cir. 2001). It may affirm only if the record, read in the light most favorable to Plaintiff, reveals no genuine issues of material fact and shows that Defendants were entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Upon its review of the record, this court must consider the evidence and draw all reasonable inferences in favor of Plaintiff, the non-moving party. *Siggers-El v. Barlow*, 412 F.3d 693, 699 (6th Cir. 2005).

B. Decision Denying Motion to Amend the Complaint.

"A court's refusal to grant leave to amend is reviewable under the 'abuse of discretion' standard." *Marks v. Shell Oil Co.*, 830 F.2d 68, 69 (6th Cir. 1987). "Though the decision to grant leave to amend is committed to the trial court's discretion, that discretion is limited by Fed. R. Civ. P. 15(a)'s liberal policy of permitting amendments to ensure the determination of claims on their merits." *Id*.

II. OVERVIEW OF THE DISTRICT COURT'S ERRORS.

The district court denied Plaintiff's motion for summary judgment and granted Defendants' motion based in large measure on five patently erroneous conclusions.

The first such glaring error is the district court's conclusion that SCF is not a

religious activity and thus does not result in religious indoctrination. Specifically, the court made the following demonstrably false claim: "*In the absence of evidence* showing that AIG's development and sale of SCF products has resulted in the instruction of religious beliefs for the purpose of instilling those beliefs in others or furthering a religious mission, Plaintiff has failed to demonstrate that a reasonable observer could conclude that AIG has engaged in religious indoctrination by supplying SCF products." (R-92: Op. & Order at 14) (emphasis added). In further support of this erroneous conclusion, the district court made the remarkably false claim that Plaintiff presented no evidence to counter Defendants' naked assertion that the sale of SCF products does not constitute religious indoctrination. (*See* R-92: Op & Order at 13-14) ("Plaintiff cannot defeat Defendants' motion for summary judgment, or prevail on its (sic) own, by arguing that the evidence in support of his claim is so overwhelming that he need not present any to the Court."). As the detailed *record evidence* cited below and in this brief demonstrates *without contradiction* (indeed, it was Defendants' naked assertion that was without record support), SCF *is* an Islamic religious activity that involves religious indoctrination. AIG's very own statements about its SCF activities prove this point. (*See, e.g.*, R-92: Op. & Order at 5-6).

The district court's second main error is its conclusion that even if AIG "has engaged in religious indoctrination by supplying SCF products, . . . any such indoctrination would not be attributable to the government." (R-92: Op. & Order at

14). In reaching this erroneous conclusion, the district court failed to consider the overwhelming evidence demonstrating that the federal government has insinuated itself into a position of interdependence with AIG so that it is in effect a joint participant in AIG's activities, thereby creating a symbiotic relationship such that AIG's activities can be attributed to the government.

The district court's third main error is its conclusion that the use of $153 million in taxpayer money to fund and financially support Islamic religious indoctrination is *de minimus* and thus not a constitutional violation.[21] (R-92: Op. & Order at 15-19). This conclusion cannot withstand any measure of scrutiny under extant Establishment Clause jurisprudence, as discussed further in this brief.

The district court's fourth main error is its conclusion that Plaintiff presented no evidence or argument regarding whether EESA has created an excessive entanglement with religion. (R-92: Op. & Order at 19-201). To that end, the district court failed to properly analyze this prong of the *Lemon* test and to consider the irrefutable evidence demonstrating that not only was the federal government entangled with religion through AIG, but that the federal government had *ownership and control* over AIG such that AIG's acts were attributable to the government and, in fact, were "state" action. This "entanglement" is "excessive" by any measure.

Finally, the district court erred by ignoring the acts of the Treasury Department

[21] Plaintiff was able to identify more than $153 million that was diverted to SCF. Nonetheless, by any man's measure, $153 million is not *de minimus*.

that provided crucial context for and direct evidence of the federal government's official promotion and endorsement of SCF. (R-92: Op. & Order at 21-22).

In the final analysis, the district court's factual findings are contradicted by the record, and its legal conclusions cannot withstand scrutiny in light of the record evidence and controlling law.

III. AIG IS A "STATE" ACTOR ENGAGED IN TAXPAYER-FUNDED RELIGIOUS INDOCTRINATION IN VIOLATION OF THE ESTABLISHMENT CLAUSE.

A. The Religious Indoctrination Associated with AIG's Promotion of Taxpayer-funded SCF Is Attributable to the Federal Government.

In its decision, the district court acknowledged that "Plaintiff objects to the government's purported entwinement with AIG." (R-92: Op. & Order at 11). Yet, the court stated that it was not going to "consider Plaintiff's argument that AIG's sale of SCF products is direct governmental action due to the government's ownership interest in AIG." (R-92: Op. & Order at 11). These statements are remarkable in light of the district court's later conclusions that (1) "Plaintiff has failed to present evidence that would allow a reasonable observer to conclude that the [expenditure of taxpayer funds to support SCF] has resulted in religious indoctrination *attributable to the government*," (R-92: Op. & Order at 19) (emphasis added), (2) that Plaintiff somehow "concedes" the issue that the challenged expenditure of taxpayer funds to support SCF has "not created an excessive [government] entanglement with religion," (R-92: Op. & Order at 19), and (3) that nevertheless, there is no such "excessive entanglement" in

this case, (R-92: Op. & Order at 19).

Contrary to the district court's conclusions, this case involves government "entanglement" with religion that far exceeds any reasonable measure of "excessiveness." It is not even a close call.

Unlike the standard Establishment Clause case in which the government is providing funds to a separate, private entity in an arms-length transaction, *see, e.g.*, *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (finding excessive entanglement in light of the government's post-audit power to evaluate the private institution's financial records), in this case, the government owns and controls the entity that is using the taxpayer money to fund Islamic religious activities. Thus, it is difficult, if not impossible, to imagine an entanglement that is more "excessive" than the one at issue here.

In *Lemon*, the Court "echoed the classic warning as to programs, whose very nature is apt to entangle the state *in details of administration*." *Id*. at 615 (citation and internal quotations omitted) (emphasis added). This concern with "excessive entanglement" is based, in large part, on the Establishment Clause's prohibition against "active involvement of the sovereign in religious activity," which is the case here. *Id.* at 612 (citation and quotations omitted).

In *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001), the Court reviewed the "host of facts" that can bear on the question of whether

the action of a party is fairly attributable to the government such that the action is "state action." In other words, when can it be said that the government "is *responsible* for the specific conduct of which the plaintiff complains"? *Id.* at 295 (citation and quotation omitted). This is ultimately an "attribution" question.

Upon review of its case law, the Court stated,

> We have, for example, held that a challenged activity may be state action when it results from the State's exercise of "coercive power," when the State provides "significant encouragement, either overt or covert," or when a private actor operates as a "willful participant in joint activity with the State or its agents." *We have treated a nominally private entity as a state actor when it is controlled by an "agency of the State,"* when it has been delegated a public function by the State, when it is "entwined with governmental policies," or *when government is "entwined in [its] management or control."*

Id. at 296 (citations omitted) (emphasis added).

In this case, AIG is owned and controlled by the government as its super-majority shareholder. Moreover, as the Court concluded, "Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards." *Id.* at 302.

As demonstrated by the irrefutable record evidence set forth in this brief, through the expenditure of federal funds, *including the expenditure of EESA funds*, the federal government acquired ownership (79.9 %, later reduced to 77.9%) and control of AIG. Indeed, the CEO of AIG, Edward Liddy, testified before Congress on May 13, 2009, as follows: "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 . . . .*" (R-61-4: Test. of Liddy on 5/13/09 at 5-6 (Pl.'s Ex.29) (Pl.'s Ex.29) (emphasis added).

The district court was dismissive of (and in fact ignored) the importance of the non-EESA funds that flowed to AIG. (*See, e.g.,* R-92: Op. & Order at 16). These funds are relevant for at least two significant reasons. First, they made possible the federal government's ownership and control of AIG, making not only AIG's actions "state action," but also ensuring that a reasonable observer would attribute AIG's actions (*i.e.*, using federal tax dollars to fund SCF) to the federal government. And second, this initial infusion of capital served merely as a placeholder for federal tax dollars that were soon to arrive via EESA. And these pre-EESA placeholder funds were used to support AIG's SCF activities. (*See* R-69-1: AIG SCF Fin./Bus. Transactions (Pl.'s Ex.39) at App.83-87).

In the final analysis, it cannot be gainsaid that the federal government is "entwined in [AIG's] management or control" such that the government is "responsible for the specific conduct of which the plaintiff complains." *See id*. Thus, the record evidence overwhelmingly proves "excessive entanglement" (in addition to state action on the part of AIG) and demonstrates that the federal government is

responsible for the religious indoctrination associated with SCF. Indeed, but for the "infusion of substantial U.S. government capital," which includes EESA taxpayer funds, AIG would not exist today. In sum, a reasonable observer informed of the facts would certainly conclude that the religious indoctrination at issue here is attributable to the federal government.

B. The District Court Abused Its Discretion by Denying Plaintiff's Motion to Amend His Complaint to Add AIG as a Defendant.

Leave to amend a complaint is to be *freely* granted when justice so requires. *See* Fed. R. Civ. P. 15(a) ("The court should freely give leave when justice so requires."). Absent bad faith or a dilatory motive on the part of the movant, leave to amend should be granted unless the amended claim would not survive a motion to dismiss. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Hurn v. Ret. Fund Trust of Plumbing, Heating & Piping, Indus. of S. Cal.*, 648 F.2d 1252, 1254 (9th Cir. 1981) ("Where there is lack of prejudice to the opposing party and the amended complaint is obviously not frivolous, or made as a dilatory maneuver in bad faith, it is an abuse of discretion to deny [the] motion.") (quotations and citation omitted). In short, courts should liberally construe Rule 15 in favor of permitting amendment. *See Greenberg v. Life Ins. Co. of Va.*, 177 F.3d 507, 522 (6th Cir. 1999).

Here, there was no bad faith or evidence of a dilatory motive on behalf of Plaintiff. And with regard to any future motion to dismiss, Plaintiff's amended complaint adding AIG as a defendant was similar to his original complaint in that it

challenged as a violation of the Establishment Clause the appropriation and expenditure of federal funds made in the exercise of Congress' power under the Taxing and Spending Clause (Art. I, § 8) that are being used to finance shariah-based Islamic religious activities and indoctrination engaged in by a corporation (AIG) that is owned, controlled, and funded by the federal government. Indeed, the district court had previously denied Defendants' motion to dismiss in *Murray v. Geithner*, 624 F. Supp. 2d 667 (E.D. Mich. 2009). Thus, there was no legitimate basis for denying any part of Plaintiff's motion in light of the liberal policy in favor of permitting amendment under Rule 15.

The reasons for the motion to amend the complaint were essentially twofold. First, to allege *additional facts* that had been uncovered or that had developed since the filing of the original complaint, including facts related to the federal taxpayer funding scheme of AIG, the expenditure of an additional $30 billion of taxpayer funds to support the funding scheme, and additional facts regarding the federal government's ownership and control of AIG. And second, as a result, to add AIG as a defendant. As demonstrated above, AIG's actions are properly considered "state action" and thus subject to constitutional challenge. *Brentwood Acad.*, 531 U.S. at 295-97. At a minimum, AIG is the recipient of the challenged grants of federal taxpayer money and is, therefore, a proper party to this action. *See, e.g., Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 288 (6th Cir. 2009) ("As a

party, [St. John's Episcopal Church] may be ordered to return the grants already made to it.").

In sum, the district court abused its discretion by denying Plaintiff leave to amend his complaint to add AIG as a named defendant.

IV. THE ESTABLISHMENT CLAUSE PROHIBITS THE GOVERNMENT FROM APPROVING, ENDORSING, OR SUPPORTING SHARIAH-BASED ISLAM.

A. "Three Main Evils" and "Three Pence."

The Establishment Clause famously states, "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. Despite the absence of precisely stated prohibitions, it was intended to protect against "three main evils": ''[1] sponsorship, [2] financial support, and [3] active involvement of the sovereign in religious activity.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

In *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), the Court further emphasized:

> *No tax in any amount*, large or small, can be levied to support *any* religious activities or institutions, *whatever they may be called*, or *whatever form they may adopt* to teach or practice religion.

Id. at 16 (emphasis added). This is consistent with James Madison's objection to "three pence" being used to fund religion. *See Flast v. Cohen*, 392 U.S. 83 (1968) (quoting James Madison's famous *Memorial and Remonstrance Against Religious Assessments*).

As set out more fully in the statement of facts, all of the "main evils" are present in this case, which involves not just "three pence," but hundreds of millions, if not billions of dollars of federal government support. Indeed, the district court's decision upholding the use of *$153 million* in taxpayer dollars to fund Islamic religious activities under the Establishment Clause is contrary to controlling law and must be reversed.

B. Prohibition on *Perceived* Endorsement of Shariah-Based Islam.

The Supreme Court has warned 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). In fact, "[*e*]*very* government practice must be judged *in its unique circumstances* to determine whether it constitutes an endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor J., concurring) (emphasis added). Consequently, another way in which Establishment Clause "values" are eroded—a way that is not so subtle—is when the government uses taxpayer money to not only fund religious activities, but to take *de facto* and *de jure* control of a private entity that engages in religious activities. And this "unique circumstance" is further worsened when the government favorably endorses the religious activities in question, as in this case.

As controlling case law makes plain, the Establishment Clause prohibits the government from engaging in any activity that "is sufficiently likely to be perceived" as an endorsement of a particular religion or religious belief. *See Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 597 (1989).

Indeed, in published presentations available to the public, senior Treasury Department officials praise SCF and state explicitly that the federal government "places significant importance on *promoting* . . . Islamic finance," that it seeks "to protect its unique role to honor its traditions," and that it has "recently *deepened* [*its*] *engagement in Islamic finance* in a number of ways," including "call[ing] for harmonization of Shari'a standards at the national and international levels." (R-63-2: May 2004 Treas. Dep't PR (Pl.'s Ex.33)) (emphasis added).

With regard to the irrefutable evidence demonstrating that the federal government officially "promot[es]" (and, indeed, has "deepened [its] engagement in") Islamic finance, the district court made the erroneous contrary finding "that a reasonable observer would not, after considering this evidence, conclude anything other than that the government merely endorsed the *study* of Islamic finance due to the increasingly significant role Islamic finance plays in the financial industry and world economy." (R-92: Op. & Order at 23). As the evidence shows, the federal government does not merely endorse the *study* of Islamic finance, it favorably promotes SCF as an acceptable practice and actively advocates a "harmonization of

Shari'a standards," which requires the government to decide what is Islamic law and which renderings of Islamic law should be controlling and then to actively "call[] for harmonization" of those religious rulings. At the most rudimentary level, this "call[] for harmonization" suggests to competing shariah authorities propounding competing standards that it is desirable and even possible to harmonize standards that are said to be divine and at odds with one another. By officially "call[ing]" for such "harmonization," the government has in fact taken a theological position. Thus, the government's active involvement in promoting "harmony" among religious rulings by shariah authorities is a government endorsement of specific shariah religious doctrines among competing Islamic dogma in direct contravention of the Establishment Clause. *See Larson*, 456 U.S. at 244; *Commack Self-Service Kosher Meats, Inc.*, 294 F.3d at 427.

Indeed, the district court's own finding undermines its ultimate conclusion in this case by acknowledging "the increasingly significant role Islamic finance [note: if it is not religious, why is it *Islamic* finance?] plays in the financial industry and world economy."[22] In other words, a reasonable observer would know the significance of

[22] Indeed, the district court made specific findings that demonstrate without contradiction that SCF *is* a religious activity that involves religious indoctrination. (*See, e.g.*, R-92: op. & Order at 5-6) (finding that "AIG has advertised itself as the market leader in Sharia-compliant financing ('SCF'), *i.e.*, financial and insurance products that comply with certain dictates of Islamic law, such that Islamic adherents are not prohibited from purchasing the products for religious reasons," that "AIG defines 'Sharia' as 'Islamic law based on *Quran* [sic] and the teachings of the Prophet

SCF and AIG's role as the market leader in this global industry *that is guided by shariah law*. At a minimum, a reasonable observer would conclude that the *federal government* was aware of this information through its very own programs and publications, but yet took no steps to prevent taxpayer money from being used by AIG to support this Islamic activity—and refuses to this day to take any future steps to prevent this impermissible use of taxpayer money.

In sum, providing over $150 million in taxpayer money to fund and support an Islamic religious activity that the federal government officially and publicly promotes is "sufficiently likely to be perceived" as an impermissible endorsement of religion in violation of the Establishment Clause.

C. The Modified *Lemon* Test.

While the Supreme Court has struggled with creating a single test for determining when the government has violated the Establishment Clause, the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), remains the starting point for the court's analysis. Under the *Lemon* test, a governmental action is unconstitutional if any one of the following applies: (1) it does not have a valid secular purpose; (2) its

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(PBUH),'" that "funds are not invested in anything that is *haram*, *i.e.*, prohibited elements in Islam according to Sharia," that "policyholder funds are not used to borrow, lend, or enter into any financial transaction that is "unislamic," that "AIG, through several of its subsidiaries, offers products that comply with Sharia by employing or otherwise engaging individuals knowledgeable in Sharia ('Sharia authorities'), who act as 'Sharia Supervisory Committees,'" and that "The role of the Sharia authorities is to review AIG's operations, supervise its development of SCF, and determine whether AIG's products comply with Sharia").

primary effect either advances or inhibits religion; or (3) it excessively entangles government with religion. *Id.* at 612-13.

1. The "Purpose" of Promoting Shariah-Based Islam.

When evaluating the "purpose" of governmental acts under *Lemon*, the reviewing court must not simply accept the government's self-serving statements in its defense. *See Edwards v. Aguillard*, 482 U.S. 578 (1987); *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 290. As the Supreme Court stated recently, "The eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and *implementation of the statute*,' or comparable official act." *McCreary Cnty. v. ACLU*, 545 U.S. 844, 862 (2005) (citation omitted) (emphasis added). In fact, the Court admonished in *McCreary County* that a reviewing court should not treat the "purpose enquiry" as if it "were so naive that any transparent claim to secularity would satisfy it, and [*should not*] *cut context out of the enquiry, to the point of ignoring history*, no matter what bearing it actually had on the significance of current circumstances." *Id.* at 863-64 (emphasis added).

Indeed, the "purpose" of a challenged act need not be nefarious, just impermissible, from an objective observer's perspective. Thus, Plaintiff need only prove that the "purpose" of the challenged acts, *which extend beyond a challenge to EESA to include Defendants' official endorsement and support of shariah-based*

Islam, is impermissible. Plaintiff is not required to prove that Defendants had a bad "motive." *See Bd. of Educ. v. Mergens*, 496 U.S. 226, 249 (1990).

While the stated purpose of EESA (to "provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States") is a secular purpose, that does not end the inquiry. As noted above, "purpose" is viewed from the perspective of an objective observer who must consider the entire context of the challenged act, including its implementation (*i.e.*, how have the funds been used in this case?). *McCreary Cnty.*, 545 U.S. at 862. The essential challenge at issue here is to the federal government's official endorsement of SCF, an Islamic religious activity. And this impermissible endorsement comes by way of word (the federal government's official promotion of SCF) and deed (the federal government's funding of SCF with taxpayer money).

The official government endorsement (and concomitant approval) of this shariah-based Islamic activity is evidenced, at a minimum, by the following compelling facts: (1) despite knowing that AIG is the market leader in SCF and actively promotes SCF as a way to "introduce[people] to a new way of life" *that is guided by shariah law*, all of which is public knowledge, the federal government provided AIG with open-ended money grants knowing that this money will be (has been, and will continue to be) used to fund SCF and (2) the federal government actively and publicly promotes and approves of SCF.

When a reasonable observer considers the entire context, which includes the federal government (knowingly) allowing taxpayer funds to be used by AIG to support SCF (*i.e.*, implementation of EESA) and the federal government's official position on SCF, a reasonable observer would conclude that the federal government's "purpose"—to promote, endorse, and fund SCF—is impermissible.

2. The "Effect" of Promoting Shariah-Based Islam.

When evaluating the "effect" of the challenged acts under *Lemon*, the reviewing court is required to do so *irrespective* of the government's purpose. Indeed, "the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 307, n.21 (internal quotations and citations omitted). At a minimum, this is precisely what the federal government and its officials have done in this case, even assuming, *arguendo*, that Defendants are blissfully ignorant about SCF (which is impossible to assume in light of the record in this case).

While "[t]he purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion[, t]he effect prong asks whether, irrespective of the government's actual purpose, the practice under review in fact *conveys a message of endorsement* or disapproval. An affirmative answer to either question should render the challenged practice invalid." *See Lynch*, 465 U.S. at 690 (O'Connor J., concurring) (emphasis added). As Justice O'Connor explained in

Lynch, "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 688 (O'Connor, J., concurring). The inquiry as to whether the challenged acts are "sufficiently likely to be perceived" as "convey[ing] a message of endorsement" of religion is from the perspective of a "reasonable" and "reasonably informed observer." *See Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 292 (6th Cir. 2009) (applying "endorsement" test to a funding scheme); *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (same).

3. The "Effect" of Funding Shariah-Based Islamic Religious Activities.

In *Hunt v. McNair*, 413 U.S. 734, 743 (1973), the Court made clear that federal aid will have "a primary effect of advancing religion . . . when it funds a specifically religious activity in an otherwise substantially secular setting," as in this case.[23] In *Agostini v. Felton*, 521 U.S. 203, 218, 232-33 (1997), the Court further modified *Lemon* by folding the entanglement inquiry into the primary effect inquiry for funding cases since both inquiries *tended* to rely on the same evidence. The Court suggested

[23] It is difficult to imagine an activity that is more religious than SCF—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)"; (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 Islamic 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). (*See* R-60: Coughlin Decl., Ex.A (Pl.'s Ex.12)).

three factors for determining whether government funding has the impermissible *effect* of advancing religion: (1) whether it results in the indoctrination of religion; (2) whether it defines its recipients by reference to religion; or (3) whether it creates an excessive entanglement. *Agostini*, 521 U.S. at 234. The first and third factors are present here.

4. The Lack of Constitutionally Required "Safeguards."

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"); *Am. Atheists, Inc.* 567 F.3d at 293 ("[A] program may have the primary effect of advancing religion if the recipient divert[s] secular aid to further its religious mission.") (quotations and citation omitted).

Here, top executives at AIG provided undisputed 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 Islamic 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).

In *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 296 (6th Cir. 2009), for example, the court upheld the funding program, but did so upon finding that there was "ample reason to think that the distributed aid did not (and will not) result in government-sponsored faith-based activities" because "the mechanics of the program ensured that the aid would go just to the approved uses." *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").

In *Am. Atheists, Inc.*, the court observed:

> Not only did eligible recipients have to satisfy three levels of review verifying that the project conformed to the program's guidelines and criteria, [***which restricted the use of funds to purely secular purposes***,] but they also had to finance 100% of the project on their own at the outset and 50% of the program by the end. Whatever "special dangers" exist when [the government] makes open-ended money grants to

> religious recipients, which may spend the funds on whatever they wish, those dangers do not exist when [the government] releases funds for completed work on approved projects that the recipient initially finances on its own.

Am. Atheists, Inc., 567 F.3d at 296 (internal citation omitted).

In *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 774 (1973), the Court struck down, *inter alia*, the "maintenance and repair" provisions of a New York statute that permitted aid to nonpublic schools. The Court found that the grants were "given largely without restriction on usage," stating that

> [***n***]***othing in the statute***, for instance, bars a qualifying school from paying out of state funds the salaries of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities. ***Absent appropriate restrictions*** on expenditures for these and similar purposes, ***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.

Id. (emphasis added).

Similarly here, there is "nothing in the statute" that prohibits AIG from using government (taxpayer) funds to support its religious activities. Absent appropriate safeguards, "it simply cannot be denied" that the use of government funds has the primary effect of advancing religion in that they subsidize directly AIG's religious activities.

The district court's conclusion that constitutionally minimal safeguards, which are not present here by any measure even though we *know* funds were actually

diverted to SCF subsidiaries and remain available for such future *diversions*, are unnecessary because AIG itself is not a "sectarian institution." (R-92: Op. & Order at 18) ("[T]he Supreme Court has only required the imposition of such restrictions when the recipient of government funds is a sectarian institution, *i.e.*, when there is a substantial risk that funds will be used for religious purposes.") (citing *Bowen*, 487 U.S. 612 ("Only in the context of aid to '*pervasively sectarian' institutions* have we invalidated an aid program on the grounds that there was a 'substantial' risk that aid to these religious institutions would, knowingly or unknowingly, result in religious indoctrination.") (emphasis added)). The district court is mistaken.

In *Roemer v. Bd. of Public Works of Md.*, 426 U.S. 736 (1976), for example, the Court concluded that the institutions receiving federal funding, while having an affiliation with the Roman Catholic Church, were not "pervasively sectarian"—that is, they were not "so permeated by religion that the secular side cannot be separated from the sectarian." *Id*. at 759 (quotations and citation omitted). The same is true of AIG. Because not all of AIG's activities or subsidiaries are "pervasively sectarian"—most notably, the activities or subsidiaries that do not engage in SCF—it is possible to separate the secular activities from the sectarian. Returning to *Roemer*, the Court made clear that the funding at issue did not have an impermissible "effect" under the analysis of *Hunt v. McNair*, 413 U.S. 734 (1973), because the statute authorizing the funding had a specific "prohibition against sectarian use" and there was

"administrative enforcement of that prohibition." *Roemer*, 426 U.S. at 759 (quotations omitted). Consequently, when an entity receiving federal funds has a "sectarian side," such as AIG, then restrictions on the use of such funds are necessary to ensure that the money is not being used to support this impermissible "side" of the entity's activities. *See also 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").

Indeed, if the rule were as the district court is attempting to craft for this case, then the government could easily circumvent the restrictions of the Establishment Clause by enacting facially neutral funding programs that funnel money for religious activities through a secular third party, such as a corporation established by a grant recipient for that purpose. Also, there are many private organizations that are not "sectarian institutions," but yet engage in religious activities, such as the many non-profit organizations created by the laity that help the poor as well as engage in evangelical work, such as distributing Bibles and other religious materials. The government could provide funding for programs that help to feed and shelter the poor, for example, but it could not fund the specific religious activities of these non-sectarian institutions. *See, e.g.*, *Kendrick*, 487 U.S. at 621-22. Providing open-ended money grants to these organizations without also placing restrictions on the use of such funds is impermissible under the Court's extant Establishment Clause

jurisprudence. *See, e.g., Hunt*, 413 U.S. at 743.

In the final analysis, while there is a risk that taxpayer funds could be used impermissibly by a sectarian institution because that institution by its very nature is likely to be engaged in religious activities, there is a similar risk here in that the secular institution involved (AIG) is knowingly engaged in religious activities (SCF). Thus, there is a "substantial risk"—a risk that is more than "substantial" because it has actually been realized—that aid to AIG would knowingly result in religious indoctrination. Consequently, because neither Congress nor any government official responsible for managing the federal funds at issue here has imposed any restrictions on the use of those funds by AIG—funds that we know are being used to support SCF—this court should, by way of declaratory and injunctive relief, ensure compliance with the Constitution by restricting such use.

V. THE TOTALITY OF THE FACTS DEMONSTRATE AN ESTABLISHMENT CLAUSE VIOLATION AS A MATTER OF LAW.

A review of the material facts in light of established legal principles leads to the firm conclusion that Defendants violated the Establishment Clause. In 2008, the federal government, through the FED, took unprecedented action by acquiring a majority ownership interest in AIG. The funds used to acquire this ownership were also used to support AIG's religious activities. Through EESA, the government then provided further support for its investment by granting AIG $40 billion in taxpayer money, which replaced a portion of the FED funds and allowed AIG to continue its

operations, including its Islamic religious activities. This disbursement of EESA funds was followed within a few months by an additional $30 billion of taxpayer funds. The funds provided pursuant to EESA are unrestricted (except for executive compensation), open-ended grants of taxpayer money. Moreover, AIG employs consolidated financing—all of its funds are fungible and flow through a single port. Consequently, all funds going to AIG are used to financially support AIG's activities, including its Islamic religious activities. Because there are no restrictions or safeguards in EESA that bar the use of the funds to support AIG's religious activities, and there is no true mechanism in EESA by which the government could police this impermissible use of funds, it "simply cannot be denied" that disbursement of EESA funds to AIG "has a primary effect that advances religion." *Nyquist*, 413 U.S. at 774. Thus, the lack of any constitutionally sufficient safeguards restricting the impermissible use of billions of taxpayer dollars going to AIG is sufficient to find a constitutional violation. *Id.*; *Tilton*, 403 U.S. at 682-84.

The Supreme Court has also made clear that when taxpayer money is being used to fund a religious activity, even when the activity occurs in an otherwise secular setting, as in this case, the "effect" of such funding violates the Establishment Clause. *Hunt*, 413 U.S. at 743. The Court has similarly made clear that funding resulting in either religious indoctrination or excessive government entanglement with religion, as in this case, has an unconstitutional "effect." *Agostini*, 521 U.S. at 234. And this

"effect" is worsened by the "symbolic" union between the government and AIG as a result of the government's ownership and control of AIG. *See id*. at 223-28. Consequently, this union creates a further "excessive entanglement" problem in that the "sovereign" itself is engaging in religious activities. *See Lemon*, 403 U.S. at 612; *see also Brentwood Acad.*, 531 U.S. at 296 (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).

Indeed, the taxpayer funding of AIG was not done in a vacuum. As noted above, at the time of this funding, the federal government had a super-majority ownership interest in and *de facto* and *de jure* control over AIG. Furthermore, AIG was *publicly known* as the world leader in SCF. In fact, shortly after receiving the first grant of EESA money, AIG publicly announced that it was *expanding* its SCF activities in the United States. (R-92: OP. & Order at 6). Moreover, near the time of the EESA funding, the Treasury Department itself held a forum on SCF *for government policy makers*, giving this religious practice the federal government's stamp of approval. That official approval is further endorsed by Defendants through documents found on the Treasury Department's website. In sum, it is a *clear violation* of the Establishment Clause when the government throws its weight in support of a *particular* religious doctrine, such as shariah-based Islam. *Larson*, 456 U.S. at 244 ("The clearest command of the Establishment Clause is that one religious

denomination cannot be officially preferred over another."); *Commack Self-Service Kosher Meats, Inc.*, 294 F.3d at 427 (holding that the government violated the First Amendment because it suggested a "preference for the views of one branch of Judaism").

In the final analysis, the totality of the undisputed facts in light of the controlling law compels one conclusion: Defendants' approval and support of shariah-based Islam is sufficiently likely to be perceived as conveying a message of endorsement of religion in violation of the Establishment Clause.

CONCLUSION

Plaintiff respectfully requests that this court reverse the district court, declare that the appropriation and expenditure of taxpayer funds to purchase AIG and to financially support AIG's Islamic religious activities and the federal government's endorsement and promotion of shariah-based Islamic religious practices violate the Establishment Clause, enjoin the further illicit use of taxpayer funds, and order that all impermissibly used funds be disgorged from AIG.

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 as a defendant, and remand the case for trial.

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.

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 13,968 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 February 28, 2011, I electronically filed the foregoing brief and the Appellant's Sealed Appendix 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)

ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record No.	Description
R-1	Complaint
R-6	Defendants' Motion to Dismiss
	Exhibit A: Credit Agreement
R-12	Order Denying Motion to Dismiss
R-26	Plaintiff's Motion for Leave to File First Amended Complaint
R-44	Order Granting in Part and Denying in Part Motion for Leave to File First Amended Complaint
R-45	Amended Complaint
R-57	Plaintiff's Motion for Summary Judgment
R-58	*Sealed Exhibits* in Support of Plaintiff's Motion for Summary Judgment (*Contained in Appellant's Sealed Appendix*)
	Exhibit 1: Affidavit of AIG General Counsel
	Exhibit 4: Affidavit of AIG Treasurer
	Exhibit 7: Affidavit of CEO of AIA Takaful
	Exhibit 8: Affidavit of Assistant VP & Regional Director of ALICO
	Exhibit 9: Affidavit of General Counsel & Director of AIA Financial
	Exhibit 10: Affidavit of General Manager of Takaful-Enaya

Exhibit 11: Affidavit of Executive VP of Lexington & President of A.I. Risk

Exhibit 37: Supplemental Affidavit of ALICO

R-59 Exhibits in Support of Plaintiff's Motion for Summary Judgment

Exhibit 2: AIG 10K Filing (excerpts)

Exhibit 3: AIG 10Q Filing (excerpts)

Exhibit 5: Defendants' Responses to Requests for Admissions (excerpts)

Exhibit 6: AIG Takaful Mission Statement

R-60 Exhibits in Support of Plaintiff's Motion for Summary Judgment

Exhibit 12: Expert Declaration of Steven Coughlin

Exhibit A: Expert Report

Exhibit B: AIG PowerPoint Presentation: "What is Takaful?"

Exhibit C: AIG December 2008 Press Release Announcing Takaful Products in the U.S.

Exhibit 13: Expert Declaration of Robert Spencer

Exhibit A: Expert Report

Exhibit B: AIG PowerPoint Presentation: "What is Takaful?"

Exhibit C: AIG December 2008 Press Release Announcing Takaful Products in the U.S.

R-61 Exhibits in Support of Plaintiff's Motion for Summary Judgment

Exhibit 14: AIG Takaful FAQ's

Exhibit 15: Declaration of Plaintiff Murray

Exhibit 16: FED Report

Exhibit 17: Minutes of FED Meeting

Exhibit 18: Deposition of Millstein (excerpts)

Exhibit 19: Letter from Bernanke to Paulson

Exhibit 20: Deposition of Greenlee (excerpts)

Exhibit 21: Credit Agreement (excerpts)

Exhibit 22: Trust Agreement

Exhibit 23: Geithner Testimony to Senate Banking Committee

Exhibit 24: Legislative History

R-62 Exhibits in Support of Plaintiff's Motion for Summary Judgment

Exhibit 25: AIG Press Release of November 2008

Exhibit 26: SIGTARP Report

Exhibit 27: Testimony of Trustee Foshee to Congress

Exhibit 28: Testimony of Trustee Feldberg to Congress

Exhibit 29: Testimony of Liddy to Congress in May 2009

Exhibit 30: Testimony of Liddy to Congress in March 2009

R-63 Exhibits in Support of Plaintiff's Motion for Summary Judgment

Exhibit 31: Overview of Islamic Finance Paper on Treasury Department Website

Exhibit 32: Press Release of Treasury Department of June 2004

Exhibit 33: Press Release of Treasury Department of May 2004

Exhibit 34: Deposition of Kiwan (excerpts)

R-64 Exhibits in Support of Plaintiff's Motion for Summary Judgment

Exhibit 35: (Part 1) Islamic Finance 101 Presentation Materials

R-65 Exhibits in Support of Plaintiff's Motion for Summary Judgment

Exhibit 35: (Part 2) Islamic Finance 101 Presentation Materials

R-67 Defendants' Motion for Summary Judgment (Redacted)

Exhibit 1: Millstein Declaration

R-68 Plaintiff's Response to Defendants' Motion for Summary Judgment

Exhibit 40: Securities Purchase Agreement

R-69 *Sealed Exhibits* in Support of Plaintiff's Response to Defendants' Motion for Summary Judgment
(*Contained in Appellant's Sealed Appendix*)

Exhibit 38: Coughlin Supplemental Declaration

Exhibit 39: AIG SCF Financial/Business Transactions

R-71 Defendants' [Response] to Plaintiff's Motion for Summary Judgment

Exhibit 13: Securities Purchase Agreement

R-72 Plaintiff's Reply to Defendants' Response to Motion for Summary Judgment

Exhibit 41: Yerushalmi Declaration

R-74 Exhibit in Support of Plaintiff's Reply to Defendants' Response to Motion for Summary Judgment [Exhibit A to Yerushalmi Declaration]

Exhibit A: July 21, 2009 Quarterly Report to Congress Issued by SIGTARP (excerpts)

R-75 Exhibit in Support of Plaintiff's Reply to Defendants' Response to Motion for Summary Judgment [Exhibit B to Yerushalmi Declaration]

Exhibit B: Part 2 Agency Financial Statements (2009) for the Office of Financial Stability of the U.S. Department of the Treasury (excerpts)

R-76 Exhibit in Support of Plaintiff's Reply to Defendants' Response to Motion for Summary Judgment [Exhibit C to Yerushalmi Declaration]

Exhibit C: Financial Stability Oversight Board Quarterly Report to Congress for the Quarter Ending March 31, 2010 (excerpts)

R-87 [Stricken] *Sealed* Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendants' Motion for Summary Judgment

R-88 [Stricken] Judgment in Favor of Defendants

R-89 Notice of Appeal

R-91	Order to Strike Order on Motions for Summary Judgment [87] and Judgment [88]
R-92	Opinion and Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendants' Motion for Summary Judgment
R-93	Judgment
R-94	[Amended] Notice of Appeal