Appeal No. 12-1466

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

AMERICAN CIVIL LIBERTIES UNION
OF MASSACHUSETTS (ACLUM),

Plaintiff-Appellee,

v.

UNITED STATES CONFERENCE OF CATHOLIC BISHOPS,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Massachusetts
Civ. No. 09-10038-RGS

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF GOSPEL RESCUE MISSIONS, THE BECKET FUND FOR RELIGIOUS LIBERTY, THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, THE UNION OF ORTHODOX JEWISH CONGREGATIONS, AND WORLD RELIEF IN SUPPORT OF APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each *Amicus* states that it has no parent corporation, nor does it issue any stock.

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INTEREST OF THE *AMICI*[1]

Amici are concerned that if left to stand, the opinion below would cause great harm to both the relationship between religious organizations and governmental entities as well as the needy who rely on public-private partnerships like the one at issue in this case. Individual *amicus* statements are set forth below.

The Association of Gospel Rescue Missions ("AGRM") was founded in 1913 and has grown to become North America's oldest and largest network of independent crisis shelters and recovery centers offering radical hospitality in the name of Jesus. Last year, AGRM-affiliated ministries served nearly 42 million meals, provided more than 15 million nights of lodging, bandaged the emotional wounds of thousands of abuse victims, and graduated over 18,000 individuals from addiction recovery programs. The ramification of their work positively influences surrounding communities in countless ways.

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[1] All parties have consented to the filing of this brief. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *Amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

The Becket Fund for Religious Liberty is a non-profit law firm dedicated to the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

Because religion—like race, ethnicity, art, or music—is a fundamental aspect of human culture, the Becket Fund opposes attempts to use the Establishment Clause to disqualify religious organizations from full participation on equal terms in public life. It has litigated numerous Establishment Clause cases before the United States Supreme Court and the Federal Courts of Appeals, including this Court. *See*, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church and Sch.* v. *EEOC*, 132 S. Ct. 694 (2012) (counsel for Petitioner); *Freedom From Religion Found.* v. *Hanover Sch. Dist.*, 626 F.3d 1 (1st Cir. 2010) (counsel for intervenor-defendants).

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist church and represents nearly 59,000 congregations with more than 17 million members worldwide. In the United States the North American Division

of the General Conference oversees the work of more than 4,600 congregations with more than one million members. In addition to churches and related administrative offices, the denomination runs approximately 850 elementary schools, 114 secondary schools, 14 institutions of higher learning and 35 hospitals in the United States. The church through its various humanitarian organizations provides services to the public, including by way of governmental grants and contracts. The Seventh-day Adventist church has a strong interest in insuring that religious institutions are not compelled to extend benefits that violate the tenets that define the very basis for their existence.

The **International Society for Krishna Consciousness** ("ISKCON") is a monotheistic, or Vaishnava, tradition within the broad umbrella of Hindu culture and faith. There are approximately 500 ISKCON temples worldwide, including 50 in the United States. As part of its tradition, ISKCON engages in service to others in society. It is a core belief among ISKCON's members that ISKCON members should act as appropriate role models in their belief, practice, and application of spiritual ethics, including when they serve others. ISKCON has an interest in this case because it believes its members, temples and other

organizations should be able to implement their spiritual values without being disqualified from interacting with government officials.

The Union of Orthodox Jewish Congregations of America ("UOJCA") is a non-profit organization representing nearly 1,000 Jewish congregations throughout the United States. It is the largest Orthodox Jewish umbrella organization in the nation. Through its Institute for Public Affairs, the UOJCA researches and advocates legal and public policy positions on behalf of the Orthodox Jewish community. The UOJCA has filed, or joined in filing, briefs with federal appellate courts in many of the important cases which affect the Jewish community and American society at large.

World Relief, the humanitarian arm of the National Association of Evangelicals, is a faith-based international relief and development organization committed to serving the most vulnerable populations through the local church. World Relief currently works on five continents, in some of the most impoverished areas of the world. In the United States, World Relief focuses on serving the foreign-born, including providing immigrant legal services to refugees, asylees, parolees, victims of trafficking and other vulnerable immigrants in

twenty-four cities around the country. World Relief also supports churches in developing immigrant legal services programs. Since 1979, World Relief has resettled over 236,000 refugees in the United States. As a faith-based organization that contracts with the U.S. government and receives federal and state government funding, the decision of the decision of the court could greatly impact our ability to continue to provide these services. As a Resettlement Agency, we are one of ten private organizations that are contracted to "Receive and Place" refugees. Without this contract, we could not do this critical work. In addition, we receive funding for our work with immigrants and trafficking victims. If the lower court's decision is allowed to stand, it could force our organization to have to make a decision between ignoring our beliefs or not helping the most vulnerable.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici agree with Appellant that the district court should be reversed and the case either dismissed for lack of standing or judgment entered in favor of Appellant. *Amici* offer this brief to provide greater focus on two separate problems caused by the district court's decisions: a troublesome new standard for determining taxpayer standing, and a major blow against the provision of services to the needy.

I. The district court's decisions on standing would upend Article III taxpayer standing jurisprudence and create a large new area of church-state conflict. Not only does the district court's decision run directly counter to the two most recent Supreme Court decisions on taxpayer standing, *Hein* and *Winn*, it also conflicts with those Courts of Appeals that have interpreted *Hein*. Indeed, the lower court freely admitted that it was disagreeing with the Seventh Circuit's interpretation of *Hein* v. *Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007), and its decision also contradicts rulings of the Sixth and D.C. Circuits. Were this Court to uphold the lower court's decision, it would thus immediately create a Circuit split over the meaning of *Hein*.

Neither precedent nor the facts in this case require such a result. The only basis Plaintiff American Civil Liberties Union of Massachusetts ("ACLU") asserts for standing is its members' status as federal taxpayers. There are two separate reasons ACLU cannot rely on taxpayer standing. First, ACLU has not challenged "congressional" action under *Hein*. 551 U.S. at 604. In enacting the Trafficking Victims Protection Act ("TVPA"), 22 U.S.C. § 7101 (2012), Congress neither mandated nor contemplated religious activity of any kind; indeed it neither mandated nor contemplated *any* outside contract at all. Instead, the Department of Health and Human Services ("HHS") decided on its own to outsource services to trafficking victims, and contracted with the United States Conference of Catholic Bishops ("USCCB") to administer funds allocated to HHS under the TVPA. Absent any indication that Congress had this arrangement in mind, there simply is no congressional action under *Hein*.

Second, ACLU separately lacks taxpayer standing under *Arizona Christian School Tuition Organization* v. *Winn*, 131 S. Ct. 1436 (2011) because it does not allege that its members' tax money was actually extracted and spent. The part of the HHS-USCCB contract that ACLU

complains of provides that USCCB will *not* spend money for abortion or contraceptive services. A taxpayer plaintiff cannot complain that the government should have spent her money but didn't. Without a "dollars-and-cents injury," *Doremus* v. *Board of Education of Borough of Hawthorne*, 342 U.S. 429, 434 (1952), taxpayer standing does not exist.

The lower court justified its taxpayer standing ruling by stating that it wanted to make sure that Establishment Clause violations are justiciable. But no expansion of taxpayer standing is necessary to protect legitimate plaintiffs' rights. Anyone actually harmed by an alleged establishment may still bring a complaint. Without this necessary "injury-in-fact," however, finding standing for ACLU will threaten the separation of powers by allowing government contracts to be challenged merely because a remote plaintiff does not like the terms of the contract. Given that over 3 million government contracts are awarded by executive agencies each year, the federal court system would be forced into an unworkable position of supremacy over the other branches.

II. The district court's new interpretation of the Establishment Clause, if upheld, would also decrease services to the needy by severely

restricting the government's ability to contract with faith-based organizations. Prohibiting the government from contracting with entities that place "restrictions on the expenditure of taxpayer funds" if the contractors' underlying reasons for the provisions are "religiously based," *ACLU of Mass.* v. *Sebelius*, 821 F. Supp. 2d 474, 488 (D. Mass. 2012) ("2012 Op."), not only distorts *Lemon*'s requirement of neutrality, *see Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971), it also improperly shifts the court's focus away from the purposes and effects of government actions onto the subjective reasoning of a non-governmental actor. *Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 335 (1987). Here, it is uncontested that HHS employed secular criteria to choose the USCCB as the organization best able to fulfill the purposes of the TVPA. At no time were any funds used to further religious activity.

The lower court's motivation-based interpretation would have the effect of unilaterally prohibiting faith-based organizations from proposing contract provisions necessary for preserving the integrity of their own religious beliefs. This anti-religion restriction would endanger thousands of government contracts that provide hundreds of millions of

dollars in funding each year to aid the most impoverished in our nation and abroad.

ARGUMENT

I. ACLU lacks taxpayer standing.

ACLU claims only one basis for standing: the allegation that its members are federal taxpayers. *ACLU of Mass.* v. *Sebelius*, 697 F. Supp. 2d 200, 203 (D. Mass. 2010) ("2010 Op."). It cannot meet its burden of proving taxpayer standing for three reasons: (1) *Hein* prevents ACLU from challenging a discretionary Executive Branch decision and (2) none of ACLU members' money has been extracted and spent.

A. ACLU lacks taxpayer standing to challenge discretionary Executive Branch decisions like the HHS contract.

ACLU cannot establish taxpayer standing in this case because the Supreme Court has explicitly held that taxpayers do not have standing to challenge Executive Branch decisions, and the contract in question is an Executive Branch decision. The Supreme Court in *Hein* stated that the "taxpayer standing" exception outlined in *Flast* v. *Cohen*, is "'limited . . . to challenges directed only [at] exercises of congressional power' under the Taxing and Spending Clause." *Hein*, 551 U.S. at 604 (quoting

Valley Forge Christian Coll. v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 479 (1982)). Congress' only part in the present case was in passing the TVPA, and that act neither "mandate[s]" nor "contemplate[s]" spending on religious activity of any kind. *Hein*, 551 U.S. at 607 (quoting *Bowen* v. *Kendrick*, 487 U.S. 589, 619-620 (1988)).

The present case mirrors *Hein*, as it involves "discretionary Executive Branch expenditures." *Hein*, 551 U.S. at 609. Congress did not contract with USCCB. HHS did. The funds were spent by HHS, for services rendered in a contract agreement that was not even contemplated by the TVPA, but instead pursued at the initiative and the discretion of HHS. Indeed, HHS did not use an intermediary contractor for the first several years of the statute's operation. When HHS did decide to use an intermediary, bidding for the contract was open to all. The Salvation Army and USCCB both responded, and it was entirely within HHS's discretion to choose either or neither of these organizations to carry out the mission.

By contrast, in the text of the TVPA—what Congress wrote—neither USCCB nor any other entity was required to be, or even contemplated as, a contractor for the disbursal of funds. The TVPA does not require

that religious organizations be involved, or even mention religion.[2] This is directly parallel to *Hein*, where the general congressional appropriation was not directed toward religion in any specific way. In *Hein,* it was the White House's decision to fund faith-based initiatives. *Hein*, 551 U.S. at 592. Here, it was HHS's decision to contract with USCCB.

The lower court relied principally on *Bowen* v. *Kendrick* to support its erroneous conclusion that congressional action was involved in the HHS decision. 2010 Op., 697 F. Supp. 2d at 208-210. But *Hein*'s definitive interpretation of *Bowen* belies the district court's conclusion. As Justice Alito noted in *Hein*, the Adolescent Family Life Act (AFLA) at issue in *Bowen* "***expressly contemplated*** that some of those moneys might go to projects involving religious groups." *Hein*, 551 U.S. at 607 (emphasis added). For instance, when it came to the disbursement of grants, the chosen "projects *shall* . . . make use of support systems such as other family members, friends, *religious* and charitable organizations, and voluntary associations." Adolescent Family Life Act

[2] The TVPA's only mention of religion is a reference to the fact that many traffickers steal their victims away from, among other places, their "religious institutions." 22 U.S.C. § 7101(b)(5).

of 1981, 42 U.S.C. § 300z-2(a) (emphasis added). Under AFLA, organizations applying for a grant had to describe how they would "involve *religious* and charitable organizations, voluntary associations, and other groups." 42 U.S.C. § 300z-5(a)(21)(B) (emphasis added). Given these congressional requirements, the mere fact that the money "flowed," *Hein*, 551 U.S. at 606 (quoting *Bowen*, 487 U.S. at 619), through an agency was not enough to take it out of the hands of congressional intent. The "key to that conclusion" lay in the fact that the spending was "pursuant to the AFLA's statutory mandate." *Hein*, 551 U.S. at 607 (quoting *Bowen*, 487 U.S. at 619-620) (emphasis omitted). But TVPA has none of these key characteristics of AFLA. TVPA makes no mention of religion and does not "expressly contemplate," much less "mandate" funding for religious activity of any kind.

All of the decisions of Courts of Appeals to examine *Hein* and *Bowen* have made this same distinction. For example, as the district court noted, its standing decision was directly contrary to the Seventh Circuit's decision in *Freedom From Religion Foundation* v. *Nicholson*, 536 F.3d 730 (7th Cir. 2008). 2010 Op., 697 F. Supp. 2d at 209 n.15

(acknowledging conflict between district court's ruling and the Seventh Circuit's). In *Nicholson*, the Seventh Circuit held that

> Whereas in [*Bowen*], the challenged congressional action ***expressly contemplated*** that funds would be disbursed to religious organizations, the congressional action here—the statutory mandate that the VHA provide medical care to veterans—does not contemplate that any funds would be disbursed to support the ***particular aspects*** of the Chaplain Service that Freedom From Religion contests.

Nicholson, 536 F.3d at 744-45 (citation omitted; emphases added). Here of course, the "particular aspects" of HHS's actions the ACLU challenges, namely the conscience-protecting provisions USCCB contracted for, were not "expressly contemplated"; indeed, not even the existence of a contractor was contemplated.

Nicholson also rejects the idea that there is taxpayer standing where there is "an absence of any direction, guidance or indication on the part of Congress as to how the VHA should expend the funds appropriated for medical care or, more generally, as to how the VHA should employ its chaplains." In *Nicholson* Congress at the very least contemplated the existence of chaplains, a religious office. Here, by contrast, Congress did not even contemplate contractors, much less religious ones like USCCB.

The disagreement between the district court and the Seventh Circuit was deepened by the Seventh Circuit's recent decision in *Sherman* v. *Illinois*, 682 F.3d 643 (7th Cir. 2012). There, the Seventh Circuit held that a taxpayer had no standing to challenge the disbursal of $20,000 in state funds for the repair of a privately-owned historic cross. The Illinois Legislature had made a general appropriation for $5 million, "to be used for grants administered by the [Department of Commerce and Economic Opportunity]." *Id.* at 647. Because there was no "specific and binding legislative action" directing the funds toward that particular repair, there was no standing. *Id.* at 646.

The district court's admitted disagreement with the Seventh Circuit over the meaning of *Bowen* and *Hein* is paralleled by unacknowledged disagreements with the Sixth and D.C. Circuits.

In *Murray* v. *United States Department of Treasury*, 681 F.3d 744 (6th Cir. 2012) taxpayers challenged the federal government's acquisition of American International Group, Inc. ("AIG") through the Troubled Asset Relief Program ("TARP"). *Id.* at 746-47. The taxpayer plaintiffs claimed the government's ownership interest in AIG violated the Establishment Clause because part of the business of some AIG

subsidiaries was to market and sell "Sharia-compliant" financial products. *Id.* at 745. Stating that *Hein* had "recast" *Flast*, the Sixth Circuit rejected standing, holding that unless the "appropriating statute ***expressly contemplates*** the disbursement of federal funds to support religious groups or activities" there could be no taxpayer standing. *Id.* at 750-51 (emphasis added).[3]

Similarly, in *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008), the Court held that because "[n]o legislative enactment expressly authorizes or appropriates funds for the Navy to favor Catholic chaplains" non-Catholic chaplain taxpayers had no standing to challenge how the Navy administered the funds that had been appropriated to it. Like the expenditures challenged in *Nicholson*, Congress clearly intended some government interaction with religion because it was funding the Navy Chaplain Corps. But because the "challenged expenditures" "'were not expressly authorized or mandated

[3] It bears noting in this context that *Flast* itself appears to be on increasingly shaky ground. Two Justices have called for the *Flast* exception to be eliminated. *Winn*, 131 S. Ct. at 1449-50 (Scalia and Thomas, JJ., concurring). And the Court's opinion in *Winn* further confined *Flast* to its facts. *Id.* at 1448-49 (limiting *Flast* doctrine to cases where it is expressly relied upon). The increasing uncertainty surrounding *Flast* makes the district court's bold extension of *Flast* all the more disturbing and unwarranted.

by any specific congressional enactment,'" there was no standing under *Hein*. *See id.* 534 F.3d at 762, quoting *Hein*, 555 U.S. at 608.

This case is much easier than *Nicholson*, *Murray*, or *Navy Chaplaincy*. In those cases, there was at least some inkling that the programs funded by Congress might result in government interaction with religious organizations—the challenged chaplaincies and Sharia-compliant products were all a matter of public record (and in the case of the chaplaincies the subject of prior legislation) before Congress appropriated any money.

But in this case, there was no sign at all. Indeed there could not have been since TVPA funds were disbursed directly by HHS for several years before that task was put out to bid for private contractors. Thus it was impossible that the expenditures ACLU challenges could have been within the contemplation of Congress when it enacted the TVPA. ACLU is therefore complaining only about how HHS chose in its executive discretion to carry out its duties under the TVPA, something foreclosed by *Hein*. The district court's opinion therefore cannot be upheld without creating a Circuit split between this Circuit and the Sixth, Seventh, and D.C. Circuits.

B. ACLU lacks taxpayer standing under *Winn* because no funds were "extracted and spent."

A separate and equally insuperable obstacle to ACLU's standing is its inability to show that funds "extracted" from its members were "spent," as required by the Supreme Court's decision in *Winn*. The centerpiece of ACLU's complaint is that HHS and USCCB contracted *not* to spend government money on reimbursing abortion and contraceptive services. The Court in *Winn* explained that the *Flast* exception applies only because there is injury to plaintiffs in that "a dissenter whose tax dollars are 'extracted and spent' knows that he has in some small measure been made to contribute to an establishment in violation of conscience." *Winn*, 131 S. Ct. at 1447 (quoting *Flast*, 392 U.S. at 106).

But that is not the case here. None of ACLU's members can claim that his or her tax dollars have been spent to "contribute to an establishment." In fact, ACLU, and the district court, focused on the notion that "permitting the USCCB to place a religiously motivated restriction on reproductive services that beneficiaries of the TVPA program would otherwise have received" creates the injury. 2012 Op., 821 F. Supp. 2d at 484. But the refusal to spend money to provide

services to TVPA beneficiaries simply does not result in a "contribution" to an establishment of religion, any more than contracting to provide Jewish or Catholic chaplains as an accommodation to prisoners or servicemembers contributes to an establishment of Judaism or Catholicism as an official religion. Providing an accommodation or other religion-sensitive provision simply does not amount to a contribution. *Amos*, 483 U.S. at 334-35; *cf.* USCCB Br. at 43-47.

The lower court attempts to distinguish *Winn* by arguing that because no "tax credit" is at issue in this case, *Winn* does not apply. 2012 Op., 821 F. Supp. 2d at 480. This is a red herring. The extract-and-spend requirement the Court applied in *Winn* was not limited to cases involving tax credits, but to all cases involving the *Flast* exception.

In *Winn*, the Court reasoned that a tax credit is unlike a levied tax. In the latter case, a taxpayer's dollars are "extracted," but in the former case, the taxpayer has not had anything taken by the government. 131 S. Ct. at 1447. There can be no injury based on taxation when there was no extraction; the taxpayer is not forced to "contribute three pence" to an establishment of religion. *Id.* at 1446 (quoting 2 Writings of James Madison 183, 186 (G. Hunt ed. 1901)). The Court's holding thus

separated cases involving the extraction and spending of taxpayer monies, which could fall within the narrow *Flast* exception, from all other cases, which would not give rise to taxpayer standing. Its reasoning is equally applicable to other cases where a government is alleged to have extracted but not spent taxpayers' money. Because an extract-but-not-spend claim does not meet the requirements of both extracting *and* spending, no Article III injury is present.

Here, ACLU cannot show the "injury-in-fact" necessary to maintain standing because it claims that the government failed to spend. In *Winn*, there was no tax, but here, there is no expenditure. The basis of standing is that the party should have "a personal stake in the outcome of the controversy." *Flast*, 392 U.S. at 101 (quoting *Baker* v. *Carr* 369 U.S. 186, 204 (1962)). The very reason that taxpayer status is generally not enough to establish standing is that the particular "stake" of any given person in the funds of the federal government is minuscule, and shared among everyone—that is, the person has a *de minimis* amount of money at stake, and even that stake is not "personal and individual," *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 n.1, as it affects all citizens in the same fashion. The *Flast* exception is based narrowly on

the supposition that there is actual injury in the knowledge that one's personal funds are being taken by the government and spent on a violation of the Establishment Clause. In this case, nothing was spent on the complained-of conduct, so there can be no injury.

The district court said the extract-and-spend requirement was satisfied because "a sectarian organization (the USCCB) has received government funds drawn from general tax revenues," 2012 Op., 821 F. Supp. 2d at 480 n.12. But the extraction and spending must occur in the "program of disbursement of funds." *Bowen*, 487 U.S. at 619. Funds expended in the "administration of an essentially regulatory statute" cannot be challenged. *Id.* (quoting *Flast*, 392 U.S. at 102). Courts of Appeals have applied *Hein* and *Bowen* to draw a dividing line between the costs of administering a government program and the flow of program funding to recipients. In *Nicholson*, for example, the Seventh Circuit rejected the "argument that *Hein* allows taxpayer standing any time that funds appropriated for a congressionally established program are *administered* in a way that allegedly violates the Establishment Clause, even when the alleged maladministration bears no relationship to congressional action." *Nicholson*, 536 F.3d at 743 (emphasis added).

See also Hinrichs v. *Speaker of House of Representatives of Ind. Gen. Assembly*, 506 F.3d 584, 598-99 (7th Cir. 2007) ("funds expended in the administration of the program" did not provide basis for *Flast* taxpayer standing).

In this case, HHS paid USCCB itself the costs of administration only. The rest of the money passed through USCCB to other organizations. ACLU cannot establish that the final destination of the funds was improper, because *no* funds were spent on allegedly religious activities. ACLU likewise cannot depend for standing on the fees paid to USCCB because this money was paid for the administration of a program, not for program services.

Indeed, the district court's holding that the "spending" prong of the *Flast*/*Winn* test is satisfied merely by the fact that TVPA funds were disbursed to USCCB would amount to a ban on "sectarian organizations" "receiv[ing] government funds drawn from general tax revenues." 2012 Op., 821 F. Supp. 2d at 480 n.12. Such a discriminatory disqualification of "sectarian" religious organizations would itself violate the Establishment Clause. *See Larson* v. *Valente*, 456 U.S. 228

(1982); *Mitchell* v. *Helms*, 530 U.S. 793 (2000) (plurality op.). *Cf.* USCCB Br. at 43-45.

Just as there is no standing where the government does not "extract" funds from taxpayers, *Winn*, 131 S. Ct. at 1447, so there can be no standing when the government does not "spend" the funds on an establishment of religion. Since funds must be both "extracted" *and* "spent," *Flast*, 392 U.S. at 106, ACLU also lacks taxpayer standing under *Winn*.

C. Truly discriminatory programs can still be challenged based on other forms of standing.

The district court's gross misreading of *Hein* and *Winn* was expressly results-driven: the lower court thought it had to stand up for the Establishment Clause. It described its "firm conviction" that the Establishment Clause is "vital," combined with a belief that a "rule that has no enforcement mechanism is not a rule at all." 2010 Op., 697 F. Supp. 2d at 212. This led it to describe taxpayer standing as one of the "principal tools" available for enforcing the Establishment Clause and to decide that it had to find taxpayer standing in this case. *Id.*

As an initial matter, the district court's basic intuition about taxpayer standing is incorrect. Far from being a "principal tool" of

preventing Establishment Clause violations, *Hein* held that taxpayer standing is disfavored. It is a "narrow" exception to the "general constitutional prohibition" *against* taxpayer standing. *Hein*, 551 U.S at 602.

But the district court's fears about enforceability also got it wrong on a more fundamental level: if no one is injured, there is nothing to enforce. The lower court's anxiety that government could establish a religion without anyone having a right to sue has no basis in fact or law. The only plaintiffs who lack standing are those who, as in this case, cannot demonstrate any actual Article III injury.

The fact that ideological plaintiffs will find it harder to challenge laws they don't like does not of course mean that the Establishment Clause is unenforceable. For example, if a potential subcontractor were denied a contract or otherwise discriminated against because of its religious affiliation or lack of religious affiliation, then that subcontractor would have suffered an Article III injury-in-fact. The same would be true had HHS discriminated in favor of USCCB and against another contractor when it decided to award the contract. The discriminated-against contractor would have Article III standing to

challenge the USCCB contract. But without a similar direct injury, there is no standing here and nothing to enforce.

The distinction between legitimate Establishment Clause plaintiffs and those lacking standing is thrown into relief by *Winn*'s comparison, 131 S. Ct. at 1443, of two cases involving the reading of the Bible in public schools: *Doremus,* 342 U.S. 429 (1952), and *School District of Abington Township, Pennsylvania* v. *Schempp*, 374 U.S. 203 (1963). The plaintiffs in *Doremus* did not have standing, as neither of them personally attended the school in question, and their status as taxpayers was insufficient, because the Bible readings did not cause a "dollars-and-cents" injury. *Doremus*, 342 U.S. at 434. *Schempp*, on the other hand, involved "school children and their parents, who are ***directly affected*** by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain." *Schempp*, 364 U.S. at 224 n.9 (emphasis added). Those plaintiffs suffered an injury-in-fact because the children were compelled to take part in religious activities. The lack of taxpayer standing did not affect the eventual result on the merits of Establishment Clause challenges to Bible reading. At the end of the

day, compelled Bible reading in public schools was found to violate the Establishment Clause, but there was no need of taxpayer standing for the federal courts to reach that conclusion.

The district court's fears about the enforceability of the Establishment Clause were thus groundless and do not provide a legitimate ground for its refusal to follow *Hein* and *Winn*.

II. The district court's novel interpretation of the Establishment Clause would reduce services to the needy.

There is, however, a far weightier policy consideration. The lower court reinterpreted the Establishment Clause to limit the government's freedom to contract depending upon the private contractors' underlying motivations for contracting. 2012 Op., 821 F. Supp. 2d at 488. If this Court were to uphold that decision, all government entities would be prohibited from contracting with any entity that places restrictions on how it disburses taxpayer funds if those restrictions are "religiously based," *id.*, or "religiously motivated," *id.* at 484, regardless of whether there are concurrent secular purposes. *Id.* at 485; *Cf. Lemon*, 403 U.S. at 612. This interpretation would result in a *de facto* categorical disqualification of many if not most religious organizations from contracting with the government. By definition, religious entities have

religious purposes, and most attempt to conform their behavior to those religious purposes. The district court's restriction on taking any account of the religious precepts of religious contractors would endanger countless long-standing government partnerships that have been successful in aiding the most impoverished in our nation and abroad.

A. The district court's reinterpretation of the Establishment Clause would bar the government from contracting with many faith-based institutions.

If upheld, the lower court's holding would forbid contracted limitations on federal funds if the *private contractor's* performance under the contract is "religiously motivated' or "religiously based." 2012 Op., 821 F. Supp. at 483, 484. Because most faith-based charities act in accordance with and are motivated by their religious beliefs, this new standard would severely restrict the government from contracting with faith-based social service providers.

The lower court's prohibition on "religiously based restrictions," 2012 Op., 821 F. Supp. at 488, in government contracts would void the majority of contract provisions undertaken by faith-based charities. The implications of the lower court's rule would be drastic because for many, if not all, religious organizations, everything they do is motivated by

their faith. *See, e.g.*, USCCB, "Mission Statement," *available at http://www.usccb.org/about/mission-statement.cfm* ("The mission of evangelization is entrusted by Christ to his Church to be carried out in *all* her forms of ministry, witness, and service") (emphasis added). The very decision to operate a soup kitchen to feed the poor or to oversee an array of homeless shelters is often motivated by religious principles of charity. *See*, *e.g.*, University Muslim Medical Association, Inc.'s motto ("Healthcare for all, Inspired by Islam"), http://www.ummaclinic.org/; The Jewish Federations of North America's mission statement ("The Federation movement . . . protects and enhances the well-being of Jews worldwide through the values of *tikkun olam* (repairing the world), *tzedakah* (charity and social justice) and *Torah* (Jewish learning)") (italics in original), http://www.jewishfederations.org/local_includes/downloads/58240.pdf; the Adventist Development and Relief Agency's mission statement ("The basis for its existence, its reason for being, is to follow Christ's example by being a voice for, serving, and partnering with those in need"), http://www.adra.org/site/PageNavigator/about_us/our_mission.html.

Because the vast majority of religious charities' actions are undertaken in furtherance of their religious beliefs, each contract provision they create is "religiously based." Even provisions such as determining a fair price to pay subcontractors, for example, are inseparable from the religious considerations regarding the just treatment of workers. There is no clear logic to classifying only the provisions about abortion or contraception in the USCCB contract as religiously based, when in fact each of its contract provisions are motivated by a Catholic worldview. Instead, the lower court's identifying only controversial religious beliefs as impermissibly "religiously based" runs dangerously close to impermissible viewpoint discrimination.

Even were it somehow possible to distinguish contract provisions on the basis of the religiosity of their motivation, government agencies and courts should not have to evaluate underlying religious beliefs to determine which provisions are more religiously motivated or more central than others. *Employment Div.* v. *Smith*, 494 U.S. 872, 919 (1990) ("courts should refrain from delving into questions whether, as a matter of religious doctrine, a particular practice is 'central' to the

religion"). Secular courts are not competent to determine, for example, whether a church's decision to require that no child labor be used in materials purchased by subcontractors is really required by its religious beliefs.

Hence, the phrase "religiously based restrictions" could be interpreted as broadly as to encompass all contracted funding provisions created by religious organizations, which would effectuate an unprecedented prohibition of government contracts with faith-based organizations. *Cf. Bowen*, 487 U.S. at 609 (The Supreme Court "has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs").

B. The district court's exclusion of religiously motivated organizations from government contracting limits the government's ability to partner with those organizations best able to serve the poor.

The lower court's decision endangers thousands of contracts that devote hundreds of millions of dollars in social services each year. Government partnerships with faith-based organizations capitalize on religious donations, volunteers, and experience to increase the efficiency of federal social service programs. If the ability to contract with faith-

based organizations is restricted, the government often would have to settle for inferior service providers or increased administrative costs. The lower court's rule limiting the right to contract in a religion-sensitive way would devastate services to the most vulnerable Americans.

1. The lower court's decision endangers thousands of successful partnerships with faith-based organizations.

Religious organizations are often positioned to submit the most attractive and competitive bids for government contracts. Each year, the federal government makes thousands of contracts with faith-based organizations in order to better serve the needy. For example, according to the Office of Management and Budget's website maintained in accordance with the Federal Funding Accountability and Transparency Act, in Fiscal Year 2011 the government entered into 3,339,706 contract transactions (prime award) involving $ 536,710,060,857 in funds. *See* Office of Management and Budget, "USASpending.gov," http://usaspending.gov/search?form_fields=%7B%22spending_cat%22%3A%5B%22c%22%5D%2C%22fyear%22%3A%5B%222011%22%5D%7D (search conducted August 23, 2012). Because organizations that contract with the government are (properly) not

required to announce whether they are affiliated with a particular religion, the Office of Management and Budget does not provide a precise number of faith-based contractors. However, a rough minimum can be estimated through a search of organizations which identify a religion in their titles. Narrowing by using the search terms "Adventist" "Baptist" "Baha'i" "Buddhist" "Catholic" "Christian" "Episcopalian" "Evangelical" "Hindu" "Islamic" "Jewish" "Lutheran" "Methodist" "Muslim" "Orthodox" "Presbyterian" "Protestant" "Sikh" "Unitarian" and "Zoroastrian" reveals 1,333 contract transactions involving $168,008,930 entered into in Fiscal Year 2011. See Office of Management and Budget, "USAspending.gov" (prime contracts only; search conducted August 23, 2012). Even without taking into account the many religious organizations without the name of these specific denominations in their titles, such as Gospel Rescue Missions, there are hundreds of federal government contracts worth millions of dollars each year which could be affected by the lower court's ruling.

Moreover, a great many government service contracts with religious organizations are with state or municipal governments. There is no central government database for these contracts, but religious groups

frequently contract with state or local governments to provide services. For example, New York City lists 1,285 vendor contracts with entities that include the word "Jewish" in the vendor's name. *See* Office of the Comptroller, City of New York, http://www.comptroller.nyc.gov/mymoneynyc/clearview (search conducted August 23, 2012).

As the very limited data above demonstrate, the lower court's ruling will affect thousands of contracts with religious organizations.

2. Government contracts with faith-based organizations capitalize on religious social capital to increase the efficiency of federal social service programs.

Faith-based charities are uniquely positioned to assist the government in providing social services to those in need. The Executive Branch recognizes the importance of partnering with, rather than excluding, faith-based organizations in order to better serve the public interest. The most recent manifestation of this ideal is the creation of the Offices of Faith-Based and Neighborhood Partnerships, which are currently located in eleven different federal agencies, including the Department of Health and Human Services and the Department of Labor. *Offices of Faith-Based and Neighborhood Partnerships*, http://www.whitehouse.gov/administration/eop/ofbnp.

To support these offices, President Obama created the Advisory Council on Faith-Based and Neighborhood Partnerships on February 5, 2009 to better serve "the needs of low-income and other underserved persons in communities at home and around the world" by "identify[ing] best practices and successful modes of delivering social services." *A New Era of Partnerships: Report of Recommendations to the President*, President's Advisory Council on Faith-Based and Neighborhood Partnerships (March 2010), *available at* http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf ("President's Advisory Report"); 76 Fed. Reg. 68 (Apr. 8, 2011), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-04-08/pdf/2011-8642.pdf. The Council has noted that:

> Faith- and community-based organizations are on the frontlines, striving to not only fill emergency gaps in income, food, and shelter, but also support families in their efforts to adapt to the realities and opportunities of a post-recession economy. Our organizations work in partnership with government to help low-income people access income-enhancing government benefits, such as the Earned Income Tax Credit; SNAP, the Supplemental Nutrition Assistance Program (food stamps); and various child nutrition programs.

President's Advisory Report at 5.

If upheld, the lower court's ruling would depart not only from a rich history of social service partnerships with faith-based organizations, but also from an important channel to better serve the underserved in our communities.

The President's Advisory Report's insights have been borne out in the work of Harvard public policy professor Robert Putnam. In *Bowling Alone: America's Declining Social Capital*, Putnam describes the benefits of such civic engagement to combat the "widespread tendency toward passive reliance on the state." Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, Journal of Democracy 6:1, 65-78 (Jan 1995). Social scientists studying health, education, urban poverty, unemployment, and crime and drug prevention "have unearthed a wide range of empirical evidence that the quality of public life and the performance of social institutions (and not only in America) are indeed powerfully influenced by norms and networks of civic engagement," concluding that "successful outcomes are more likely in civically engaged communities." *Id.* at 66. Putnam's own 20-year study further supported this link between civic engagement and the effectiveness of representative government. *Id.* Of the types of civic

engagement and associational memberships in America, "[r]eligious affiliation is by far the most common," with "more houses of worship per capita than any other nation on Earth." *Id.* at 68-69. Faith-based organizations in America in particular rank among our most important sources of social capital.

The rich community support, in the form of donations, volunteers, and experience, given to many faith-based organizations often translates into cheaper net labor costs and reduced operating expenses for the functioning of government partnerships. While both large secular non-profits and large religious non-profits can provide economies of scale, faith-based organizations draw more volunteers and donations than any other type of organization in the United States. *See Giving USA 2012 Executive Summary: The Annual Report on Philanthropy for the Year 2011*, Giving USA Foundation (2011), at 8-11. The financial benefits and competitive position of faith-based organizations is further evidenced in the substantial number of government contracts they receive. Since 2001, at least 23,632 primary contract transactions with the federal government, worth over $1,826,042,982 have been signed with religious organizations.

USAspending.gov (search conducted July 26, 2012 narrowing by organizations titled "Adventist, Anglican, Baptist, Baha'i, Buddhist, Catholic, Christian, Hindu, Evangelical, Islamic, Jewish, Jehovah's Witness, Lutheran, Methodist, Mormon, Orthodox, Presbyterian, Sikh, Unitarian, Zoroastrian"). These religious groups act as force-multipliers for government social service efforts.

If the ability to contract with these and many other faith-based organizations is restricted, the government would lose the benefit of additional funds and services provided for free, have to settle for inferior service providers or accrue excessive administrative costs. Were the lower court's holding adopted, government agencies would not be able to evaluate the proposals of bidding contractors that happen to be religiously-affiliated on merit alone. Even if a faith-based organization were better positioned to help the most people, government agencies would be obliged either to choose inferior but secular agencies or government itself would accrue needless administrative costs to fulfill its function.

In this case, for example, there was no secular competitor for the general contractor position, since only USCCB and Salvation Army

submitted bids. *See* 2012 Op., 821 F. Supp. 2d at 476-77. Under the lower court's rule, the government would have to hire eschew a general contractor, increasing its administrative costs.

By contrast, organizations such as World Vision, a Christian humanitarian agency that provides emergency food supplies around to millions around the world, exemplify efficiently low administrative costs. In 2011, the organization received $138 million in total cash and food commodity grants from USAID's Office of Food for Peace. *Consolidated Financial Statements* at 21, World Vision, Inc. and Affiliates (Sept. 30, 2010 and 2011). To be as efficient as World Vision in combating hunger, assuming the same amount of federal funding, an organization's administrative costs would have to be less than $7 million. *See id.* Without World Vision's established infrastructure, economies of scale, experience, or international partnerships, that task would be nearly impossible.

In sum, government often saves taxpayers large amounts by partnering with existing and effective faith-based organizations. It is a better deal for both government entities and for aid recipients. For the well-being of the most vulnerable in our society, government should not

be kept from doing what is best for the needy merely because diverse faith-based organizations are inspired by their beliefs to help others.

CONCLUSION

For the foregoing reasons, the district court's ruling should be reversed, and the case dismissed for lack of standing, or in the alternative, summary judgment should be granted to Defendants.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the Microsoft Word word processing program in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify pursuant to Fed. R. App. P. 25(d) that on August 23, 2012, I transmitted the foregoing brief to the Clerk of the United States Court of Appeals for the First Circuit through the Court's Electronic Case Filing system and that the following persons, who are Filing Users, will receive the brief through the Electronic Case Filing system.

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