Nos. 12-1466, 12-1658

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS,
Plaintiff-Appellee,
v.
KATHLEEN SEBELIUS et al.,
Defendants-Appellants,
and UNITED STATES CONFERENCE OF CATHOLIC BISHOPS,
Defendant-Appellant.

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

Brief of Amici Curiae Americans United for Separation of Church and State; Anti-Defamation League; Baptist Joint Committee for Religious Liberty; and Hadassah, The Women's Zionist Organization of America, Inc., in Support of Plaintiff-Appellee and Affirmance

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Corporate Disclosure Statement

The amici curiae — Americans United for Separation of Church and State; Anti-Defamation League; Baptist Joint Committee for Religious Liberty; and Hadassah, The Women's Zionist Organization of America, Inc. — are each 501(c)(3) nonprofit corporations. The amici have no corporate parents. No publicly held corporation owns any part of the amici.

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Interest of the Amici Curiae

Americans United for Separation of Church and State ("Americans United") is a national, nonsectarian public-interest organization committed to preserving religious liberty and the separation of church and state. We represent more than 120,000 members, supporters, and activists across the country, including thousands who reside in this Circuit. Since our founding in 1947, we have regularly served as a party, as counsel, or as an amicus curiae in scores of church-state cases before the U.S. Supreme Court, this Court, and other federal and state courts nationwide. We often represent taxpayers who object to unconstitutional state support of religion, and we file as amicus here to preserve the rights of taxpayers to bring such challenges.

The Anti-Defamation League ("ADL") was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States. Today, ADL is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL's core beliefs is strict adherence to the

separation of church and state. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in America, and to the protection of minority religions and their adherents.

The Baptist Joint Committee for Religious Liberty ("BJC") is a 76-year-old education and advocacy organization that serves fifteen cooperating Baptist conventions and conferences in the United States, with supporting congregations throughout the nation. BJC deals exclusively with religious liberty and church-state separation issues and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans.

Hadassah, The Women's Zionist Organization of America, Inc., founded in 1912, has over 330,000 Members, Associates, and supporters nationwide. While traditionally known for its role in initiating and supporting health care and other initiatives in Israel, Hadassah has a proud history of protecting the rights of the American Jewish community. Hadassah has a longstanding commitment to supporting the fundamental principle of separation of church and state that has

guaranteed religious freedom and tolerance of religious diversity. Taxpayers must maintain the ability to bring challenges against government funding of religious activity.

Source of Authority to File

All parties have consented to the filing of this brief.

Authorship and Funding of Brief

No party's counsel authored any part of this brief, and no person other than amici curiae contributed money intended to fund the preparation or submission of this brief.

Summary of Argument

The district court correctly held that the ACLU has standing to challenge the federal contract awarded to the United States Conference of Catholic Bishops ("the Catholic Conference") for the provision of services to victims of human trafficking. Under Supreme Court precedent, a federal taxpayer can establish standing to challenge government funding of religious institutions by showing that the expenditure was made pursuant to a federal program that was authorized and funded by Congress.

The ACLU easily satisfies that standard. Congress enacted in 2000 the Trafficking Victims Protection Act ("the Trafficking Act"), which instructs the Department of Health and Human Services ("HHS") to "expand benefits and services to victims of severe forms of trafficking in persons in the United States." 22 U.S.C. § 7105(b)(1)(B). On multiple occasions since then, Congress has appropriated millions of dollars to HHS for the specific purpose of carrying out this victims-services mandate. HHS conveyed a significant portion of these funds to the Catholic Conference, which prohibited its subgrantees from using the money to provide abortion and contraception services.

HHS and the Catholic Conference argue that standing should be denied under *Hein v. Freedom From Religion Foundation*, 551 U.S. 587 (2007). But *Hein* merely held that taxpayers lack standing to challenge government expenditures that are paid out of unrestricted, general funds for the internal operations of the Executive Branch. The facts of *Hein* are wholly distinguishable from those at bar: Congress specifically authorized and funded a program with a particular legislative purpose in enacting the Trafficking Act, and program funds have been

transferred away from the Executive Branch to a private religious organization.

The appellants contend that establishing taxpayer standing requires showing either (a) that the text of the relevant statute itself envisions the use of government funds by religious organizations, or (b) that the legislature knew or intended that the funds would be used to promote religious activity. No Supreme Court case, however, has adopted such standards. To the contrary, the Court has expressly upheld standing in two cases where these standards were not met, *Flast v. Cohen*, 392 U.S. 83 (1968), and *Bowen v. Kendrick*, 487 U.S. 589 (1988). And the Supreme Court reaffirmed both of these cases in *Hein*. Adoption of the appellants' manufactured standards would eviscerate these cases and the constitutional prohibition on public funding of religious institutions by closing courthouse doors — in a wide variety of circumstances — on taxpayers who wish to enforce that prohibition.

What is more, even under the more restrictive "legislative intent or knowledge" standard proposed by the Catholic Conference, the ACLU would still have standing. When Congress reauthorized the Trafficking Act in 2008, it was aware that funds were being awarded to a religious

organization under the Act. From 2006 to 2008, Congress had received multiple reports from Executive Branch agencies stating that the victims-services contract had been awarded to the Catholic Conference. HHS also passed a regulation in 2004 promoting the granting of HHS funds to religious organizations, and Congress is legally presumed to be aware of regulations applicable to programs it finances. In addition, statements by supporters of the Trafficking Act's reauthorization on the floor of the House reference the involvement of religious organizations with services under the Act.

The appellants argue that their position is supported by post-*Hein* cases from other circuits. But where, as here, a legislature appropriated taxpayer funds for a particular government program, and those funds were paid to a private religious organization outside the government, post-*Hein* circuit decisions have upheld standing. Standing has been denied only where the challenged funding came from appropriations not designated for a specific purpose, where the funding was used for internal governmental activity, and/or where the connection between the ultimate recipient of the funding and its source was very remote.

Finally, the appellants assert that the ACLU lacks taxpayer standing because the Catholic Conference did not use contract funds for religious instruction or activity. Religious teaching and preaching are merely one way to advance religion, however. The Catholic Conference found another effective way to advance its religious faith here: it used Trafficking Act funds to *impose* its religious beliefs on others, by prohibiting its subcontractors from using program funds for services disallowed under Catholic doctrine.

The district court's ruling should be affirmed.

Argument

I. The ACLU has taxpayer standing because the victims-services program was created by a congressional mandate and funded by specific congressional appropriations.

A. A federal taxpayer has standing to challenge government funding of religion if the expenditures are made pursuant to a program that was authorized and funded by Congress.

Although Article III standing normally cannot be based on a plaintiff's status as a taxpayer, the Supreme Court created an exception to this rule in *Flast*, 392 U.S. 83. In that case, federal taxpayers challenged the disbursement of funds under the Elementary and Secondary Education Act of 1965 ("the ESEA") to local agencies for the

education of low-income children. *Id.* at 86. A provision of the ESEA required agencies that wished to participate in the program to provide resources "on an equitable basis" to students and teachers in private schools. *Id.* at 87. Taxpayers brought suit when some of the ESEA funds were distributed to religious schools. *Id.*

The Court created a two-part test for determining whether a federal taxpayer has standing to challenge a government expenditure:

> First, the taxpayer must establish a logical link between [taxpayer] 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 [taxpayer] 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 . . . .

Id. at 102–03. The Court went on to find that the taxpayer plaintiffs fulfilled both prongs of the test. The first "nexus" was satisfied because Congress had exercised its power under Article I, § 8 to spend for the general welfare when it passed the ESEA. *Id.* at 103. The second nexus is satisfied whenever taxpayers bring suit under the Establishment Clause. *See id.* at 103–04.

Bowen, 487 U.S. 589, decided twenty years later, reaffirmed the Court's holding in *Flast*, and made clear that taxpayer standing exists even when Congress gives an executive official significant discretion in administering the funds of a legislative program. At issue in *Bowen* was the Adolescent Family Life Act ("the AFLA"), a federal grant program that provided funding for services related to teen sex and pregnancy. *Id.* at 593. The AFLA appropriated money to HHS, which then distributed the funds to dozens of community-service groups — including some religious organizations. *Id.* at 593–97. The Court held that, under *Flast*, taxpayers had the right to challenge HHS's decisions to award specific AFLA grants to religious institutions. 487 U.S. at 618–22. Just like the ESEA, the AFLA was "at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers." *Id.* at 619–20. There was thus a "sufficient nexus" between the plaintiffs' status as taxpayers and the congressional spending power under Article I, § 8, "notwithstanding the role [HHS] play[ed] in administering the statute." *Id.* at 620.

Finally, in *Hein*, 551 U.S. 587, the Court held 5–4 that taxpayers did not have standing to challenge internal Executive Branch

expenditures paid out of unrestricted, general budget appropriations. The plaintiffs in *Hein* brought suit to challenge the Executive Branch's presentation of conferences at which federal officials praised the delivery of social services by faith-based organizations. *Id.* at 593–96. Congress did not pass any law "authoriz[ing] the creation" of the Executive Branch offices that put on the conferences, nor did it "specifically appropriat[e] money for these entities' activities." *Id.* at 595.

A three-Justice governing plurality drew a sharp distinction in *Hein* between specific expenditures for programs created by Congress and lump-sum appropriations to fund the routine operations of the Executive Branch. The plurality stressed that the taxpayer plaintiffs in *Flast* had met the requirements for standing because the challenged government expenditure was "funded by a *specific* congressional appropriation and was undertaken pursuant to an express congressional mandate." *Id.* at 603–04 (emphasis added). Similarly, the plurality noted that the plaintiffs in *Bowen* had standing because they challenged "'how the funds authorized by Congress [were] being

disbursed *pursuant to the AFLA's statutory mandate*.'" *Id.* at 607 (quoting *Bowen*, 487 U.S. at 619–20 (emphasis in *Hein*)).

By contrast, the plurality concluded that standing was lacking in *Hein* because the faith-based conferences challenged by the plaintiffs were funded entirely by unrestricted appropriations for the "day-to-day activities" of the Executive Branch. 551 U.S. at 605. The *Hein* plurality stressed that it left its holdings in *Flast* and *Bowen* undisturbed. *See id.* at 606–07, 615. Nevertheless, the plaintiffs lacked standing because the Court had never before held that the *Flast* principle applies to "a purely discretionary Executive Branch expenditure." *Id.* at 615. Thus, as the Court subsequently confirmed in *Arizona School Tuition Organization v. Winn*, 131 S. Ct. 1436, 1445 (2011), *Hein* merely held that there is "no standing under *Flast* to challenge federal executive actions funded by general appropriations."

B. As in *Flast* and *Bowen*, the challenged expenditures here were made pursuant to a program that was authorized and funded by Congress.

Here, the federal government has paid federal funds to a private religious institution pursuant to a particular federal program specifically authorized and funded by Congress, placing this suit

squarely within the bounds of *Flast* and *Bowen*. The Trafficking Act directs HHS to "expand benefits and services to victims of severe forms of trafficking in persons in the United States." 22 U.S.C. § 7105(b)(1)(B). Congress has authorized multiple appropriations to HHS for the specific purpose of carrying out that portion of the Act. The original Act set aside $5 and $10 million for victims' services in fiscal years 2001 and 2002 respectively. JA153. In a 2008 reauthorization, Congress appropriated $12.5 million to HHS for each fiscal year between 2008 and 2011. 22 U.S.C. § 7110(b)(1).

Like the ESEA and AFLA, these appropriations were specific disbursements of funds for a particular legislative purpose rather than lump-sum budget appropriations to the Executive Branch. And just as HHS awarded AFLA funds to religious groups in *Bowen,* so too did HHS award millions of dollars in Trafficking Act funds to the Catholic Conference. Moreover, unlike in *Hein*, the funding challenged here was paid to a private religious institution outside the government instead of being used for internal Executive Branch operations.

C. Neither precedent nor logic supports the standards for taxpayer standing proposed by the appellants.

The appellants offer two alternative interpretations of the plurality opinion in *Hein*. First, HHS asserts that "Establishment Clause taxpayer standing exists only where a statute's *text* specifically directs or contemplates the use of federal funds by a religious entity or for religious activity." Brief of Appellants Kathleen Sebelius et al. ("HHS Brief") at 32; *see also id.* at 39. On the other hand, the Catholic Conference would allow taxpayer standing only where Congress "intended" or "understood" that "the appropriation [would] be used to support religious activity." Brief of Appellant United States Conference of Catholic Bishops ("Catholic Conference Brief") at 26–27. Neither of these proposed standards can be squared with Supreme Court precedents on taxpayer standing, and neither standard is logically related to the principles that support the existence of Establishment Clause taxpayer standing in the first place.

1. The appellants' proposed standards conflict with the Supreme Court's holdings.

No Supreme Court case has adopted the standards proposed by the appellants. To the contrary, if the Supreme Court had applied the

appellants' standards in *Flast* and *Bowen*, it would have denied standing in both cases.

HHS's contention that statutory text must expressly direct public funds to religious institutions is flatly inconsistent with *Flast*. The statute challenged there did not make reference to religious schools at all, much less expressly direct that federal funds be disbursed to them. *See* 392 U.S. at 86–88. Applying the standard proposed by HHS would eviscerate *Flast*, even though the *Hein* plurality explicitly said that it was doing no such thing. *See* 551 U.S. at 615; *accord ACLU of Minnesota v. Tarek Ibn Ziyad Academy*, No. 09-138, 2009 WL 2215072, at *6 (D. Minn. July 21, 2009).

Furthermore, *Bowen* refutes both HHS's proposed standard and the Catholic Conference's contention that taxpayer standing requires legislative intent or knowledge that a challenged program will be used to fund religious activity. The statute challenged in *Bowen* did not require that any grants actually be awarded to religious groups. *See* 487 U.S. at 604; *accord Lamont v. Woods*, 948 F.2d 825, 830 n.2 (2d Cir. 1991). That statute merely "*contemplated* that some [project] moneys *might* go to projects *involving* religious groups." *Hein*, 551 U.S. at 607

(emphases added). Contemplating possible involvement of religious groups in program projects in some manner is a far cry from requiring provision of public funds to religious groups directly, much less intending or knowing that those funds would be used for religious activity.

Bowen and *Flast* also defeat an assertion in an amicus curiae brief written in support of the appellants that "taxpayers do not have standing to challenge Executive Branch decisions," and that the ACLU therefore lacks standing here because it was HHS that made the decision to contract with the Catholic Conference. *See* Brief of Amici Curiae Association of Gospel Rescue Missions et al. at 7, 10–12; *see also* Catholic Conference Brief at 24; HHS Brief at 34. The AFLA funds at issue in *Bowen* were distributed through discretionary decisions by HHS, just like the Trafficking Act funds in question here. 487 U.S. at 593–97. Indeed, *Bowen* held that the role played by the Executive Branch in administering the AFLA did not make the plaintiffs' suit there "any less a challenge" to Congress's taxing and spending powers. *Id.* at 619. Moreover, as the Court noted in *Bowen*, even *Flast* involved a suit against an executive official, the Secretary of the Department of

Health, Education, and Welfare, "who had been given the authority under the challenged statute to administer the spending program that Congress had created." *Id.*

Thus, it does the appellants and their amici no good to characterize the ACLU's suit as one against discretionary actions of the Executive Branch, for the challenged expenditures in *all three* of the Court's leading taxpayer-standing cases involved at least some level of Executive Branch discretion. The crucial difference between *Flast* and *Bowen* on the one hand and *Hein* on the other is that in the former cases the Executive Branch was given a measure of discretion to administer a program that was specifically authorized and funded by Congress, whereas in the latter case the Executive Branch had complete discretion over the expenditure of funds, with absolutely no congressional guidance. The *Hein* plurality made this distinction clear at the end of its opinion, when it noted that the Court had never extended *Flast* to encompass "a *purely* discretionary Executive Branch expenditure." 551 U.S. at 615 (emphasis added). The expenditures challenged here are nothing like the kind at issue in *Hein*, as the Trafficking Act unambiguously directs HHS to use its funding for the

decidedly specific purpose of "expand[ing] benefits and services to victims of severe forms of trafficking in persons in the United States." *See* 22 U.S.C. § 7105(b)(1)(B).

2. The appellants' proposed standards are unmoored from the principles at the heart of the Supreme Court's taxpayer-standing jurisprudence.

In addition to flying in the face of Supreme Court precedent, the standards proposed by the appellants and their *amici* are inconsistent with the reasoning behind the Court's taxpayer-standing decisions. The core historical concern justifying taxpayer standing in Establishment Clause cases has been to prevent public funds from being distributed to religious institutions or ministers to support propagation of their beliefs. On the other hand, the Supreme Court has made clear that allowing taxpayers to challenge the use of government funds for internal governmental activities would present serious concerns about improper judicial intervention in the day-to-day operations of other branches of government.

In *Flast*, the Court looked closely at the history of the Founding Era before determining that the Establishment Clause was a "specific constitutional limitation upon the exercise by Congress of the taxing

and spending power conferred by Art. I, § 8." 392 U.S. at 104. The Court explained that the Establishment Clause was designed to prevent the government from "employ[ing] its taxing and spending powers to aid one religion over another or to aid religion in general." *Id.* at 103–04. Subsequently, in *DaimlerChrysler Corp. v. Cuno*, the Court characterized taxpayers' rights under the Establishment Clause as "the right not to 'contribute three pence . . . for the support of any one [religious] establishment.'" 547 U.S. 332, 347 (2006) (quoting *Flast*, 392 U.S. at 103 (alterations in original)).

Recently, in *Winn*, 131 S. Ct. 1436, the Court emphasized that *Flast* was particularly concerned about the prospect of taxpayer money being given to religious organizations outside of the government. "'[T]he Framers' generation,'" noted the Court, "'worried that conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed.'" *Id.* at 1447 (quoting Noah Feldman, *Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 351 (2002)). *Flast* therefore recognized, explained the *Winn* Court, that "individuals suffer a particular injury" when their tax moneys are "transferred through the Government's

Treasury to a sectarian entity." 131 S. Ct. at 1445–46. The Court concluded that "what matters under *Flast* is whether sectarian [organizations] receive government funds drawn from general tax revenues, so that moneys have been extracted from a citizen and handed to a religious institution in violation of the citizen's conscience." *Id.* at 1448.

By contrast, the challenged expenditures in *Hein* were not paid to a sectarian entity outside the government, but were for internal activities and operations of the Executive Branch. As a result, unique concerns about the separation of powers were critical to *Hein*. The *Hein* plurality explained that permitting standing there would have "enlist[ed] the federal courts to superintend, at the behest of any federal taxpayer, the speeches, statements, and myriad daily activities of the President, his staff, and other Executive Branch officials." 551 U.S. at 611–12.

Furthermore, Justice Kennedy — who joined the plurality's opinion in *Hein* and cast the deciding vote in the 5–4 case (and who also authored the majority opinion in *Winn*) — wrote a concurrence in *Hein* that focused exclusively on the separation-of-powers doctrine. *Id.* at

615–18. Emphasizing that the *Hein* plaintiffs were challenging the content of speeches given by Executive Branch officials, Justice Kennedy explained that allowing the case to proceed would lead to "intrusive and unremitting judicial management" of Executive Branch speech and internal operations. *Id.* at 617. (Although Justice Kennedy joined Justice Alito's plurality opinion, it is appropriate for this Court to consider Justice Kennedy's concurrence in resolving or interpreting any ambiguity in the plurality's opinion. *See* Igor Kirman, *Standing Apart to be a Part: the Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2090–96 (1995), and cases cited therein; *Horn v. Thoratec Corp.*, 376 F.3d 163, 174–76 (3d Cir. 2004); *United States v. Puerta*, 982 F.2d 1297, 1304 (9th Cir. 1992).)

The standing standards proposed by the appellants cannot be logically linked to the Founders' concern about preventing public funding of private religious institutions. Nor are those standards related to *Hein*'s concern about the separation of powers. When the government transfers public funds to a religious entity that uses those funds for religious purposes, the taxpayer's injury is the same regardless of whether Congress expressly required the transfer, knew it

would occur, or merely allowed the Executive Branch to exercise discretionary authority to make such a transfer. Similarly, the separation-of-powers concerns that would arise if, for example, a taxpayer were to seek a judicial injunction prohibiting the President from including religious references in his speeches would be the same regardless of whether Congress intended or knew that the President would make such references when it appropriated funds for the President's salary. As Justice Scalia explained in a concurring opinion in *Hein*, interpreting the case as the appellants do would create "meaningless and disingenuous distinctions that . . . forc[e] lawyers and judges to make arguments that deaden the soul of the law, which is logic and reason." 551 U.S. at 633.

3. The appellants' proposed standards would pose a steep, unjustified barrier to taxpayer suits against federal funding of private religious institutions.

Not only are the standards offered by the appellants contrary to Supreme Court precedent and detached from the historical considerations that underlie taxpayer standing, but they also would allow the government to commit gross violations of the Establishment Clause with impunity. So long as the text of the relevant statute says

nothing about religion, or so long as the legislature is unaware that funds are being awarded to faith-based groups, a taxpayer would lack standing under the appellants' standards to challenge federal grants, even if the beneficiary religious organizations use the funds for proselytization.

And most grant programs through which religious organizations receive federal funds are similar to the Trafficking Act in that Congress appropriates money for a specific purpose, but gives the Executive Branch discretion to choose which organizations receive the funds. Indeed, over the last dozen years, the federal Executive Branch has increasingly used its discretionary authority to direct hundreds of millions of dollars annually from such grant programs to religious organizations. *See* LISA M. MONTIEL & DAVID J. WRIGHT, THE ROUNDTABLE ON RELIGION AND SOCIAL WELFARE POLICY, GETTING A PIECE OF THE PIE: FEDERAL GRANTS TO FAITH-BASED SOCIAL SERVICE ORGANIZATIONS 1–3, 8 (2006); *see also* Ben Smith & Byron Tau, *Obama's stimulus pours millions into faith-based groups*, POLITICO, Dec. 3, 2010, http://www.politico.com/news/stories/1210/45897.html. Accepting the appellants' theories of standing would largely nullify the

core Establishment Clause principle that the government should never provide public funds to private religious organizations that use those funds to advance their faiths.

4. Even if legislative intent or knowledge that religious institutions would be funded is required for standing, the record shows that Congress had such intent and knowledge in this case.

Although taxpayer plaintiffs need not show legislative intent or knowledge that challenged funding would be paid to religious organizations, there is substantial evidence of such intent and knowledge on the part of Congress here. After initially fulfilling the victims-services mandate by making grants to individual providers on a case-by-case basis, HHS awarded the master contract to the Catholic Conference in April 2006. JA1609–12. The contract was renewed annually through 2011; during that time the Catholic Conference received at least $15.9 million. *See* JA1612–13.

In May 2008, the Attorney General's office submitted its annual report to Congress outlining the measures taken by the federal government to combat human trafficking. This report stated that the Office of Refugee Resettlement ("ORR"), a sub-agency of HHS, was continuing a contract with the Catholic Conference to "provide

comprehensive support services to victims of human trafficking." *See* ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF THE U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS FISCAL YEAR 2007 5 (2008), http://www.justice.gov/archive/ag/annualreports/tr2007/agreporthumantrafficing2007.pdf. The report also stated that the Catholic Conference had entered into subcontracts with 93 organizations in 125 locations. *Id.* The Attorney General submitted a report with similar information to Congress the year before. *See* ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF THE U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS FISCAL YEAR 2006 7 (2007), http://www.usdoj.gov/archive/ag/annualreports/tr2006/agreporthumantrafficing2006.pdf.

ORR also issued a report providing similar information to Congress in 2008. *See* OFFICE OF REFUGEE RESETTLEMENT REPORT TO CONGRESS FISCAL YEAR 2007 54 (2008), http://www.acf.hhs.gov/sites/default/files/orr/annual_orr_report_to_congress_2007.pdf. ORR stated that it had referred more than 110 social-service organizations to the Catholic Conference, which it described as the "national service provider" of the victims-services program. *Id.* at 55. Thus, Congress

plainly knew that Trafficking Act funds were being given to a religious organization when it reauthorized the Act in December 2008. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

Additionally, HHS issued a regulation in 2004 providing that "[r]eligious organizations are eligible, on the same basis as any other organization, to participate in any Department program for which they are otherwise eligible." 45 C.F.R. § 87.1(b) (2004). This regulation promoted HHS funding of faith-based organizations by ensuring that they could "compete on an equal footing with other organizations for the Department's funding without impair[ment of] the religious character of such organizations." *See* 69 Fed. Reg. 42586-01 (July 16, 2004). Congress is legally presumed to have been aware of this regulation when it reauthorized the Trafficking Act. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–85 (1988); *Marchese v. Shearson Hayden Stone, Inc.*, 822 F.2d 876, 878 (9th Cir. 1987).

Statements of Trafficking Act supporters in the Congressional Record confirm that Congress knew that the Act would direct federal funds to religious organizations. When an earlier version of the

reauthorization bill was introduced on the House floor in 2007, Representative Daniel Lungren of California argued that the Act "provides resources so that nongovernmental organizations, Federal and local law enforcement, and faith-based entities can work together towards a common aim of justice." 153 CONG. REC. H14117 (daily ed. Dec. 4, 2007). Likewise, Congressman Jerrold Nadler of New York praised the Act for providing "resources so that nongovernmental organizations, Federal and local law enforcement, and the faith community can work together to liberate victims and bring their traffickers to justice." 153 CONG. REC. H14119 (daily ed. Dec. 4, 2007).

The kind of evidence described above of Congressional knowledge and intent that program funds would aid religious groups did not exist in *Flast* and *Bowen*, both of which upheld standing. Thus, to the extent that such knowledge or intent is relevant to taxpayer standing, the case for standing here is even stronger than in *Flast* and *Bowen*.

D. The post-*Hein* circuit cases on which the appellants rely are inapposite.

Cases cited by the appellants from the Sixth, Seventh, and D.C. Circuits do not support denial of standing here. *See* Catholic

Conference Brief at 26–29; HHS Brief at 33. These cases are distinguishable and have been misconstrued by the appellants.

The Catholic Conference mischaracterizes the test for taxpayer standing applied in *Hinrichs v. Speaker of the House*, 506 F.3d 584 (7th Cir. 2007), where the Seventh Circuit held that taxpayers lacked standing to challenge the Indiana House's practice of opening each day's proceedings with a prayer. Contrary to the Catholic Conference's assertion that its proposed requirement of religious legislative intent is supported by the case (*see* Catholic Conference Brief at 27–28), *Hinrichs* interpreted *Hein* merely as drawing a distinction between specific and general appropriations. In denying standing under *Hein*, the court noted "the lack of specific direction by the state legislature to establish the [prayer] program and the lack of specific appropriations dedicated to the program." *Id.* at 599. Similarly to the funding in *Hein*, and unlike the money here, the funds at issue in *Hinrichs* came from the House's general operating budget. *Id.* at 587. In addition, in contrast to the many millions of dollars granted in this case, the expenditures for the legislative-prayer program were negligible — $8.46 a prayer. *See id.*; *id.* at 603 (Wood, J., dissenting). Furthermore, the

Hinrichs taxpayers were challenging the internal practices of the state legislature rather than payments to religious organizations outside the government, creating the same separation-of-powers problems that existed in *Hein*.

Likewise, *Freedom From Religion Foundation v. Nicholson*, 536 F.3d 730, 742 (7th Cir. 2008), concerned internal governmental expenditures; the Seventh Circuit feared that allowing taxpayers to challenge the expenditures "would subvert the delicate equilibrium and separation of powers that the Founders envisioned and that the Supreme Court has found to inform the standing inquiry." The court held in *Nicholson* that taxpayers lacked standing to sue the Department of Veterans Affairs for offering pastoral care to patients receiving VA treatment. *Id.* at 731–33. The court noted that there was no legislative authorization or specific appropriation for the pastoral-care program, aside from a statute permitting the Secretary of Veterans Affairs to "'designate a member of the Chaplain Service of the Department as Director, Chaplain Service.'" *Id.* at 732 (quoting 38 U.S.C. § 7306(e)(1)). Rather, the funding for the Chaplain Service came from the general operating budget of the Veterans Health Administration. *Id.* at 732–33.

The most recent Seventh Circuit case, *Sherman v. Illinois*, 682 F.3d 643 (7th Cir. 2012), did not involve an internal expenditure of the Executive Branch, but is still wholly distinguishable from the case at bar. In *Sherman*, a taxpayer brought suit to challenge a $20,000 grant to repair a large cross in Alto Pass, Illinois. *Id.* at 644–45. The restoration did not occur through any legislatively authorized program and was not funded by any appropriation for a particular legislative purpose. *See id.* at 646–47. Rather, an individual state senator secured a grant for the cross restoration through a peculiar legislative mechanism that the court characterized as a way for party leaders to "exert[ ] political discipline and dispens[e] patronage." *Id.* at 646. Each year, the Illinois General Assembly passed a "general," "lump-sum appropriation intended to fund the pork-barrel projects of individual legislators," and then caucus leaders awarded parts of the appropriation to other members of the party. *Id.* at 645–46.

While the facts here are quite unlike those in *Sherman*, they are similar to the facts upon which the Sixth Circuit relied to uphold standing (in relevant part) in *Pedreira v. Kentucky Baptist Homes for Children*, 579 F.3d 722 (6th Cir. 2009), *cert. denied*, 131 S. Ct. 2143

(2011). *Pedreira* involved an Establishment Clause challenge against state and federal funding of "a pervasively sectarian" children's home. *Id.* at 725. The court held that while taxpayers lack standing to challenge "'a purely discretionary Executive Branch expenditure,'" they "still have standing to challenge legislative disbursements over which agencies have executive discretion." *Id.* at 730 (quoting *Hein*, 551 U.S. at 615). The court ruled that the plaintiffs had standing in their capacities as *state* taxpayers because the financing of the religious home occurred pursuant to a child-care program specifically authorized and funded by the state legislature, noting also that the legislature had been informed that state funds were going to the religious home. *See* 579 F.3d at 725, 731–33. On the other hand, the court ruled that the plaintiffs lacked standing in their capacities as federal taxpayers. Unlike here, the federal funds at issue in *Pedreira* were "funneled" through a state government pursuant to a "complex statutory scheme," so the connection between the challenged use of federal funds and any Congressional action was "simply too attenuated to form a sufficient nexus" for taxpayer standing. *Id.* at 730–31.

American Atheists, Inc. v. Detroit Downtown Development Authority, 567 F.3d 278, 285 (6th Cir. 2009), another Sixth Circuit case cited by HHS, has no relevance to this case because the plaintiffs there were municipal taxpayers, not federal or state ones. As the Sixth Circuit noted, cases like *Flast* and *Hein* "have no application" to municipal-taxpayer suits. *Id.* at 285–86 (citing *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923)).

Murray v. U.S. Department of Treasury, 681 F.3d 744 (6th Cir. 2012), *petition for cert. filed* (U.S. Oct. 10, 2012) (No. 12-452), involved the 2008 "bailout" of American International Group ("AIG"), as part of which the Treasury Department purchased nearly $70 billion of the company's preferred stock. A federal taxpayer alleged that the Treasury Department's involvement with AIG violated the Establishment Clause, because six subsidiaries of AIG sold financing products that conformed with sharia (Islamic law). *Id.* at 746–47. We respectfully submit that the *Murray* panel interpreted *Hein* too restrictively in concluding that taxpayer standing exists only when the legislature intends or knows that government funds will go to religious groups. *See id.* at 750–52. In any event, the facts of *Murray* are quite

different from those here. Far from granting money to a religious organization, the federal government merely took a partial, temporary ownership interest in a historically private corporation; the sharia-compliant products at issue were marketed by six of that corporation's roughly 290 subsidiaries; and the products were not given for free to their users but were sold to make a profit. *See id.* at 746–47. The connection between spending of tax dollars and any aid to religion was simply too remote to support standing.

Like *Hinrichs* and *Nicholson*, *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008), concerned internal governmental operations and not payments to outside religious groups. The D.C. Circuit held that a group of Protestant Navy chaplains lacked taxpayer standing to challenge alleged discrimination in favor of Catholic Chaplains in the Navy's retirement system. *Id.* at 762. The court noted that *Flast* "may be . . . limited to Congress's disbursement of federal funds *outside the Government*." *Id.* at 762 n.3. The court also emphasized that the plaintiffs had no objection to government spending on a chaplaincy program. *Id.* at 762. Thus, they did not suffer the injury cognizable in taxpayer Establishment Clause cases — spending of tax money in aid of

religion. *See DaimlerChrysler*, 547 U.S. at 348. Rather, the persons injured by the alleged discrimination were chaplains who — unlike the plaintiff chaplains — were personally subjected to it. *See Navy Chaplaincy*, 534 F.3d at 760.

Finally, *Americans United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406 (8th Cir. 2007), an Eighth Circuit case that upheld standing, has significant similarities to the case at bar. In *Americans United*, the court held that taxpayers had standing to challenge annual legislative appropriations for a "values-based treatment program" in an Iowa prison. *Id.* at 417–18, 420. The Iowa legislature knew when it passed the appropriations that the Iowa executive branch had already selected a religious contractor as the provider of the program. *Id.* at 420. But the appropriations did not specify a program provider and left the executive branch with discretion to select a secular contractor if it so desired. *See id.* at 417, 420. Likewise, here, Congress made specific appropriations for the victims-services program when it knew that the Catholic Conference was the sole federal contractor under the program.

Thus, post-*Hein* circuit decisions support standing in this case. Where, as here, a legislature appropriated taxpayer funds for a particular government program, and those funds were paid to a private religious organization outside the government, the courts of appeals have upheld standing. Standing has been denied only where the challenged funding came from appropriations not designated for a specific purpose, where the funding was used for internal governmental activity, and/or where the connection between the ultimate recipient of the funding and its source was very remote.

II. The challenged expenditures were made "in aid of religion."

The appellants further contend that standing should be denied on the grounds that federal funds were not spent "in aid of religion," because the Catholic Conference did not use any federal money on religious instruction or activities, but merely refused to reimburse subcontractors for abortion and contraception services. *See* HHS Brief at 42–45; Catholic Conference Brief at 29–33. Religious instruction and activity are not the only way to advance religion, however. Requiring people to "tailor[ ]" their conduct "to the principles or prohibitions of any religious sect" also advances religion, as the Supreme Court held in

Epperson v. Arkansas, 393 U.S. 97, 106–08 (1968), when it struck down a state law that banned, for religious reasons, the teaching of evolution in public schools.

Here, by barring the use of program funds for abortion or contraception services, the Catholic Conference imposed its religious beliefs upon a wide range of non-Catholic subcontractors, inducing them to tailor their conduct to Catholic beliefs. What is more, the Catholic Conference used federally funded staff time to monitor and enforce the religious restrictions it placed on the subcontractors. JA812, JA816–17, JA1244.

The Catholic Conference counters that its subcontractors were free to provide abortion or contraception services if they paid for them with private funds. *See* Catholic Conference Brief at 31–32. But the restriction on reimbursement of such services undoubtedly gave contractors strong incentives not to provide the services at all. Very likely, some subcontractors simply would have been unable to afford to provide the services on their own. *See* JA319–20, JA380–81. Other subcontractors likely would have been deterred from offering the services by the administrative difficulties in tracking and separating

reimbursable from non-reimbursable work. And some providers that otherwise would have been willing to offer services to human-trafficking victims may have refused to contract with the Catholic Conference in the first place. *See* JA212.

The appellants cite two cases, *Winn*, 131 S. Ct. 1436, and *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464 (1982), in support of their arguments on this issue. Both of these cases are inapposite.

Winn involved a challenge to an Arizona program that enabled taxpayers to receive tax credits for contributions to organizations that provided scholarships to students attending secular or religious private schools. 131 S. Ct. at 1440–41. In denying taxpayer standing, the Court drew a distinction between government expenditures and tax credits. *Id.* at 1447. When Arizona taxpayers used money saved through the tax credit to contribute to a religious organization, "they spen[t] their own money, not money the State has collected from . . . other taxpayers." *Id.* Because no money was "extracted from a citizen and handed to a religious institution in violation of the citizen's conscience," the Court determined that the plaintiffs' suit did not fall

within the scope of *Flast*. *Id.* at 1448. Here, by contrast, HHS took money from taxpayers and paid it to the Catholic Conference, which used the money to advance religious beliefs that many taxpayers do not hold, by imposing those beliefs upon its subcontractors.

In *Valley Forge*, 454 U.S. at 468–70, the plaintiffs challenged a decision of a federal official to transfer a parcel of federal land to a Bible college in Pennsylvania. The Court held that the plaintiffs lacked standing as taxpayers because the transfer was not an exercise of the taxing and spending power under Article I, but rather of the power to "dispose" of federal property under Article IV, § 3. *Id.* at 480. As such, the transfer did not fall within the scope of *Flast*. *Id.* Here, however, Congress was plainly exercising its spending power when it appropriated funds to HHS. Thus neither *Winn* nor *Valley Forge* helps the appellants' case.

Conclusion

Ensuring that religion is supported privately, not by public funds, was a principal goal of the Founding Fathers when they included the Establishment Clause in the Bill of Rights. The arguments made by the appellants here would eviscerate that goal by closing courthouse doors

on taxpayers who seek to vindicate it. The district court's judgment should be affirmed.

Respectfully submitted,

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Certificate of Service

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on October 24, 2012. I certify that counsel for all parties in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system on the following counsel at their registered e-mail addresses:

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