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. 2:08-cv-15147

PETITION FOR REHEARING AND REHEARING EN BANC

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REASONS FOR GRANTING THE PETITION

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

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

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

In sum, review of the panel's opinion is necessary to secure and maintain uniformity of the court's decisions regarding a federal taxpayer's standing to advance an Establishment Clause challenge to a congressionally mandated spending program. Moreover, review is necessary because this case has exceptional public importance, and the panel's decision conflicts with U.S. Supreme Court and Sixth Circuit precedent. *See* 6 Cir. R. 35.

STATEMENT OF THE CASE

In 2008, the federal government "obtained a controlling stake in AIG" through the expenditure of significant federal taxpayer funds authorized by EESA. (Op. at 2). At the time, AIG was known as the market leader in "Sharia-compliant financing ('SCF') products." (*See* Op. at 2; R-92: Op. & Order at 6; R-60: Coughlin Decl., Ex.C

[1] The district court properly held that Plaintiff had standing to advance this as-applied Establishment Clause challenge to the impermissible use of congressionally-authorized taxpayer funds. (R-12: Order Denying Mot. to Dismiss at 13).

at ECF 27-29 of 29 (Pl.'s Ex.12)). "SCF insurance and financial products are designed to comply with Sharia law." (Op. at 2). "AIG subsidiaries ensure the Sharia-compliance of its SCF products by obtaining consultation from 'Sharia Supervisory Committees.' The members of these committees are authorities in Sharia law and oversee the implementation of SCF products by reviewing AIG's operations, supervising the development of SCF products, and evaluating the compliance of these products with Sharia law." (Op. at 2-3). AIG publicly markets and promotes its Sharia business practices to introduce people to a "new way of life" guided by a specific religious doctrine (*i.e.*, Sharia). (*See* R-60: Coughlin Decl., Ex.A (Pl.'s Ex.12)).

Through EESA, the federal government acquired a majority and thus controlling ownership interest in AIG by purchasing stock with taxpayer funds. (Op. at 2). "In November 2008, the Treasury Secretary used his TARP[2] authority to buy $40 billion worth of AIG preferred stock." (Op. at 4). In April 2009, "the Treasury Department made another capital commitment to AIG . . . in the amount of $30 billion, in exchange for more shares of AIG preferred stock." (Op. at 4).

"AIG's subsidiaries received a significant portion of the funds AIG received from the federal government," and "[s]ix AIG subsidiaries have marketed and sold SCF products since AIG began receiving capital injections from the federal

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

government. . . ." (Op. at 3). "*Neither party disputes that Treasury Department financing supported all of AIG's business, including the subsidiaries that marketed SCF products*. Plaintiff contends that AIG disbursed $153 million to two subsidiaries that marketed and sold SCF products. . . ." (Op. at 4) (emphasis added).

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

ARGUMENT

I. Plaintiff, a Federal Taxpayer, Has Standing to Advance an As-Applied, Establishment Clause Challenge to the Impermissible Use of Federal Tax Funds Made Pursuant to a Specific Congressional Appropriation.

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

Pursuant to controlling U.S. Supreme Court precedent, a federal taxpayer has standing to advance an Establishment Clause challenges to the exercise of Congress' taxing and spending power under Article I, § 8, of the Constitution. *Flast v. Cohen*,

392 U.S. 83, 88 (1968). Controlling precedent also establishes that a federal taxpayer has standing to advance an "as applied" challenge to the impermissible use of such funds by individual grantees. *Bowen v. Kendrick*, 487 U.S. 589, 619 (1988).

In *Flast v. Cohen*, 392 U.S. 83 (1968), the Supreme Court addressed the question of whether the plaintiffs had standing as taxpayers to advance a constitutional challenge to the expenditure of federal funds under the Elementary and Secondary Education Act of 1965. The Act established, *inter alia*, "a program of federal grants for the acquisition of school library resources, textbooks, and other printed and published instructional materials 'for the use of children and teachers in public and private elementary and secondary schools.'"[3] *Id*. at 86-87 (quoting the Act). The plaintiffs alleged that federal funds were being used to finance instruction in reading, arithmetic, and other subjects, and to purchase textbooks and other instructional materials for use in religious schools in violation of the Establishment Clause. *Id*. at 87-88.

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

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

> The nexus demanded of federal taxpayers [to satisfy standing] has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, *a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution*. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, *the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power* and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.

Id. at 102-03 (emphasis added).

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

As a federal taxpayer, Plaintiff has a stake in the outcome of this case sufficient to invoke the jurisdiction of this court because (1) this case is a constitutional challenge to a substantial expenditure of federal tax funds made pursuant to the exercise of Congress' taxing and spending power under Art. I, § 8, and (2) the

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

challenge is brought under the Establishment Clause, which is a specific limitation on such power. *Compare Frothingham v. Mellon*, 262 U.S. 447 (1932) (holding that the taxpayer lacked standing because she did not base her constitutional challenge on an allegation that Congress exceeded a *specific limitation* on its taxing and spending power, such as the Establishment Clause).

The U.S. Supreme Court's decision in *Bowen v. Kendrick*, 487 U.S. 589 (1988), further supports Plaintiff's standing in this case. In *Kendrick*, *the Court rejected the position taken by the panel here:* that the plaintiffs lacked standing to assert their "as applied" challenge to the Adolescent Family Life Act ("AFLA") because such a challenge was to executive action, not to an exercise of congressional authority under the Taxing and Spending Clause. In doing so, the Court stated, "We do not think, however, that [plaintiffs'] claim that AFLA funds are being *used improperly by individual grantees* is any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress *has flowed through and been administered by the Secretary*." *Id*. at 619 (emphasis added). The Court held that the federal taxpayers had standing to assert their Establishment Clause claim and remanded the case, in part, so that the district court could consider "whether *in particular cases* AFLA aid has been used to fund 'specifically religious activit[ies] in an otherwise substantially secular setting.'"[5] *Id*. at 621 (quoting *Hunt v. McNair*, 413

[5] The Court remanded the case to determine whether funds in particular cases were

U.S. 734, 743 (1973)) (emphasis added). The Court concluded that the district court "should consider on remand whether particular AFLA grants have had the primary effect of advancing religion," stating further that if the court should "conclude that the Secretary's current practice *does allow such grants*, it should devise a remedy to insure that grants awarded by the Secretary comply with the Constitution and the statute."[6] *Kendrick,* 487 U.S. at 622 (emphasis added).

In this action, Plaintiff asserts that federal funds appropriated and authorized by EESA are being used for improper purposes (to finance SCF) by an individual grantee (AIG). And based on controlling precedent, it makes little difference that the challenged funding flowed through and is administered by the Secretary of the Treasury, who, by the way, *was given express authority by Congress to administer the spending program*.[7] *See* 12 U.S.C. § 5211. As the Court in *Kendrick* noted, "*Flast* itself was a suit against the Secretary of HEW, who had been given the authority

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being used in violation of the Establishment Clause even though Congress "*expressed* the view that the use of [AFLA] funds by grantees to promote religion, or to teach religious doctrines of a particular sect, would be contrary to the intent of the statute" and the Secretary had "promulgated a series of conditions to each grant, *including a prohibition against teaching or promoting religion*." *Kendrick,* 487 U.S. at 621-22 (emphasis added). Here, neither Congress nor the Treasury Secretary has prohibited AIG from using federal funds to support SCF, and there are no constitutionally sufficient safeguards to ensure that federal tax money was not going to support SCF.

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

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

under the challenged statute to administer the spending program that Congress had created." *Kendrick*, 487 U.S. at 619. *In short, the panel simply got it wrong*. This is an as-applied challenge to a congressional spending program; it is *not* a challenge to an executive branch decision on how to spend generally appropriated funds. *This Circuit's precedent recognizes this distinction, which the panel failed to apprehend in this case*. *See Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 210, n.5 (6th Cir. 2011) (recognizing the distinction between suits which "challenge congressional expenditures alleged to violate the Establishment Clause" and those which challenge expenditures made by the Executive from funds "appropriated to the Executive's discretionary budget by Congress").

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

Consequently, the panel's reliance on *Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007), is incorrect. (Op. at 7-12). Indeed, Justice Alito's plurality opinion did not overrule *Flast*. Instead, it reaffirmed the two-part nexus test discussed above. *See Hein*, 551 U.S. at 602-03. In his discussion of *Flast*, Justice Alito pointed out that the challenged disbursements "were made pursuant to an express

congressional mandate and a specific congressional appropriation" in that the challenged Act expressly provided funding to support education, including funding to support "library resources, textbooks, and other instructional materials" for both public and private schools. *Id*. at 603. Justice Alito stated parenthetically that the "private" schools also included "religiously affiliated schools," *id*. at 604; however, the Act itself did not *expressly* mandate funds for "religious" schools, which was the gravamen of the plaintiffs' challenge, nor did it *expressly* mandate funds to finance religious education *or any other religious activities*. Similarly here, Congress fully intended that EESA funding would go to AIG. The record unequivocally reveals that when Congress passed EESA, it understood that AIG was in financial trouble and would be *a direct beneficiary of EESA funds*. (*See, e.g.*, R-61-10: Legislative History (Pl.'s Ex.24)). EESA itself (§ 129) requires the Fed to report the exercise of its Section 13(3) authority *as it applied to AIG*. 12 U.S.C. § 5235(a) & (d); (*see also* R-61-2: Fed Rep. (Pl.'s Ex.16); R-62: AIG Nov. 2008 PR at 1 (Pl.'s Ex.25); R-62-1: SIGTARP Rep. (Pl.'s Ex.26)). Consequently, the panel's claim that "[i]t was only through executive discretion that TARP funds were transferred to AIG and, in turn, its subsidiaries" (Op. at 12) *is patently incorrect*. This case is not *Hein*.

Moreover, prior to the enactment of EESA and certainly before taxpayer money was sent to AIG (and even to this present day while AIG remains on the public dole), AIG was known as a market leader in SCF. (R-92: Op. & Order at 6; R-60: Coughlin

Decl., Ex.C at ECF 27-29 of 29 (Pl.'s Ex.12)). In fact, shortly after the federal government acquired its majority ownership interest in AIG and infused the company with the *first* tranche of billions in federal tax dollars, AIG issued a press release from its main headquarters in New York City announcing the expansion of its SCF businesses in the United States. (R-92: Op. & Order at 6; R-60: Coughlin Decl., Ex.C at ECF 27-29 of 29 (Pl.'s Ex.12)). Consequently, it is incorrect to say that AIG (and thus the government) itself is not actively involved in promoting SCF, it is unreasonable to argue that Defendants (or Congress) were unaware of AIG's SCF activities, and there is no dispute that AIG received billions of dollars in tax money.[8]

In *Hein*, Justice Alito also highlighted the obvious fact that the plaintiffs had standing in *Kendrick* to mount an as-applied challenge to AFLA because it was "at heart" *a spending program authorized by Congress*. *Hein,* 551 U.S. at 606-07. He also noted that AFLA contemplated that some of the funds might go to projects involving religious groups. *Id*. at 607. This point, however, is unremarkable because religious groups are not *per se* excluded from receiving federal grants. *Mitchell v. Helms*, 530 U.S. 793 (2000). Indeed, the plaintiffs' as-applied challenge was allowed

[8] And if there were any doubt about AIG's very public, national and international leadership role in SCF, around the time that EESA funds were being sent to AIG, the Treasury Department was hosting a conference on *Islamic* financing. And this conference is in addition to all of the other government-sponsored Sharia-based programs set forth in the record. (*See generally* "Islamic Finance 101" presentation materials at R-64; R-65: Kiwan Dep. Ex.21 (Pl.'s Ex.35); *see also* R-63-2: May 2004 Treas. Dep't PR (Pl.'s Ex.33); R-63-3: Kiwan Dep. at 32-33 (Pl.'s Ex.34)).

to proceed not because religious organizations were receiving funds, but because the plaintiffs alleged that some of the money *was being used for impermissible purposes* by these organizations, such as funding religious activities. *See Hunt*, 413 U.S. at 743 (holding that federal aid will have "a primary effect of advancing religion . . . when it funds a specifically religious activity in an otherwise substantially secular setting"). Similarly here, Plaintiff alleged (and has shown) that the funds appropriated and spent pursuant to EESA—a specific congressional mandate—are being used to fund SCF in violation of the Establishment Clause. Thus, "[t]he link between congressional action and constitutional violation" plainly exists. *Hein*, 551 U.S. at 605.

Indeed, Justice Alito's opinion in *Hein* is rather unremarkable in light of *Flast* and *Kendrick*, and it does not alter Plaintiff's standing in this case. In *Hein*, the plaintiffs did not base their claims on any congressionally enacted spending program. Rather, the money used to fund the challenged activities came from *general appropriations provided to the Executive Branch to support its day-to-day activities*. *Id*. Consequently, the use of these funds resulted from executive discretion, not congressional action. If, for example, the Executive Branch wanted to use these general funds to purchase office furniture, it was within its discretion to do so. The same cannot be said here. Defendants do not have unfettered discretion to determine how EESA funds could be used. *See* 12 U.S.C. §§ 5211, 5225 (limiting use of funds). Rather, Congress specifically appropriated and expressly mandated that the funds be

used to purchase assets from critical financial institutions, such as AIG, *to support the operations of these institutions*. Thus, unlike the funds at issue in *Hein*, Defendants could not use EESA funds to buy office furniture, for example—these funds had to be used pursuant to the express mandate of Congress, and pursuant to this mandate, they are being impermissibly used to fund SCF. Thus, Plaintiff has a sufficient stake as a federal taxpayer in the outcome of this controversy.

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

In the final analysis, a federal taxpayer, such as Plaintiff, has an independent right under the Establishment Clause to challenge the *impermissible use* of federal funds appropriated and expended pursuant to Congress' taxing and spending power. When such funds are being used to support religious activities (and the government's ownership and control of a company engaged in such activities), as in this case, a federal taxpayer suffers a concrete injury. And this injury is indisputably "traceable"

to the challenged spending and "likely to be redressed by" an injunction prohibiting it. *See Allen*, 468 U.S. at 751. Consequently, Plaintiff meets all of the elements necessary to confer standing and to invoke this court's jurisdiction under Article III.[9]

CONCLUSION

Plaintiff requests that the court grant this petition, vacate the panel's opinion, and find that Plaintiff has standing to advance his Establishment Clause claim.

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[9] The panel's reliance on *Pedreira v. Ky. Baptist Homes for Children*, 579 F.3d 722 (6th Cir. 2009), is misplaced. (Op. at 9-10). In *Pedreira*, the plaintiffs' amended complaint "refer[red] to the Kentucky statutes authorizing the funding of services as KBHC. However, nowhere in the record before the district court did the plaintiffs explain what the nexus [was] between their suit and a *federal* legislative action." *Id.* at 730. *Six years* after filing the original action, the plaintiffs sought leave to file a second amended complaint, that, *inter alia*, "added references to state and federal funding provisions in support of standing." *Id.* In particular, the plaintiffs invoked the Social Security Act's Title IV-E and Supplemental Security Income programs, which authorize federal funding to states to provide foster care and maintenance for children. *Id.* Nonetheless, the court noted that "[e]ven though the plaintiffs refer to specific federal programs and specific portions of these programs, they have failed to explain how these programs are related to the alleged constitutional violation," and concluded that "[w]hile the plaintiffs do challenge congressional legislation, as required by *Flast*, . . . the plaintiffs' claims are simply too attenuated to form a sufficient nexus between the legislation and the alleged violations." *Id.* at 730-31.

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 35, the foregoing petition does not exceed 15 pages, excluding material not counted under Fed. R. App. P. 32.

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise
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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2012, I electronically filed the foregoing 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.

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