No. _____

In The Supreme Court of the United States

SUNRISE CHILDREN'S SERVICES, INC.,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY, SECRETARY OF THE CABINET FOR HEALTH AND FAMILY SERVICES; COMMONWEALTH OF KENTUCKY, SECRETARY OF THE JUSTICE AND PUBLIC SAFETY CABINET; ALICIA PEDREIRA; PAUL SIMMONS; JOHANNA W.H. VAN WIJK-BOS; AND ELWOOD STURTEVANT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Flast v. Cohen, 392 U.S. 83 (1968) created a controversial exception to the general rule prohibiting taxpayer standing, holding that federal taxpayers only have standing to bring an Establishment Clause challenge if they can show a "nexus" exists between the taxpayer's status "and the type of legislative enactment attacked."

This case presents an Establishment Clause challenge by State taxpayers to contracts between Kentucky executive branch agencies and a private, religiously affiliated entity that provides social services to thousands of abused and neglected wards of the Commonwealth. The U.S. Court of Appeals for the Sixth Circuit reaffirmed an earlier panel decision in this case fundamentally loosening this *Flast* "nexus" contrary to decisions of this Court in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 342 (2006); *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007); *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011) and other Circuits, which have consistently tightened this "nexus." This Court, moreover, has never held that *Flast* applies to State taxpayers, and the Courts of Appeals are divided on the matter.

The questions presented by this petition are, accordingly, the following:

1. Whether *Flast* should be overruled.

2. Whether *Flast* should be expanded to State taxpayers.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is Sunrise Children's Services, Inc.

Respondents are Commonwealth of Kentucky, Secretary of the Cabinet for Health and Family Services, in its official capacity; Commonwealth of Kentucky, Secretary of the Justice and Public Safety Cabinet, in its official capacity; Alicia Pedreira; Paul Simmons; Johanna W.H. Van Wijk-Bos; and Elwood Sturtevant.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, Petitioner states as follows:

Sunrise Children's Services, Inc. is a non-profit Kentucky corporation and has neither a parent corporation nor any publicly held corporation that owns ten percent or more of its stock.

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DECISIONS BELOW

The United States Court of Appeals for the Sixth Circuit entered its panel decision on October 6, 2015. This decision is reported at 802 F.3d 865 (6th Cir. 2015) and is reprinted at Petitioner's appendix ("App.") 1-19. The Sixth Circuit subsequently entered an order denying Petitioner's petition for rehearing and rehearing *en banc* on November 12, 2015. This order is unreported but reprinted at App. 136-37.

The United States District Court for the Western District of Kentucky, the court of first instance, entered its final opinion and order on June 30, 2014. This order and opinion is unreported but reprinted at App. 20-82.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its panel decision on October 6, 2015. Petitioner's petition for rehearing and rehearing *en banc* was denied on November 12, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2 of the United States Constitution provides that "[t]he judicial power shall extend to all cases, in law and equity, arising under this

Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

A. Factual Background

1. Kentucky's Contracts with Sunrise Children's Services, Inc.

Kentucky has one of the nation's highest mortality rates for abused and neglected children. Thousands of Commonwealth wards each year require intensive institutional treatment and therapy to overcome the devastating effects of this abuse and

neglect. Executive branch agencies of the Commonwealth engage a wide array of secular and religiously affiliated providers to fulfill this great need.

Petitioner Sunrise Children's Services, Inc. ("Sunrise")[1] is the largest private institutional child care provider in Kentucky. Since 1869, Sunrise has continually affiliated with Kentucky Baptists. While Sunrise receives substantial funds from private donors, it also receives public funds through discretionary contracts with Kentucky executive branch agencies, including Respondent Cabinet for Health and Family Services and Respondent Justice and Public Safety Cabinet's Department of Juvenile Justice (collectively, through their respective Secretaries, the "Kentucky Respondents"). *See, e.g.*, excerpted Private Child Care Agreement between Cabinet for Health and Family Services and Sunrise (July 1, 2004) (without attachments), App. 219-31.

These contracts promise only to reimburse Sunrise after-the-fact for audited, documented, secular child care expenses. In other words, they do not constitute a grant program. These reimbursements, in turn, are provided by executive agency expenditures of money generally appropriated to each agency by the Kentucky General Assembly (and, indirectly, by Congress) for general, unrestricted child care purposes. The legislatures have not, however, used

[1] Sunrise was formerly identified in this litigation as Kentucky Baptist Homes for Children, Inc. ("KBHC").

these powers to mandate or expressly designate expenditures for out-of-home child care placement services of any sort, public or private. Kentucky's decision to contract with any child care provider at all – much less a private child care provider, or a religiously affiliated provider, or Sunrise specifically – rests solely with the discretion of Kentucky executive branch agencies. Similarly, the creation of the terms of Kentucky's service contracts with Sunrise, and the authority to determine Sunrise's compliance with those contract terms, rests with those agencies.

2. Taxpayer Respondents' Establishment Clause Claim Exclusively Targets Kentucky's Executive Branch Contracts with Sunrise.

On April 17, 2000, Plaintiff-Respondents (the "Taxpayer Respondents") filed this action in the United States District Court for the Western District of Kentucky. Taxpayer Respondents brought claims against the Kentucky Respondents pursuant to 42 U.S.C. § 1983 alleging violations of the Establishment Clause of the First Amendment to the U.S. Constitution.[2] Sunrise was named as a necessary party to these claims pursuant to Fed. R. Civ. P. 19.

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[2] One of the Taxpayer Respondents (Pedreira) alleged that Sunrise had discriminated against her because of religion in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, as amended, and the Kentucky Civil Rights Act, K.R.S. §§ 344.010, *et seq*. These claims were conclusively

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Taxpayer Respondents objected to the receipt and use of taxpayer funds by Sunrise in light of its religious affiliation and inspiration. Specifically, those Respondents alleged that Sunrise wrongfully used state and federal funds to "hire employees who [were] required to accept and abide by the institution's religious beliefs, and to pay for services that [sought] to teach youth the institution's version of Christian values." *See* Amended Complaint, Introduction, App. 165-66. Taxpayer Respondents requested declaratory relief, an order prospectively enjoining the Kentucky Respondents from providing further funding to Sunrise for staff positions purportedly filled in accordance with religious tenets, an order requiring Sunrise to reimburse Kentucky for state funds used to finance such positions, fees, and court costs. *Id.*, Request for Relief, App. 193.

3. Taxpayer Respondents Base Their Article III Standing on Legislative Activity That Is Not Challenged as Unconstitutional.

Sunrise has consistently challenged Taxpayer Respondents' Article III standing to sue, citing this Court's general bar against taxpayer standing and the narrow exception for Establishment Clause cases met only by satisfying the exacting "legislative

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resolved in Sunrise's favor. *See* 579 F.3d at 727-28 (panel decision affirming dismissal pursuant to Fed. R. Civ. P. 12(b)(6)), App. 90-94.

enactment" nexus requirement established in *Flast v. Cohen*, 392 U.S. 83 (1968).[3] Critically, Taxpayer Respondents have never based their taxpayer standing on the activities they challenged as unconstitutional: the Kentucky Respondents' discretionary executive branch contracts with Sunrise or the administration of those contracts. Taxpayer Respondents have instead sought to show, through other legislative activity, that the Kentucky General Assembly "knew" and constructively "approved" of the Kentucky Respondents' contracts with Sunrise and their alleged maladministration of those contracts.[4]

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[3] Sunrise's initial standing challenges were denied by the District Court under then controlling circuit precedent. *See Johnson v. Econ. Dev. Corp. of the County of Oakland*, 241 F.3d 501, 507 (6th Cir. 2001). Sunrise's renewed dispositive motion made after this Court's decision in *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007), however, was granted by the District Court, which gave rise to the first appeal. 553 F.Supp.2d at 862, App. 130-31.

[4] This legislative activity included: (1) enabling statutes authorizing (*i.e.*, not requiring) executive branch agencies to spend money on child care generally, *see* K.R.S. §§ 199.641(2), 200.115, 605.120, App. 143-46, 155-57; (2) general appropriation acts funding the operational budgets of the Kentucky Respondents; (3) regulatory statutes authorizing executive branch agencies to condition a child care provider's eligibility for public service on various licensing criteria, *see* K.R.S. §§ 199.640(1), (5)(a)-(b), 199.650, 605.090, App. 138-42, 145, 147-55; (4) a bricks-and-mortar appropriation of the Kentucky General Assembly made in 2005, five years after Taxpayer Respondents' Complaint was filed, for the construction of classrooms for State wards educated at Sunrise, *see* 2005 Ky. Laws Ch. 173 (H.B. 267, Part I, § H.10 (5)), App. 158-60; and (5) a legislative commendation approved by one house of the bicameral General Assembly

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Taxpayer Respondents urged that these legislative activities constituted a sufficient nexus between an explicit legislative appropriation and an alleged Establishment Clause violation to support taxpayer standing under this Court's precedents.

B. Proceedings Below

1. The District Court Grants Sunrise's Motion to Dismiss for Lack of Standing Based on this Court's *Cuno* and *Hein* Decisions.

On March 31, 2008, the District Court granted Sunrise's motion to dismiss Taxpayer Respondents' Establishment Clause claims for lack of standing pursuant to Fed. R. Civ. P. 12(b)(1).[5] App. 130-33. This motion was filed shortly after this Court decided *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007), which had illuminated the narrow *Flast* "legislative enactment" nexus.

Having concluded that *Flast* was applicable to Taxpayer Respondents' claims, regardless of whether

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in 2006, six years after Taxpayer Respondents' Complaint was filed, thanking Sunrise for its secular work with abused and neglected children, *see* Ky. H.R. Jour., 2006 Reg. Sess. No. 57, March 24, 2006, Leg. Citation No. 142, App. 163-64.

[5] Ms. Pedreira's religious discrimination claims had been dismissed on the merits in 2001. 186 F.Supp.2d at 762. Accordingly, the final and appealable March 31, 2008 order resolved all claims in Sunrise's favor.

they are based upon the federal or State taxes paid, the District Court determined that there was no standing in either context due to the absence of the requisite legislative enactment nexus. 553 F.Supp.2d at 858-59, App. 121-31. In reaching this decision, the court relied on *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 342 (2006) as well as *Hinrichs v. Speaker of the House of Representatives of the Indiana General Assembly*, 506 F.3d 584 (7th Cir. 2007), a post-*Cuno*, post-*Hein* Establishment Clause case brought by Indiana taxpayers that had applied the *Flast* analysis to deny State taxpayer standing. *Id*.

2. The Sixth Circuit Affirms on Federal Taxpayer Standing, But Reverses on State Taxpayer Standing.

Taxpayer Respondents appealed to the Sixth Circuit. While affirming on the issue of federal taxpayer standing pursuant to *Hein*, the Sixth Circuit reversed the District Court on the issue of State taxpayer standing. The panel held that State taxpayer standing required only a "good faith pocketbook injury" – purportedly satisfied here by Taxpayer Respondents' bare assertion of "lost revenue" – and that *Flast*'s "legislative enactment" nexus requirement was inapplicable to State taxpayers. 579 F.3d at 731-33, App. 101-04 ("*Pedreira I*"), *citing Johnson*, 241 F.3d at 507 (establishing lenient State taxpayer standing test akin to that for municipal taxpayer standing).

The Sixth Circuit then reasoned in the alternative that even if the *Flast* "legislative enactment" nexus requirement did apply to State taxpayers, Taxpayer Respondents would still have standing, as they had purportedly "demonstrated a nexus between Kentucky and its impermissible funding of a pervasively sectarian institution." *Id*. at 732-33, App. 104-06. In support of this finding, the Sixth Circuit cited Taxpayer Respondents' reference to "Kentucky statutory authority, legislative citations acknowledging Sunrise's participation, and specific legislative appropriations to [Sunrise]." *Id*. at 732, App. 105; *see also infra* n.4. The Sixth Circuit thus reversed the District Court's dismissal of Taxpayer Respondents' State taxpayer Establishment Clause claim and remanded the case for further proceedings consistent with its limited mandate. *Id*. at 734, App. 108. After their motions for rehearing and rehearing *en banc* were denied, Sunrise and the Kentucky Respondents petitioned this Court for certiorari. App. 134-35. This petition was denied. 563 U.S. 935 (2011).

3. On Remand, Taxpayer Respondents Amend Their Amended Complaint; Sunrise and Kentucky File Their Motions for Summary Judgment.

Shortly after remand, Taxpayer Respondents filed a second amended complaint identifying two Kentucky enabling statutes allegedly authorizing the expenditure of public funds in violation of the Establishment Clause through unspecified general "appropriation

acts." Second Amended Complaint, paras. 19, 55, *citing* K.R.S. §§ 200.115(1), 605.120(1), App. 202-03, 216.

On November 21, 2012, Sunrise filed a Fed. R. Civ. P. 56 motion for summary judgment, demonstrating that Kentucky maintains a policy of neutrality between religiously-inspired and secular organizations participating in its private child care system (the "PCC System"), and accordingly did not violate the Establishment Clause by contracting with Sunrise. The Kentucky Respondents concurred in Sunrise's Rule 56 motion. Taxpayer Respondents filed no response to either motion, instead filing several successful motions to extend, and ultimately stay, briefing to permit the negotiation of a consent decree with the Kentucky Respondents.

4. The District Court Enters a Bilateral Consent Decree Over Sunrise's Objections.

In March 2013, attorneys representing Taxpayer Respondents and Kentucky Respondents executed a bilateral settlement agreement (the "Agreement"). App. 44-82. Although Sunrise, a party to the suit since its inception, is not a party to the Agreement, Americans United for Separation of Church and State ("AU"), the Americans Civil Liberties Union ("ACLU") and the ACLU of Kentucky, never parties to this case, are parties to the Agreement. App. 44-45. In addition, the ACLU and AU were granted "the same rights to enforce the [Agreement] that are provided to the

other Parties." App. 73. These entities are not Kentucky taxpayers.

On motion of all Respondents, over Sunrise's objections, the District Court entered a dismissal order on June 30, 2014 incorporating the Agreement's terms and retaining jurisdiction to enforce the Agreement – an order that Sunrise, and later the Court of Appeals, correctly recognized as a consent decree. App. 43-82. The consent decree outlines numerous regulatory changes to the Kentucky PCC System that will result in new duties and obligations for private agencies, including Sunrise, that contract with the Kentucky Respondents to serve the abused and neglected children in their care. App. 46-63.

Sunrise, moreover, will be forced to submit to special, heightened scrutiny not imposed on other private agencies. Specifically, for seven years, the Kentucky Respondents must provide information to the ACLU and AU concerning Sunrise that they are not required to produce about any other private agencies. App. 63-65. The ostensible purpose of this Sunrise-specific monitoring is to detect alleged violations of children's Free Exercise rights and to provide the ACLU and AU entrée to challenge such alleged infringements. But the consent decree would not bar Sunrise, an allegedly "pervasively sectarian" entity, from receiving taxpayer funds or prevent Sunrise from using public funds for religious activities.

On the date the District Court entered this consent decree, it also denied a new motion filed by

Sunrise to dismiss the Taxpayer Respondents' Second Amended Complaint (and the court's corresponding power to enter and enforce the Respondents' consent decree) for lack of subject-matter jurisdiction. Sunrise's and Kentucky's motions for summary judgment were neither considered nor decided by the District Court.

5. The Sixth Circuit Reaffirms Its Idiosyncratic State Taxpayer Standing Rule.

Sunrise timely appealed, renewing both its objections to standing and to the consent decree. The Sixth Circuit affirmed the denial of Sunrise's motion to dismiss for lack of standing, holding that even though *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011) endorsed the equal application of the *Flast*/*Hein* "nexus" test to State and federal taxpayers alike (thus abrogating the principal State taxpayer holding of its predecessor panel), it nevertheless remained bound by the prior panel's *alternative* conclusion that State taxpayer standing existed pursuant to its own lenient restatement of that "nexus" test. 802 F.3d at 870, App. 8-9 ("*Pedreira II*"). The Sixth Circuit further held that the District Court's dismissal order incorporating the Agreement was indeed a consent decree, but declined to reverse it outright, instead vacating and remanding the matter for the District Court to conduct a fairness hearing. *Id*. at 872, App. 13-15.

Sunrise's petition for rehearing and rehearing *en banc* was denied on November 12, 2015. App. 136-37. Sunrise's motion to stay the mandate was filed on November 18, 2015, and granted by the original panel on November 19, 2015.

REASONS TO GRANT THE PETITION

The reasons for granting the petition are straightforward and compelling. Article III standing requires (1) a concrete and particularized injury-in-fact that is (2) fairly traceable to the defendant's alleged unlawful conduct and (3) likely to be redressed by a favorable decision. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Yet here, four Kentucky taxpayers ostensibly have standing based on allegations – made solely in their capacities as Kentucky taxpayers – that two Kentucky executive agencies have spent their (and others') taxpayer funds through discretionary service contracts in a manner that violates the Establishment Clause. These taxpayer plaintiffs have been able to initiate and perpetuate federal litigation against a sovereign State for nearly sixteen years based on this general grievance, and ultimately secure a consent decree that does nothing to redress their purported financial injury, as a result of the narrow, dubious *Flast* exception to this Court's general prohibition against taxpayer standing.

Flast should be overruled. It has always been an outlier, but after this Court's recent decisions in *Cuno*, *Hein*, and *Winn*, it has been narrowed beyond any further principled or practical *raison d'etre*. If left unaddressed, *Flast*'s only functions will be to contradict Article III, confound the lower courts, and confuse the necessary boundaries between the branches and seats of government. This Court should grant review and give careful scrutiny to whether *Flast* deserves the continued benefit of *stare decisis*.

Alternatively, this Court should grant review so it may squarely consider, for the first time, whether *Flast* should be expanded to State taxpayers. In other contexts, this Court has recently and serially committed to limiting *Flast* – a federal taxpayer case – to its result. Cabining *Flast* to the federal level will guarantee its idiosyncratic effects are not multiplied by the differing frameworks of fifty different States, ensure future applications of *Flast*'s "nexus" test are made within the federal context addressed in previous decisions construing that test, and eliminate considerable confusion in the Courts of Appeals regarding *Flast*'s applicability to State taxpayers.

I. *FLAST* HAS BEEN FATALLY UNDERMINED BY *CUNO*, *HEIN*, AND *WINN*, AND SHOULD BE OVERRULED.

A. *Flast* is a failed experiment that has been narrowed by *Cuno*, *Hein*, and *Winn* beyond the point of continued viability. At *Flast*'s core is a two-part

test, which, while perhaps sufficient to decide the presenting circumstances of that case, has proven to be an ambiguous and unhelpful boundary for Article III standing ever since:

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

Flast, 392 U.S. at 102-03. From its genesis, the rationale of *Flast* has been criticized as inconsistent with traditional, plaintiff-oriented standing analyses. *See id*. at 122 (Harlan, J., dissenting) (observing that while the "difficulties with [*Flast's*] criteria are many and severe . . . it is enough for the moment to emphasize that they are not in any sense a measurement of any plaintiff's interest in the outcome of any suit."). *Flast*'s rationale has also been expressly assailed for disregarding critical separation of powers concerns.

Lewis v. Casey, 518 U.S. 343, 353 n.3 (1996); *Spencer v. Kemna*, 523 U.S. 1, 11-12 (1998). Because of these and other misgivings about loosening Article III standing for taxpayers, *Flast* taxpayer standing has never been extended beyond cases challenging legislative spending that purportedly violated the Establishment Clause. *U.S. v. Richardson*, 418 U.S. 166 (1974); *Schlesinger v. Reservists Cmte.*, 418 U.S. 208 (1974); *Valley Forge Christian College v. Am. United for Separation of Church and State*, 454 U.S. 464 (1982); *Bowen v. Kendrick*, 487 U.S. 569 (1988). The Court, however, had not recently addressed taxpayer standing – until *Cuno*.

B. In *Cuno*, the Court unanimously rejected the broader possibilities of taxpayer standing made available by *Flast*. *Cuno* held that State taxpayers lacked Article III standing to challenge a State business-development franchise tax credit on Commerce Clause grounds. 547 U.S. at 349. While not an Establishment Clause case, *Cuno*'s analysis narrowed *Flast* in several important ways. First, *Cuno* narrowly described the injury alleged in *Flast* Establishment Clause challenges as "the very 'extraction and spending' of 'tax money' in aid of religion alleged by a plaintiff" – a concept that would prove dispositive in *Hein* and *Winn*. *Id.*, *citing Flast*, 392 U.S. at 106. Second, *Cuno* restricted the "constitutional limitation" that would satisfy the second prong of the *Flast* test, *supra*, to Establishment Clause violations, holding that no other restriction on Article I, Section 8 implicated the same type of serious taxpayer interests. The

Cuno Court reasoned that broadening *Flast* to include taxpayer Commerce Clause suits would necessarily open the door to taxpayer standing in cases involving a host of other limitations on the Taxing and Spending Clause – an outcome that would be "quite at odds" with what it described as "*Flast*'s own promise that it would not transform federal courts into forums for taxpayers' 'generalized grievances.'" *Id*., *citing Flast*, 392 U.S. at 106. Finally, *Cuno* restated and reaffirmed the Court's jurisprudence describing standing as a necessary component of the Article III case-or-controversy requirement, implicitly rejecting *Flast*'s conception of standing as a malleable, prudential element of justiciability. *Id*. at 601-05; *Flast*, 392 U.S. at 91-93. *Cuno*'s unanimity on these points represented a break from divided decisions of the past, and set the stage for the Court to scrutinize *Flast* more directly in *Hein*.

C. In *Hein*, the Court considerably narrowed *Flast* by limiting taxpayer standing to challenges of express legislative spending. Citing *Flast* and *Bowen*, the *Hein* plurality endorsed the "result" of *Flast* – *i.e.*, taxpayer standing exists only where an offending expenditure was expressly contemplated by legislative action – while declining to embrace what the remainder of the Court clearly considered the *rationale* of *Flast*, *i.e.*, the defense of a taxpayer's "mental displeasure" with government spending in violation of the Establishment Clause. Accordingly, by "leaving *Flast* where [it] found it," the Court necessarily excised from the *Flast* exception all discretionary

executive branch expenditures made from general legislative appropriations.

Both the *Hein* dissent and Justices Scalia and Thomas's concurrence criticized the seemingly arbitrary manner in which the Court endorsed standing for some plaintiffs suffering a judicially cognizable taxpayer injury (as recognized in *Flast* and then *Bowen*) but not others – depending on the manner in which the *defendant* allegedly perpetrated the injury. The dissent contended that *Flast* standing should be applied to all taxpayers forced to effectively "contribute three pence . . . for the support of any one [religious] establishment," regardless of the manner in which the government spent the funds. *Hein*, 551 U.S. at 462 (Souter, J., dissenting) (*citing* 2 Writings of James Madison 183, 186 (G. Hunt ed. 1901)). The dissent further lamented that "if the Executive could accomplish through the exercise of discretion exactly what Congress cannot do through legislation, Establishment Clause protection [will] melt away." *Id*. at 463 (Souter, J., dissenting). The two-justice concurrence pointedly argued that the only way to avoid "utterly meaningless distinctions" in Article III standing law was to deny taxpayer standing in that case, overrule *Flast* entirely, and re-embrace *Frothingham v. Mellon*, 262 U.S. 497 (1923). *Id*. at 450 (Scalia, J., concurring).

In sum, while *Hein* did not overrule *Flast*, it quarantined *Flast* to its facts, undercut *Flast*'s ability to allow federal taxpayers to vindicate their special "stake" against Establishment Clause violations, and

highlighted an obvious work-around for governments seeking to evade judicial review of support for religion. Four years later, the Court would further limit *Flast* in the context of an Arizona tax credit program.

D. In *Winn*, the Court narrowed *Flast* (and *Hein*) even further, holding that though taxpayers might have standing to challenge legislative expenditures to aid religious entities, they lack standing to challenge legislative tax credit programs for the same purposes. In reaching this distinction, the *Winn* court (now a majority) again stressed a narrow, precedent-bound interpretation of *Flast*, and specifically seized upon *Flast* (and *Cuno*)'s characterization of the taxpayer injury as the mental displeasure of the "dissenter whose tax dollars are 'extracted and spent' [who] knows that he has in some small measure been made to contribute to an establishment in violation of conscience." *Winn*, 563 U.S. at 142, *citing Flast*, 392 U.S. at 106. Thus, while the majority acknowledged that "it is easy to see that tax credits and governmental expenditures can have similar economic consequences," a tax credit program did not "implicate individual taxpayers in sectarian activities" since the program only facilitated individual taxpayer choices, and did not theoretically compel anyone to pay tax funds towards a religious entity. *Id*., *citing Flast*, 392 U.S. at 106.

The *Winn* dissenters emphasized the significant practical consequences of the majority's approach. The Court's "hair-splitting" on taxpayer injury, they argued, read a distinction into *Flast* that simply did

not exist, and elevated a strict reading of that case over well-established Article III principles and previous decisions of the Court equating tax expenditures with tax credits. *Winn*, 563 U.S. at 148 (Kagan, J., dissenting) ("This novel distinction in standing law . . . has as little basis in principle as it has in our precedent. Cash grants and targeted tax breaks are means of accomplishing the same government objective – to provide financial support to select individuals or organizations."); *see also id*. at 157 (Kagan, J., dissenting) (collecting prior decisions recognizing that "tax breaks are often 'economically and functionally indistinguishable from a direct monetary subsidy.'") (citation omitted). As a result, "[p]recisely because appropriations and tax breaks can achieve identical objectives, the government can easily substitute one for the other," easily "enabl[ing it] to end-run *Flast*'s guarantee of access to the judiciary." *Id*. at 148 (Kagan, J., dissenting). For this reason, *Winn*'s dissenters viewed the Court's decision as "the effective demise of taxpayer standing." *Id*.

E. *Flast* no longer serves as an effective or reliable method for challenging alleged Establishment Clause violations after *Cuno*, *Hein*, and *Winn*. This Court should aspire to reach consensus on Article III standing precepts grounded in logical developments in the law. *Flast*'s continued existence, however, forces the Court to compromise its precedents and injects unnecessary instability into a critical separation of powers (and federalism) matter. There is unanimity on the general *Frothingham* bar

on taxpayer standing; readopting that standard would greatly enhance the predictability, stability, and integrity of both Article III standing and Establishment Clause jurisprudence.

Overruling *Flast*, moreover, would not provide a "green light" for Establishment Clause violations; as this Court has previously recognized, there are other potential plaintiffs besides taxpayers, other courts besides the federal judiciary, and other branches with their own independent Constitutional responsibilities. *See, e.g.*, *Hein*, 551 U.S. at 447 (plurality op.), 449-50 (Kennedy, J., concurring). Abandoning *Flast* would merely return Establishment Clause violations to an equal footing with every other type of Constitutional violation before the federal courts.

Finally, *Flast* persists as an unnecessary stumbling block for the lower courts, which can derive little guidance from the text or trend of this Court's cases. *Hein*, 551 U.S. at 636-37 (Scalia, J., concurring) ("In the proceedings below, well-respected federal judges declined to hear this case *en banc*, not because they thought the issue unimportant or the panel decision correct, but simply because they found our cases so lawless that there was no point in, quite literally, second-guessing the panel."). So long as this Court salutes *Flast*, its vague, two-part test will be misunderstood, necessarily enabling judicial overreach and all the corresponding social costs of public litigation.

F. The Sixth Circuit's decisions below provide ample evidence of how this Court's *Flast* jurisprudence has failed to effectively guide the lower courts. In its alternative State taxpayer standing analysis from the *Pedreira I* panel, which was then re-adopted as the primary taxpayer standing analysis by the *Pedreira II* panel, the Sixth Circuit gutted the *Flast* "legislative enactment" nexus test and considered legislative activity far beyond that considered in *Flast* and *Hein* – after rejecting federal taxpayer standing a few pages earlier through a conventional *Flast*/*Hein* analysis.

The first prong of the *Flast* test requires a taxpayer to identify an express legislative funding authorization or appropriation that itself violates the Establishment Clause. *Flast*, 392 U.S. at 102-03; *Hein*, 551 U.S. at 605. Taxpayer standing can arise from an executive disbursement only when those funds are spent pursuant to an express statutory mandate. *See id*. at 607. The *Pedreira I* panel, however, required only that Taxpayer Respondents identify some "link" between Kentucky (but not necessarily its legislature, its legislation, or legislative taxing or spending) and ultimate payments to a religiously affiliated institution, dramatically broadening that prong of *Flast*. *See* 579 F.3d at 732-33, App. 105 ("[T]he plaintiffs have demonstrated a nexus between Kentucky and its allegedly impermissible funding of a pervasively sectarian institution.").

To arrive at this mischaracterization of the *Flast* "legislative enactment" requirement, the *Pedreira I*

panel understated the import of *Hein*, finding that this Court "did not change the standards for standing" and "explicitly refused to alter the standards for taxpayer standing" in that case. 579 F.3d at 731 n.4, App. 102-03. This interpretation unduly minimizes *Hein*'s powerful effect on Establishment Clause taxpayer standing jurisprudence. *See Hinrichs*, 506 F.3d at 599 ("Although the Supreme Court's [*Hein*] plurality characterized its opinion as effecting no change in *its* view of taxpayer standing, the plurality's decision, especially when read with *Cuno*, clarified significantly the law of taxpayer standing for the lower federal courts.") (emphasis original). While the *Hein* court declined to overrule *Flast*, its plurality opinion clearly intended to retrench the *Flast* "nexus" test as a bright-line matter of express legislative enactment, and in that respect significantly impacted the taxpayer standing standards required to be used by the lower federal courts.

After expanding *Flast's* "legislative enactment" nexus parameters well beyond those required by *Hein*, the *Pedreira I* panel likewise considered Kentucky legislative activity well beyond that permitted by *Flast*, *Hein*, and other decisions of this Court. Indeed, the *Pedreira I* panel's brief summary of the Kentucky legislative activity here unfolds as if *Hein* was never decided. Taxpayer Respondents' Establishment Clause claim is based on the alleged maladministration of reimbursement contracts between Kentucky executive branch agencies and Sunrise that are not required by any statute. The Kentucky

General Assembly (and, indirectly, Congress) generally appropriated funds to two Kentucky executive branch agencies for unrestricted child care purposes. These agencies, in turn, had unfettered discretion to spend these funds on child care in whatever manner they deemed appropriate – including, but not limited to, direct government secular child care providers, contracts with private secular child care providers, contracts with religiously affiliated private child care providers besides Sunrise, or contracts with Sunrise. The agencies freely chose to contract with Sunrise for after-the-fact, post-audit, secular child care services.

Taxpayer Respondents' Establishment Clause claim is not based upon a "commendation" passed by one chamber of the Kentucky legislature six years after the complaint was filed evidencing "awareness" (App. 163-64), or a single brick-and-mortar appropriation for classrooms made five years after the complaint was filed (App. 158-60). Taxpayer Respondents' claim does not challenge the constitutionality of enabling statutes permitting Kentucky executive branch agencies to spend money on child care generally (App. 143-45, 146, 155-57) or regulatory statutes setting forth requirements for a child care license in the Commonwealth (App. 138-42, 145, 147-55). The purportedly unconstitutional contract administration is wholly separate from these legislative actions. Neither *Pedreira* panel explained, as *Flast* and *Hein* demand, how the legislative activity cited to establish standing (App. 202-03, 216) actually violates the Establishment Clause – or how any relief, much less

the consent decree actually entered by the District Court, would redress alleged spending violations arising from the executive contracts. Nor did they explain how a taxpayer's standing can be premised upon one set of government activities (legislative commendation, school appropriation, enabling and regulatory statutes, *supra*) while the taxpayer's claim on the merits is based on another (Sunrise's child care reimbursement contracts, App. 220-32), and while the taxpayer's relief seeks to achieve monitoring and regulation over yet another (Sunrise and other agencies' compliance with those contracts, App. 44-82). Such a conclusion cannot be explained because this reasoning was expressly rejected in *Cuno*. 547 U.S. at 350-52 (unanimously reversing Sixth Circuit on this very point).

As reflected by the foregoing, enforcing an increasingly esoteric *Flast* exception in the lower courts is exceedingly – and needlessly – difficult.

G. In sum, the changed historical circumstances, the weight of this Court's heavy, collective criticism, and *Flast*'s constitutional foundation compel its reconsideration. While *stare decisis* "is the preferred course . . . when governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (citations and quotations omitted). The doctrine of *stare decisis*, moreover, "is at its weakest when [the Court] interpret[s] the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our

prior decisions." *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (citations omitted). Thus, that doctrine does not prevent the Court "from overruling a previous decision where there has been a significant change in or subsequent development of our constitutional law." *Id*., *citing U.S. v. Gaudin*, 515 U.S. 506, 521 (1995); *Alabama v. Smith*, 490 U.S. 794, 803 (1989); and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 857 (1992).

These general precepts are easily satisfied here. The reasoning and analysis of *Flast* have been expressly repudiated by this Court since its rendition. All that effectively remains of *Flast* today is its two-pronged test, untethered from Article III, left to sow confusion in the lower courts. As Justice Scalia urged in *Hein*:

> Overruling prior precedents, even precedents as disreputable as *Flast*, is nevertheless a serious undertaking, and I understand the impulse to take a minimalist approach. But laying just claim to be honoring *stare decisis* requires more than beating *Flast* to a pulp and then sending it out to the lower courts weakened, denigrated, more incomprehensible than ever, and yet somehow technically alive. [. . .]
>
> [ ] *Flast*'s lack of a logical theoretical underpinning has rendered our taxpayer standing doctrine such a jurisprudential disaster that our appellate judges do not know what to make of it. And of course the case has engendered no reliance interests, not only because

> one does not arrange his affairs with an eye to standing, but also because there is no relying on the random and irrational. I can think of few cases less warranting of *stare decisis* respect. It is time – it is past time – to call an end.

551 U.S. at 637 (Scalia, J., concurring). This case is proof positive of how even a carefully limited *Flast* exception will result in outcomes far afield of what this Court envisioned. *Flast* should not simply be left alone, or defined down to a narrower restatement of itself; it should be overruled.

II. ALTERNATIVELY, THE NARROW *FLAST* EXCEPTION SHOULD NOT BE EXPANDED TO STATE TAXPAYER PLAINTIFFS.

If this Court, however, is not willing to overrule *Flast*, it should expressly consider and decide whether the logic of its recent taxpayer standing decisions "leav[ing] *Flast* as [the Court] found it," *Hein*, 551 U.S. at 448, prohibits *Flast* from being expanded to State taxpayers.

A. State taxpayers do not generally have Article III standing. In *Cuno*, the Court unanimously held that "state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers." 547 U.S. at 346. *Cuno*, however, did not address the question presented here: whether State taxpayers enjoy an Establishment Clause exception to the general rule

against taxpayer standing. But the Court did emphasize that the rationale for rejecting federal taxpayer standing "applies with undiminished force to state taxpayers." *Id*. at 345 (*citing Doremus v. Bd. of Educ. of Hawthorne*, 342 U.S. 429 (1952)). Accordingly, the default rule is that State taxpayers lack Article III standing.

B. The minimalist rationale of *Cuno*, *Hein*, and *Winn* forecloses State taxpayer standing in Establishment Clause cases. As addressed at length above, *supra*, this Court has repeatedly refused to extend *Flast* beyond its original Spending Clause/Establishment Clause rationale. *See Flast*, 392 U.S. at 102 ("Thus, our point of reference in this case is the standing of individuals who assert only the status of *federal* taxpayers and who challenge the constitutionality of a *federal* spending program.") (emphasis added). In *Cuno*, for example, the plaintiffs sought to extend *Flast* to State taxpayer challenges under the Commerce Clause. But this Court unanimously rejected standing, holding that "a broad application of *Flast*'s exception to the general prohibition on taxpayer standing would be quite at odds with its narrow application in our precedent[.]" *Cuno*, 547 U.S. at 348 (quoting *Flast*, 392 U.S. at 106).

Similarly, in *Hein*, the plaintiffs sought to extend *Flast* to federal taxpayer challenges based on executive, as opposed to legislative, action. Again, this Court rejected standing, explaining that because the challenged expenditures were "not expressly authorized or mandated by any specific congressional

enactment, respondents' lawsuit is not directed at an exercise of congressional power, and thus lacks the requisite 'logical nexus' between taxpayer status 'and the type of legislative enactment attacked.'" *Hein*, 551 U.S. at 608-09 (*citing Valley Forge*, 454 U.S. at 479, and quoting *Flast*, 392 U.S. at 102).

Finally, in *Winn*, the plaintiffs sought to extend *Flast* to cover state statutory tax credits, as opposed to an act of legislative taxing or spending. This Court again disagreed, holding that without an affirmative governmental tax or expenditure, "there is no . . . connection between dissenting taxpayer and alleged establishment[,]" and, accordingly approving standing on those facts constituted a "departure from *Flast*'s stated rationale." *Winn*, 563 U.S. at 143.

Just as *Cuno* rejected an expansion of *Flast* based on the Commerce Clause, and *Hein* rejected an expansion of *Flast* based on executive action, and *Winn* rejected an expansion of *Flast* based on tax credits, this Court should now consider whether *Flast* should be expanded to State taxpayers. The acts of State legislatures, much less State executive agencies, simply do not rely on "congressional power" under the Spending Clause – the touchstone of *Flast*. The restrictive reasoning of *Flast*, *Cuno*, *Hein*, and *Winn* stands in stark contrast with the expansive proposition of granting Article III standing to hundreds of millions of State taxpayers, and the issue should be resolved.

C. Although this Court has several times assumed that State taxpayers have standing to bring Establishment Clause cases in federal court, and has discussed the *Flast* test while explaining why state taxpayer standing does *not* exist in a particular case, it has never squarely addressed the matter. Since *Everson v. Board of Education*, 330 U.S. 1 (1947), incorporated the Establishment Clause against the States, there have been at least eighteen cases where this Court arguably relied on or assumed State taxpayer standing. *See infra*. In none of these cases did the Court squarely consider State taxpayer standing, much less announce a *Flast*-like exception to the general rule described in *Cuno*. Because such "drive-by jurisdictional rulings . . . have no precedential effect," *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998), the availability of State taxpayer standing under Article III remains unresolved.

In *Doremus*, the first post-*Everson* case to mention State taxpayer standing, the Court held that the taxpayer plaintiffs lacked Article III standing to bring an Establishment Clause claim. According to the Court, the plaintiffs lacked any "direct and particular financial interest" that was threatened by the unconstitutional conduct; instead, they suffered an injury only "in some indefinite way in common with people generally." 342 U.S. at 434-35. *Doremus* thus stands for the proposition that there is no State taxpayer standing in the absence of a "direct injury." *Id*. But it

does not resolve whether State taxpayers may resort to a *Flast*-like exception to demonstrate this "injury."[6]

Since *Doremus*, there have been at least fourteen Establishment Clause cases where the Court apparently assumed the existence of State taxpayer standing without ever analyzing the question. *See Walz v. Tax Comm'n*, 397 U.S. 664, 666 (1970); *Lemon v. Kurtzman*, 403 U.S. 602, 611 (1971); *Sloan v. Lemon*, 413 U.S. 825, 827 (1973); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 762 (1973); *Hunt v. McNair*, 413 U.S. 734, 735 (1973); *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472, 478 (1973); *Marburger v. Public Funds for Public Schools of New Jersey*, 417

[6] *Cuno*'s definition of what constitutes a sufficient "injury" for Article III State taxpayer standing – along with its express analogy of State to federal taxpayer standing – was disregarded by the Sixth Circuit in *Pedreira I*. *See Cuno*, 547 U.S. at 344. There, the Sixth Circuit followed its own pre-*Cuno* precedent analogizing State and *municipal* taxpayer standing. App. 102, *citing Johnson*, 241 F.3d at 508 (6th Cir. 2001). The *Pedreira I* panel found that because the Taxpayer Respondents had identified several Kentucky legislative acts related to Sunrise, they had identified a "direct injury" that justified standing. *Id*. The fact that these legislative acts did not perpetrate the Establishment Clause violations about which they had complained, or that the "direct injury" found was no different than that experienced by any other like-minded taxpayer of Kentucky, was of no consequence to the *Pedreira I* panel. Thus, if this Court decides that *Doremus* and *Cuno* govern State taxpayer standing in Establishment Clause cases, it should not hesitate to summarily reverse the Sixth Circuit on this gross misstatement of the "injury" requirement specified in those two decisions.

U.S. 961 (1974) (mem.); *Griggs v. Public Funds for Public Schools of New Jersey*, 417 U.S. 961 (1974) (mem.); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 744 (1976); *Wolman v. Walter*, 433 U.S. 229, 232 (1977); *Mueller v. Allen*, 463 U.S. 388, 392 (1983); *Board of Education of Kiryas Joel School District v. Grumet*, 512 U.S. 687, 694 n.2 (1994); *Mitchell v. Helms*, 530 U.S. 793, 801 (2000) (plurality); *Zelman v. Simmons-Harris*, 536 U.S. 639, 648 (2002). In none of these cases did the Court address the standing of the State taxpayer plaintiffs, or refer to *Doremus* or *Flast*.

In three other post-*Doremus* cases, the Court found standing in passing, but did not examine the question of State taxpayer standing in any detail. *See School District of City of Grand Rapids v. Ball*, 473 U.S. 373, 380 n.5 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997); *Marsh v. Chambers*, 463 U.S. 783, 785 n.4 (1983); *Meek v. Pittinger*, 421 U.S. 349, 355 n.5 (1975), *overruled by Mitchell*, 530 U.S. at 808.

Most recently, in *Winn*, the Court discussed *Flast* in denying taxpayer standing to State taxpayers challenging certain Arizona tax credits. 563 U.S. at 138-45. The Court did not, however, squarely decide that the *Flast* test applied to State taxpayers, and in fact expressly disclaimed the precedential effect of decisions passing on questions of jurisdiction *sub silentio*. *Id*. at 144-45. *Winn* cited the general "rule against taxpayer standing, a rule designed both to avoid speculation and to insist on a particular

injury[,]" and the State taxpayer plaintiffs' need to reply on an exception to bring their Establishment Clause claims. *Id.* at 138. The taxpayer plaintiffs in that case argued *Flast* was an applicable exception. *Id*. The Court proceeded to analyze standing under *Flast*, but found that because the Arizona tax credit at issue was not a "government expenditure" that could be redressed by an injunction, the taxpayer plaintiffs' claims did not meet the second prong of the *Flast* test requiring a nexus between their taxpayer status and "the precise nature of the constitutional infringement alleged" in an Establishment Clause case. *Id*. at 139, 142-43.

Accordingly, having rejected the plaintiffs' presenting argument (*i.e.*, could *Flast* standing exist on the facts presented), the *Winn* Court had no occasion to decide the underlying constitutional question – whether the *Flast* exception should be expanded to State taxpayers at all. The Court cannot, moreover, assume that necessary issue was decided by implication; indeed, *Winn* itself restated the principle that "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed," and warned that "[t]he Court would risk error if it relied on assumptions that have gone unstated and unexamined." *Id*. at 145 (citations omitted).

D. Given the absence of a definitive holding from this Court, the Courts of Appeal have haphazardly veered between *Doremus* and *Flast* in their

State taxpayer standing analyses. Before *Cuno*, *Hein*, and *Winn*, the Second, Sixth, Ninth and Tenth Circuits applied *Doremus*, not *Flast*, to State taxpayer standing analyses. *See Taub v. Kentucky*, 842 F.2d 912, 918-19 (6th Cir. 1988); *Colorado Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394 (10th Cir. 1992); *Board of Education v. N.Y.S. Teachers Retirement Sys.*, 60 F.3d 106, 110 (2d Cir. 1995); *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 793 (9th Cir. 1999) (*en banc*); *Johnson*, 241 F.3d at 507. The Eighth Circuit, however, applied *Flast* to state taxpayers. *See Tarsney v. O'Keefe*, 225 F.3d 929, 934-38 (8th Cir. 2000); *Minn. Federation of Teachers v. Randall*, 891 F.2d 1354 (8th Cir. 1989).

After *Cuno* and *Hein*, the Seventh and Eighth Circuits have held that *Flast* does indeed apply to State taxpayer plaintiffs. *Hinrichs*, 506 F.3d at 598; *Americans United for Separation of Church and State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 419-20 (8th Cir. 2007). And in the instant case, the initial "*Pedreira I*" Sixth Circuit panel hedged, principally holding that *Flast* was inapplicable to state taxpayers, but then concluding in the alternative that Taxpayer Respondents would nevertheless satisfy *Flast*'s two-part test. App. 101-06. This latter conclusion was then reaffirmed by the "*Pedreira II*" panel as both consistent with *Winn* and the law of the case. App. 8-9; *see also Smith v. Jefferson County Bd. of Education*, 641 F.3d 197 (6th Cir. 2011) (*en banc*) (*citing Doremus* and *Hein* in discussion of state taxpayer standing standards, but declining to clarify

applicable standard in Establishment Clause case). The Court's review is necessary to provide the lower courts guidance and confidence on this important question.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR RECONSIDERING *FLAST*.

This case provides an exceptionally strong platform for reviewing *Flast*. First, the facts upon which Taxpayer Respondents' standing is based are plainly stated in the pleadings; no factual record is required to answer the questions presented. Second, Sunrise has exhausted its opportunities to secure a proper application of this Court's precedent in the Sixth Circuit. This case has percolated through the lower courts for nearly sixteen years, and the Sixth Circuit's opinions below indicate that court will not revisit its taxpayer standing analyses absent a new opinion from this Court. Third, the case features dedicated interest-group parties, a sovereign State, and a faith-based social service provider that have vested interests in securing finality on the issues presented by this petition. Finally, this case provides the Court with a number of potential avenues for addressing *Flast*: it can overrule *Flast*, limit *Flast* to federal taxpayers, clarify *Flast*'s two-part test further, or simply choose to enforce *Flast*.

The parties do not yet have a final judgment, but that should not dissuade the Court from granting review. This Court's cases reflect a strong commitment

to ensuring Article III standing is addressed and definitively resolved as a threshold inquiry. *See, e.g.*, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-88 (1999) (unanimously holding that federal courts must confirm subject matter jurisdiction before considering the merits of a case); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 88-89 (1988). The significance accorded to confirming standing, especially in cases like the one at bar, was recently reaffirmed in *Winn*:

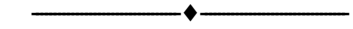
> Few exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them. *In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so.* Making the Article III standing inquiry all the more necessary are the significant implications of constitutional litigation, which can result in rules of wide applicability that are beyond Congress' power to change.

563 U.S. at 145-46 (emphasis added).

No good – and a great deal of harm – will result from a decision to delay review here. After fifteen years of litigation, the Sixth Circuit permitted Taxpayer Respondents to use their limited standing

mandate to achieve broad, non-financial relief that exceeds anything the District Court could have possibly awarded them – but fails to redress the taxpayer injury alleged in their pleadings. The Taxpayer Respondents' second amended complaint only sought declaratory and prospective injunctive relief seeking to stop Kentucky's executive branch payments to Sunrise. Yet – through artful pleading, confused taxpayer standing standards, and the fatigue of litigation, Taxpayer Respondents were able to avoid responding to Sunrise's summary judgment motion, and reach consent decree terms with Kentucky that provided to them (and their non-taxpayer patrons, the ACLU and AU) far-reaching oversight over the Kentucky Respondents and their private child care providers for years to come. The District Court entered the Respondents' consent decree over Sunrise's objections. The fairness of this jurisdictional bait-and-switch aside, it was possible only because the courts below overlooked and misapplied Article III standing requirements, *supra*, and decided that a policy in favor of settling disputes – with the imprimatur of the federal judiciary – trumped those requirements.

No further proceedings will change the compelling questions presented in this petition. Any fairness hearing held by the District Court on the Respondents' consent decree cannot and will not moot standing issues – and, in fact, would only perpetuate the prejudice caused thus far. Now is the time to grant review and reverse the decision below.



CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ALICIA M. PEDREIRA; PAUL SIMMONS; JOHANNA W.H. VAN WIJK-BOS; ELWOOD STURTEVANT, *Plaintiffs-Appellees,*	
v.	No. 14-5879
SUNRISE CHILDREN'S SERVICES, INC., *Defendant-Appellant,*	
J. MICHAEL BROWN, Secretary, Justice and Public Safety Cabinet; AUDREY HAYNES, Secretary, Cabinet for Health and Family Services, *Defendants-Appellees.*	

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 3:00-cv-00210 – Charles R. Simpson III,
District Judge.

Argued: June 11, 2015

Decided and Filed: October 6, 2015

Before: BOGGS and KETHLEDGE, Circuit Judges; BLACK, District Judge.*

COUNSEL

ARGUED: John O. Sheller, STOLL KEENON OGDEN PLLC, Louisville, Kentucky, for Appellant. R. Stanton Jones, ARNOLD & PORTER LLP, Washington, D.C., for Appellees.

ON BRIEF: John O. Sheller, Jeffrey A. Calabrese, K. Timothy Kline, Joseph A. Bilby, STOLL KEENON OGDEN PLLC, Louisville, Kentucky, Patrick T. Gillen, AVE MARIA SCHOOL OF LAW, Naples, Florida, for Appellant. R. Stanton Jones, David B. Bergman, Ian S. Hoffman, ARNOLD & PORTER LLP, Washington, D.C., Mona S. Womack, CABINET FOR HEALTH AND FAMILY SERVICES, Frankfort, Kentucky, Ayesha N. Khan, Alex J. Luchenitser, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, Washington, D.C., Daniel Mach, ACLU PROGRAM ON FREEDOM OF RELIGION AND BELIEF, Washington, D.C., William E Sharp, ACLU OF KENTUCKY, Louisville, Kentucky, for Appellees.

KETHLEDGE, J., delivered the opinion of the court in which BOGGS, J., joined. BLACK, D.J., (pp. 10-11), delivered a separate dissenting opinion.

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* The Honorable Timothy S. Black, United States District Judge for the Southern District of Ohio, sitting by designation.

OPINION

KETHLEDGE, Circuit Judge. In 2000, several plaintiffs sued Sunrise Children's Services and Kentucky, alleging that Kentucky had violated the Establishment Clause by paying Sunrise – a religiously oriented organization – for services it provides to children in State custody. Thirteen years later, the plaintiffs and Kentucky – but not Sunrise – agreed to a settlement that singled out Sunrise for monitoring by the American Civil Liberties Union and the Americans United for Separation of Church and State. Sunrise objected to the settlement, arguing that after more than a decade of litigation it was entitled to a merits adjudication to clear its name. Over Sunrise's objection, however, the district court dismissed the plaintiffs' Establishment Clause claim, incorporated the settlement into its dismissal order, and retained jurisdiction to enforce that order. In doing so, the court held that its dismissal order was not a consent decree, notwithstanding the order's incorporation of the settlement agreement; and for that reason, the court determined, Sunrise could not object to the order's entry. We respectfully disagree with the court's conclusion that its order was not a consent decree. Thus, we vacate that order and remand for further consideration of whether, among other things, the settlement agreement is fair to Sunrise.

I.

Sunrise operates group homes, places children in foster care, and provides related services for the State of Kentucky, which provides 65% of Sunrise's revenue. Sunrise describes its mission as "to extend the grace and hope of our loving God to the young people in our care by meeting their physical, emotional and spiritual needs." Some of those young people have alleged that Sunrise pressured them to become practicing Christians.

Fifteen years ago, Alicia Pedreira and some other Kentucky taxpayers filed this lawsuit, arguing that Kentucky's payments to Sunrise violated the Establishment Clause. The plaintiffs named Sunrise as a necessary defendant under Federal Rule of Civil Procedure 19. Without Sunrise, the plaintiffs alleged, they could not obtain complete relief and Sunrise itself would be unable to protect its interests. Seven years later, Sunrise and Kentucky moved to dismiss the suit for lack of standing. The district court granted the motion, but on appeal we reversed, holding that the plaintiffs have standing as Kentucky taxpayers. *See Pedreira v. Ky. Baptist Homes for Children (Pedreira I)*, 579 F.3d 722, 731-33 (6th Cir. 2009).

On remand, the plaintiffs filed an amended complaint, which again named Sunrise as a necessary defendant. In 2012, Sunrise and Kentucky moved for summary judgment. R. 480. The plaintiffs never responded to the merits of that motion. Instead, citing ongoing settlement negotiations, they moved to

extend their deadline for responding to it. Over Sunrise's objection, the district court granted the motion.

A few months later, the plaintiffs and Kentucky – but not Sunrise – agreed to the settlement agreement at issue here, which runs 15 pages single-spaced. Kentucky expressly denies in the agreement that it (or Sunrise) violated the Establishment Clause or otherwise violated the rights of children in Sunrise's care. But the settlement requires Kentucky to change some of the terms in its standard two-year contracts with Sunrise and other providers. The new terms require providers to inform a child and the child's parents of a foster home's religious affiliation, to provide children with opportunities to go to the church of their choice, and to provide non-religious alternatives to religious activities. Providers must also agree not to discriminate against children on the basis of religion, coerce children to engage in religious activity, or attempt to convert children to a new religion. Further, when children leave their care, providers must give them an exit survey that asks, among other things, whether the provider tried to convert the child to a new religion.

The settlement includes monitoring provisions that single out Sunrise in some ways. Specifically, Kentucky must provide the ACLU and Americans United with information about the religious beliefs for all children in Sunrise's care, the completed exit surveys for those children, any reports that the State's caseworkers write about Sunrise, and records

of any religious activities at Sunrise's group homes. Kentucky must give the ACLU and Americans United similar information about other providers only if Kentucky investigates a complaint about them, and even then only for the children who were the subject of those investigations.

In return, the plaintiffs agree to dismiss their lawsuit with prejudice and to waive any claims based on conduct occurring before the settlement. The plaintiffs retain the right to bring claims based on future conduct, but must submit to arbitration before doing so.

The settlement provides that the Kentucky district court that entered the agreement shall have exclusive jurisdiction to enforce it. Although the ACLU and Americans United (neither of which is a party to this case) have the same rights as Kentucky and the plaintiffs to seek enforcement of the agreement, Sunrise (which is a party to the case) has no rights to do the same. The settlement also recites that it is "Not [sic] Consent Decree," and purports to divest the district court of its power to hold Kentucky in contempt as a remedy for violations of the agreement (which, the parties contemplated, the district court would incorporate into its order dismissing the case). The settlement expires seven years after its effective date, subject to certain exceptions not relevant here.

After the plaintiffs and Kentucky reached agreement on the settlement, they asked the court to

stay the case while they finalized some of the settlement's terms. Again over Sunrise's objection, the district court granted the motion. In September 2013 – nearly a year after Sunrise moved for summary judgment – the plaintiffs and Kentucky filed a motion asking the court to dismiss the suit and retain jurisdiction to enforce the settlement. Sunrise objected and filed a motion to dismiss for lack of jurisdiction. The district court denied Sunrise's motion, granted the plaintiffs' motion to dismiss, entered an order incorporating the settlement, and retained jurisdiction to enforce that order. This appeal followed.

II.

A.

We begin with two issues of standing. First, though none of the parties argues that Sunrise lacks standing to appeal, we have a duty to ensure that it does. *See City of Cleveland v. Ohio*, 508 F.3d 827, 835 (6th Cir. 2007). Discharging that duty requires brief discussion here.

A party has standing to appeal if the party is "aggrieved by the judgment or order from which the appeal is taken." *City of Cleveland*, 508 F.3d at 836. To be aggrieved in this sense, a party need not be "formally bound or restricted by" the judgment it appeals from. *See Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 484 (6th Cir. 1985). Rather, a party to the case can appeal any final judgment –

including a consent decree – that imposes "some detriment" on the party. *Id.* (emphasis removed).

Here, Sunrise appeals from the district court's dismissal order, which incorporated the settlement between the plaintiffs and Kentucky. That order requires Kentucky to change the terms on which it offers contracts to Sunrise and singles Sunrise out for extra scrutiny by the ACLU and Americans United. Thus, the district court's order imposes some detriment on Sunrise, and Sunrise has standing to appeal it.

Second, Sunrise argues that the plaintiffs lack standing to bring this suit altogether. We have already rejected that argument once in this case: in *Pedreira I*, we held in a published decision that the plaintiffs have standing as Kentucky taxpayers to bring their Establishment Clause claim. 579 F.3d at 731-33. This panel may not revisit that question "unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules" the earlier panel. *Ward v. Holder*, 733 F.3d 601, 608 (6th Cir. 2013) (internal quotation marks omitted).

Sunrise contends we can revisit that question because *Pedreira I* is inconsistent with the Supreme Court's later decision in *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011). The short answer to that contention – and the answer we stand on here – runs as follows. Federal-taxpayer standing has

two elements: first, that there is "a logical link between the plaintiff's taxpayer status and the type of legislative enactment attacked[,]" *Winn*, 131 S. Ct. at 1445 (internal quotation marks omitted); and second, that there is "a nexus between the plaintiff's taxpayer status and the precise nature of the constitutional infringement alleged." *Id.* (internal quotation marks omitted). In *Pedreira I*, we held that state-taxpayer standing which is the type of taxpayer standing the plaintiffs assert here – requires a plaintiff to satisfy a different standard, namely that she has suffered a "good-faith pocketbook injury." 579 F.3d at 731-32 (internal quotation marks omitted). But in *Winn* the Supreme Court held that state-taxpayer standing requires a plaintiff to establish the same two elements required for federal-taxpayer standing. 131 S. Ct. at 1445-47. That said, we have no occasion to revisit our holding in *Pedreira I* – because there we held that, required or not, the plaintiffs had established both elements of federal-taxpayer standing. 579 F.3d at 732-33. We therefore adhere to that holding in this case.

C.

Sunrise's remaining arguments go to the merits. Sunrise argues that the district court "erred" in dismissing this case because the court's dismissal "with prejudice" (under Fed. R. Civ. P. 41(a)(2)) will in fact operate as a dismissal without prejudice. However one characterizes the dismissal, we review it for an abuse of discretion. *See Bridgeport Music, Inc. v.*

Universal-MCA Music Pub'g, Inc., 583 F.3d 948, 953 (6th Cir. 2009).

We begin (and end) with the premise of Sunrise's argument, *i.e.*, whether the dismissal was with prejudice or without. A dismissal with prejudice "operates as a final adjudication on the merits and has a res judicata effect." *Warfield v. AlliedSignal TBS Holdings, Inc.*, 267 F.3d 538, 542 (6th Cir. 2002). Sunrise contends that the dismissal here flunks this test for two reasons: first, different taxpayer-plaintiffs (*i.e.*, persons other than Alicia Pedreira, et al.) could bring a new lawsuit against Kentucky and Sunrise asserting claims identical to the claims dismissed here; and second, even the named plaintiffs in this case could bring a new lawsuit against Kentucky and Sunrise asserting claims based on conduct occurring after the dismissal. But Sunrise overlooks that both of those things would be true of a dismissal with prejudice: an adjudication on the merits normally lacks res judicata effect against persons not a party to the suit giving rise to it, *see Amos v. PPG Indus.*, 699 F.3d 448, 451 (6th Cir. 2012); and a dismissal with prejudice normally does not bar claims based on conduct that occurs *after* the dismissal is entered, *see Cellar Door Prods., Inc. v. Kay*, 897 F.2d 1375, 1378 (6th Cir. 1990). Sunrise therefore gives us no reason to think the dismissal here was without prejudice – and we otherwise think the dismissal was with prejudice.

What Sunrise appears to want is not merely an order from the district court dismissing this case with prejudice, but a published opinion from this court

holding the plaintiffs' claims invalid as a matter of law. That the district court did not posture this case for such an opinion was not an abuse of discretion.

D.

Sunrise's remaining argument rests on two premises: first, that the district court's incorporation of the settlement agreement into its dismissal order converted the order into a consent decree; and second, that the district court did not properly determine that the order-*qua*-consent decree was fair.

1.

We first consider whether the order is a consent decree. We review de novo the district court's interpretation of its order. *Northeast Ohio Coal. for the Homeless v. Sec'y of State of Ohio*, 695 F.3d 563, 569 (6th Cir. 2012). "A consent decree is essentially a settlement agreement subject to continued judicial policing." *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983). Consent decrees typically have two key attributes that make them different from private settlements. First, when a court enters a consent decree, it retains jurisdiction to enforce the decree. *Id.* In contrast, the parties to a private settlement typically must bring another suit (for breach of contract) to enforce it. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381-82 (1994). Second, a consent decree puts "the power and prestige of the court

behind the compromise struck by the parties." *Williams*, 720 F.2d at 920. The same is not true of a dismissal order that does not incorporate the parties' terms.

Both of these key attributes are present here: the court expressly retained jurisdiction to enforce compliance with the settlement's terms; and by incorporating the settlement into the court's own dismissal order, the court gave its imprimatur to the settlement's terms.

These attributes notwithstanding, the plaintiffs say the dismissal order is not a consent decree for two reasons. The first is that that [sic] the settlement agreement purports to strip the court of its power to hold Kentucky in contempt for violations of the dismissal order (and thus for violations of the settlement's terms). One problem with that argument, however, is that we doubt that the parties or even the court itself can divest a federal district court of this power. Another is that the agreement expressly allows the plaintiffs to seek an injunction against the State requiring specific performance of the agreement's terms. And that in turn leads to a third problem: the plaintiffs themselves concede that the no-contempt provision would merely require them to file two motions rather than one to obtain the same relief. To wit, if the State violates the terms of the dismissal order (*i.e.* the settlement's terms), the plaintiffs could then move for specific enforcement of the violated terms. If the State then violates the specific-enforcement order, the plaintiffs could move for a

second order holding the State in contempt for violating the specific-enforcement order. Suffice it to say that it takes more than this procedural two-step to circumvent this court's precedents regarding what counts as a consent decree and – more to the point – the requirements for entering one.

The plaintiff's remaining argument is of a piece. The plaintiffs say the settlement is not a consent decree because the agreement itself says that it is "Not [sic] Consent Decree[.]" But on this point we think the agreement protests too much. And in any event our precedents, and not the parties' recitations (even as incorporated by the district court), determine whether an order is a consent decree.

In sum, the district court's order has both of the key attributes of a consent decree. Moreover, a governmental entity (the State of Kentucky) is a party to the agreement incorporated into the court's order, and the agreement itself provides for monitoring and prospective injunctive relief. On these facts, we hold that the district court's dismissal order is a consent decree.

2.

Before entering a consent decree, a district court must determine, among other things, that the agreement is "fair, adequate, and reasonable, as well as consistent with the public interest." *United States v. Lexington-Fayette Urban Cnty. Gov't.*, 591 F.3d 484, 489 (6th Cir. 2010) (internal quotation marks omitted).

Moreover, the court must allow anyone affected by the decree to "present evidence and have its objections heard[.]" *Tenn. Ass'n of Health Maint. Orgs. v. Grier*, 262 F.3d 559, 566-67 (6th Cir. 2001) (internal quotation marks and alterations omitted).

Here, the district court mistakenly characterized the settlement as a private agreement and thus held that Sunrise had no right to object to it. True, the court did go on briefly to address in dicta whether the agreement was fair to Sunrise. But the very reason we distinguish between dicta and holdings is that judges think about questions in a different way when real consequences turn on their answers. Of course, we could ourselves decide in this appeal whether the consent decree is fair, reasonable, and consistent with the public interest; and given that this case has already been here twice, there is some temptation to do so. But on balance we think it best to have the district court first address these questions in earnest. We will therefore remand this case for that purpose.

We do not, for purposes of the remand, express any opinion as to the matters discussed by the court in its dicta concerning the decree's fairness to Sunrise. The point of the remand is to allow the district court to consider that question anew. But we do flag one concern that the court did not consider. As a practical matter, the complaint's allegations of wrongdoing are directed largely at Sunrise. Sunrise, in turn, has steadfastly denied any wrongdoing on its part, and for more than a decade of litigation, including to this day, has a sought a merits adjudication to

clear its name Meanwhile, over Sunrise's objection, the consent decree singles out Sunrise by name for special monitoring by the ACLU and Americans United; and in doing so, Sunrise argues, the decree subjects Sunrise to unique reputational harm. Thus, the decree denies Sunrise a chance to clear its name – and instead, over Sunrise's objection, imposes the very reputational harm that Sunrise sought to avoid by means of 15 years of litigation. A decree that did not, directly or indirectly, single out Sunrise in this manner would stand on different ground than the decree as it comes to us here. As the decree now stands, however, the matters discussed above should be among those considered by the district court on remand.

* * *

The district court's June 30, 2014 order is vacated, and the case remanded for proceedings consistent with this opinion.

DISSENT

BLACK, District Judge, dissenting. After fourteen years of contentious litigation, the district court judge helped effectuate settlement of this case. His actions should be entitled to our deference.

In many, many civil actions, the district court retains jurisdiction to enforce a private settlement agreement, typically at the parties' request. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 381 (1994) (finding that a district court would have ancillary jurisdiction to enforce a settlement agreement where "the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal – either by separate provision (such as a provision "retaining jurisdiction" over the settlement agreement) or by incorporating the terms of the settlement agreement in the order."). The simple retention of jurisdiction should not *ipso facto* transform a settlement agreement into a consent decree – if it did, virtually all private settlement agreements would be consent decrees, subject to review for fairness, reasonableness, and consistency with the public interest.[1] Here, the settlement agreement provided for monitoring by the state and, with respect to Sunrise, by Plaintiffs' counsel – *not* by the state nor *by the district court.* This is not "continued judicial policing" indicative of a consent decree. *See Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983).

In any event, the trial court judge *did* review the settlement agreement for fairness to Sunrise, and he

[1] Notably, in *Kokkonen*, the Supreme Court does not even mention consent decrees, despite advocating use of the above-cited methods to provide for the court's enforcement of a settlement agreement. *Id.*

found that the settlement agreement was fair. We review a district court's finding as to the fairness of a consent decree for an abuse of discretion. *See United States v. Cty. of Muskegon*, 298 F.3d 569, 581 (6th Cir. 2002). Seeing no abuse of discretion, I would affirm.

However, presuming instead that the case should be remanded for a more extensive fairness review, this court ought not to single out any issue for the district court to consider on remand, *i.e.*, Sunrise's concern about reputational harm. The district court is clearly aware of this concern, having already noted that, in the settlement agreement, the state categorically denied that Sunrise's actions violated the religious rights or freedoms of children placed in its care. Upon remand, the district court should not yet be directed to accept Sunrise's position as to fairness.

For the reasons set forth above, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14-5879

ALICIA M. PEDREIRA; PAUL SIMMONS; JOHANNA W.H. VAN WIJK-BOS; ELWOOD STURTEVANT,
Plaintiffs-Appellees,

v.

SUNRISE CHILDREN'S SERVICES, INC.,
Defendant-Appellant,

J. MICHAEL BROWN, Secretary, Justice and Public Safety Cabinet; AUDREY HAYNES, Secretary, Cabinet for Health and Family Services,
Defendants-Appellees.

Before: BOGGS and KETHLEDGE, Circuit Judges; BLACK, District Judge.

JUDGMENT

(Filed Oct. 6, 2015)

On Appeal from the United States District Court for the Western District of Kentucky at Louisville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's order of June 30,

2014 is VACATED, and the case REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER
OF THE COURT

/s/ Deb S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ALICIA M. PEDREIRA, et al. PLAINTIFFS

v. CIVIL ACTION NO. 3:00CV-210-S

SUNRISE CHILDREN'S SERVICES, INC., f/k/a KENTUCKY BAPTIST HOMES FOR CHILDREN, INC., et al. DEFENDANTS

MEMORANDUM OPINION

(Filed Jun. 30, 2014)

This matter is before the court for consideration of the following motions:

(1) Motion of defendant Sunrise Children's Services, Inc., to dismiss for lack of subject matter jurisdiction (DN 513).

(2) Motion of the plaintiffs, Alicia M. Pedreira, *et al.*, to voluntarily dismiss with prejudice (DN 512).

In March of 2013, the United States Magistrate Judge entered an order staying all proceedings in this case until a settlement agreement which had been reached between a number of parties was finalized. In May 2013, this court issued a Memorandum Opinion and Order addressing objections of defendant Sunrise Children's Services, Inc. ("Sunrise") to the magistrate judge's stay order. This court affirmed the magistrate judge's order. (DN 505). The settlement

between the plaintiffs and the Commonwealth Defendants[1] has not yet been finalized, as Sunrise has sought, through additional motion practice, to prevent it.

The Plaintiffs' Motion to Voluntarily Dismiss the Action with Prejudice

The Settlement Agreement (DN 512-2) to which Sunrise objects was reached between the plaintiffs[2] and the so-called "Commonwealth defendants."[3,4] Sunrise is not a party to the agreement. The plaintiffs provided the gist of the Settlement Agreement in

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[1] These defendants are identified later in the opinion.

[2] Alicia M. Pedreira, Paul Simmons, Johanna W H Van Wijk-Bos, and Elwood Sturtevant.

[3] Audrey Tayse Haynes, Secretary, Cabinet for Health and Family Services, and J. Michael Brown, Secretary, Justice and Public Safety Cabinet.

[4] The Settlement Agreement lists Americans United for Separation of Church and State ("Americans United") and the American Civil Liberties Union and the American Civil Liberties Union of Kentucky (collectively "ACLU") as "Parties." The Agreement makes clear that Americans United and the ACLU are *not* parties to the lawsuit, but are parties to the Settlement Agreement. Americans United and the ACLU are referred to collectively in the Agreement as "Plaintiffs' Organizational Counsel." The Agreement recites that the plaintiffs, Alicia M. Pedreira, Paul Simmons, Johanna W.H. Van Wijk-Bos, and Elwood Sturtevant, have claimed that the Commonwealth defendants violated the Establishment Clause of the First Amendment to the United States Constitution through their agreements with Sunrise.

their motion to voluntarily dismiss the Second Amended Complaint:

> Generally, the Settlement Agreement provides for the Commonwealth Defendants to make certain modifications to their procedures for providing care to children through private child-caring facilities and child-placing agencies, such as Sunrise. The Settlement Agreement also provides for the Commonwealth Defendants to make certain modifications to their standard agreements with such private child-caring facilities and child-placing agencies, referred to as the "PCC Agreements." The PCC Agreements are two-year agreements that the Commonwealth Defendants enter into with service providers such as Sunrise each year. The Settlement Agreement states that the Commonwealth Defendants will include the agreed-upon modifications in the PCC Agreements that they enter into with providers starting in . . . July 2014.

DN 512, pp. 2-3.

We briefly recap what we stated in the May, 2013 Memorandum Opinion and Order regarding the history of the action.

This action began with the filing of the initial complaint against Sunrise and the Commonwealth of Kentucky in April, 2000 alleging discrimination in employment on the basis of religion and violation of the Establishment Clause. The long and winding road that has been traveled to this point in the litigation is

immaterial to this opinion. We need only note that, with the 2009 affirmance of the dismissal of the employment claims by the United States Court of Appeals for the Sixth Circuit, no claims remain against Sunrise. After remand of the Establishment Clause claim to the district court in 2011, the parties began to actively negotiate a settlement of the case.

A Second Amended Complaint was filed, consistent with the ruling of the Court of Appeals. (DN 439). The plaintiffs could not bring an Establishment Clause claim directly against Sunrise, as such a claim must target state action. The Second Amended Complaint evidences that Sunrise's presence in the action was grounded in Rule 19 of the Federal Rules of Civil Procedure (DN 439, ¶ 56), as Sunrise was joined in the remaining Establishment Clause claim for purposes of affording complete relief among the existing parties. The relief sought in the Second Amended Complaint was limited to:

(1) a declaration that the Commonwealth of Kentucky has violated the Establishment Clause of the First Amendment of the United States Constitution by funding Sunrise, a purported pervasively religious entity;

(2) an order enjoining the Commonwealth of Kentucky from providing further funding to Sunrise for services so long as they seek to instill Christian values and teachings in youth in Sunrise's care; and

(3) an award of costs and attorney's fees.

Sunrise has, in many respects, sought to pull the oar in this litigation, as the issues raised in the case potentially impact Sunrise's contracts with the Commonwealth and challenge the incorporation of Sunrise's moral and religious principles in its business practices. Sunrise filed a motion for summary judgment addressing the merits of the Establishment Clause claim seeking to refute the allegations against it. (DN 480). The Commonwealth joined in the motion.

On March 19, 2013, before the motion was fully briefed, the plaintiffs and the Commonwealth defendants agreed to settle the claim between them. (*See* DN 502-2). The Agreement requires the Commonwealth to make certain modifications to their procedures and to the PCC contracts with private child-caring facilities and child-placing agencies on a going-forward basis.

Importantly, the Agreement *does not* indicate that there were any Establishment Clause violations by the Commonwealth or Sunrise. In fact, Section 12, entitled *No admission of liability*, states, in part:

> The execution of this Agreement affects the settlement of claims which are contested and denied and to which a bona fide dispute exists. The execution of this Agreement shall not be construed as an admission of any liability of any kind by any Party. By entering into this Settlement Agreement, the Commonwealth Defendants expressly deny that

> they have violated the United States Constitution or the Kentucky Constitution by contracting with Sunrise, and expressly deny that Sunrise is a "pervasively sectarian" organization, or that any alleged acts or omissions by Sunrise have violated the religious rights or freedoms of the children placed in Sunrise's care. The Commonwealth Defendants represent that they are entering into this Settlement Agreement for the sole purpose of resolving the Lawsuit . . .

DN 512-1, p. 14.

The Agreement provides for the dismissal of the entire action with prejudice, when the settlement is finalized. The Agreement settles the claim asserted in the Second Amended Complaint.. There are no claims asserted against Sunrise, nor has Sunrise itself asserted any claims in this action.

The Agreement imposes obligations on the Commonwealth relating to religious affiliation or religious objections of children entrusted to the Commonwealth for placement. As summarized by the Commonwealth,

> [T]he Settlement Agreement reached between the Plaintiffs and the Commonwealth requires a few basic things: (1) the Commonwealth is going to consider a child's religious affiliation and any religious objections when making placement decisions; (2) the Commonwealth has amended its standard PCC Agreement with *all providers* to further flesh-out the already existing requirements

> that child-caring and child-placing agencies respect each child's religious affiliation (if any), reasonably accommodate those religious affiliations (if any), and not discriminate against any child based on his or her religious affiliations (if any); (3) the Commonwealth and each agency will provide information regarding the child's rights with respect to religion to the children and parents (through posters and pamphlets), and employees will be trained about religious rights; (4) children will be questioned about their religious experiences during placement (through case worker interviews and through exit interviews); and (5) certain of these materials will be provided to the Plaintiffs over a seven year period to monitor the Commonwealth's compliance.

DN 521, pp. 3-4 (emphasis in original). The Agreement delineates the Commonwealth's commitment to provide information to children and their families about their religious freedoms and to gather information from them about religious preferences, if any, of the children in the Commonwealth's care. The Agreement also details steps to be taken by the Commonwealth to ensure that expressions of religious preference are respected and that compliance by all contracting child-caring facilities and child-placing agencies is monitored by the Commonwealth defendants.

In conjunction with this agreement, the plaintiffs have moved for entry of an order (1) voluntarily

dismissing the action with prejudice, (2) incorporating the Settlement Agreement into the order, and (3) retaining jurisdiction by the court to enforce the order.

As noted in *Smoot v. Fox*, 340 F.2d 301, 302 (6th Cir. 1964), "Dismissal of an action with prejudice is a complete adjudication of the issues presented by the pleadings and is a bar to a further action between the parties. An adjudication in favor of the defendants, by court or jury, can rise no higher than this. [citations omitted]." *See also D & M Millwork, Inc. v. Elite Trimworks Corporation, Inc.*, No. 2:08-0101, 2010 WL 547154, *3 (M.D.Tenn. Feb. 10, 2010) ("The holding in *Smoot* has been consistently endorsed by the Sixth Circuit and applied by the district courts . . . In light of the unbroken string of cases cited above and the absence of a Sixth Circuit case that identifies clear circumstances under which the district court would have discretion to deny a Motion for Voluntary Dismissal with prejudice, the court concludes that *Compuserve*[5] does not substantively change the *Smoot* doctrine").

[5] Sunrise cites to *Compuserve v. Saperstein*, 1999 WL 16481 (6th Cir. Jan. 8, 1999), an unpublished decision, for the proposition that this court should find an exception to the *Smoot* doctrine and apply it in this instance. The court did not find a basis for an exception to the *Smoot* doctrine in the *Compuserve* case, nor did the court identify the contours of such a theoretical exception.

Although it earnestly desires to receive its "day in court," Sunrise has no ground to prevent the voluntary dismissal with prejudice of this action. The Establishment Clause claim, the only claim stated in the Second Amendment Complaint, was brought against the Commonwealth defendants, and Sunrise has asserted no claims here. Despite the fact that this Establishment Clause claim was premised upon certain factual allegations concerning Sunrise's actions while under contract with the Commonwealth, relief for the purported Establishment Clause violation was sought as against the Commonwealth defendants only. No such claim could be maintained against Sunrise. Thus Sunrise's suggestions that it is unduly burdened or unfairly impacted by the settlement are unavailing. In any event, we address a number of these contentions herein to illustrate that this settlement, negotiated at arms-length, is legal, not a product of collusion, nor contrary to the public interest.[6]

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[6] This tripartite standard, set out in *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983) *citing Stotts v. Memphis Fire Department*, 679 F.2d 541 (6th Cir. 1982), was applied to court review and approval of a consent decree. For the reasons stated herein (pp. 10-11), we conclude that the Settlement Agreement is not a consent decree nor is it "tantamount to a consent decree," as urged by Sunrise, either as written, or incorporated into an order of dismissal with the retention of jurisdiction by this court. The law in the Sixth Circuit is clear, and permits the plaintiffs' voluntary dismissal of the action with prejudice. The court need not, therefore, address all of the many policy

(Continued on following page)

Sunrise urges that the Agreement will subject it to a "Hobson's Choice" – That is, it will have to choose either to accept terms in new PCC agreements which it finds objectionable, or forego contracts with the Commonwealth which provide essential funding for its continued operation. As aptly stated by the Commonwealth defendants however, this is not a "Hobson's Choice;" it is a business choice. The Agreement itself cannot be found objectionable in this regard. The Agreement imposes no obligations on Sunrise whatsoever. Sunrise and all other child-caring and child-placing entities who choose to enter into PCC contracts with the Commonwealth in the future will be subject to various new terms in these contracts. These contracts may be accepted or not, at the discretion of each entity. Sunrise does not suggest that the Commonwealth does not have the right to add to or alter the terms of its future PCC contract offerings, with or without this settlement.[6] [sic]

Sunrise argues that the Agreement impermissibly singles it out for scrutiny by the plaintiffs' Organizational Counsel, as the Commonwealth defendants have agreed to annually disclose certain (redacted) religious preference documentation concerning children

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arguments and tangential legal attacks on this court's authority raised in opposition to the motion to voluntarily dismiss.

[6] [sic] Sunrise has urged that the Commonwealth must engage in notice and rulemaking prior to enacting these changes. The Commonwealth has identified regulations already in place which render additional administrative procedures unnecesary [sic].

placed in Sunrise facilities. Sunrise expresses concern that this requirement will subject it to "public stigma" because "it would support an inference in the mind of a reasonable observer that Sunrise infringed upon the religious freedoms of children . . . " DN 514, p. 16.

In the very document which supposedly gives rise to this "inference," the Commonwealth defendants categorically deny "that any acts or omissions by Sunrise have violated the religious rights or freedoms of the children placed in Sunrise's care." DN 512-1, p. 14, Section 12. Thus the document seeks to dispel this purported "stigma" head on.[7] [sic]

Further, the monitoring provision of the Agreement (DN 512-1, Section 3, p. 9) specifically states that disclosure of this documentation is "to monitor *the Commonwealth Defendants*' compliance with the terms of this Settlement Agreement." (emphasis ours). That is, whether the Commonwealth defendants are advising, conferring, and documenting, as required by the Agreement. No additional documentation must be generated with respect to children

[7] [sic] Sunrise takes great umbrage at the press generated after the settlement agreement was reached which touted a plaintiffs' victory against religious indoctrination. Sunrise quoted plaintiffs' counsel's press release which stated "The advocacy group presented extensive evidence that Sunrise Children's Services, a state contractor affiliated with the Kentucky Baptist Convention, coercively imposed Christianity upon children in its care in many ways." DN 502-4. The court expresses no opinion concerning the content of the press release.

placed in Sunrise facilities that is not also required to be maintained for all PCC-contracting facilities.

By operation of this Agreement, the plaintiffs seek to annually review documentation generated for Sunrise-placed children, the entity with whom the Commonwealth contracted, and from which contract the plaintiffs' Establishment Clause claim arose. The plaintiffs also seek review of documentation concerning *any other facility with whom a complaint is lodged* concerning religious choice. Thus, while clearly denying the claim against Sunrise, the Commonwealth defendants have agreed to permit the plaintiffs to monitor the Commonwealth defendants' compliance with the agreed procedures in its future dealings, if any, with any and all PCC-contracting entities, including Sunrise.

Sunrise may view this as splitting hairs. The court has, however, has simply recited what is stated in the Agreement. The Commonwealth defendants have agreed to permit their future dealings with Sunrise and any other PCC-contracting entity to be reviewed. It bears noting that it is Sunrise who extrapolates from the actual terms of the Agreement the notion that it will be subjected to "seven years of constant scrutiny" (DN 514, p. 8) by Organizational Counsel which will "be applied solely to Sunrise." *Id.*[8] [sic]

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[8] [sic] Sunrise's arguments concerning a purported "competitive disadvantage" and a lack "of any sense of finality" for Sunrise

(Continued on following page)

Finally, Sunrise argues that its Due Process and Free Exercise rights will be violated by this Agreement. It urges that it will be denied PCC contract terms that it has enjoyed for many years without being afforded an opportunity to challenge the Commonwealth defendants' decision to implement changes to those terms. Sunrise is clearly not being denied the right to enter into PCC contracts. It has not claimed that the Commonwealth lacks the authority to make the changes to which it has agreed, nor has Sunrise identified any future entitlement to particular contract terms with the Commonwealth.

Sunrise further claims that it is being discriminated against on the basis of its Baptist affiliation by purportedly being singled out for scrutiny by the plaintiffs' Organizational Counsel. But it identifies no such discrimination. It asserts nothing more than the fact of its Baptist identity in support of its argument.

The plaintiffs have settled their claim against the Commonwealth defendants by obtaining an agreement from those defendants to change the way in which they conduct business with their clients and child service providers. This Agreement need not satisfy Sunrise, nor may Sunrise prevent its consummation in settlement of this litigation.

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are undeveloped. However, these arguments are irrelevant to this court's consideration of the motion for voluntary dismissal.

Moving beyond the Agreement itself, Sunrise contends that the entry of an order by this court incorporating the Settlement Agreement and retaining jurisdiction to enforce it renders the agreement "tantamount to a Consent Decree" requiring judicial approval and continual monitoring.[9] [sic]

The court finds the cases of *U.S. v. Lexington-Fayette Urban County Gov't.*, 591 F.3d 484 (6th Cir. 2010) and *Williams v. Vukovich*, 720 F.2d 909 (6th Cir. 1983), unhelpful in evaluating Sunrise's argument. *Lexington-Fayette*, involving a consent decree in a Clean Water Act civil enforcement action, and *Williams*, involving an employment discrimination class action, do not assist in characterizing the Agreement in this case. While *Williams* notes generally that "[a] consent decree is essentially a settlement agreement subject to continued judicial policing," *Williams*, 720 F.2d at 920, the court did not discuss what "continued judicial policing" entails.

In the case of *Christina A. v. Bloomberg*, 315 F.3d 990 (8th Cir. 2003), addressing the distinction between settlement agreements and consent decrees in

[9] [sic] The document is not presented as a consent decree, and judicial approval of a consent decree has not been sought. The plaintiffs and Commonwealth defendants urge that the Agreement clearly evidences that it is not a consent decree, citing Section 9 which limits enforcement by the court to specific performance only. Sunrise does not argue to the contrary. Rather, it urges that the court should view it as "tantamount to a consent decree."

the context of prevailing party status, the court stated:

> The Supreme Court specified that a judgment on the merits or a "settlement agreement[ ] enforced through a consent decree" is sufficient to meet this standard. *Id.* at 604, 121 S.Ct. 1835. In the present case, the debate is over the status of the settlement agreement and the court's role in enforcing it The Court in *Buckhannon* stated that "[p]rivate settlements do not entail the judicial approval and oversight involved in consent decrees." *Id.* at 604 n. 7, 121 S.Ct. 1835.

Christina A, 315 F.3d at 992 (*quoting Buckhannon Board & Care Home Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001)). The court additionally stated that "consent decrees are distinguishable from private settlements by the means of enforcement," noting that consent decrees are enforceable through the supervising court's exercise of contempt powers. *Christina A.*, 315 F.3d at 993.

In *Buckhannon*, the Supreme Court noted that "Private settlements do not entail the judicial approval and oversight involved in consent decrees. And federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into an order of dismissal. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994)." *Buckhannon*, 121 S.Ct. 1840, n. 7.

In *Kokkonen*, the court discussed the effect of retaining or choosing not to retain jurisdiction over an ordinary settlement. The court noted that where jurisdiction is retained in a court order of dismissal, the parties need not resort to a separate suit in the event of a breach of the agreement. Nothing in *Kokkonen* suggests that the retention of jurisdiction over a settlement transforms it into a consent decree. Rather, the court noted that "If the parties *wish* to provide for the court's enforcement of a dismissal-producing settlement agreement, they can seek to do so." *Kokkonen*, 511 U.S. at 381 (emphasis in original). With respect to the settlement before this court, the parties have clearly defined the court's role in any further issue arising from performance under the agreement. This court is divested of the enforcement powers normally available to a court under a consent decree.

In the Agreement before the court, the court is divested of any contempt power, as Section 9 states that "[t]he Commonwealth Defendants shall not be subjected to any civil contempt fines or criminal contempt sanctions for any violation of this Settlement Agreement." DN 512-2, p. 13, Sec. 9. Enforcement is limited to specific performance *Id.* The Agreement also provides for a comprehensive informal resolution process before proceeding under Section 9. DN 512-2, Section 10, p. 13. The court finds that there is neither a factual nor legal basis for construing this Settlement Agreement to be tantamount to a consent decree.

Sunrise's Motion to Dismiss for Lack of Jurisdiction

Sunrise has filed a motion to dismiss the action for lack of subject matter jurisdiction. For the reasons stated below, the court finds Sunrise's motion to dismiss is without merit.

The United States Court of Appeals for the Sixth Circuit determined that the plaintiffs sufficiently articulated state taxpayer standing to pursue an Establishment Clause claim against the Commonwealth defendants. Accordingly, this court permitted the filing of the Second Amended Complaint. DNs 317; 439. The plaintiffs and Commonwealth defendants have reached a settlement of this claim whereby the plaintiffs agree to voluntarily dismiss the action with prejudice. Sunrise contends, however, that for a variety of reasons the plaintiffs no longer have standing and the action must be dismissed with prejudice. Thus we begin a journey toward dismissal with prejudice which, in any event, appears to be the result sought by all concerned.

Sunrise argues that the 2011 decision of *Arizona Christian School Tuition Organization v. Winn*, 131 S.Ct. 1436 (2011) abrogated *Pedreira*'s holding in which the Court of Appeals recognized state taxpayer standing for the plaintiffs. Sunrise urges that if the "correct nexus test," stated in *Winn*, were to be applied to the two Kentucky statutes cited in the Second Amended Complaint, the court would find that state taxpayer standing is now lacking.

Sunrise urges this court to adjudge anew the matter of standing, to find standing lacking, and to dismiss the action with prejudice, rather than permit a voluntary dismissal with prejudice of the Second Amended Complaint.

As the case is presently postured, the plaintiffs have state taxpayer standing. However, the plaintiffs do not seek to proceed to litigate this claim to judgment. Rather, they have agreed tp [sic] dismissal of their claim with prejudice.

Sunrise contends that

> [N]ow, for the first time, more than thirteen years after they commenced this action – [plaintiffs] are requesting new relief (by seeking an order from the Court incorporating the Bilateral Settlement Agreement ("BSA")) . . . that is *completely different* from the injunctive and declaratory relief Plaintiffs requested in their Second Amended Complaint. Entry of an order incorporating the BSA's terms would provide different, and entirely *non-financial* relief to Plaintiffs: unspecified reforms to Kentucky's administrative regulations, substantial modifications to PCC Agreements, enhanced compliance monitoring, and seven years of Sunrise-specific oversight by Plaintiffs or their counsel . . . The long and the short of the BSA is an effort to graft sharper enforcement teeth onto the pre-existing legal requirements that already protect children in the PCC System from

> religious coercion, discrimination and proselytization. E.g., KRS 199.640(5); 922 KAR 1:300(6)(7); 922 KAR 1:310(12)(1)(h). The BSA's "enforcement-plus" regime has many components, . . . but they all have one thing in common: they dictate how the Executive Branch administers the PCC System and *not* how the Legislative Branch funds the PCC System.

DN 513-1, pp. 2-3.

Sunrise suggests that the terms of the settlement agreement somehow alter the relief sought by the plaintiffs in the Second Amended Complaint, and that therefore standing is undermined (presumably because the settlement does not provide relief for the alleged financial injury of the state taxpayers). Thus Sunrise urges that the terms of the settlement transform the Establishment Clause claim into a Free Exercise claim on behalf of children. However, the relief agreed upon in settlement need not be identical to the relief sought in the complaint. Indeed, settlements most often do not yield plaintiffs all they seek in an action. In a weak case, a settlement may yield a plaintiff next to nothing. In a private settlement, a plaintiff may choose to settle for an apology or a token. We have found that this settlement is not tantamount to a consent decree, and the judicial imprimatur required for judicially enforced decrees is neither sought nor required here. Sunrise has not offered any authority for the proposition that a plaintiff is limited to settling for the relief sought in the

complaint. Nor has it cited authority establishing that the terms of a settlement can alter a party's standing to bring the underlying action.

In any event, even under the judicial approval framework for consent decrees, the court would find that the agreement "springs from and serves to resolve a dispute within the court's subject matter jurisdiction," comes "within the general scope of the case made by the pleadings," and operates to "further the objectives of the law upon which the complaint was based." *Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501, 525, 106 S.Ct. 3063, 3077, 92 L.Ed. 405 (1986). The Second Amended Complaint alleges that the Commonwealth defendants provided government funds to pervasively religious entities without restrictions or safeguards against religious use of the funds, in violation of the Establishment Clause (DN 439, ¶ 55), identifying the contractual relationship with Sunrise as an alleged case in point. The Agreement clearly springs from the allegation, serves to resolve it, and in so doing furthers the objective of the claim on a going-forward basis by incorporating certain additional restrictions into the Commonwealth defendants' procedures. This is not impermissible.

In sum, based upon its argument that the plaintiffs lack Article III standing as state taxpayers, Sunrise seeks dismissal of the action *with prejudice* for lack of subject matter jurisdiction. DN 513-3. Voluntary dismissal of the action *with prejudice* is what the plaintiffs intend to provide.

Although Sunrise seeks the same result, its apparent motivation is to prevent the Commonwealth defendants from committing themselves, in the process of dismissing the action, to the implementation of procedures and administrative oversights which it finds distasteful and unwarranted. With or without a settlement, Sunrise simply has no ability to control this outcome. It urges, for example, that "[b]ecause of the unique nature of taxpayer standing and the nexus test that narrowly circumscribes it, the sole remedy available to Plaintiffs is an injunction prohibiting the unlawful funding, if any, that causes their alleged financial injury. *Sherman v. Illinois*, 682 F.3d 643, 647 (7th Cir. 2012), *cert. denied*, 133 S.Ct. 985 (2013)." DN 525, p. 11. However, the plaintiffs are not seeking a judicial remedy. Instead, they are agreeing to terminate the lawsuit on terms which they find agreeable. Such negotiated terms need not constitute "available judicial remedies" in order to end the litigation.

Conclusion

For the reasons set forth herein, the court will (1) enter the tendered order of the settling parties incorporating the settlement agreement into the order of dismissal and providing for this court's retention of jurisdiction to enforce the order, and (2) grant the motion of the plaintiffs to voluntarily dismiss the

Second Amended Complaint with prejudice. A separate order will be entered herein this date in accordance with this opinion.

June 30, 2014

/s/ Charles R. Simpson
Charles R. Simpson III,
Senior Judge
United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ALICIA M. PEDREIRA, et al. — PLAINTIFFS

v. — CIVIL ACTION NO. 3:00CV210-S

SUNRISE CHILDREN'S SERVICES, INC., f/k/a KENTUCKY BAPTIST HOMES FOR CHILDREN, INC., et al. — DEFENDANTS

ORDER

(Filed Jun. 30, 2014)

Motions having been made and for the reasons set forth in the memorandum opinion entered this date and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that the motion of the defendant, Sunrise Children's Services, Inc., to dismiss for lack of subject matter jurisdiction (DN 513) is **DENIED** and the motion of the plaintiffs, Alicia M. Pedreira, *et al.*, to voluntarily dismiss with prejudice (DN 512) is **GRANTED** and the action will be voluntarily dismissed as settled by separate order.

IT IS SO ORDERED.

/s/ Charles R. Simpson
June 30, 2014 **Charles R. Simpson III, Senior Judge**
United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ALICIA M. PEDREIRA, PAUL SIMMONS, JOHANNA W.H. VAN WIJK-BOS, ELWOOD STURTEVANT, Plaintiffs, v. SUNRISE CHILDREN'S SERVICES, INC., f/k/a KENTUCKY BAPTIST HOMES FOR CHILDREN, INC.; AUDREY TAYSE HAYNES, SECRETARY, CABINET FOR HEALTH AND FAMILY SERVICES, AND J. MICHAEL BROWN, SECRETARY, JUSTICE AND PUBLIC SAFETY CABINET, Defendants.	)	CIVIL ACTION NO. 3:00-CV-210-S

ORDER

(Filed Jun. 30, 2014)

Plaintiffs Alicia M. Pedreira, Paul Simmons, Johanna W.H. Van Wijk-Bos, and Elwood Sturtevant (collectively, "Plaintiffs") and defendants Audrey Tayse Haynes, Secretary, Cabinet for Health and Family Services, and J. Michael Brown, Secretary, Justice and Public Safety Cabinet (collectively, the "Commonwealth Defendants"), have agreed to a settlement of

the above-captioned lawsuit. Upon consideration of Plaintiffs' motion to voluntarily dismiss with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2), and any response thereto, the Court ORDERS as follows:

1. The above-captioned lawsuit is dismissed with prejudice.

2. The settlement agreement between the Plaintiffs and the Commonwealth Defendants, which is attached to this Order as Exhibit 1, is incorporated into this Order.

3. The Court retains jurisdiction to enforce this Order.

IT IS SO ORDERED.

/s/ Charles R. Simpson
June 30, 2014 **Charles R. Simpson III, Senior Judge**
United States District Court

Exhibit 1

SETTLEMENT AGREEMENT

This Settlement Agreement (the "*Settlement Agreement*"), dated as of March 12, 2013, is made by and among the following parties (collectively, the "*Parties*"):

Alicia M. Pedreira, Paul Simmons, Johanna W.H. Van Wijk-Bos, and Elwood Sturtevant (collectively, "*Plaintiffs*");

Audrey Tayse Haynes, Secretary, Cabinet for Health and Family Services, and J. Michael Brown, Secretary, Justice and Public Safety Cabinet, and their successors, officers, employees, and agents (collectively, the "*Commonwealth Defendants*");

Americans United for Separation of Church and State ("*Americans United*"); and

the American Civil Liberties Union and the American Civil Liberties Union of Kentucky (collectively, "*ACLU*") (collectively Americans United and ACLU shall be referred to as "*Plaintiffs' Organizational Counsel*").

RECITALS

A. Plaintiffs filed suit against the Commonwealth Defendants alleging, among other things, that the Commonwealth Defendants violated the Establishment Clause of the First Amendment to the United States Constitution through their agreements with Sunrise Children's Services, Inc., f/k/a Kentucky Baptist Homes for Children ("*Sunrise*"). The lawsuit is captioned *Pedreira, et al. v. KBHC et al.*, No. 3:00cv210 (W.D. Ky.) (the "*Lawsuit*").

B. The Parties, through their respective authorized representatives who have signed below, agree that the Lawsuit be dismissed with prejudice on the following terms and conditions.

AGREEMENT

ACCORDINGLY, the Parties to this Settlement Agreement agree as follows:

Section 1. *Definitions*.

(a) *Agency* shall collectively mean a child-caring facility as defined in KRS 199.641(1)(b) and a child-placing agency as defined in KRS 199.011(7). *Child-caring facility* shall have the same meaning as set forth in KRS 199.641(1)(b) and *child-placing agency* shall have the same meaning as set forth in KRS 199.011(7).

(b) *PCC Agreement* shall mean the private child care agreement used by the Commonwealth Defendants to contract with private child-caring facilities and child-placing agencies.

(c) *Religious affiliation* shall mean one's religion (*e.g.*, Christian, Jewish, Muslim, etc.) or denomination (*e.g.*, Baptist, Methodist, Presbyterian).

(d) *Proselytize or proselytization* shall mean an affirmative attempt to induce a child to convert to a particular faith against the wishes or without the knowing and voluntary prior consent of the child.

Section 2. *Modifications to Commonwealth Procedures and PCC Agreements.*

Subject to Section 2(j) below, the Commonwealth Defendants shall modify, as described in this Section 2, their procedures for providing care through private Agencies to children placed in the Commonwealth

Defendants' care, and shall incorporate certain modifications, as described in this Section 2, to the PCC Agreements.

(a) *Placement.*

(i) *Child-caring facilities*: Subject to the provisions of KRS §199.801 and upon enactment of modified administrative regulations within KAR Title 505 and KAR Title 922, prior to placing any child at a child-caring facility, the Commonwealth Defendants shall (i) inform the child, and the child's parent(s) or guardian if a parent or guardian can be contacted by the Commonwealth at the time of the placement, about the child-caring facility's religious affiliation, if any such religious affiliation has been identified by the child-caring facility or the Commonwealth Defendants; (ii) inquire whether the child or parent or guardian objects to the child being placed at such child-caring facility based on its identified religious affiliation; and if the child or parent or guardian so objects, (iii) consider such objection and make reasonable efforts to provide an alternative placement if an alternative placement exists. If it is not reasonably possible to provide the above-described notice and inquiry prior to placing the child, the Commonwealth Defendants shall provide such notice and inquiry as soon as reasonably practical after placement and, in all events, not more than

fourteen (14) days after placement. Nothing in this section shall be construed to require that the Commonwealth place a child in an alternative placement if there is no alternative placement available for the child based on the child's needs or limitations of the potential alternative placements, or if placement at the child-caring facility, without regard to its identified religious affiliation, is in the best interests of the child, as determined by the reasonable and good faith discretion of the Commonwealth. If the Commonwealth Defendants place a child at a child-caring facility over the child's or the child's parent's or guardian's objection with respect to the religious affiliation of the child-caring facility, the Commonwealth Defendants shall promptly document in writing the reasons why such placement was made over the objection of the child or the child's parent or guardian concerning the child-caring facility's religious affiliation, and why no alternative placement was made to accommodate the child's or parent's or guardian's objection concerning the religious affiliation of the child-caring facility. Nothing in this subsection shall be construed to interfere with the Commonwealth Defendants' ability to exercise their reasonable and good faith discretion regarding the placement that it is in the best interests of the child.

(ii) *Child-placing agencies*: Subject to the provisions of KRS § 199.801 and upon enactment of modified administrative regulations within KAR Title 505 and KAR Title 922, prior to placing any child at a foster home, the Commonwealth Defendants shall require the child-placing agency to (i) inform the child, and the child's parent(s) or guardian if a parent or guardian can be contacted by the Commonwealth at the time of the placement, about the foster home's religious affiliation, if any such religious affiliation has been identified by the foster home in the home study required by 922 KAR 1:310, Section 4, or by the Commonwealth Defendants, (ii) inquire whether the child or parent or guardian objects to the child being placed at such a foster home based on its identified religious affiliation; and if the child or parent or guardian so objects, (iii) consider such objection and make reasonable efforts to provide an alternative placement if an alternative placement exists. If it is not reasonably possible to provide the above-described notice and inquiry prior to placing the child, the Commonwealth Defendants shall provide such notice and inquiry as soon as reasonably practical after placement and, in all events, not more than fourteen (14) days after placement. Nothing in this section shall be construed to require that the child-placing agency place a child in an

alternative placement if there is no alternative placement available for the child based on the child's needs or limitations of the child-placing agency, or if placement at the foster home, without regard to its identified religious affiliation, is in the best interests of the child, as determined by the reasonable and good faith discretion of the Commonwealth and the child-placing agency. If a child-placing agency places a child at a foster home over the child's or the child's parent's or guardian's objection with respect to the religious affiliation of the foster home, the child-placing agency shall promptly document in writing the reasons why such placement was made over the objection of the child or the child's parent or guardian concerning the foster home's religious affiliation, and why no alternative placement was made to accommodate the child's or parent's or guardian's objection concerning the religious affiliation of the foster home. Nothing in this subsection shall be construed to interfere with the Commonwealth Defendants' ability to exercise their reasonable and good faith discretion regarding the placement that it is in the best interests of the child.

(b) *Notice of Ombudsman; Service Appeal Process.*

(i) Prior to placing any child at an Agency, the Commonwealth Defendants shall

(A) inform the child, and the child's parent(s) or guardian if a parent or guardian can be contacted, of the terms of the modified PCC Agreement and procedures set forth in Sections 2(a), 2(d)(i)-(ii), 2(e), and 2(f) of this Agreement; (B) inform the child, and the child's parent(s) or guardian if a parent or guardian can be contacted, of the contact information for the available Ombudsman for the Cabinet for Health and Family Services ("Ombudsman") and the Service Appeal Process set forth in 922 KAR 1:320 ("Service Appeal Process"), and that the Ombudsman and the Service Appeal Process are available in the event the child or parent or guardian has concerns regarding the Agency's alleged violations of the terms of the modified PCC Agreement and procedures set forth in Sections 2(a), 2(d)(i)-(ii), 2(e), and 2(f); (C) provide the child with a document, that the child could keep on his or her person or in his or her room, containing information about the terms of the modified PCC Agreement and procedures set forth in Sections 2(a), 2(d)(i)-(ii), 2(e), and 2(f), the Ombudsman, and the Service Appeal Process. If it is not reasonably possible to provide the above-described information and document prior to placing the child, the Commonwealth Defendants shall provide such information and document as soon as reasonably practical after placement

and, in all events, not more than fourteen (14) days after placement.

(ii) The PCC Agreement shall be modified to provide that a child-caring facility shall post information, in at least one common area of the child-caring facility, about the terms of the modified PCC Agreement and procedures set forth in Sections 2(a), 2(d)(i)-(ii), 2(e), and 2(f), the Ombudsman, and the Service Appeal Process; and that a child-placing agency shall post information, in a prominent place in each location operated by the child-placing agency, about the terms of the modified PCC Agreement and procedures set forth in Sections 2(a), 2(d)(i)-(ii), 2(e), and 2(f), the Ombudsman, and the Service Appeal Process.

(c) *Intake.* Upon intake, the Commonwealth Defendants' case worker assigned to each child shall interview the child about his or her religious affiliation, if any, and shall document this information on the DPP-886A or a similar document. Such documentation shall include, but not be limited to, questions concerning the child's choice of religion, whether the child would like to attend religious services or instruction, whether the child would like access to any religious texts or materials, and whether the child has any specific religious holidays that the child wishes to celebrate. The DPP-886A or similar document will be included in the child's case file maintained by the Commonwealth Defendants, and shall

be provided to the private Agency with which the child is placed at the time of referral, or as soon as reasonably practical thereafter and, in all events, not more than fourteen (14) days after intake. If the child is under the age of 13 or otherwise unable to provide informed responses to the questions, the Commonwealth Defendants shall use best efforts to obtain responses from the child's parent(s) or guardian if a parent or guardian can be contacted and whose legal parental rights have not been previously terminated, and shall maintain such responses in the child's case file.

(d) *Religious Activities.*

(i) The PCC Agreement shall be modified to provide that (A) an Agency shall adopt and enforce a written policy requiring the Agency to demonstrate consideration for and sensitivity to the racial, cultural, ethnic, and religious background of a child in its care; and (B) subject to subsection 2(d)(ii) *infra*, with the exception of religious practices that are destructive or place a child in physical danger, the child-caring facility shall (1) provide children in its care with opportunities (subject to geographic and other reasonable time, transportation, and personnel limitations) to practice the religious belief and faith of the child's individual or family religious affiliation; and (2) provide or facilitate the children's ability to participate in religious activities of the child's individual or family religious

affiliation without coercion (subject to geographic and other reasonable time, transportation, and personnel limitations).

(ii) The PCC Agreement shall be modified to state that the child-caring facility shall adopt and enforce a written policy requiring the facility to use its best efforts to (A) provide children in its care with the opportunity to attend different houses of worship and/or services of different religious denominations based on the identified religious affiliations of the children in its care (subject to geographic and other reasonable time, transportation, and personnel limitations); and (B) for children not wishing to attend any offered religious service or religious activity, provide or facilitate the children's ability to participate, at the same time as the religious service or religious activity, in an appropriate, non-religious alternative to the religious service or religious activity (the child-caring facility's selection of which non-religious alternative(s) to provide or facilitate shall be subject to geographic and other reasonable time, transportation, and personnel limitations). The religious service or religious activity and the non-religious alternative should be reasonably comparable in terms of general attractiveness to children, but they need not be of the same nature or require the use of comparable funds, staffing and other

resources. Whether a particular activity constitutes a religious service or religious activity shall be determined by reference to the content of the activity, specifically whether such content is religious in nature; the fact that an activity is sponsored, funded, or otherwise supported by an entity or individual affiliated with a religion shall not be determinative of whether the activity itself is religious. Likewise, the fact that any such entity or individual may be motivated to participate in the provision of any activity on account of their own religious beliefs or convictions shall not be determinative of whether the activity itself is religious.

(iii) The PCC Agreement shall be modified to provide that the child-caring facility shall, on at least a monthly basis, in the TWIST PCC Tracking module or through other similar documentation: (i) list any religious services, religious instruction, or other religious activities or events attended by each child during the month, (ii) state what religious materials, if any, were provided at such activities or events, and (iii) if the child attended a non-religious alternative activity or event, describe that activity or event. If the child-caring facility does not input such information into the TWIST PCC Tracking module, the child-caring facility shall provide other similar documentation to

the Commonwealth Defendants at least twice per year.

(e) *Religious Materials.*

(i) The PCC Agreement shall be modified to provide that the child-caring facility shall not place religious symbols or other religious articles in any child's private room, and shall not automatically provide religious texts or materials to any child, unless such symbols, articles, texts, or materials are requested by the child. A child-caring facility shall inform children that they can request religious symbols, articles, texts, or materials. If the child makes a request for religious symbols, articles, texts, or materials, the child-caring facility shall make reasonable and good faith efforts to contact the parent or legal guardian of the child to inquire whether the parent or guardian approves the provision of and is willing to provide the child with appropriate religious symbols, articles, texts, or materials for the child's personal use while in the custody of the child-caring facility. If the parent or guardian is unavailable or otherwise does not provide the requested religious symbols, articles, texts, or materials, but does not object to the provision thereof, the child-caring facility shall make reasonable and good faith efforts to provide the child with access to such symbols, articles, texts, or materials, subject to considerations regarding

the safety, security, and administration of the child-caring facility, which considerations shall be applied in a manner that is non-discriminatory with respect to children's religious faiths, and may include any prohibitory financial burdens associated with accommodating the child's request.

(ii) The PCC Agreement shall be modified to provide that the child-placing agency shall inform foster homes that they are not permitted to place religious symbols or other religious articles in any child's private room, or to automatically provide religious texts or materials to any child, unless such symbols, articles, texts, or materials are requested by the child. A child-placing agency shall inform children that they can request religious symbols, articles, texts, or materials. If the child makes a request for religious symbols, articles, texts, or materials, the child-placing agency shall make reasonable and good faith efforts to contact the parent or legal guardian of the child to inquire whether the parent or guardian approves the provision of and is willing to provide the child with appropriate religious symbols, articles, texts, or materials for the child's personal use while in the custody of the foster home. If the parent or guardian is unavailable or otherwise does not provide the requested religious symbols, articles, texts, or materials, but does not object to the provision

> thereof, the child-placing agency shall make reasonable and good faith efforts to provide the child with access to such symbols, articles, texts, or materials, subject to considerations regarding the safety, security, and administration of the child-placing agency and foster home, which considerations shall be applied in a manner that is non-discriminatory with respect to children's religious faiths and may include any prohibitory financial burdens associated with accommodating the child's request.

(f) *No Discrimination or Religious Coercion.* The PCC Agreement shall be modified to provide that the Agency shall not (i) discriminate in any manner against any child based on the child's religious faith or lack of religious faith or the child's failure to conform to any religious tenet or practice; (ii) require, coerce, or pressure any child in any manner to attend religious services or instruction or to otherwise engage in or be present at any activity or programming that has religious content; (iii) impose any form of punishment or benefit based on a child's voluntary decision as to whether to participate in or attend any religious service or instruction or any other activity or programming that has religious content; (iv) proselytize any child in any religious beliefs; (v) require any child to pray or to participate in any form of prayer, or to attend any form of prayer that is organized, led, or otherwise sponsored or promoted, by the Agency.

(g) *Training*. The Commonwealth Defendants shall provide additional written training materials (such as written bulletins) to employees of all Agencies to address issues of religious rights and accommodations. The PCC Agreement shall be modified to provide that the Agency shall (i) provide these written training materials to each employee upon hiring or, in the case of employees already employed by the Agency at the time of the Effective Date (defined *infra*) of this Settlement Agreement, to provide these written training materials to its existing employees upon execution of the modified PCC Agreement; (ii) require each of its new and existing employees to sign a one-time form acknowledging that the employee received and read these training materials; (iii) maintain a copy of the acknowledgment form in each employee's personnel file; (iv) provide a copy of the written employee acknowledgment form upon the request of the Commonwealth Defendants.

(h) *Agency Exit Surveys*. The Commonwealth Defendants shall prepare a brief exit survey concerning the child's experiences and impressions regarding the child-caring facility's religious activities and accommodations. During the week of a planned discharge for any child who has been in the care of a single child-caring facility for one month or longer, the Agency shall (i) provide the child with the exit survey, (ii) provide a secure location for the child to submit the exit survey anonymously, and (iii) submit the exit surveys to the Commonwealth Defendants on at least a quarterly basis. The Commonwealth

Defendants shall maintain these exit surveys, organized by the Agency from which the surveys were received. Such exit survey shall include, but not be limited to, questions concerning whether the child experienced any alleged form of religious coercion, discrimination, or proselytization during such placement, as described in Section 2(f). The central office of the Department for Community Based Services or Department of Juvenile Justice, or their counsel, shall investigate any allegations of religious coercion, discrimination, or proselytization contained within the Exit Surveys, and take appropriate action, as necessary. The Commonwealth Defendants, in their reasonable and good faith discretion, shall determine whether any such allegation of religious coercion, proselytization, or discrimination may violate the terms of Sections 2(d), (e) or (f) of this Agreement and thus merits a referral of the complaint to the Office of Inspector General within the Cabinet for Health and Family Services ("Office of Inspector General") for further investigation and other appropriate action, as deemed necessary by the Office of Inspector General in its reasonable and good faith discretion.

(i) *Case Manager Surveys.* The Commonwealth Defendants shall require case workers to (i) question all children on their caseload about the child's experiences and impressions regarding the Agency's religious activities and accommodation at one of the "home visits" made by the case worker annually, and (ii) document the children's responses in TWIST, or through other similar documentation. The questions

shall include without limitation inquiries regarding the activities prohibited by Section 2(f). If a case worker believes that an Agency has engaged in an act of religious coercion, discrimination, or proselytization, the case worker shall report such complaint and suspected behavior to the central office of the Department for Community Based Services or Department of Juvenile Justice, who shall investigate any such allegations, and take appropriate action, as necessary. The Commonwealth Defendants, in their reasonable and good faith discretion, shall determine whether any such allegation of religious coercion, discrimination, or proselytization may violate the terms of Sections 2(d), (e) or (f) of this Agreement and thus merits a referral of the complaint to the Office of Inspector General for further investigation and other appropriate action, as deemed necessary by the Office of Inspector General in its reasonable and good faith discretion.

(j) *Sunset of Certain Modifications to Commonwealth Procedures and PCC Agreements.*

(i) Subject to Section 2(j)(iii) below, the Commonwealth Defendants shall maintain the specific modifications of their procedures and the modifications to the PCC Agreements (or other similar agreements governing the Commonwealth's procurement of child services from private Agencies) set forth in Sections 2(d)(iii), 2(g), 2(h), and 2(i) only for a period of seven (7) years after the "Effective Date" of this Agreement (defined

infra). After the expiration of the seven-year period, the Commonwealth Defendants shall determine in their sole discretion whether to maintain the modifications to their procedures and the changes to the PCC Agreements described in those Sections of this Settlement Agreement, whether to make additional modifications, or whether those modifications are unnecessary.

(ii) Subject to Section 2(j)(iii) below, the Commonwealth shall maintain the specific modifications of their procedures and the modifications to the PCC Agreements set forth in Sections 2(a), 2(b), 2(c), 2(d)(i)-(ii), 2(e), and 2(f) indefinitely.

(iii) Nothing in the Settlement Agreement shall be construed to prevent the Commonwealth Defendants from making other modifications to the PCC Agreements, as deemed necessary in their sole discretion, or as required by law (statutory, regulatory, or by Court Order), so long as such modifications do not conflict with the terms of this Settlement Agreement. The Commonwealth Defendants reserve the right to seek a Court order, pursuant to Section 9, *infra*, providing appropriate relief from specific terms of this Settlement Agreement in the event that the Commonwealth Defendants believe they have become required by subsequent law (statutory, regulatory, or by Court Order) to alter their procedures or

to alter the terms of the PCC Agreements in a way that conflicts with such specific terms of this Settlement Agreement. If the Commonwealth Defendants seek or obtain such relief, Plaintiffs shall have the right, in their sole discretion, to declare this entire Agreement null and void.

Section 3. *Monitoring.*

(a) For a period of seven (7) years following the "Effective Date" of this settlement agreement (defined *infra*), the Commonwealth Defendants shall provide Plaintiffs' Organizational Counsel, on at least an annual basis, the materials described in Sections 2(a) (documentation of placement over objection in a religiously affiliated child-caring facility or foster home), 2(c) (intake religious preference documentation), 2(d)(iii) (religious activity documentation), 2(h) (agency exit surveys), and 2(i) (copies of any reports made by case workers), for those children who were placed with any child-caring facility or child-placing agency operated by Sunrise, redacting children's names and other personally identifying information, for purposes of allowing Plaintiffs' Organizational Counsel to monitor the Commonwealth Defendants' compliance with the terms of this Settlement Agreement. In light of the redactions, the Commonwealth Defendants shall, for each individual child, group together the materials described in Sections 2(a), 2(c), 2(d)(iii), 2(h), and 2(i).

(b) The Commonwealth Defendants will also disclose to Plaintiffs' Organizational Counsel whether they or the Office of Inspector General investigated any complaint against any Agency pursuant to Section 2(h) or 2(i) above, the results of the investigation, and what action, if any, was taken as a result of the investigation. With respect to each Agency that becomes a subject of such an investigation by the Office of Inspector General, the Commonwealth Defendants also shall provide Plaintiffs' Organizational Counsel, on at least an annual basis, until seven (7) years following the Effective Date, in the manner set forth in Section 3(a), the materials described in Sections 2(a), 2(c), 2(d)(iii), 2(h), and 2(i), for those children who made or were the subjects of any complaints that triggered the investigation by the Office of Inspector General.

(c) Plaintiffs and Plaintiffs' Organizational Counsel shall maintain the confidentiality of the materials and information received under this Section 3, and shall not make any disclosure of such materials, except in connection with the assertion of Future Child-Caring Claims as set forth in Section 8, *infra*, a court proceeding to enforce the terms of this Settlement Agreement as set forth in Section 9, *infra*, communicating with representatives of the Commonwealth Defendants, or as required by a court of law. To the extent that Plaintiffs and/or Plaintiffs' Organizational Counsel need to disclose such materials to a court for the purpose of asserting Future Child-Caring Claims, enforcing the Settlement

Agreement, or as required by a court of law, they will file the materials under seal pursuant to the terms of the Protective Order. On an annual basis, Plaintiffs' Organizational Counsel shall each identify one individual to receive the materials and information required by this Section 3.

Section 4. *Waiver of Attorney's Fees.* No Party, including Plaintiffs' Organizational Counsel, shall seek or be awarded, from or against any Party, any fees, costs, or expenses, including but not limited to attorney's fees, incurred in connection with the Lawsuit, or in connection with this Settlement Agreement, or in connection with any action taken pursuant to Section 9 or Section 10, *infra*, except to the extent specifically permitted in Section 9, *infra.* The Parties expressly agree that they are waiving any and all rights to seek or to recover, from or against any Party, attorney's fees, costs, and expenses arising from this Lawsuit, except to the extent specifically permitted in Section 9, *infra.* Nothing in this Section 4, however, shall be construed as a waiver of any Party's right to seek attorney's fees, expenses, or costs that are incurred in any separate lawsuit based on any Future Child-Caring Claims (defined in Section 8, *infra*).

Section 5. *Stay of Lawsuit.* Within 7 days after the date this Settlement Agreement is executed, the Parties shall file a Joint Motion to Stay Proceedings in the Lawsuit based on reaching an agreement in principle to settle the Lawsuit on the terms set forth herein.

Section 6. *Effective Date; Dismissal of Lawsuit.*

(a) No later than July 1, 2013, the Commonwealth Defendants shall implement modifications to the PCC Agreement as set forth herein, subject to the conditions set forth in this Section 6. If the parties are unable to finalize the documents pursuant to the conditions set forth in this Section before July 1, 2013, the Commonwealth Defendants shall implement modifications to the PCC Agreement no later than July 1, 2014. Within 90 days of the execution of this Settlement Agreement, the Commonwealth Defendants shall provide to Plaintiffs (i) the draft modified PCC Agreement; (ii) the draft forms for documentation of placement over objection in a religiously affiliated child-caring facility or foster home described in Section 2(a); (iii) the draft informational document and poster required under Section 2(b)(i)-(ii) about the terms of the modified PCC Agreement set forth in Sections 2(a), 2(d)(i)-(ii), 2(e), and 2(f), the Ombudsman, and the Service Appeal Process; (iv) the draft intake questionnaire concerning religious preferences described in Section 2(c); (v) the draft religious-activity documentation forms described in section 2(d)(iii); (vi) the draft training materials and employee acknowledgement forms described in Section 2(g); (vii) the draft agency exit surveys described in Section 2(h); and (viii) the draft case-manager surveys described in Section 2(i). The Commonwealth Defendants shall also provide copies of all these draft documents to Agencies, upon request, to allow Agencies to provide comments regarding the proposed

modifications. Within 15 days after receiving these draft documents from the Commonwealth Defendants, Plaintiffs shall notify the Commonwealth Defendants of any modifications to the draft documents that Plaintiffs believe in good faith are needed to comply with the Settlement Agreement. If Plaintiffs notify the Commonwealth Defendants of any requested modifications to the draft documents, the Parties shall negotiate such modifications in good faith for a period of 60 days after Plaintiffs provide such notice. If the parties are unable to agree on the modifications to the draft documents within such 60-day period, this Settlement Agreement shall become null and void, except if the Parties agree to extend such 60-day period in writing. This Settlement Agreement shall be final and effective as of the date on which the Parties agree upon the final modifications to the draft documents (the "Effective Date"). Within 7 days after the Effective Date, the Parties shall file the Settlement Agreement and an Agreed Order dismissing the Lawsuit, with prejudice, as settled. The Agreed Order shall provide that (1) the Lawsuit is dismissed with prejudice, (2) the Settlement Agreement is incorporated into the order dismissing the Lawsuit, and (3) the Court retains jurisdiction to enforce the order. The form of the Agreed Order that shall be filed with the Court is attached hereto as Exhibit A.

(b) Within 90 days of the execution of this Settlement Agreement, the Commonwealth Defendants shall also initiate the process of modifying any

administrative regulations currently governing child-caring facilities and child-placing agencies that must be enacted to comply with the terms of this Settlement Agreement. Plaintiffs and Plaintiffs' Organizational Counsel expressly agree and acknowledge that the Commonwealth Defendants cannot guarantee the promulgation of any regulation, and that the failure to promulgate any regulation shall not be considered a violation of this Settlement Agreement pursuant to Section 9, *infra*. However, if the Commonwealth Defendants fail to promulgate any regulation that must be enacted to comply with the terms of this Agreement, Plaintiffs shall have the right, in their sole discretion, to declare this entire Agreement null and void.

(c) Plaintiffs and Plaintiffs' Organizational Counsel expressly agree and acknowledge that the Commonwealth Defendants cannot guarantee that all Agencies will agree to execute the modified PCC Agreement. Furthermore, the Commonwealth Defendants reserve the right to seek an appropriate Court order, pursuant to Section 9, *infra*, temporarily suspending provisions of this Agreement, in the event that their compliance with this Agreement causes a material and imminent threat to their ability to fulfill their statutory duties to provide care to children placed in their custody. Such a temporary suspension shall toll the seven-year time limitations under Sections 2(j), 3, 8, 9, and 10 of this Agreement. Such a temporary suspension shall remain in effect only so long as necessary to allow the Commonwealth

Defendants to make appropriate arrangements to meet their contractual obligations under this Agreement. During the period of such a temporary suspension, the Commonwealth Defendants shall use their best efforts to make such arrangements. The Commonwealth Defendants shall have 60 days in which to make such arrangements. If after 60 days the Commonwealth Defendants are unable to make arrangements that enable them to comply with their obligations under this Agreement and to provide care to children placed in their custody, Plaintiffs shall have the right, in their sole discretion, to declare this entire Agreement null and void. Failure or refusal of any Agency to execute the modified PCC Agreement shall not be considered a violation of this Settlement Agreement pursuant to Section 9, *infra.* However, if an Agency fails or refuses to execute the modified PCC Agreement, the Commonwealth may continue to place children with the Agency prior to obtaining a Court order temporarily suspending provisions of this Agreement only if it files, within ten (10) days of the Agency's failure or refusal to execute the modified PCC Agreement, an emergency motion for expedited issuance of such a Court order, and only until the Court rules on the motion.

Section 7. *Release of all claims/Covenant Not to Sue.* With the exception of the Parties' right to enforce the terms of this Settlement Agreement, as provided in Section 9, *infra,* and the Plaintiffs' and Plaintiffs' Organizational Counsel's ability to assert claims based on future conduct, as provided in Section 8, *infra*, in

exchange for the consideration provided by the Commonwealth Defendants herein, the Plaintiffs and Plaintiffs' Organizational Counsel do hereby release, acquit and forever discharge the Commonwealth Defendants and their predecessors, successors, assigns, parent corporations, subsidiary corporations, affiliated corporations, and the officers, directors, shareholders, partners, employees, attorneys, insurers and agents, past and present, of each of the aforesaid entities, from any and all claims, demands, damages, costs, expenses, attorney's fees, actions, or causes of action, whether in law or equity, known or unknown, asserted or unasserted, which in any way arise out of the Commonwealth Defendants' and/or Sunrise's acts or omissions giving rise to the Lawsuit that have occurred or will occur before the Effective Date of this Agreement (defined *supra*), including all claims, demands, liabilities, actions or causes of action, of whatever kind or nature, in law, equity or otherwise, whether now known or unknown, vested or contingent, suspected or unsuspected that Plaintiffs, the ACLU, and Americans United may now have or have ever had relating directly or indirectly, in whole or part, to the Commonwealth Defendants' agreements with Sunrise for the provision of private child-caring and child-placing services. Plaintiffs expressly covenant that they shall not subsequently bring any claims, file any lawsuit, or voluntarily participate in any lawsuit, relating to conduct that occurs prior to the Effective Date of this Agreement, against the Commonwealth Defendants arising from the Commonwealth Defendants' agreements with Sunrise for

the provision of private child-caring and child-placing services, as well as any and all claims that the Commonwealth Defendants and/or Sunrise have violated, through conduct that occurs prior to the Effective Date of this Agreement, the Establishment Clause of the United States Constitution or any provision of the Constitution of the Commonwealth of Kentucky by contracting with any private providers for the provision of child-caring and child-placing services. Plaintiffs expressly covenant that any "Future Child-Caring Claim" (defined *infra*) shall not be based upon or supported by any acts or omissions which allegedly occurred prior to the Effective Date of this Agreement. Plaintiffs and Plaintiffs' Organizational Counsel further agree that this Agreement, as well as any other considerations called for in this Agreement, are conditioned upon Plaintiffs' withdrawal or dismissal of the Lawsuit in its entirety with prejudice and all related legal proceedings in any forum with prejudice. The parties expressly agree and covenant that they do not intend to make any person, entity, or organization a third-party beneficiary of this Agreement, and expressly acknowledge and warrant that only the express parties to this Agreement shall have rights and obligations arising under this Agreement.

Section 8. *Preservation of Claims Based on Future Conduct.* Notwithstanding Section 7 of this Agreement, the Parties agree that neither Plaintiffs nor Plaintiffs' Organizational Counsel release, discharge, or covenant not to assert claims against the Commonwealth Defendants based on any acts or

omissions by the Commonwealth Defendants that occur after the Effective Date of this Agreement. To the extent such future claims relate to the Commonwealth Defendants' agreements with any child-caring facilities or child-placing agencies based on acts or omissions that occur after the Effective Date of this Agreement ("Future Child-Caring Claims"), the Future Child-Caring Claims shall be subject to the Informal Resolution procedures set forth in Section 10, *infra*, for a period of seven (7) years after the Effective Date. Plaintiffs expressly covenant that any "Future Child-Caring Claim" shall not be based upon or supported by any acts or omissions which allegedly occurred prior to the Effective Date of this Agreement.

Section 9. *Governing Law*; *Submission To Jurisdiction; Private Remedy*; *Not Consent Decree.* All questions as to the execution, validity, interpretation and performance of this Agreement shall be governed by the laws of the Commonwealth of Kentucky. The Parties agree that the sole remedy for any alleged violation or failure to comply with the terms of this Settlement Agreement is specific performance pursuant to this Section 9. Any Party to this Settlement Agreement shall have the right to enforce this Settlement Agreement exclusively in the United States District Court for the Western District of Kentucky, Louisville Division, by motion filed in No. 3:00-cv-210-S. The Parties expressly submit to the exclusive jurisdiction of the United States District Court for the Western District of Kentucky, Louisville Division, for

the purpose of any action to enforce the terms of the Settlement Agreement. The ACLU and Americans United shall have the same rights to enforce the Settlement Agreement that are provided to the other Parties under this Section 9. The Commonwealth Defendants shall not be subjected to any civil contempt fines or criminal contempt sanctions for any violation of this Settlement Agreement. Furthermore, the Commonwealth Defendants shall be liable for reasonable attorney's fees incurred by Plaintiffs in any action to enforce this Agreement only if a Court determines that they violated the Agreement willfully and intentionally. Nothing in this Settlement Agreement shall be construed to require the Commonwealth Defendants to increase the per diem contract rates paid to each Agency pursuant to the current or modified PCCs, or to require the Commonwealth Defendants or any Agency to hire additional personnel, or to require the General Assembly of the Commonwealth of Kentucky to raise taxes. The Parties shall have six (6) months after the termination of the monitoring provisions of this Settlement Agreement (the monitoring provisions of the Settlement Agreement shall "terminate" seven (7) years after the Effective Date), to bring any motion relating to the enforcement of the Commonwealth's compliance with Sections 2(d)(iii), 2(g), 2(h), and 2(i) of the Settlement Agreement pursuant to this Section 9, or any such proceeding shall be forever barred.

Section 10. *Informal Resolution Period.* For a period of seven (7) years after the Effective Date, prior to bringing any Future Child-Caring Claims against the Commonwealth Defendants, or any proceeding pursuant to Section 9 *supra*, the Plaintiffs and/or Plaintiffs' Organizational Counsel shall provide written notice to the Commonwealth Defendants of any Future Child-Caring Claim or any alleged breach or failure to comply with the terms of the Settlement Agreement. The Commonwealth Defendants shall have thirty (30) days from receipt of the written notice to cure the alleged basis for the claim or breach or failure to comply with the terms of the Settlement Agreement, or to provide a written response to Plaintiffs and Plaintiffs' Organizational Counsel (the "cure period"). If, after the "cure period," the Parties have not resolved their dispute, the Parties agree to submit the dispute for a settlement conference with a U.S. Magistrate Judge assigned to the W.D. Ky., Louisville Division, within forty five (45) days (the "mediation period") after the expiration of the "cure period." (The "cure period" and the "mediation period" are collectively the "informal resolution period.") Or upon the joint agreement of the Parties, the Parties may agree to submit to a private mediation with a private mediator agreed to by all Parties. If the Parties jointly agree to conduct a private mediation, the cost of the mediation shall be shared equally by the Parties. No Party shall bring any Future Child-Caring Claim, or proceeding pursuant to Section 9, *supra*, prior to the expiration of the informal resolution period. The six (6) month

limitation period pursuant to Section 9 *supra*, as well as any statute of limitations applicable to any Future Child-Caring Claim, shall be tolled during the informal resolution period.

Section 11. *Protective Order.* The parties expressly agree that the Protective Order entered by the Court in the Lawsuit on December 7, 2011 shall remain in effect during, and after the termination of the monitoring provisions of, this Settlement Agreement. The parties further agree that any information obtained or disclosed pursuant to the terms of this Settlement Agreement shall be subject to the Protective Order. Within sixty (60) days after the Effective Date of this Agreement, Plaintiffs and Plaintiffs' Organizational Counsel shall return or destroy all documents that were previously produced pursuant to the Protective Order by the Commonwealth Defendants and Sunrise. Within sixty (60) days after the conclusion of the six (6) month limitation period set forth in Section 9, *supra*, or of the conclusion of any proceeding based on Future Child-Caring Claims, or for specific performance pursuant to Section 9, *supra*, Plaintiffs and Plaintiffs' Organizational Counsel shall return or destroy all documents subsequently provided pursuant to Section 3, *supra.* Plaintiffs and Plaintiffs' Organizational Counsel shall provide to the Commonwealth Defendants and Sunrise, with any returned documents, a verified statement executed by Plaintiffs and Plaintiffs' Organizational Counsel that they have complied fully with this provision.

Section 12. *No admission of liability.* The execution of this Agreement affects the settlement of claims which are contested and denied and to which a bona fide dispute exists. The execution of this Agreement shall not be construed as an admission of any liability of any kind by any Party. By entering into this Settlement Agreement, the Commonwealth Defendants expressly deny that they have violated the United States Constitution or the Kentucky Constitution by contracting with Sunrise, and expressly deny that Sunrise is a "pervasively sectarian" organization, or that any alleged acts or omissions by Sunrise have violated the religious rights or freedoms of the children placed in Sunrise's care. The Commonwealth Defendants represent that they are entering into this Settlement Agreement for the sole purpose of resolving the Lawsuit. By entering into this Settlement Agreement, the Commonwealth Defendants do not concede that the United States Constitution, the Kentucky Constitution, or any state or federal law, including but not limited to the "Charitable Choice" statute, 42 U.S.C. 604a, require any of the provisions or changes agreed to in this Settlement Agreement, and Plaintiffs, the ACLU and Americans United expressly agree and acknowledge that the Commonwealth Defendants' execution of this Settlement Agreement, its agreement to make the changes set forth in this Agreement, or its alleged past failure to make the changes set forth in this Agreement, shall not be used as evidence that the Commonwealth Defendants have violated the United States Constitution, the Kentucky Constitution, or any state or

federal law, that Sunrise is a "pervasively sectarian" organization, or that that any alleged acts or omissions by Sunrise have violated the religious rights or freedoms of the children placed in Sunrise's care. The parties expressly and mutually agree that by entering into this Agreement, neither party is admitting, denying, or waiving their legal position with respect to whether the Charitable Choice statute, i.e., 42 U.S.C. 604a, applies to the provision of foster care by state agencies through private providers.

Section 13. *Headings.* Headings and captions used in this Settlement Agreement are included herein for convenience of reference only and shall not constitute a part of this Settlement Agreement for any other purpose or be given any substantive effect.

Section 14. *Counterparts.* This Settlement Agreement may be signed in any number of counterparts, each of which shall be an original, with the same effect as if the signatures thereto and hereto were upon the same instrument.

IN WITNESS WHEREOF, the following Parties have caused this Settlement Agreement to be executed by their respective duly authorized officers as of the date first set forth above.

On behalf of the Plaintiffs, Alicia M Pedreira, Paul Simmons, Johanna W.H. Van Wijk-Bos, and Elwood Sturtevant, by their counsel:

/s/ David B. Bergman Date: 3/11/2013
David B. Bergman

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On behalf of Plaintiffs' Organizational Counsel Americans United for Separation of Church and State, by its counsel:

/s/ Alex J. Luchenitser Date:March 11, 2013
Alex J. Luchenitser

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On behalf of Plaintiffs' Organizational Counsel American Civil Liberties Union, by its counsel:

/s/ Daniel Mach Date: March 11, 2013
Daniel Mach

Daniel Mach
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On behalf of Plaintiffs' Organizational Counsel American Civil Liberties Union of Kentucky, by its counsel:

/s/ William E. Sharp Date: 3-11-13
William E. Sharp

William E. Sharp
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On behalf of the Commonwealth Defendants, Audrey Tayse Haynes, Secretary, Cabinet for Health and Family Services, and J. Michael Brown, Secretary, Justice and Public Safety Cabinet, and their successors, officers, employees, and agents, by their counsel:

/s/ Jonathan D. Goldberg Date: March 12, 2013
Jonathan D. Goldberg

Jonathan D. Goldberg
Jan M. West
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[EXHIBIT A]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ALICIA M. PEDREIRA, PAUL SIMMONS, JOHANNA W.H. VAN WIJK-BOS, ELWOOD STURTEVANT, Plaintiffs,	)	CIVIL ACTION NO. 3:00-CV-210-S
v.	)	
SUNRISE CHILDREN'S SERVICES, INC., f/k/a KENTUCKY BAPTIST HOMES FOR CHILDREN, INC.; AUDREY TAYSE HAYNES, SECRETARY, CABINET FOR HEALTH AND FAMILY SERVICES, AND J. MICHAEL BROWN, SECRETARY, JUSTICE AND PUBLIC SAFETY CABINET, Defendants.	)	

AGREED ORDER

Plaintiffs Alicia M. Pedreira, Paul Simmons, Johanna W.H. Van Wijk-Bos, and Elwood Sturtevant (collectively, "Plaintiffs") and defendants Audrey Tayse Haynes, Secretary, Cabinet for Health and Family Services, and J. Michael Brown, Secretary, Justice and Public Safety Cabinet (collectively, the

"Commonwealth Defendants"), have agreed to a settlement of the above-captioned lawsuit. Accordingly, the Court ORDERS as follows:

1. The above-captioned lawsuit is dismissed with prejudice.

2. The settlement agreement between the Plaintiffs and the Commonwealth Defendants, which is attached to this Order as Exhibit 1, is incorporated into this Order.

3. The Court retains jurisdiction to enforce this Order.

IT IS SO ORDERED.

Dated: _____, 2013

_____
United States District Judge

United States Court of Appeals,
Sixth Circuit.
Alicia M. PEDREIRA; Karen Vance; Paul Simmons; Johanna W.H. Van Wijk-Bos; and Elwood Sturtevant, Plaintiffs-Appellants,
v.
KENTUCKY BAPTIST HOMES FOR CHILDREN, INC.; Ishmun F. Burks, Secretary of the Commonwealth of Kentucky Justice and Public Safety Cabinet; and Janie Miller, Secretary of the Commonwealth of Kentucky Cabinet for Health and Family Services, Defendants-Appellees.
No. 08-5538.

Argued: March 11, 2009.
Decided and Filed: Aug. 31, 2009.
Rehearing and Rehearing En Banc Denied Dec. 16, 2009.

ARGUED: Alexander Joseph Luchenitser, Americans United For Separation Of Church and State, Washington, D.C., for Appellants. Jonathan David Goldberg, Goldberg Simpson, LLC, Louisville, Kentucky, John O. Sheller, Stoll Keenon Ogden PLLC, Louisville, Kentucky, for Appellees. **ON BRIEF:** Alexander Joseph Luchenitser, Ayesha N. Khan, Americans United for Separation of Church and State, Washington, D.C., David B. Bergman, Elizabeth Leise, Alicia A.W. Truman, Joshua P. Wilson, Arnold & Porter LLP, Washington, D.C., Kenneth Y. Choe, James D. Esseks, American Civil Liberties Union Foundation, New York, New York, David A. Friedman, William E. Sharp, American Civil Liberties

Union of Kentucky, Louisville, Kentucky, Daniel Mach, American Civil Liberties Union Program On Freedom of Religion & Belief, Washington, D.C., for Appellants. Jonathan David Goldberg, Goldberg Simpson, LLC, Louisville, Kentucky, John O. Sheller, Jeffrey A. Calabrese, Stoll Keenon Ogden PLLC, Louisville, Kentucky, Patrick T. Gillen, Ann Arbor, Michigan, Timothy J. Tracey, Center For Law & Religious Freedom, Springfield, Virginia, LaDonna Lynn Koebel, Joshua C. Billings, Commonwealth of Kentucky, Frankfort, Kentucky, for Appellees. Steven W. Fitschen, The National Legal Foundation, Virginia Beach, Virginia, Edward L. White III, The American Center for Law & Justice, Ann Arbor, Michigan, for Amici Curiae.

Before: CLAY and GIBBONS, Circuit Judges; GREER, District Judge.*

OPINION

JULIA SMITH GIBBONS, Circuit Judge.

Plaintiffs-appellants Alicia M. Pedreira, Karen Vance, and several Kentucky taxpayers[1] appeal the district court's dismissal of their claims against defendants-appellees Kentucky Baptist Homes for

* The Honorable J. Ronnie Greer, United States District Judge for the Eastern District of Tennessee, sitting by designation.

[1] On appeal, the taxpayers are Paul Simmons, Johanna W.H. Van Wijk-Bos, and Elwood Sturtevant.

Children, Inc. ("KBHC"); Ishmun F. Burks, Secretary of the Commonwealth of Kentucky Justice and Public Safety Cabinet; and Janie Miller, Secretary of the Commonwealth of Kentucky Cabinet for Health and Family Services.[2] Pedreira and Vance brought suit against KBHC for its policy of firing and not hiring gay and lesbian employees, alleging discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII") and the Kentucky Civil Rights Act, and the plaintiffs brought suit against all defendants for violations of the Establishment Clause of the First Amendment. The United States District Court for the Western District of Kentucky granted KBHC's motion to dismiss the employment discrimination claims and, in a subsequent order, dismissed the plaintiffs' First Amendment claims against all defendants because it concluded that the plaintiffs did not have standing.

For the reasons that follow, we affirm the dismissal of the plaintiffs' employment discrimination claims, but we reverse the dismissal of the plaintiffs'

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[2] The plaintiffs originally sued Robert Stephens in his official capacity as the Secretary for the Commonwealth of Kentucky Justice Department and Viola P. Miller in her official capacity as the Secretary for the Commonwealth of Kentucky Cabinet for Families and Children. The Cabinet for Families and Children has since been merged with the Cabinet for Health Services to create the Cabinet for Health and Family Services, and the Justice Department has become the Justice and Public Safety Cabinet. Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Ishmun F. Burks and Janie Miller are automatically substituted for former Secretaries Stephens and Miller.

First Amendment claims and remand them for further proceedings.

I.

KBHC is funded by Kentucky for its participation in the "Alternatives for Children Program," which provides placement resources for children who have been, or are at risk of being, abused or neglected. In 1998, plaintiff Alicia Pedreira was terminated from her job as a Family Specialist at Spring Meadows Children's Home, a facility owned and operated by KBHC, when members of KBHC's management discovered a photograph at the Kentucky State Fair of Pedreira and her female partner at an AIDS fundraiser. Pedreira's termination notice indicated that she was fired "because her admitted homosexual lifestyle is contrary to Kentucky Baptist Homes for Children core values." After her termination, KBHC announced as official policy that "[i]t is important that we stay true to our Christian values. Homosexuality is a lifestyle that would prohibit employment."

Karen Vance is a social worker from the Louisville area. She would have applied for positions at KBHC, but because she is a lesbian, she felt that it was futile to apply due to KBHC's formal and well-publicized policy prohibiting gays and lesbians from employment. In 2000, Pedreira and Vance brought suit against KBHC alleging violations of Title VII and

the Kentucky Civil Rights Act in terminating and refusing to hire gay and lesbian employees.

This employment discrimination suit was consolidated with an action brought by Pedreira and Vance, joined by six Kentucky taxpayers,[3] against all defendants alleging violations of the Establishment Clause. The plaintiffs claimed that KBHC is a pervasively sectarian institution that uses state and federal funds for the religious indoctrination of children. According to the plaintiffs, KBHC has received more than $100 million in state government funds since 2000. KBHC acknowledges that it has received an average of $12.5 million per year from Kentucky over the last decade, bringing the amount to approximately $125 million. Drawing on legislative documents and budget reports, the plaintiffs contend that Kentucky, in particular the Secretaries of the Justice and Public Safety Department and the Cabinet for Health and Family Services, are aware that state money is funding religious indoctrination.

The plaintiffs presented the following evidence of KBHC's sectarian mission. In its annual report, KBHC's president announced: "We know that no child's treatment plan is complete without opportunities for spiritual growth. The angels rejoiced last year as 244 of our children made decisions about

[3] The original taxpayer plaintiffs were Paul Simmons, Johanna W.H. Van Wijk-Bos, Elwood Sturtevant, Bob Cunningham, Jane Doe, and James Doe.

their relationships with Jesus Christ." He further committed resources to KBHC's religious goals: "[W]e are committed to hiring youth ministers in each of our regions of service to direct religious activities and offer spiritual guidance to our children and families." In its news release, KBHC's president said that KBHC's "mission is to provide care and hope for hurting families through Christ-centered ministries. I want this mission to permeate our agency like the very blood throughout our bodies. I want to provide Christian support to every child, staff member, and foster parent." KBHC displays religious iconography throughout its facilities, leads group prayer before meals and during staff meetings, and requires its employees to incorporate its religious tenets in their behavior. Kentucky contracted with a private company to conduct reviews of KBHC's facilities. These reviews contain 296 interview responses from youth describing KBHC's religious practices as coercive.

The defendants filed a series of dispositive motions. The district court granted KBHC's motion to dismiss Pedreira's and Vance's claims of employment discrimination, finding that sexual orientation is not a protected class under either Title VII or the Kentucky Civil Rights Act and that Pedreira and Vance had failed to show that they had been discriminated against because of their refusal to comply with KBHC's religion. *Pedreira v. Ky. Baptist Homes for Children, Inc.,* 186 F.Supp.2d 757, 762 (W.D.Ky.2001) ("*Pedreira I*"). The district court denied the defendants' motion for summary judgment on the

First Amendment allegations, finding that the plaintiffs had adequately asserted that funding to KBHC has the impermissible effect of advancing religion and therefore violates the Establishment Clause. *Id.* at 764. The district court denied the plaintiffs' motion for reconsideration. The plaintiffs filed interlocutory appeals for the dismissal of the employment discrimination claims, but the appeals were dismissed for lack of appellate jurisdiction. *Pedreira v. Ky. Baptist Homes for Children, Inc.,* No. 3:00-CV-210-S, 2007 WL 316992, at *1 (W.D.Ky. Jan. 29, 2007) ("*Pedreira II*").

In 2003, the defendants moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), challenging the plaintiffs' standing to bring allegations of violations of the Establishment Clause. The district court found that the plaintiffs had sufficiently alleged taxpayer standing and denied the defendants' motion. *Pedreira v. Ky. Baptist Homes for Children, Inc.,* No. 3:00-CV-210-S, slip op. at 3 (W.D.Ky. Apr. 16, 2003) ("*Pedreira III*"). The district court also permitted the plaintiffs to file an amended complaint. *Id.*

In 2006, after mediation was attempted and failed, the plaintiffs sought to file a second amended complaint, asserting that KBHC is a state actor and suggesting a new theory of recovery. *Pedreira II,* 2007 WL 316992, at *2. The district court denied the motion, finding that allowing the plaintiffs' amendment would cause prejudice to the defendants and an imposition on the court's resources. *Id.*

The parties then filed a new round of motions. The defendants submitted, *inter alia,* two subsequent motions to dismiss for lack of subject matter jurisdiction; the plaintiffs submitted, *inter alia,* another motion for leave to file a second amended complaint and a motion for a hearing on the motions. *Pedreira v. Ky. Baptist Homes for Children,* 553 F.Supp.2d 853, 854 (W.D.Ky.2008) ("*Pedreira IV*"). The district court found that the Supreme Court's recent opinion in *Hein v. Freedom From Religion Foundation, Inc.,* 551 U.S. 587, 127 S.Ct. 2553, 168 L.Ed.2d 424 (2007), narrowed taxpayer standing and granted the defendants' motion to dismiss for lack of standing that was previously denied. *Pedreira IV,* 553 F.Supp.2d at 856.

The plaintiffs appealed to this court. The National Legal Foundation and the American Center for Law & Justice submitted *amicus* briefs in support of the defendants.

II.

A. Employment Discrimination

We review a district court's grant of a motion to dismiss *de novo. See Mezibov v. Allen,* 411 F.3d 712, 716 (6th Cir.2005). We must construe the complaint in the light most favorable to the plaintiffs and accept all allegations as true. *See Harbin-Bey v. Rutter,* 420 F.3d 571, 575 (6th Cir.2005). However, "[f]actual allegations must be enough to raise a right to relief above the speculative level" and to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v.*

Twombly, 550 U.S. 544, 555, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). In considering a motion to dismiss, we generally look only to the plaintiffs' complaint. *See Winget v. JP Morgan Chase Bank, N.A.,* 537 F.3d 565, 576 (6th Cir.2008).

Pedreira brought suit against KBHC pursuant to the Kentucky Civil Rights Act ("KCRA"). Vance joined in the KCRA suit against KBHC and additionally alleged violations of Title VII. Vance claims that there are positions open at KBHC for which she is qualified, but she has not applied due to KBHC's policy against hiring gay and lesbian employees. However, Vance has not applied for the job and thus has not shown that her failure to be hired is due to her sexual orientation. Unlike Pedreira, Vance's injury is purely speculative as she has not carried her burden of showing "actions taken by the employer from which one can infer, if such actions remained unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under [Title VII or the KCRA].'" *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 576, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978) (quoting *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 358, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)). She has not established standing to bring a Title VII or KCRA claim against KBHC, and we therefore analyze the employment discrimination claims with respect to Pedreira only. Because Pedreira brought a claim under the KCRA only, we dismiss all Title VII allegations against KBHC.

Because the purpose of the KCRA was "[t]o provide for execution within the state of the policies embodied in [Title VII]," Ky.Rev.Stat. § 344.020(1)(a), we apply Title VII precedent to assess Pedreira's claim under the KCRA. *See Hamilton v. Gen. Elec. Co.,* 556 F.3d 428, 434 (6th Cir.2009); *Smith v. Leggett Wire Co.,* 220 F.3d 752, 758 (6th Cir.2000). The parties do not dispute that the KCRA does not prohibit discriminatory acts based on an employee's sexual orientation. *See* Ky.Rev.Stat. § 344.040; *see also* 42 U.S.C. § 2000e-2(a)(1); *Vickers v. Fairfield Med. Ctr.,* 453 F.3d 757, 762 (6th Cir.2006). The issue on appeal is whether the plaintiffs' claim is covered by the KCRA's prohibition against employment discrimination on account of religion. *See* Ky.Rev.Stat. § 344.040; *see* 42 U.S.C. § 2000e-2(a). Courts have interpreted the prohibition to preclude employers from discriminating against an employee because of the employee's religion as well as because the employee fails to comply with the *employer's* religion. *See, e.g., Hall v. Baptist Mem'l Health Care Corp.,* 215 F.3d 618, 624 (6th Cir.2000) (explaining that Title VII's scope "include[s] the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer"); *Blalock v. Metals Trades, Inc.,* 775 F.2d 703, 708-09 (6th Cir.1985). Seizing on this latter interpretation, Pedreira argues that living openly as a lesbian constitutes not complying with her employer's religion. Pedreira claims that she was terminated because she does not hold KBHC's religious belief that homosexuality is sinful.

Both parties extensively briefed the issue of whether Pedreira established a *prima facie* case of discrimination. The defendants urge us to apply the traditional *McDonnell Douglas* framework to Pedreira's claim, while Pedreira argues that we should treat this case as similar to reverse race and sex discrimination cases and view the "protected class" inquiry as inapposite. *See Noyes v. Kelly Servs.,* 488 F.3d 1163, 1168 (9th Cir.2007) (finding the "protected class" element inapplicable for reverse religious discrimination claims); *Shapolia v. Los Alamos Nat'l Lab.,* 992 F.2d 1033, 1038 (10th Cir.1993) ("Where discrimination is not targeted against a particular religion, but against those who do not share a particular religious belief, the use of the protected class factor is inappropriate."). On a motion to dismiss, however, these arguments are premature. "The prima facie case under *McDonnell Douglas* . . . is an evidentiary standard, not a pleading requirement." *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 510, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). Thus, "the ordinary rules for assessing the sufficiency of a complaint apply." *Id.* at 511, 122 S.Ct. 992; *see Lindsay v. Yates,* 498 F.3d 434, 439 (6th Cir.2007) (noting *Swierkiewicz*'s holding that "an employment-discrimination plaintiff satisfies her pleading burden by drafting a short and plain statement of the claim consistent with Federal Rule of Civil Procedure 8(a)." (internal quotation marks omitted)). We therefore look to see whether Pedreira has sufficiently pled "a claim to relief that is plausible on its face." *Twombly,* 550 U.S. at 570, 127 S.Ct. 1955.

It is undisputed that KBHC fired Pedreira on account of her sexuality. However, Pedreira has not explained how this constitutes discrimination based on *religion.* Pedreira has not alleged any particulars about her religion that would even allow an inference that she was discriminated against on account of her religion, or more particularly, her religious differences with KBHC. "To show that the termination was based on her religion, [the plaintiff] must show that it was the *religious* aspect of her [conduct] that motivated her employer's actions." *Hall,* 215 F.3d at 627. Furthermore, Pedreira does not allege that her sexual orientation is premised on her religious beliefs or lack thereof, nor does she state whether she accepts or rejects Baptist beliefs. While there may be factual situations in which an employer equates an employee's sexuality with her religious beliefs or lack thereof, in this case, Pedreira has "failed to state a claim upon which relief could be granted." *Amadasu v. Christ Hosp.,* 514 F.3d 504, 506-07 (6th Cir.2008); *see Vickers,* 453 F.3d at 763 (dismissing a complaint of discrimination on the basis of sexual orientation for failure to state a claim under Title VII).

We therefore affirm the dismissal of Vance's and Pedreira's claims for violations of the KCRA.

B. Establishment Clause

1.

The threshold issue for the plaintiffs' First Amendment claims is whether they have standing,

defined as whether they have "allege[d] personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Hein,* 551 U.S. at 598, 127 S.Ct. 2553 (quoting *Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)). The plaintiffs have alleged standing as both federal and state taxpayers, both of which were denied by the district court. We review *de novo* a district court's determination of standing. *See Schultz v. United States,* 529 F.3d 343, 349 (6th Cir.2008). In reviewing a determination of standing, we consider the complaint and the materials submitted in connection with the issue of standing. *See Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

The plaintiffs also appeal the district court's denial of their motion for leave to submit a second amended complaint and urge us to consider the information in their second amended complaint in determining standing. To the extent that the plaintiffs' second amended complaint contains new legal arguments and additional theories for recovery, the district court did not err in denying the plaintiffs' motion. Although district courts "should freely give leave [to a party to amend its pleadings] when justice so requires," Fed.R.Civ.P. 15(a)(2), district courts can exercise their discretion to deny a motion for leave to amend based on "undue delay, bad faith or dilatory motive . . . [or] futility of amendment." *Prater v. Ohio Educ. Ass'n,* 505 F.3d 437, 445 (6th Cir.2007) (quoting *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9

L.Ed.2d 222 (1962) (alterations in original)). Noting that the case had been pending in district court for almost seven years when the plaintiffs sought to file a second amended complaint, the district court found undue delay and denied their motion. We find that the district court did not abuse its discretion in denying the plaintiffs' motion to the extent that it contained novel substantive arguments. *See Miller v. Admin. Office of Courts,* 448 F.3d 887, 898 (6th Cir.2006).

The district court also denied the plaintiffs' amendments clarifying their standing arguments. In determining standing, the district court properly considered the proposed amendments to the complaint "in order to ensure that [it] consider[ed] and addresse[d] fulsomely the standing arguments." *Pedreira IV,* 553 F.Supp.2d at 854-55. Finding that the proposed amendments still would not suffice to demonstrate standing, the district court denied the plaintiffs' motion for leave to amend their complaint. When a motion for leave is denied because the amended complaint would not withstand a motion to dismiss, we review the judgment of the district court *de novo* because the decision was based on a legal conclusion. *See Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield,* 552 F.3d 430, 437 (6th Cir.2008). In determining whether the district court correctly found that the plaintiffs' amendments were insufficient to establish standing, we will consider the plaintiffs' amendments in the second

amended complaint and the related exhibits as they relate to standing only.

(a.) Federal Taxpayer Standing

Generally, individuals lack standing when their only interest in the matter is as a taxpayer. *Frothingham v. Mellon,* 262 U.S. 447, 485-86, 43 S.Ct. 597, 67 L.Ed. 1078 (1923). After forty-five years of "an impenetrable barrier" to taxpayer standing, the Supreme Court announced a narrow exception for the plaintiffs who could show that their alleged injury satisfies the following two-part test:

> First, the taxpayer must establish a logical link between that [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. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally

> beyond the powers delegated to Congress by Art. I, [§]8.

Flast v. Cohen, 392 U.S. 83, 102-03, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). The Supreme Court reaffirmed that individuals could not use their status as federal taxpayers to bring general grievances to court but held that taxpayers "will have standing consistent with Article III to invoke federal judicial power when [they] allege[ ] that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power." *Id.* at 105-06, 88 S.Ct. 1942. In *Hein*, the Supreme Court confirmed that the nexus had to be between the taxpayer and a legislative action, clarifying that the exception articulated in *Flast* does not apply "to a purely discretionary Executive Branch expenditure." 551 U.S. at 615, 127 S.Ct. 2553. Nevertheless, taxpayers still have standing to challenge legislative disbursements over which agencies have executive discretion. *See Bowen v. Kendrick,* 487 U.S. 589, 618-19, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988).

The plaintiffs claim in their complaint that they have standing as federal taxpayers. In their amended complaint, they refer to the Kentucky statutes authorizing the funding of services such as KBHC. However, nowhere in the record before the district court did the plaintiffs explain what the nexus is between their suit and a *federal* legislative action. The district court found that the plaintiffs' allegations were more akin to those in *Hein,* which raised a

general Establishment Clause challenge to federal agencies' use of federal money to promote the President's faith-based initiatives. 551 U.S. at 595-96, 127 S.Ct. 2553. Relying on *Hein*'s analysis, the district court similarly dismissed the plaintiffs' claims because they "fail[ ] to allege any particular appropriation, and thus obviously also fail[ ] to allege any legislative action." *Pedreira IV,* 553 F.Supp.2d at 861. The plaintiffs sought leave to file a second amended complaint that added references to state and federal funding provisions in support of standing. The district court denied their motion but found that even if it had considered the new complaint, their "additional allegations do not save the claim." *Id.*

On appeal, the plaintiffs refer to the same state and federal provisions to support standing as they presented to the district court in their proffered second amended complaint. Looking at the record that was before the district court, we find that the plaintiffs have not alleged a sufficient nexus to show federal taxpayer standing. Even considering the proposed second amended complaint, as the district court did, the question before us is whether the plaintiffs' invocation of Social Security Act's Title IV-E and Supplemental Security Income programs, codified at 42 U.S.C. §§ 670-679b and 42 U.S.C. §§ 1381-1383f, respectively, as congressional authorization of funds to KBHC satisfies *Flast.* Various statutes governing these programs authorize federal funding for states to provide foster care and maintenance for children. *See* 42 U.S.C. §§ 670-679b. Under a complex

statutory scheme, states are entitled to payments for childcare, including for child placement services such as those provided by KBHC. *See* 42 U.S.C. § 674(a)(3). Drawing on the fact that federal funds from these programs are regularly funneled to service providers in Kentucky, the plaintiffs argue that these programs are specific legislative actions for purposes of satisfying the first prong of the *Flast* test.

Even though the plaintiffs refer to specific federal programs and specific portions of these programs, they have failed to explain how these programs are related to the alleged constitutional violation. These statutes are general funding provisions for childcare; they do not contemplate religious indoctrination. The plaintiffs respond that the statutes do not *forbid* unconstitutional uses of these funds. A failure to prohibit unconstitutionality, however, does not equate to an unconstitutional congressional funding mandate. While the plaintiffs do challenge congressional legislation, as required by *Flast,* 392 U.S. at 102, 88 S.Ct. 1942, the plaintiffs' claims are simply too attenuated to form a sufficient nexus between the legislation and the alleged violations. *Compare with Bowen,* 487 U.S. at 620, 108 S.Ct. 2562 (finding that the plaintiffs had alleged a sufficient nexus between the specific legislative action of the Adolescent Family Life Act and alleged violations of the religious clauses of the First Amendment).

(b.) State Taxpayer Standing

As with federal taxpayer standing, the plaintiffs must demonstrate "a good-faith pocketbook" injury to demonstrate state taxpayer standing. *See Doremus v. Bd. of Educ. of Borough of Hawthorne,* 342 U.S. 429, 434, 72 S.Ct. 394, 96 L.Ed. 475 (1952); *Taub v. Kentucky,* 842 F.2d 912, 918 (6th Cir.1988). The defendants argue that the plaintiffs must also show a nexus. Each requirement will be addressed in turn.

i. Injury

The plaintiffs point to the alleged $100 million received by KBHC from Kentucky as the requisite "pocketbook" injury. *Doremus,* 342 U.S. at 434, 72 S.Ct. 394. The Kentucky legislature established a regulatory structure to authorize the placement of children with private facilities. *See, e.g.,* Ky.Rev.Stat. § 200.115, § 605.090(1)(d). According to the plaintiffs, Kentucky was well aware that it was funding KBHC and that its funds were used to finance religious activity. Defendants former Secretary of the Justice Cabinet and former Secretary of the Cabinet for Families and Children attempted to terminate the contractual relationship between KBHC and Kentucky because they were worried about the state "endorsing – or at least through our funding – giving some sort of state sanction to a religious practice." Pointing to material submitted by KBHC, the plaintiffs show that the Kentucky legislature itself was aware that it was funding KBHC when it issued a

legislative citation thanking KBHC for its work with children. Ky. H.R. Jour., 2006 Reg. Sess. No. 57, Mar. 24, 2006, Legislative Citation No. 142. Furthermore, the Kentucky legislature also appropriated sums of money specifically to KBHC.2005 Ky. Laws Ch. 173 (HB 267) (H)(10)(5), *available at* http://www.lrc.ky.gov/record/05RS/HB267.htm. Unlike in the federal taxpayer analysis, the plaintiffs have alleged a "concrete and particularized" injury. *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 344, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). These legislative acts show a direct injury to the plaintiffs, as their tax money is funding KBHC and constitutes "lost revenue." *Johnson v. Econ. Dev. Corp. of County of Oakland,* 241 F.3d 501, 507 (6th Cir.2001).[4]

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[4] The district court initially found that the plaintiffs had established standing by demonstrating that KBHC received federal and state funds and alleging that KBHC was a pervasively sectarian institution. *Pedreira III,* slip op. at 3. The district court reconsidered its decision in light of *Hein* and found that the plaintiffs did not have standing. However, *Hein* did not change the standards for standing. As the Supreme Court announced:

> Over the years, *Flast* has been defended by some and criticized by others. But the present case does not require us to reconsider that precedent. The Court of Appeals did not apply *Flast*; it extended *Flast.* It is a necessary concomitant of the doctrine of *stare decisis* that a precedent is not always expanded to the limit of its logic. That was the approach that then-Justice Rehnquist took in his opinion for the Court in *Valley*

(Continued on following page)

ii. Nexus

The defendants cite a Seventh Circuit decision to show that at least one court has required a demonstration of nexus for state taxpayer standing. *Hinrichs v. Speaker of House of Representatives of Ind. Gen. Assembly,* 506 F.3d 584, 598 (7th Cir.2007). In response, the plaintiffs rely on Supreme Court and Sixth Circuit cases to argue that they do not have to satisfy the *Flast* nexus test to establish state taxpayer standing. *See Johnson,* 241 F.3d at 507 (rejecting defendants' argument that state taxpayers must show a nexus to satisfy the standing requirement). They contend that alleging a direct injury is sufficient. *See Doremus,* 342 U.S. at 434, 72 S.Ct. 394.

As previously noted by this court, "[v]ery few cases have dealt with state taxpayer standing as it relates to the Establishment Clause." *Johnson,* 241

Forge, and it is the approach we take here. We do not extend *Flast,* but we also do not overrule it. We leave *Flast* as we found it.

Hein, 551 U.S. at 614-15, 127 S.Ct. 2553. As this court recently stated in rejecting a similar attempt to use *Hein* to limit taxpayer standing, *Hein* "did not erect a new barrier to taxpayer suits; it marked the boundaries of an existing exception to the rule against federal and state taxpayer standing." *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.,* 567 F.3d 278, 285-86 (6th Cir.2009). Because *Hein* explicitly refused to alter the standards for taxpayer standing, there is no reason for the district court to have interpreted *Hein* to change the requirements for standing. As the district court initially found, the plaintiffs have demonstrated sufficient injury to plead taxpayer standing.

F.3d at 507. Furthermore, this court has not addressed state taxpayer standing at all since the Supreme Court's decisions in *DaimlerChrysler* or *Hein*. In *DaimlerChrysler,* the Supreme Court confirmed that the logic and reasoning of the standing analysis for federal taxpayers extends to state taxpayers. 547 U.S. at 345, 126 S.Ct. 1854. Nevertheless, the Supreme Court did not apply the *Flast* nexus requirement in *DaimlerChrysler. See id.* Instead, the Supreme Court applied the injury requirement, which has always been applicable to both federal and state taxpayers, and found that the plaintiffs did not sufficiently plead an injury: "We then reiterate[d] what we had said in rejecting a federal taxpayer challenge to a federal statute 'as equally true when a state Act is assailed: The [taxpayer] must be able to show . . . that he has sustained . . . some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally." *Id.* (internal quotation marks and citations omitted) (alterations in original).

Noting that no Supreme Court or Sixth Circuit case has applied the nexus test to analyze state taxpayer standing, even while discussing the similarities of the two analyses, we decline to find that *Hein* overrules our precedent that specifically instructs that nexus is *un* necessary in state taxpayer cases. *See Johnson,* 241 F.3d at 507.

Even if there were a nexus requirement, the plaintiffs have sufficiently demonstrated a link between the challenged legislative actions and the

alleged constitutional violations, namely that Kentucky's statutory funding for neglected children in private childcare facilities knowingly and impermissibly funds a religious organization. As discussed above, the plaintiffs have pointed to Kentucky statutory authority, legislative citations acknowledging KBHC's participation, and specific legislative appropriations to KBHC. Through these specifications, the plaintiffs have demonstrated a nexus between Kentucky and its allegedly impermissible funding of a pervasively sectarian institution. *See Ams. United for Separation of Church & State v. Sch. Dist. of City of Grand Rapids,* 718 F.2d 1389, 1416 (6th Cir.1983) ("Had plaintiffs challenged the constitutionality of these [state] legislative enactments, they may possibly have invoked taxpayer standing. . . ."). This case thus falls squarely within the line of cases where the Supreme Court and our sister circuits have upheld taxpayer standing when grants, contracts, or other tax-funded aid are provided to private religious organizations pursuant to explicit legislative authorization. *See, e.g., Bowen,* 487 U.S. at 619-20, 108 S.Ct. 2562; *Flast,* 392 U.S. at 103-04, 88 S.Ct. 1942; *Freedom from Religion Found., Inc. v. Bugher,* 249 F.3d 606, 609-10 (7th Cir.2001); *DeStefano v. Emergency Hous. Group, Inc.,* 247 F.3d 397, 403-05 (2d Cir.2001); *Lamont v. Woods,* 948 F.2d 825, 829-31 (2d Cir.1991); *Pulido v. Bennett,* 860 F.2d 296, 297-98 (8th Cir.1988). Finding that the plaintiffs

have sufficiently demonstrated standing as state taxpayers, we reverse the judgment of the district court.[5] To the extent that the second amended complaint and supporting documents clarified the plaintiffs' standing arguments, we reverse the district court's denial of the plaintiffs' motion for leave to amend with respect to the amendments regarding standing only.

2.

The plaintiffs also claim that the district court erred in prohibiting them from presenting evidence related to Pedreira's termination in support of their First Amendment claim. The district court dismissed Pedreira's and Vance's employment discrimination claims and also dismissed the portion of the plaintiffs' First Amendment claims that was grounded on Pedreira's termination. To the extent that the plaintiffs seek to restate Pedreira's employment discrimination claim as a constitutional one, we affirm the judgment of the district court. The termination of

[5] The American Center for Law and Justice argues in its *amicus* brief that interests of federalism and separation of powers counsel against finding standing. These concerns are taken into consideration by the strict requirement for taxpayer standing. As the *amicus* brief itself notes, "[r]equiring a distinct and palpable injury for state taxpayers comports with notions of federalism that are central to our system of government." *Colo. Taxpayers Union, Inc. v. Romer,* 963 F.2d 1394, 1402 (10th Cir.1992). The plaintiffs have met this high burden and thus established state taxpayer standing.

Pedreira based on her sexual orientation is not a violation of the Establishment Clause because, as noted above, she has not established discrimination based on religion.

However, the fact that Pedreira has not presented an employment discrimination claim based on her termination does not mean that KBHC's hiring practices are not relevant for the First Amendment inquiry. In fact, courts routinely look to employment policies to shed light on the sectarian nature of an institution for purposes of the Establishment Clause. *See, e.g., Roemer v. Bd. of Public Works of Md.,* 426 U.S. 736, 757, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist,* 413 U.S. 756, 767-68, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973); *Hunt v. McNair,* 413 U.S. 734, 743-44, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973); *Johnson,* 241 F.3d at 504-05; *see also Columbia Union Coll. v. Clarke,* 159 F.3d 151, 163 (4th Cir.1998) (adopting a four-factor test based on Supreme Court precedent for the determination of whether a school is pervasively sectarian for First Amendment purposes that includes "how much do the religious preferences shape the . . . hiring and student admission processes" as a factor). KBHC concedes that its policy of firing and not hiring gays and lesbians is religiously inspired. Although a religiously inspired employee conduct rule is not sufficient to constitute discrimination on the basis of religion, it is relevant to an inquiry under the Establishment Clause. We thus reverse the district court's dismissal of this portion of the plaintiffs' First

Amendment claim to the extent that it prohibits plaintiffs from presenting evidence of KBHC's hiring practices.[6]

III.

For the foregoing reasons, we affirm the dismissal of the plaintiffs' employment discrimination claims and reverse and remand for further proceedings the plaintiffs' First Amendment claims.

[6] The defendants have not appealed the denial of their motion for summary judgment. Now that the dismissal of the plaintiffs' claims is reversed, the plaintiffs may proceed with their claims on remand.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-5538

ALICIA M. PEDREIRA; KAREN VANCE; PAUL SIMMONS; JOHANNA W.H. VAN WIJK-BOS; and ELWOOD STURTEVANT,
Plaintiffs-Appellants,

v.

KENTUCKY BAPTIST HOMES FOR CHILDREN, INC.; ISHMUN F. BURKS, Secretary of the Commonwealth of Kentucky Justice and Public Safety Cabinet; and JANIE MILLER, Secretary of the Commonwealth of Kentucky Cabinet for Health and Family Services,
Defendants-Appellees.

Before: CLAY and GIBBONS, Circuit Judges; GREER, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Western District of Kentucky at Louisville.

(Filed Aug. 31, 2009)

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's dismissal of the plaintiffs' employment discrimination claims is AFFIRMED. IT IS FURTHER ORDERED that the dismissal of the plaintiffs' First Amendment claims is

REVERSED and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

United States District Court,
W.D. Kentucky,
at Louisville.
Alecia M. PEDREIRA, et al., Plaintiffs
v.
KENTUCKY BAPTIST HOMES FOR CHILDREN, INC., et al., Defendants.
Civil Action No. 3:00-CV-210-S.

March 31, 2008.

Alex J. Luchenitser, Americans United for Separation of Church and State, Alexander E. Bennett, Alicia A.W. Truman, E. Lea Johnston, Elizabeth Leise, Joshua A. Wilson, Murray R. Garnick, David B. Bergman, Arnold & Porter LLP, Ayesha Khan, Washington, DC, Bruce R. Kelly, Kenneth Y. Choe, Matthew Coles, New York, N.Y., William E. Sharp, ACLU of Kentucky Foundation, Inc., Vicki L. Buba, Oldfather Law Firm, for Plaintiffs.

Gregory S. Baylor, Religious Liberty Advocates of the Christian Legal Society, Springfield, VA, John O. Sheller, Jeffrey Calabrese, Stoll Keenon Ogden PLLC, Jan M. West, Jonathan D. Goldberg, Jennifer K. Luhrs, Goldberg & Simpson, PSC, Louisville, KY, Robert J. Muise, Patrick T. Gillen, Kimberly A.R. Daniels, Ann Arbor, MI, Timothy J. Tracey, Springfield, VA, for Defendants.

MEMORANDUM OPINION

CHARLES R. SIMPSON, III, District Judge.

This matter is before the court for consideration of the following motions:

1. Motion to dismiss for lack of jurisdiction by Mark D. Birdwhistell, Secretary of the Cabinet for Health and Family Services, and Norman A. Arflack, Secretary of the Justice and Public Safety Cabinet (collectively, "the Commonwealth") (DN 275).

2. Motion to dismiss for lack of jurisdiction by Kentucky Baptist Homes for Children, Inc. ("KBHC") (DN 276).

3. Motion of the plaintiffs, Alecia M. Pedreira, et al., for leave to file a second amended complaint (DN 288).

4. Motion of the plaintiffs, Alecia M. Pedreira, et al., for hearing on pending motions (DN 289).

5. Motion of the defendant, Kentucky Baptist Homes for Children, Inc., to strike the motion for leave to file a second amended complaint (DN 294).

6. Motion of the plaintiffs, Alecia M. Pedreira, et al., for leave to file a sur-reply in support of their motion for leave to file a second amended complaint (DN 298).

The briefs of the parties articulately detail the issues and arguments for the court. Therefore, the motion of the plaintiffs for oral argument will be denied. The motion for leave to file a sur-reply will be granted. The motion of KBHC to strike the motion for leave to file a second amended complaint will be denied. KBHC urges quite reasonably that the court should strike the motion on the grounds of untimeliness, prejudice, and for various perceived procedural irregularities. However, in order to ensure that this opinion considers and addresses fulsomely the standing arguments, the court will sidestep these issues, with the exception of the futility argument, and consider the proposed amendments herein.[1] For the reasons explained in greater detail later in this opinion, the motion of the plaintiffs for leave to file a second amended complaint will be denied as futile. *Long v. United States,* 2007 WL 2725973 (W.D.Ky.2007), *citing North American Specialty Insurance Co. v. Myers,* 111 F.3d 1273, 1284 (6th Cir.1997). The motions to dismiss the Establishment Clause claim for lack of standing will be granted, and the action will be dismissed with prejudice.

In April of 2003, the court denied the defendants' motion for judgment on the pleadings challenging

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[1] The court agrees with the defendants that the proposed amendments are more than mere "technical amendments" to the claims already stated in the amended complaint. We conclude, however, that even with the proposed amendments, the taxpayer plaintiffs do not have standing herein.

whether the plaintiffs had standing as state and federal taxpayers to bring an Establishment Clause challenge to the receipt of state and federal money by KBHC for the care of youth placed in its care as wards of the state. The motion was grounded primarily in the contention that there was no factual basis for a finding of a "good-faith pocketbook injury" alleged by this purported unconstitutional conduct. The court ordered further briefing, and permitted the plaintiffs to file an amended complaint amplifying the factual allegations undergirding its claims. The court held that the plaintiffs had satisfied the *Doremus [v. Board of Education,* 342 U.S. 429, 434-435, 72 S.Ct. 394, 96 L.Ed. 475 (1952)] test for taxpayer standing on the facts alleged, and permitted the claims to go forward.

The court is now faced with a new round of motions to dismiss which address new contours added to the body of law addressing Establishment Clause claims raised by state and federal taxpayers.

In June of 2007, the United States Supreme Court handed down its opinion in *Hein v. Freedom* [sic] *Religion Foundation, Inc.,* ___ U.S. ___, 127 S.Ct. 2553, 168 L.Ed.2d 424 (2007) which reaffirmed its longstanding decision in *Flast v. Cohen,* 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). In so doing, the Court found *Flast* to have been incorrectly applied by the United States Court of Appeals for the Seventh Circuit, and "limit[ed] the expansion of federal taxpayer and citizen standing in the absence of specific statutory authorization to an outer boundary drawn

by the *results* in *Flast . . . " Hein,* 127 S.Ct. at 2569 (emphasis in original), *quoting, United States v. Richardson,* 418 U.S. 166, 196, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974). The Court noted that the *Hein* case fell outside the narrow exception that *Flast* created to the general rule against taxpayer standing, and reemphasized that "the *Flast* exception has a 'narrow application in our precedent,' *[DaimlerChrysler Corp. v.] Cuno,* 547 U.S. [332, at 348], 126 S.Ct. [1854], at 1865, [164 L.Ed.2d 589 (2006)] that only 'slightly lowered' the bar on taxpayer standing, *Richardson,* 418 U.S., at 173, 94 S.Ct. 2940, 41 L.Ed.2d 678, and that must be applied with 'rigor,'" *Valley Forge* [*Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464,] at 481, 102 S.Ct. 752[, 70 L.Ed.2d 700 (1982)].

Hein, 127 S.Ct. at 2568.

The defendants ask the court to find that a proper and rigorous application of the *Flast* test, as further refined by the *Hein* analysis, yields the conclusion that the taxpayers in this case lack standing to bring their Establishment Clause claim. We conclude that the defendants are correct, and that the proposed amendments offered by the plaintiffs in their tendered Second Amended Complaint would not alter this conclusion. Therefore the claim must be dismissed.

In order to meet the "case or controversy" requirement of Article III, the plaintiffs must demonstrate standing. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Standing is a necessary component of the court's subject matter jurisdiction. *Kardules v. City of Columbus,* 95 F.3d 1335, 1346 (6th Cir.1996). Courts have the continuing obligation to examine their own subject matter jurisdiction. *Zurich Insurance Co. v. Logitrans Inc.,* 297 F.3d 528, 531 (6th Cir.2002).

Background

The following facts, taken from our July 23, 2001 opinion, are restated herein for purposes of continuity only. The matters presently before the court have advanced well beyond the initial premises of the original complaint. Thus these facts are pertinent only insofar as they provide context for the reader.

On October 23, 1998, after approximately seven months of employment, Alicia Pedreira ("Pedreira") was terminated from her position as a Family Specialist at Spring Meadows Children's Home, a facility owned and operated by KBHC.

The decision to terminate her was made after a photograph taken of her together with her acknowledged "life partner" was displayed at the Kentucky State Fair, and her lesbian lifestyle became known to KBHC. The termination statement she received stated "Alicia Pedreira is being terminated on October 23, 1998, from Kentucky Baptist Homes for

Children because her admitted homosexual lifestyle is contrary to Kentucky Baptist Homes for Children core values."

KBHC then issued a public statement with respect to the termination to the effect that "[i]t is important that we stay true to our Christian values. Homosexuality is a lifestyle that would prohibit employment."

KBHC has required that all its employees "exhibit values in their professional conduct and personal lifestyles that are consistent with the Christian mission and purpose of the institution." KBHC also adopted an employment policy which stated that

> [h]omosexuality is a lifestyle that would prohibit employment with Kentucky Baptist Homes for Children. The Board does not encourage or intend for staff to seek out people within the organization who may live an alternative lifestyle, we will however, act according to Board policy if a situation is brought to our attention.

Complaint, ¶¶ 25, 29, 34, 35.

Pedreira filed this action challenging her termination and the policies adopted by KBHC on the ground that its actions constitute religious discrimination.

A second plaintiff in this action, Karen Vance ("Vance"), a social worker living in California, alleged

that she wished to relocate to Louisville to be closer to her aging parents. She claimed that there were employment positions open at KBHC for which she was qualified, but for which she had not applied because she is a lesbian. She asserted that her application for a position with KBHC would be futile in light of its formal and well-publicized policy prohibiting gays and lesbians from employment. Complaint, ¶¶ 41, 42, 43. Vance claimed that KBHC's hiring policy constitutes religion-based employment discrimination.

Seven individuals, identified in the complaint as Kentucky taxpayers, were also named plaintiffs in the action. They claimed that government funds provided to KBHC were used to finance staff positions which were filled according to religious tenets, and to provide services designed to instill Christian values and teachings in the children. These plaintiffs contended that state money was thus used for religious purposes, in violation of the United States Constitution.

The Commonwealth of Kentucky was sued on the ground that it violated the Establishment Clause of the First Amendment by providing government funds to KBHC. There is no dispute that KBHC has contracted with Kentucky and received government funds for the operation of its facilities. KBHC provides services to youth placed in its care as wards of the state.

For the reasons stated in the July 23, 2001 Memorandum Opinion, the court dismissed the claims of Pedreira and Vance alleging religious discrimination in employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 200e-2(a)(1) [sic], and the Kentucky Civil Rights Act, KRS 344.010(1), and further dismissed a portion of the plaintiffs' Establishment Clause claim to the extent that such claim was grounded in the premise that KBHC's employment practices constituted religious discrimination. The constitutional challenge to KBHC's employee conduct requirement was rejected by the court. The court further noted that there was little in the way of evidence upon which to further address the Establishment Clause claim at that time. The motion for summary judgment was denied on the issue, with leave to reinstate on a more complete record.

As already noted, the court permitted the plaintiffs to file an amended complaint to fulsomely detail their Establishment Clause claim. Having determined that the plaintiffs had overcome the practical difficulties in articulating a "good-faith pocketbook injury," the court found that the plaintiffs had alleged sufficient facts to establish taxpayer standing under *Doremus, supra.* and *Johnson v. Economic Development of County of Oakland,* 241 F.3d 501, 509 (6th Cir.2001).

The Amended Complaint realleges much from the original complaint which has been dismissed. We need say nothing more in that regard.

The sum total of the allegations concerning the Establishment Clause claim is the contention that KBHC receives government funds through contracts with Kentucky agencies. These agencies are authorized to distribute state funds for care and treatment as deemed by the agency to be necessary for the well-being of any child committed to the care of the state. Such costs may include medical expenses, room and board, clothing, and other necessities. KRS § 200.115(1). *See,* Amend. Compl., ¶ 22. The Establishment Clause claim (Amend.Compl., ¶¶ 61-68) alleges that the Commonwealth of Kentucky's practice of providing government funds (1) to finance KBHC staff positions that are filled in accordance with religious tenets,[2] and (2) to finance KBHC services that seek to instill Christian values and teachings to the youth in its care constitute a violation of the Establishment Clause. Amend. Compl., ¶¶ 63, 64. The plaintiffs allege that "[t]he conduct of the Commonwealth of Kentucky described above has deprived and continues to deprive Plaintiffs of their rights, as taxpayers, that are protected by the First and Fourteenth Amendments . . . " Amend. Compl., ¶ 65.[3]

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[2] This factual premise has been rejected by earlier ruling of the court. As such, it may not be relied on as a basis for an Establishment Clause violation.

[3] The plaintiffs sought leave to file a second amended complaint in July of 2006 which was denied. The amendments proposed therein are not pertinent here.

State and Federal Taxpayers

As an initial matter, the plaintiffs urge that the principles enunciated in the Supreme Court decisions of *Flast* and *Hein, supra.,* are inapplicable to claims by state taxpayers. We find that *Cuno, supra.* and *Hinrichs v. Speaker of the House of Representatives of the Indiana General Assembly,* 506 F.3d 584, 2007 WL 3146453 (7th Cir. Oct.30, 2007) mandate a contrary conclusion.

The Supreme Court stated in *Cuno* that

> The foregoing rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers. We indicated as much in *Doremus v. Board of Education of Hawthorne,* 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475 (1952). In that case, we noted our earlier holdings that "the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect" to support standing to challenge "their manner of expenditure." *id.,* at 433, 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475. We then "reiterate[d]" what we had said in rejecting a federal taxpayer challenge to a federal statute "as equally true when a state Act is assailed: 'The [taxpayer] must be able to show . . . that he has sustained . . . some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally.'" *Id.,* at 433-434, 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475 (quoting *Frothingham, supra,* at 488, 43 S.Ct. 597, 67 L.Ed. 1078); see

> *ASARCO Inc. v. Kadish,* 490 U.S. 605, 613-614, 109 S.Ct. 2037, 104 L.Ed.2d 696 (opinion of KENNEDY, J.) ("[W]e have likened state taxpayers to federal taxpayers" for purposes of taxpayer standing (citing *Doremus, supra,* at 434, 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475)).

Cuno, 547 U.S. at 345, 126 S.Ct. 1854.

The plaintiffs urge that *Cuno* is limited to taxpayer standing outside of the Establishment Clause context, and that the Sixth Circuit case of *Johnson, supra.,* establishes that *Flast* does not apply to the issue of state taxpayer standing.

The *Hinrichs* case supports the application of *Cuno* to state taxpayer Establishment Clause claims. In that case, the Seventh Circuit Court of Appeals held that the plaintiffs, state taxpayers seeking to challenge the Indiana "Minister of the Day" legislation, did not have standing to maintain their claim under the authority of *Flast* and *Hein. Hinrichs,* 506 F.3d at 599-602. *See also, Doremus,* 72 S.Ct. at 397.

We do not read anything in *Johnson* to suggest that the Sixth Circuit would decline to apply the holding in *Cuno* to state taxpayer Establishment Clause claims. The plaintiffs urge that since the Sixth Circuit did not apply *Flast* in the *Johnson* case, it established a less demanding standard for demonstrating state taxpayer standing. However, the issue before the court was whether the *Flast* nexus

test applies to state taxpayer claims. Indeed, the *Flast* case is never mentioned in *Johnson.* Rather, the question addressed in *Johnson* was whether a loss of revenue constituted the requisite "financial interest" of a plaintiff to establish standing. *Id.* Thus it was the concept of "expenditure" which the court explored in *Johnson,* and stated that "the Supreme Court in *Doremus* did not distinguish between an expenditure and a loss of revenue in determining whether there was a 'good-faith pocketbook injury'" alleged. *Id.* The nexus test in *Flast* was not pertinent to the issue then before the court. Thus we do not find *Johnson* to be conclusive on this issue.

We conclude that *Flast* is the proper yardstick by which we must measure standing of both state and federal taxpayers to bring the Establishment Clause claim in this case.

Application

The Supreme Court began its decision in *Flast* by stating that *Frothingham v. Mellon,* 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923) stood for forty-five years as "an impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers." The narrow inroad into this barrier to suit for taxpayers alleging that a federal statute violated the Establishment Clause was premised on the Supreme Court's understanding that the "injury" alleged in Establishment Clause challenges to federal spending are the

very extraction and spending of tax money in aid of religion. *See, Cuno,* 126 S.Ct. at 1865, *quoting, Flast,* 88 S.Ct. at 1955-56.

The *Flast* case involved a claim by New York taxpayers that federal funds appropriated under the Elementary and Secondary Education Act were being used to finance instruction in religious schools, and to purchase materials for use in such schools. The court noted that "Appellants' constitutional attack focused on the statutory criteria which state and local authorities must meet to be eligible for federal grants under the Act." *Flast,* 88 S.Ct. at 1945. The Court explained that under the Act, any plan or program seeking funding was required to be "consistent with such basic criteria as the United States Commissioner of Education may establish." Any state participating in the program was subject to approval and supervision by the Commissioner, and the state was required to give assurances that a state plan would provide library resources, textbooks, and other instructional materials on an equitable basis for the use of children and teachers in private elementary and secondary schools in the state. *Id.*

In holding that the *Flast* plaintiffs had standing to bring their Establishment Clause claim, the court framed a two-part test in addressing the standing issue:

> The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that

> status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. This requirement is consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus v. Board of Education,* 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475 (1952). Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.

Flast, 88 S.Ct. at 1954.

The Court in *Flast* contrasted the facts before it with those in *Frothingham* where the taxpayer was found to lack standing. In *Frothingham,* the taxpayer challenged a particular federal spending program, the

Maternity Act of 1921. She had failed, however, to allege that Congress, in enacting the Act, had breached any specific limitation upon its taxing and spending power. *Flast,* 88 S.Ct. at 1955. Rather, she alleged that the enactment "invaded the legislative province reserved to the States by the Tenth Amendment." The Court explained that "[i]n essence, Mrs. Frothingham was attempting to assert the State's interest in their legislative prerogatives and not a federal taxpayer's interest in being free of taxing and spending in contravention of specific constitutional limitations imposed upon Congress' taxing and spending power." *Id.*

The Court found in *Flast* that, in the employment of the two-part nexus test, cases such as *Frothingham* where a taxpayer seeks to employ a federal court as a forum for the airing of generalized grievances about the conduct of government would be weeded out. *Flast,* 88 S.Ct. at 1956. A taxpayer "will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power." *Flast,* 88 S.Ct. at 1955.

What we find to be of preeminent importance in *Flast,* and which was emphasized by the court in *Hein, Cuno*, and *Hinrichs,* is that under the *Flast* two-part test the expenditures of which a taxpayer complains must be shown to have been made pursuant to legislative action. Absent such allegation, the

purpose for which the *Flast* exception to the *Frothingham* prohibition was recognized would not be served. Taxpayers may not bring "generalized grievances" by simply asserting their status as payors and challenging the constitutionality of the spending of public funds. In the words of the Supreme Court in *Hein,* it is the "link between congressional action and constitutional violation" that supports taxpayer standing. *Hein,* 127 S.Ct. at 2566.

The Court in *Hein* explained that the challenged expenditures in *Flast* were funded by a specific congressional appropriation and were disbursed to private schools, including religiously affiliated schools, pursuant to a direct and unambiguous congressional mandate which directed that funds be made available to private schools, the majority of which were, at that time, religiously affiliated. *Hein,* 127 S.Ct. at 2565. The Court in *Hein* underscored the importance of this "logical link between their taxpayer status and the type of legislative enactment attacked." *id.*

Similarly, the court discussed *Bowen v. Kendrick,* 487 U.S. 589, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988) in which standing was found to mount an as-applied challenge to the Adolescent Family Life Act which authorized federal grants to private community service groups including religious organizations. A sufficient nexus was found even though the funds "had flowed through and been administered by an Executive Branch Official," because the claims called into question how the funds authorized by Congress were being disbursed pursuant to the Act's statutory

mandate. The Court noted that *Kendrick* "involved a 'program of disbursement of funds pursuant to Congress' taxing and spending powers' that 'Congress had created,' 'authorized,' and 'mandated.' " *Hein,* 127 S.Ct. at 2567, *quoting, Kendrick,* 108 S.Ct. at 2580.

By contrast, the *Hein* taxpayers challenged expenditures made under the auspices of the President's Office of Faith-Based and Community Initiatives program created by executive order. Congress did not appropriate money for activities promoted by the program. Rather activities were funded from general Executive Branch appropriations through various agencies such as the Department of Education and the Department of Housing and Urban Development which had Executive Department Centers formed within the agencies pursuant to the President's order. In finding that *Flast* had been improperly applied by the lower court, the Supreme Court held that the *Hein* taxpayers lacked standing because the expenditures at issue were not made pursuant to any Act of Congress. The Court held that the general appropriations to the Executive Branch "did not expressly authorize, direct, or even mention the expenditures of which [the taxpayers] complain," and thus no link between congressional action and constitutional violation had been shown. *Hein,* 127 S.Ct. at 2566.

We find that the claim of the taxpayers in this case is comparable to that in *Hein* rather than *Bowen* or *Flast*. At best, the Amended Complaint alleges that KBHC receives funds through contracts with various

Kentucky agencies. Thus it is alleged that the funds are provided through executive branch allocation rather than through legislative action. The Amended Complaint does allege that Kentucky Agencies charged with the care of children are authorized to make necessary expenditures for their care. However, the Amended Complaint fails to allege any particular appropriation, and thus obviously also fails to allege any legislative action through such appropriation which exceeded the taxing and spending powers of the legislature. Thus no nexus has been shown between any legislation, state or federal, and the alleged constitutional violation. The sole focus of the Amended Complaint is the contracts between KBHC and the Kentucky agencies.[4]

The plaintiffs seek leave to amend the complaint again to add references to state and federal funding provisions which are the purported sources of the funds which make their way into the coffers of the state agencies and ultimately into the hands of KBHC. These additional allegations do not save the claim, however. They are funding provisions which

[4] Further, we note that the defendants state that these contracts do not, as might be presumed, award money with specific restrictions or conditions on use of the funds. Rather, the contracts entitle KBHC to seek reimbursement of funds expended where the costs have not otherwise been covered and where the expenditures are shown to have been made for permissible childcare expenses. The purported operation of these contracts while interesting, is not dispositive of the issue before us.

authorize spending for the care of children committed to the state's care. They cite provisions of the Social Security Act's Title IVE program as well as Kentucky statutory provisions which authorize the Kentucky agencies to pay for the necessary care and treatment of wards of the state. These general funding provisions are alleged to be the ultimate source of funds, but there are no allegations that these congressional actions bear any connection to the alleged constitutional violation. Indeed, they are wholly non-directive, general funding provisions.

The plaintiffs take a stab at articulating a nexus between the appropriations and the constitutionally challenged conduct by stating that the cited legislation does not contain any safeguards to prevent unconstitutional uses of funds. The plaintiffs have cited no caselaw to support the proposition that a failure to include oversight provisions is the equivalent of a congressional mandate in the context of a constitutional challenge to congressional action.

As noted in *Hein,* "Because almost all Executive Branch activity is ultimately funded by some congressional appropriation, extending the *Flast* exception to purely executive expenditures would effectively subject every federal action . . . to Establishment Clause challenge by any taxpayer in federal court . . . Such a broad reading would ignore the first prong of *Flast's* standing test which requires a 'logical link between [taxpayer] status and the type of legislative enactment attacked.'" *Hein,* 127 S.Ct. at 2569. We conclude that the Amended Complaint, even

embellished with the proposed recitation of funding sources, fails to demonstrate taxpayer standing to bring the Establishment Clause challenge herein.

For the reasons stated herein the motions of the defendants to dismiss the Establishment Clause claim for lack of standing will be granted and the action will be dismissed with prejudice. A separate order will be entered this date in accordance with this opinion.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ALECIA M. PEDREIRA, et al. PLAINTIFFS

v. CIVIL ACTION NO. 3:00-CV-210-S

KENTUCKY BAPTIST HOMES
FOR CHILDREN, INC., et al. DEFENDANTS

ORDER

(Filed Mar. 31, 2008)

Motions having been made and for the reasons set forth in the memorandum opinion entered herein this date and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that:

1. The motion of the defendants, Mark D. Birdwhistell, Secretary of the Cabinet for Health and Family Services, and Norman A. Arflack, Secretary of the Justice and Public Safety Cabinet, to dismiss (DN 275) is **GRANTED.**

2. The motion of the defendant, Kentucky Baptist Homes for Children, Inc., to dismiss (DN276) is **GRANTED.**

3. The motion of the plaintiffs, Alecia M. Pedreira, et al., for leave to file a second amended complaint (DN 288) is **DENIED.**

4. The motion of the plaintiffs, Alecia M. Pedreira, et al., for hearing (DN 289) is **DENIED.**

5. The motion of the defendant, Kentucky Baptist Homes for Children, Inc., to strike the motion for leave to file a second amended complaint (DN 294) is **DENIED.**

6. The motion of the plaintiffs, Alecia M. Pedreira, et al., for leave to file a sur-reply (DN 298) is **GRANTED.**

7. The claim of the plaintiffs, Alecia M. Pedreira, et al., alleging a violation of the Establishment Clause of the United States Constitution is **DISMISSED FOR LACK OF TAXPAYER STANDING.**

8. All claims now having been dismissed, the action is **DISMISSED WITH PREJUDICE.** There being no just reason for delay in its entry, this is a final order.

IT IS SO ORDERED.

[SEAL]

March 28, 2008 /s/ Charles R. Simpson III

Charles R. Simpson III, Judge
United States District Court

No. 08-5538

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALICIA M. PEDREIRA, ET AL.,	)	
Plaintiff-Appellants,	)	
v.	)	ORDER
KENTUCKY BAPTIST HOMES FOR CHILDREN, INC., ET AL.,	)	(Filed Dec. 16, 2009)
Defendants-Appellees.	)	

BEFORE: CLAY and GIBBONS, Circuit Judges: and GREER,* District Judge.

The court having received two petitions for rehearing en banc, which were circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original

* Hon, J. Ronnie Greer, United States District Judge for the Eastern District of Tennessee, sitting by designation.

submission and decision of the case. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

No. 14-5879

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALICIA M. PEDREIRA, ET AL., Plaintiffs-Appellees, v. SUNRISE CHILDREN'S SERVICES, INC., Defendant-Appellant, J. MICHAEL BROWN, SECRETARY, JUSTICE AND PUBLIC SAFETY CABINET, ET AL. Defendants-Appellees.	ORDER (Filed Nov. 12, 2015)

BEFORE: BOGGS and KETHLEDGE, Circuit Judges; BLACK, District Judge.*

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

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* The Honorable Timothy S. Black, United States District Judge for the Southern District of Ohio, sitting by designation.

Therefore, the petition is denied. Judge Black would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Deb S. Hunt
Deborah S. Hunt, Clerk

K.R.S. § 199.640 Licensing of child-caring and child-placing agencies or facilities – License fees – Standards – Recordkeeping and reporting – Use of corporal punishment – Prohibition against hiring convicted sex offender – Confidentiality of records.

(1) Any facility or agency seeking to conduct, operate, or maintain any child-caring facility or child-placing agency shall first obtain a license to conduct, operate, or maintain the facility or agency from the cabinet.

(2) The cabinet shall:

(a) Develop standards, as provided in subsection (5) of this section, which must be met by any facility or agency seeking to be licensed to conduct, operate, or maintain a child-caring facility or child-placing agency;

(b) Issue licenses to any facility or agency found to meet established standards and revoke or suspend a license after a hearing in any case that a facility or agency holding a license is determined to have substantially failed to conform to the requirements of the standards;

(c) Establish and follow procedures designed to insure that any facility or agency licensed to conduct, operate, or maintain a child-caring facility or child-placing agency complies with the requirements of the standards on an ongoing basis.

(3) Licenses shall be issued for a period of one (1) year from date of issue unless revoked by the cabinet. Each licensed facility or agency shall be visited and inspected at least one (1) time each year by a person authorized by the cabinet and meeting specific qualifications established by the secretary of the cabinet in an administrative regulation. A complete report of the visit and inspection shall be filed with the cabinet.

(4) Each license issued shall specify the type of care or service the licensee is authorized to perform. Each initial application for a license shall be accompanied by a fee of one hundred dollars ($100) and shall, except for provisional licenses, be renewable annually upon expiration and re-application when accompanied by a fee of fifty dollars ($50). The fees collected by the secretary shall be deposited in the State Treasury and credited to a revolving fund account for the purpose of carrying out the provisions of this section. The balance of said account shall lapse to the general fund at the end of each biennium.

(5) (a) The secretary shall promulgate administrative regulations establishing basic standards of care and service for child-caring facilities and child-placing agencies relating to the health and safety of all children in the care of the facility or agency, the basic components for a quality program, as referenced below, and any other factors as may be necessary to promote the welfare of children cared for or placed by the agencies and facilities. Standards established may *vary* depending on the capacity of the agency or

facility seeking licensure. These administrative regulations shall establish standards that insure that:

1. The treatment program offered by the facility or agency is directed toward child safety, improved child functioning, improved family functioning, and continuity and permanence for the child;

2. The facility or agency has on staff, or has contracted with, individuals who are qualified to meet the treatment needs of the children being served, including their psychological and psychiatric needs;

3. The facility or agency has procedures in place to insure that its staff receives ongoing training and that all staff members who are required to do so meet all regional and national standards;

4. The facility or agency develops an integrated, outcomes-based treatment plan that meets the health, mental health, education, safety, and security needs of each child in its care;

5. The facility or agency has procedures in place to include parents, family, and other caregivers in a child's treatment program;

6. The facility or agency has procedures in place whereby it evaluates its programs on a quarterly basis and documents changes in the program if the results of the review indicate a change is needed;

7. The facility or agency makes available quality programs for substance abuse prevention and treatment with providers licensed under KRS Chapter 222 as part of its treatment services;

8. The facility or agency initiates discharge planning at admission and provides sufficient aftercare; and

9. The facility or agency has procedures in place that outline the structure and objectives of cooperative relationships with the community within which it is located and the local school district.

(b) The secretary shall promulgate regulations establishing recordkeeping and reporting requirements and standards for licensed agencies and facilities that recognize the electronic storage and retrieval of information for those facilities that possess the necessary technology and that include, at a minimum, the following information relating to children in the care of the agency or facility:

1. The name, age, social security number, county of origin, and all former residences of the child;

2. The names, residences, and occupations, if available, of the child's parents;

3. The date on which the child was received by the agency or facility; the date on which the child was placed in a foster home or made available for adoption;

and the name, occupation, and residence of any person with whom a child is placed; and

4. A brief and continuing written narrative history of each child covering the period during which the child is in the care of the agency or facility.

(c) The secretary may promulgate administrative regulations creating separate licensure standards for different types of facilities.

(d) The secretary shall promulgate administrative regulations to establish practices and procedures for the inspection of child-caring facilities and child-placing agencies. These administrative regulations shall establish a uniform reporting mechanism that includes guidelines for enforcement.

(6) Any administrative regulations promulgated pursuant to KRS Chapter 13A to govern services provided by church-related privately operated child-caring agencies or facilities shall not prohibit the use of reasonable corporal physical discipline which complies with the provisions of KRS 503.110(1), including the use of spanking or paddling, as a means of punishment, discipline, or behavior modification and shall prohibit the employment of persons convicted of any sexual offense with any child-caring facility or child-placing agency.

(7) All records regarding children or facts learned about children and their parents and relatives by any licensed agency or facility shall be deemed

confidential in the same manner and subject to the same provisions as similar records of the cabinet. The information thus obtained shall not be published or be open for public inspection except to authorized employees of the cabinet or of such licensed agency or facility in performance of their duties.

K.R.S. § 199.641 Definitions – Payments to non-profit child-caring facility.

(1) As used in this section, unless the context otherwise requires:

(a) "Allowable costs report" means a report from each child-caring facility that contracts with the department for services and includes all allowable costs as defined by the Federal Office of Management and Budget circular A-122, "cost principles for nonprofit organizations," and other information the department may require, utilizing cost data from each child-caring facility's most recent yearly audited financial statement;

(b) "Child-caring facility" means any institution or group home other than a state facility, or one certified by an appropriate agency as operated primarily for educational or medical purposes providing residential care on a twenty-four (24) hour basis to children, not related by blood, adoption, or marriage to the person maintaining the facility;

(c) "Department" means the Department for Community Based Services of the Cabinet for Health and Family Services;

(d) "Model program cost analysis" means a report based on a time study, the allowable costs report, and other information required by the department from each child-caring facility that contracts with the department for services that determines a statewide median cost for each licensed program category of service provided by child-caring facilities; and

(e) "Time study" means the process of reporting the work performed by employees of child-caring facilities in specified time periods.

(2) Subject to the limitations set forth in subsection (4) of this section, when the department chooses to contract with a nonprofit child-caring facility for services to a child committed to the department, the department shall make payments to that facility based on the rate setting methodology developed from the model program cost analysis. The department shall also assure that the methodology:

(a) Provides payment incentives for moving children as quickly as possible to a permanent, continuous, stable environment;

(b) Provides children who require out-of-home care or alternative treatment with placements that are as close as possible to their home geographic area; and

(c) Provides appropriate placement and treatment services that effectively and efficiently meet the needs of the child and the child's family as close as possible to the child's home geographic area.

(3) The department shall use the model program cost analysis as a basis for cost estimates for the development of the department's biennial budget request.

(4) The secretary shall, to the extent funds are appropriated, establish and implement the rate setting methodology and rate of payment by promulgation of administrative regulations in accordance with KRS Chapter 13A that are consistent with the level and quality of service provided by child-caring facilities. The administrative regulations shall also include the forms and formats for the model program cost analysis.

K.R.S. § 199.650 Authorized activities of child-caring facilities or child-placing agencies.

Any licensed child-caring facility or child-placing agency may contract to provide care, maintenance, and services for a child in accordance with the terms of its license. Any licensed child-caring facility or child-placing agency may receive children committed to its custody and provide care and services for the child until the child is discharged from custody pursuant to law.

K.R.S. § 200.115 Cabinet or Department of Juvenile Justice authorized to pay for care and treatment of child committed to it – Payment by person having charge of child.

(1) The cabinet or the Department of Juvenile Justice, as appropriate, is authorized and may pay for such care and treatment as it deems necessary for the well-being of any child committed to it, including medical expenses, room and board, clothing, and all other necessities for such children committed to its care and custody, but only if no similar services are rendered by other agencies.

(2) Where the person having charge of the child is able to pay for the care or treatment or portions thereof, the court shall so direct and in what amounts, and such funds as he is able to pay shall be turned over to the cabinet or the Department of Juvenile Justice, as appropriate, or the person having custody and care of the child to be applied on the cost of the treatment and care of the child.

K.R.S. § 605.090 Alternative treatment for committed children – Notice of inappropriate behavior of child – Procedures for removal of child committed as dependent, neglected, or abused – Reports – Written transfer summary – Placement of public offenders.

(1) Unless precluded by law, any child committed to the Department of Juvenile Justice or the cabinet may by the decision of the Department of Juvenile Justice or the cabinet or its designee, at any time during the period of his or her commitment, be:

(a) Upon fourteen (14) days' prior written notice to the court, discharged from commitment. Written notice of discharge shall be given to the committing court and to any other parties as may be required by law;

(b) Placed in the home of the child's parents, in the home of a relative, a suitable foster home, or boarding home, upon such conditions as the Department of Juvenile Justice or the cabinet may prescribe and subject to visitation and supervision by a social service worker or juvenile probation and parole officer.

1. At the time a committed child is placed in the home of his or her parents by the Department of Juvenile Justice or the cabinet, the parents shall be informed in writing of the conditions of the placement and the criteria that will be used to determine whether removal is necessary.

2. At the time a committed child is placed anywhere other than the home of the child's parents, the cabinet or the Department of Juvenile Justice shall inform the foster home, the relative, or the governing authority of any private facility or agency in which the child has been placed whether the minor placed is a juvenile sexual offender as defined in KRS 635.505(2) or of any inappropriate sexual acts or sexual behavior by the child specifically known to the cabinet or Department of Juvenile Justice, and any behaviors of the child specifically known to the cabinet or Department of Juvenile Justice that indicate a safety risk for the placement. Information received by any private facility or agency under this paragraph shall be disclosed immediately and directly to the individual or individuals who have physical custody of the child.

3. If, after a placement is made, additional information is obtained by the cabinet or the Department of Juvenile Justice about inappropriate sexual behavior or other behavior of the committed child that may indicate a safety risk for the placement, the cabinet or the Department of Juvenile Justice shall as soon as practicable, but no later than seventy-two (72) hours after the additional information is received, inform the foster parent, relative, or private facility or agency. Additional information received

by any private facility or agency shall be disclosed immediately and directly to the individual or individuals who have physical custody of the child.

4. Information disclosed under this paragraph shall be limited to the acts or behaviors of the committed child and shall not constitute a violation of confidentiality under KRS Chapter 610 or 620. No foster parent, relative, or other person caring for a committed child shall divulge the information received under this paragraph to persons who do not have a legitimate interest or responsibility relating to the case. Nothing in this subparagraph shall prohibit the disclosure or sharing of information between a foster parent, custodian, private facility, or governmental entity for the protection of any child. A violation of this subparagraph is a Class B misdemeanor;

(c) Placed in one (1) of the facilities or programs operated by the Department of Juvenile Justice or the cabinet, except that no child committed under the provisions of KRS 610.010(2)(a), (b), or (c) shall be placed in a facility operated by the Department of Juvenile Justice for children adjudicated as a public offender unless the cabinet and the department agree, and the court consents, that the placement is in the best interest of the child and that the placement does not exceed a group home level;

(d) Placed in a child-caring facility operated by a local governmental unit or by a private organization willing to receive the child, upon such conditions as the cabinet may prescribe;

(e) However, under no circumstances shall a child committed under KRS Chapter 620 be placed in a home, facility, or other shelter with a child who has been committed to the Department of Juvenile Justice for commission of a sex crime, as that term is defined in KRS 17.500, unless the child committed for the commission of a sex crime is kept segregated from other children in the home, facility, or other shelter that have not been committed for the commission of a sex crime;

(f) Treated as provided in KRS Chapter 645;

(g) Following the transfer or placement of a child pursuant to paragraphs (b), (c), (d), (e), or (f) of this subsection, the Department of Juvenile Justice or the cabinet shall, within fourteen (14) days, excluding weekends and holidays, give written notice to the court of the transfer, the placement, and the reasons therefor.

(2) No child ten (10) years of age or under shall be placed in a facility operated by the Department of Juvenile Justice for children adjudicated as public offenders, except that a child charged with the commission of a capital offense or with an offense designated as a Class A or Class B felony may be detained in a state-operated detention facility when there is no available less restrictive alternative.

(3) If a child committed to the cabinet as dependent, neglected, or abused is placed in the home of the child's parents, the child shall not be removed except in accordance with the following standards and procedures:

(a) If the social service worker believes that the committed child continues to be dependent, neglected, or abused, but immediate removal is unnecessary to protect the child from imminent death or serious physical injury, the casework situation and evidence shall be reviewed with his supervisor to determine whether to continue work with the family intact or to remove the child. There shall be documentation that the social service worker, prior to the court hearing, made an effort to contact the parents to inform them of the specific problems that could lead to removal so they have an opportunity to take corrective action. If the parents are unavailable or do not respond to attempts to communicate, the specific circumstances shall be documented;

(b) If it appears that the child's health or welfare or physical, mental, or emotional condition is subjected to or threatened with real and substantial harm and there is not reasonably available an alternative less drastic than removal of the child from the home, the cabinet shall petition the District Court to review the commitment pursuant to KRS 610.120 in relation to the cabinet's intention to remove the child from the parent's home. The petition shall set forth the facts which

constitute the need for removal of the child. The court shall serve notice of the petition and the time and place of the hearing on the parents; however, the social service worker shall also contact the parents to ensure that they received the notice and are aware of the right to be represented by counsel. If the parents' whereabouts are unknown, notice may be mailed to the last known address of an adult who is a near relative. If the court fails to find that the child's health or welfare or physical, mental, or emotional condition is subjected to or threatened with real and substantial harm, or recommends a less drastic alternative that is reasonably available, the child shall not be removed from the parents' home;

(c) If a social service worker finds a committed, unattended child who is too young to take care of himself, the social service worker shall make reasonable efforts to arrange for an emergency caretaker in the child's home until the parents return or fail to return within a reasonable time. If no in-home caretaker is available for the child, the social service worker shall request any appropriate law enforcement officer to take the child into protective custody. If, after a reasonable time, it appears the child has been abandoned, the cabinet shall petition the District Court to review the case; or

(d) If there exist reasonable grounds to believe that the child is in danger of imminent death or serious physical injury or is being sexually

abused and that the parents are unable or unwilling to protect the child, the social service worker shall, with the assistance of a law enforcement officer, immediately remove the child prior to filing a petition for review. Within seventy-two (72) hours after the removal, the cabinet shall file a petition for review in District Court pursuant to KRS 610.120 with a request for an expeditious hearing. If the court fails to find that the child's health or welfare or physical, mental, or emotional condition is subjected to or threatened with real and substantial harm, or recommends a less drastic alternative that is reasonably available, the child shall be returned to the parents' home.

(4) The cabinet or the Department of Juvenile Justice, as appropriate, shall notify the juvenile court of the county of placement with the conditions of supervised placement of each child placed in that county from one (1) of the residential treatment facilities operated by the Department of Juvenile Justice or the cabinet. Notice of the conditions of such placement may be made available by the court to any law enforcement agency.

(5) The person in charge of any home to which a child is probated, and the governing authority of any private facility or agency to which a child is committed, shall make such reports to the court as the court may require, and such reports as the Department of Juvenile Justice or the cabinet may require in the performance of its functions under the law. The Department of Juvenile

Justice or the cabinet shall have the power to make such visitations and inspections of the homes, facilities, and agencies in which children who have committed public offenses have been placed as it deems necessary to carry out its functions under the law.

(6) The Department of Juvenile Justice or the cabinet shall provide a written transfer summary to the person in charge of any foster home or any governing authority of any private facility or agency in which the Department of Juvenile Justice or the cabinet has placed a child. The written summary shall include, at a minimum, demographic information about the child, a narrative statement detailing the child's prior placements, the length of time the child has been committed, a description of the services and assistance provided to the child or the child's family since the most current case plan, a copy of the current case plan for the child and the child's family, and a copy of the child's medical and educational passport, if available, provided that no information shall be provided that violates any statutory confidentiality requirements. The transfer summary shall state whether the child placed is a juvenile sexual offender as defined in KRS 635.505(2), and include information required under subsection (1) of this section. The transfer summary shall be provided by the Department of Juvenile Justice if it is responsible for the child, or the cabinet if it is responsible for the child, within seven (7) days of the placement of the child with the person, agency, or facility providing care to the child.

(7) The Department of Juvenile Justice may assist the courts in placing children who have committed public offenses in boarding homes, and, under agreements with the individual courts, may assume responsibility for making such placements. Counties may pay or contribute towards the expenses of maintaining such children and, to the extent authorized by the fiscal court, the Department of Juvenile Justice may incur obligations chargeable to the county for such expenses.

K.R.S. § 605.120 Payments to home where children are placed – Reimbursement system for foster parents – Pilot projects – Kinship care program – Administrative regulations – Decisions regarding haircuts and hairstyles.

(1) The cabinet is authorized to expend available funds to provide for the board, lodging, and care of children who would otherwise be placed in foster care or who are placed by the cabinet in a foster home or boarding home, or may arrange for payments or contributions by any local governmental unit, or public or private agency or organization, willing to make payments or contributions for such purpose. The cabinet may accept any gift, devise, or bequest made to it for its purposes.

(2) The cabinet shall establish a reimbursement system, within existing appropriation amounts, for foster parents that comes as close as possible to meeting the actual cost of caring for foster children. The cabinet shall consider providing

additional reimbursement for foster parents who obtain additional training, and foster parents who have served for an extended period of time. In establishing a reimbursement system, the cabinet shall, to the extent possible within existing appropriation amounts, address the additional cost associated with providing care to children with exceptional needs.

(3) The cabinet shall review reimbursement rates paid to foster parents on a biennial basis and shall issue a report in October of each odd-numbered year to the Legislative Research Commission comparing the rates paid by Kentucky to the figures presented in the Expenditures on Children by Families Annual Report prepared by the United States Department of Agriculture and the rates paid to foster parents by other states. To the extent that funding is available, reimbursement rates paid to foster parents shall be increased on an annual basis to reflect cost of living increases.

(4) The cabinet is encouraged to develop pilot projects both within the state system and in collaboration with private child caring agencies to test alternative delivery systems and nontraditional funding mechanisms.

(5) To the extent funds are available, the cabinet may establish a program for kinship care that provides a more permanent placement with a qualified relative for a child that would otherwise be placed in foster care due to abuse, neglect, or death of both parents.

(6) The cabinet shall promulgate administrative regulations in accordance with KRS Chapter 13A to implement the provision of subsection (5) of this section. The administrative regulations shall include uniform conditions and requirements regarding:

(a) Eligibility requirements for the kinship caregiver and the child;

(b) Financial assistance and payment rates; and

(c) Support services and case management services that may be provided to the kinship caregiver or the child.

(7) Foster parents shall have the authority to make decisions regarding haircuts and hairstyles for foster children who are in their care for thirty (30) days or more.

KENTUCKY 2005 SESSION LAWS
2005 REGULAR SESSION

CHAPTER 173
HB 267
APPROPRIATIONS – STATE BUDGET

AN ACT relating to appropriations and revenue measures providing financing for the operations, maintenance, support, and functioning of the government of the Commonwealth of Kentucky and its various officers, cabinets, departments, boards, commissions, institutions, subdivisions, agencies, and other state-supported activities.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

H. HEALTH AND FAMILY SERVICES CABINET.

Budget Units

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10. COMMUNITY BASED SERVICES

	2004-05	2005-06
General Fund (Tobacco)	**8,300,400**	**8,300,400**
General Fund	**275,476,700**	**300,236,700**
Restricted Funds	**135,169,500**	**118,779,800**
Federal Funds	**475,266,700**	**485,621,100**
TOTAL	**895,213,300**	**912,938,000**

(1) Tobacco Settlement Funds: Included in the above General Fund (Tobacco) appropriation is $8,120,400 in each fiscal year for the Early Childhood Development Program, and $180,000 in each fiscal year for Child Advocacy Centers.

(2) Out-of-Home Care: Included in the above General Fund appropriation is $20,309,700 in fiscal year 2005-2006 which is necessary to support and sustain the increased number of court-committed children in the care of the Cabinet.

(3) Criminal Background Investigation Fee Establishment: The Secretary shall be authorized to promulgate administrative regulations necessary to prescribe criminal background investigation fee amounts which are reflected in the Restricted Funds appropriation above.

(4) Personal Care Home State Supplementation Payment Increase: Included in the above appropriation is $2,910,000 in General Fund support and $450,000 in Restricted Funds in fiscal year 2005-2006 to increase State Supplementation

payments to Personal Care Homes by $20 per month per eligible resident for the personal needs allowance and $2 per day per eligible resident for a facility payment increase.

(5) Kentucky Baptist Children's Home Youth Ranch: Included in the above appropriation is $200,000 in General Fund support in fiscal year 2005-2006 for Alternatives for Children educational classrooms at the Kentucky Baptist Children's Home Youth Ranch.

(6) Bluegrass Domestic Violence Program: Included in the above appropriation is $100,000 in General Fund support in fiscal year 2005-2006 to purchase vans and security equipment and for operating costs.

TOTAL – HEALTH AND FAMILY SERVICES CABINET

	2004-05	2005-06
General Fund (Tobacco)	**26,423,400**	**27,028,400**
General Fund	**1,450,700,300**	**1,551,139,300**
Restricted Funds	**873,592,500**	**781,864,200**
Federal Funds	**3,867,637,800**	**3,753,002,800**
TOTAL	**6,218,354,000**	**6,113,034,700**

KENTUCKY 2008 SESSION LAWS
2008 REGULAR SESSION

CHAPTER 127
HB 406
APPROPRIATIONS –
EXECUTIVE BRANCH BUDGET

AN ACT relating to appropriations and revenue measures providing financing and conditions for the operations, maintenance, support, and functioning of the government of the Commonwealth of Kentucky and its various officers, cabinets, departments, boards, commissions, institutions, subdivisions, agencies, and other state-supported activities.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

PART I

H. HEALTH AND FAMILY SERVICES CABINET

Budget Units

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10. COMMUNITY BASED SERVICES

	2008-09	2009-10
General Fund (Tobacco)	**8,970,400**	**9,220,400**
General Fund	**346,147,200**	**350,145,700**
Restricted Funds	**141,311,600**	**143,498,700**
Federal Funds	**533,312,100**	**536,884,300**
TOTAL	**1,029,741,300**	**1,039,749,100**

(1) Tobacco Settlement Funds: Included in the above General Fund (Tobacco) appropriation is $8,970,400 in fiscal year 2008-2009 and $9,220,400 in fiscal year 2009-2010 for the Early Childhood Development Program.

(2) Debt Service: Included in the above General Fund appropriation is $91,000 in fiscal year 2009-2010 for new debt service to support new bonds as set forth in Part II, Capital Projects Budget, of this Act.

(3) Private Child Care Provider Reimbursement Rates: Included in the above appropriation is $3,800,000 in General Fund moneys, $2,684,100 in Restricted Funds, and $836,100 in Federal Funds in each fiscal year to continue private child care provider fiscal year 2007-2008 reimbursement rates.

JOURNAL
of the
HOUSE OF REPRESENTATIVES
of the
General Assembly
of the
Commonwealth of Kentucky

2006 Regular Session

Volume III

* * *

Representative Napier moved the adoption of the following **Legislative Citation No. 142**.

The House of Representatives of the Commonwealth of Kentucky hereby recognizes and honors the administration and staff members of the Kentucky Baptist Homes For Children for their extraordinary efforts in assisting those children within the Commonwealth in need and providing for them a safe and nurturing environment. Founded in 1869 to offer aid to children who were orphaned after the Civil War, this esteemed and exceptional charitable organization currently provides foster care and residential group homes for thousands of children across Kentucky who have been victims of neglect or physical, sexual or emotional abuse and consistently strives, as part of its mission, to serve those that are hurting and in need of hope and healing to break the cycle of abuse. Inasmuch as the Kentucky Baptist Homes for Children has demonstrated remarkable dedication to providing for those children within the communities

of this great Commonwealth a home filled with compassion and encouragement, the members of this august body are pleased to join with Representative Lonnie Napier as he recognizes all those who have contributed to this extraordinary and benevolent institution and in extending best wishes for their continued prosperity and success. Done in Frankfort, Kentucky, this twenty-fourth day of March, in the year two thousand and six.

Legislative Citation No. 142 was adopted without objection.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ALICIA M. PEDREIRA, KAREN VANCE, PAUL SIMMONS, JOHANNA W.H. VAN WIJK-BOS, ELWOOD STURTEVANT, BOB CUNNINGHAM, JANE DOE AND JAMES DOE Plaintiffs v. KENTUCKY BAPTIST HOMES FOR CHILDREN, INC., VIOLA MILLER, SECRETARY, CABINET FOR FAMILIES AND CHILDREN, AND ROBERT STEPHENS, SECRETARY, JUSTICE CABINET Defendants	CIVIL ACTION NO. 3:00-CV-210-S **AMENDED COMPLAINT**

INTRODUCTION

This lawsuit is brought on behalf of seven Kentucky taxpayers and one additional Plaintiff who object to and have been injured by the Commonwealth of Kentucky's funding of the Kentucky Baptist Homes for Children, Inc. (hereinafter "KBHC"). The KBHC uses Commonwealth funds to hire employees who are required to accept and abide by the institution's

religious beliefs, and to pay for services that seek to teach youth the institution's version of Christian values.

Alicia Pedreira was employed by KBHC and then terminated because her committed relationship with another woman is inconsistent with KBHC's religious beliefs. Karen Vance is barred from employment by KBHC for the same reason. Jane and James Doe are the tax-paying parents of a young man who was a resident of KBHC and was seriously damaged by KBHC's policies. Several other taxpayer Plaintiffs are clergy and concerned citizens who object to the use of their tax dollars to fund the religion-based discrimination of KBHC.

Plaintiffs believe that the actions of the Commonwealth of Kentucky and the Kentucky Baptist Homes for Children violate the Establishment Clause of the First Amendment of the United States Constitution, Title VII of the Civil Rights Act of 1964, and the Kentucky Civil Rights Act.

JURISDICTION

1. This action involves a federal question under the First Amendment to the United States Constitution. Jurisdiction is founded upon 28 U.S.C. § 1331(a), which gives federal district courts original jurisdiction over cases involving federal questions; 28 U.S.C. § 1343; and 42 U.S.C. §§ 2000e *et seq*. Pursuant to 28 U.S.C. § 1367, Plaintiffs request that this Court invoke its supplemental jurisdiction to

hear claims arising under state law because those claims are so related to Plaintiff's federal claims as to form part of the same case or controversy under Article III of the United States Constitution. This Court has jurisdiction to grant the declaratory relief requested under 28 U.S.C. § 2201.

VENUE

2. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because some of the Defendants reside in this district, and a substantial number of the events giving rise to these claims occurred in this district.

PARTIES

3. Plaintiff ALICIA M. PEDREIRA (hereinafter "Pedreira") is a resident of Louisville, Kentucky. At all relevant times, PEDREIRA was employed as a Family Specialist at Spring Meadows Children's Home of the KENTUCKY BAPTIST HOMES FOR CHILDREN ("KBHC"). At all relevant times Pedreira has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

4. Plaintiff KAREN VANCE ("Vance") is a resident of Long Beach, California.

5. Plaintiff PAUL SIMMONS ("Simmons") is a resident of Louisville, Kentucky. At all relevant times, SIMMONS has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

6. Plaintiff JOHANNA W.H. VAN WIJK-BOS ("Bos") is a resident of Louisville, Kentucky. At all relevant times, BOS has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

7. Plaintiff ELWOOD STURTEVANT ("Sturtevant") is a resident of Louisville, Kentucky. At all relevant times, STURTEVANT has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

8. Plaintiff BOB CUNNINGHAM ("Cunningham") is a resident of Louisville, Kentucky. At all relevant times, CUNNINGHAM has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

9. Plaintiffs JANE and JAMES DOE ("the Does") are residents of Hardin County, Elizabethtown, Kentucky. At all relevant times, the DOES have been, and continue to be, taxpayers of the Commonwealth of Kentucky. They are the parents of John Doe, a minor who was under the care of KBHC while ALICIA PEDREIRA was employed there. The true names of the DOES and John Doe are not included in this Complaint in order to protect their confidentiality.

10. Defendant KENTUCKY BAPTIST HOMES FOR CHILDREN ("KBHC") is a non-profit corporation organized under the laws of the Commonwealth of Kentucky, with its principal place of business located in Louisville, Kentucky.

11. Defendant VIOLA MILLER ("Miller") is the Secretary of the Cabinet for Families and Children of the Commonwealth of Kentucky. In this capacity, MILLER is responsible for approving all contracts for services between the Cabinet for Families and Children and contracting agencies, including KBHC. MILLER's actions complained of were performed and undertaken under color of Kentucky law. She is sued in her official capacity only.

12. Defendant ROBERT STEPHENS is the Secretary of the Justice Cabinet of the Commonwealth of Kentucky. In this capacity, STEPHENS is responsible for approving all contracts for services between the Justice Cabinet and contracting agencies, including KBHC. STEPHENS' actions complained of were performed and undertaken under color of Kentucky law. He is sued in his official capacity only.

13. Plaintiffs are all federal taxpayers. They have federal as well as state taxpayer standing because KBHC is the recipient of federal as well as state taxpayer dollars.

STATEMENT OF FACTS

14. ALICIA PEDREIRA holds a Bachelor of Science degree and a Master of Arts degree from the University of Louisville. She is currently employed as an intake counselor supervisor by Seven Counties Services, a Kentucky corporation that assists individuals in need of mental health services. PEDREIRA

is a lesbian and is in a long-term committed relationship with her life partner, Nance Goodman.

15. In or about February 1998, PEDREIRA was recruited by Jack Cox, KBHC Program Director, to apply for the publicly-funded position of Family Specialist at KBHC. PEDREIRA told Cox that she was a lesbian, and he still encouraged her to apply for the position. She applied, was offered and accepted the position, and began working full-time at the Spring Meadows Children's Home of KBHC on March 19, 1998.

16. PEDREIRA's job responsibilities included supervising adolescent youth in a transitional living cottage, teaching independent living skills, counseling, and assisting in individual case management.

17. PEDREIRA's job performance was outstanding through her employment with KBHC. PEDREIRA's six month performance evaluation lauded her "exceptional skills" and noted that she worked well with staff and was a "valuable part" of the KBHC program. PEDREIRA's direct supervisor, Jack Cox, described her as a good clinician and a "wonderful person to supervise," who was "very honest and hard working" and of the "highest moral and ethical character."

18. KBHC describes itself as the oldest Southern Baptist child care ministry and the largest private residential child care provider in Kentucky. It was founded in 1869 by the Ladies Aid Society of the

Walnut Street Baptist Church, along with women from other Baptist churches in Louisville.

19. Although historically KBHC was financed primarily by contributions from Baptist churches, during the time of PEDREIRA's employment, and at present, most of KBHC's budget comes from contracts with the Commonwealth of Kentucky.

20. KBHC also receives financial contributions from the Kentucky Baptist Convention and from individual Baptist churches. It is licensed by the Commonwealth of Kentucky as a child-care and child-placing agency.

21. KBHC contracts with Commonwealth of Kentucky agencies including, but not limited to, the Cabinet for Families and Children and the Justice Cabinet, to provide services to youth. Most of the youth in the care of KBHC are either temporary or permanent wards of the Commonwealth of Kentucky and are placed at KBHC by state or county social workers.

22. KBHC receives governments funds through contracts with Kentucky state government agencies, including the Cabinet for Families and Children and the Justice Cabinet's Department of Juvenile Justice. The Kentucky General Assembly has authorized these two Kentucky agencies to distribute state funds through such contracts pursuant to its taxing and spending powers, Section 230 of the Kentucky Constitution provides that "[n]o money shall be drawn from the State Treasury, except in pursuance

of appropriations made by law." The Kentucky Constitution gives the General Assembly the powers to tax and spend. *See* Ky. Const., §§ 36(1), 171. Pursuant to these powers, the General Assembly has provided that "[t]he [C]abinet [for Families and Children] or the Department of Juvenile Justice, as appropriate, is authorized and may pay for such care and treatment as it deems necessary for the well-being of any child committed to it, including medical expenses, room and board, clothing, and all other necessities for such children committed to its care and custody." Ky.Rev.Stat.Ann. § 200.115(1). The General Assembly has also authorized the Cabinet for Families and Children "to expend available funds to provide for the board, lodging, and care of children . . . who are placed by the cabinet in a foster home or boarding home." Ky.Rev.Stat.Ann. § 605.120(1). The General Assembly has in fact regularly appropriated funds to the Cabinet for Families and Children and the Department of Juvenile Justice. The funds provided by the Cabinet for Families and Children and the Department of Juvenile Justice to KBHC consist both of state funds obtained from Kentucky taxpayers and of federal funds obtained by the federal government from federal taxpayers and given by the federal government to the Commonwealth of Kentucky.

23. The Commonwealth of Kentucky pays for most of the services provided to youth in the care of KBHC, including adolescent youth at Spring Meadows Children's Home. The Commonwealth of

Kentucky also pays for the salaries of most KBHC employees, and paid the salary for PEDREIRA's position while she was employed at KBHC.

24. KBHC elects its trustees in accordance with the conditions and bylaws of the Kentucky Baptist Convention. It maintains a close relationship with the Kentucky Baptist Convention and is committed to the same purposes, interests and concerns as the Convention. KBHC reserves its leadership positions for those who are professing Christians and active members of the Baptist Church. Among the KBHC positions so restricted are: President, Executive Assistant to the President, Vice President of Development/ Communications, Vice President of Program Services, Regional Administrators, Cornerstone Counseling Directors, Director of Religious Life, and Special Representatives to the President.

25. KBHC's mission statement declares: "Kentucky Baptist Homes for Children provides care and hope for hurting families and children through Christ-centered ministries. . . . We are a Christian ministry that, through God's direction and leadership, reaches out to children and families with Christ's love and compassion. We are committed to presenting a clear message of Christian values."

26. On information and belief, KBHC seeks to instill its version of Christian values and teachings to the youth in its care by, among other things, taking the youth to Baptist church services, hiring only staff who model KBHC's version of Christian values and

lifestyles, denying the youth access to healthy adult gay and lesbian role models, providing informal Christian training to the youth through KBHC staff, and placing foster children in Baptist foster homes. KBHC's Christ-centered mission permeates KBHC programs and the services that KBHC provides to youth in its care.

27. KBHC requires all employees to "exhibit values in their professional conduct and personal lifestyles that are consistent with the Christian mission and purpose of the institution."

28. William Smithwick ("Smithwick") is the President and Chief Executive Officer of Defendant KBHC. In that position, he is responsible for formulating and applying the employment policies of Defendant KBHC.

29. In or about August 1998, a photograph of PEDREIRA and her life partner appeared in a display at the Kentucky State Fair. The photograph of the couple was taken at an AIDS Walk fundraiser. Neither PEDREIRA nor her partner was aware that the photograph was on display at the State Fair until PEDREIRA was informed by KBHC co-workers. Smithwick and other members of KBHC management became aware that PEDREIRA is a lesbian as a result of the photograph.

30. In or about September 1998, the Cabinet of KBHC, which consisted of Smithwick and other members of the KBHC management team, met and discussed whether PEDREIRA should remain

employed at KBHC in light of KBHC's religious belief that homosexuality is sinful and immoral.

31. Shortly thereafter, Jack Cox informed PEDREIRA that the KBHC Cabinet decided to ask PEDREIRA to resign because she is a lesbian. PEDREIRA refused to resign. Shortly thereafter, PEDREIRA was informed that she would be terminated because her sexual orientation was inconsistent with KBHC's religious beliefs.

32. PEDREIRA and Cox decided that it would be clinically dangerous if PEDREIRA's departure were not explained to the youth in her care, who might feel abandoned if they thought her departure was voluntary, or might feel that their trust was violated unless they were told the true reason for her departure. Therefore, for therapeutic reasons, PEDREIRA agreed to explain to the youth the reason she was being fired, and she and Cox met with the young men for this purpose. PEDREIRA had never discussed her sexual orientation with any of the young men until this meeting.

33. PEDREIRA suffered great humiliation and embarrassment as a result of being forced to disclose her sexual orientation, and the fact that she was being terminated because of it, to the youth in her care. Nonetheless, she told the young men in order to protect their well-being.

34. The following day, PEDREIRA led a regularly scheduled group session with the young men. Several of them were upset because another

KBHC staff member told them that PEDREIRA, who the young men had come to trust, was no better than a murderer because she was gay and therefore deserved to be fired. Several of the youth expressed fear that they could be expelled from KBHC if they were gay. PEDREIRA did her best to calm them and tried to reassure them that they would be protected.

35. PEDREIRA suffered further humiliation and embarrassment as she helped the young men in her care understand and accept her termination and worked to repair the sense of abandonment, betrayal, and instability caused by KBHC.

36. On or about October 23, 1998, PEDREIRA met with Smithwick, who informed PEDREIRA that her employment with KBHC was being terminated because she is a lesbian. PEDREIRA was given a Termination Statement by Karen Hamilton, KBHC Vice President for Human Resources. The Termination Statement declares: "Alicia Pedreira is being terminated on October 23, 1998, from Kentucky Baptist Homes for Children because her admitted homosexual lifestyle is contrary to Kentucky Baptist Homes for Children core values." In a public statement to the media concerning PEDREIRA's termination, KBHC explained: "It is important that we stay true to our Christian values. Homosexuality is a lifestyle that would prohibit employment."

37. On the same date that PEDREIRA was terminated, KBHC management informed all KBHC employees that "in order to reaffirm and clarify our

values," the Board of Directors of KBHC had that day adopted the following employment policy:

> Homosexuality is a lifestyle that would prohibit employment with Kentucky Baptist Homes for Children. The Board does not encourage or intend for staff to seek out people within the organization who may live an alternate lifestyle, we will, however, act according to Board policy if a situation is brought to our attention.

38. KBHC's termination of PEDREIRA and its simultaneous adoption of a policy barring gays and lesbians from employment was motivated by religious reasons, thus causing KBHC to make employment decisions based on religious criteria. KBHC's decision to deny youth in its care adult role models who are gay or lesbian was motivated by the religious goal of teaching youth that homosexuality is sinful and immoral, thus causing KBHC to provide services based on religious criteria.

39. KBHC's religion-based employment policy and its attempts to impart Christian teaching about homosexuality to youth in its care conflicts with widely-recognized best practices in the child welfare field, professional norms of social work, and the best interests of youth who are entrusted to KBHC's care by the Commonwealth of Kentucky. For example, the Code of Ethics for the National Association of Social Workers states: "Social workers should not practice, condone, facilitate, or collaborate with any form

of discrimination on the basis of . . . sexual orientation. . . ."

40. As a result of KBHC's religion-based employment policy and discriminatory stance concerning homosexuality, the Kent School of Social Work of the University of Louisville and the Department of Social Work of Spalding University informed KBHC that they would no longer use KBHC as a practicum placement site for their graduate students. The decisions of the Kent School of Social Work and the Spalding Department of Social Work were endorsed by the Kentucky Association of Social Work Educators. The quality of the services that KBHC provides to youth in its care has suffered as a result.

41. As a result of KBHC's religion-based employment policy and discriminatory stance concerning homosexuality, numerous KBHC employees, including trained counselors and social workers, have resigned their positions with the agency. These include, but are not limited to, PEDREIRA's direct supervisor, a KBHC cottage supervisor, and a KBHC residential counselor.

42. Numerous individuals, including trained counselors and social workers, have been unable to apply for employment at KBHC because of the agency's religion-based and discriminatory policies. The quality of the services that KBHC provides to youth in its care has suffered as a result.

43. KAREN VANCE is a trained social worker who holds a Bachelor's degree, with a concentration in Psychology, from the University of Kentucky. She works as a senior children's social worker for the Department of Children and Family Services of Los Angeles County, where she has worked for the past fourteen years with youth like those in the care of KBHC. Her job responsibilities include performing case management, conducting crisis interventions, counseling youth and families in need, and investigating child abuse and neglect allegations. Previously, VANCE worked with youth and families in need in a residential setting.

44. VANCE seeks to relocate to the Louisville area to be closer to her aging parents. She has applied during the past year for professional positions at institutions in the Louisville area that, like KBHC, provide services to at-risk youth.

45. There are professional positions at KBHC which are open, for which KBHC has sought applicants, and for which VANCE is qualified. VANCE would like to work at KBHC. However, VANCE has not applied to KBHC because she is lesbian. VANCE knows that her application would be futile in light of KBHC's formal and well-publicized policy prohibiting gays and lesbians from employment because of KBHC's religious beliefs. Were it not futile, VANCE would make out a bona fide application for an available position at KBHC for which she is qualified.

46. Because VANCE is barred from employment with KBHC, the largest provider of services to at-risk youth in Kentucky, and because she has not been able to obtain satisfactory employment elsewhere in Louisville, she has not been able to fulfill her plans to relocate to provide increased care and company to her aging parents.

47. Despite KBHC's adoption of a religion-based employment policy and its discriminatory stance concerning homosexuality, the Commonwealth of Kentucky has continued to provide KBHC with most of its operating budget, including funds for staff positions. Defendant MILLER has continued to approve service contracts with KBHC on behalf of the Cabinet for Families and Children. Defendant STEPHENS has continued to approve service contracts with KBHC on behalf of the Justice Cabinet.

48. The Commonwealth of Kentucky's continued funding of KBHC has engendered deep political divisiveness along religious lines by creating public questioning of the Commonwealth's neutrality on religious questions.

49. One of the adolescents in PEDREIRA's care was John Doe. Doe suffered from severe emotional and behavioral disorders and had been repeatedly institutionalized prior to arriving at Spring Meadows. PEDREIRA was the first counselor who ever worked effectively with Doe, and he progressed remarkably under her care.

50. JANE and JAMES DOE wrote to KBHC and complained that their son John Doe was devastated by PEDREIRA's termination and that his care and progress had suffered from her departure. Smithwick wrote a letter to the DOES in response, stating:

> We do not believe the homosexual lifestyle is the one God intends for the human race and do not want to suggest the same to our children. . . . The purpose of our agency is to help hurting children and families through Christ-centered ministries. Having staff whose lifestyles demonstrate the opposite of the Judea-Christian values we build our mission upon working with our kids is a contradiction of who we are.

51. The DOES are Kentucky taxpayers, and they object to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance against homosexuality.

52. PAUL SIMMONS is an ordained Baptist minister who taught Christian ethics at the Southern Baptist Theological Seminary in Louisville for twenty three years. He is now a clinical professor in the Department of Family and Community Medicine, and an adjunct professor in philosophy at the University of Louisville. Reverend SIMMONS is a Kentucky taxpayer, and he objects to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance concerning homosexuality.

53. JOHANNA W.H VAN WIJK-BOS is an ordained Presbyterian minister and has been a Professor of the Old Testament at the Louisville Presbyterian Theological Seminary for more than two decades. Reverend BOS is a Kentucky taxpayer, and she objects to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance concerning homosexuality.

54. ELWOOD STURTEVANT is an ordained Unitarian Universalist minister and is the pastor of the Thomas Jefferson Unitarian Church in Louisville. Reverend STURTEVANT is a Kentucky taxpayer, and he objects to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance concerning homosexuality.

55. BOB CUNNINGHAM was the first Louisville chairperson of the Kentucky Alliance Against Racism and Political Repression, and currently sits on the Alliance's Board of Directors. CUNNINGHAM, who is retired, is a member of Young's Chapel, African Methodist Episcopal (AME) of Louisville. CUNNINGHAM is a Kentucky taxpayer, and he objects to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and discriminatory stance concerning homosexuality.

56. All Plaintiffs are federal taxpayers and object to the receipt and use of taxpayer funds by KBHC in light of its religion-based employment policy and

discriminatory stance concerning homosexuality and, as both federal taxpayers and state taxpayers (with the exception of Plaintiff Vance), object to the receipt and use of taxpayer funds by KBHC in light of the fact that it is pervasively sectarian and the fact that it uses taxpayer dollars for religious indoctrination.

57. KBHC is pervasively sectarian. The Baptist Children's Messenger, a publication of KBHC, says that KBHC's "efforts include permeating the environment of KBHC's programs with Christian influences such as music, magazines and Bibles, and giving children opportunities to explore spiritual matters in many different ways: Mid-week Bible studies, mission trips, camp and Christian concerns are some of the things KBHC strives to offer." As reflected in that statement, religion permeates all aspects of the lives of the youth in KBHC's care. Religion permeates their treatment, as demonstrated by statements of Jay Close, KBHC's regional minister for the Louisville area: "The goal is to integrate religious or spiritual aspects into the treatment of every child or family member that KBHC services. What we have to do is to confront them with their need for God and attempt to bring spiritual matters into their lives." Religion also permeates their extracurricular activities, such as Christian camps and speakers. Moreover, there is reason to believe that there is evidence of religious iconography on display at KBHC, and evidence that KBHC leads its staff in prayer during staff meetings. Such pervasive sectarianism is consistent with the message that KBHC sends to the community at large

on its website: "We are a Christian ministry that, through God's direction and leadership, reaches out to children and families with Christ's love and compassion. We are committed to presenting a clear message of Christian values." It is also consistent with the message that KBHC sends to the community at large through its employees: "Kentucky Baptist Homes for Children is a ministry operated under the direction of a board of directors elected by the Kentucky Baptists Convention. Our mission is to provide care and hope for hurting families and children through Christ-centered ministries. Every employee is a role model for the children and families under Kentucky Baptist Homes for Children's care, therefore, employees are expected to exhibit values in their professional conduct and personal lifestyles that are consistent with the Christian mission and purpose of the institution. Kentucky Baptist Homes for Children prohibits personal behavior which . . . interferes with KBHC's pursuit of its Christian mission and purpose." As summed up by KBHC's President William Smithwick in a news release, "[KBHC's] mission is to provide care and hope for hurting families through Christ-centered ministries. I want this mission to permeate our agency like the very blood throughout our bodies. I want to provide Christian support to every child, staff member, and foster parent."

58. The contracts between KBHC and the Commonwealth do not restrict the use to which taxpayer dollars may be put. The Commonwealth does not prohibit the use of taxpayer dollars by KBHC for

religious purposes. No safeguards, statutory, administrative, or otherwise, exist to prevent KBHC from putting government funds to religious uses. The Commonwealth does not monitor KBHC to ensure that KBHC is not using government funds to finance religious activity. KBHC does not in any way attempt to use only private funds to pay for religious activity. KBHC uses government funds to pay the salaries of employees who engage in religious indoctrination and other religious activities as part of their duties at KBHC.

59. KBHC actually uses taxpayer dollars for religious activities, instruction, and indoctrination. For example, according to the Baptist Children's Messenger, KBHC's "goal is to keep Kentucky Baptist Homes for Children a Christ-centered agency, not just in name, but in practice." It quotes Mike Dixon, KBHC's Vice President for Religious Life, as saying, "It isn't too difficult to convince children that God exists. Kids are looking for someone, or something to believe in. What we have to do is give them an appropriate image of God. If they hear that and absorb it, most of them will give him a shot." It further quotes Dixon as saying that, of late, KBHC feels "a sense of urgency" in providing the "opportunity to experience God and accept Christ." Through an annual report, KBHC's President William Smithwick has made clear that KBHC dedicates staff resources to this goal: "We know that no child's treatment plan is complete without opportunities for spiritual growth. The angels rejoiced last year as 244 of our children made

decisions about their relationships with Jesus Christ. Because of that, we are committed to hiring youth ministers in each of our regions of service to direct religious activities and offer spiritual guidance to our children and families. We already have one of these positions filled." This specific dedication of staff resources supplements the religious indoctrination of the youth in KBHC's care that already occurs during the course of a typical day through KBHC's direct care counselors and other staff. In addition, KBHC pressures and coerces the youth in its care to attend Baptist church services twice a week, regardless of whether they are Baptist or even Christian. KBHC also leads the youth in its care in Christian prayer before meals; provides Bibles and other Christian literature to the youth in its care; has relationships with local churches that "come to campuses to lead Bible studies or to distribute Bibles and other materials;" makes efforts to increase the likelihood of child placement with Baptist families; and otherwise engages in religious indoctrination of the youth in its care – all regardless of whether the youth in its care are Baptist or even Christian.

60. After they learned of the circumstances of Plaintiff Pedreira's termination, Defendants Miller and Stephens decided to terminate the contractual relationship between KBHC and the Commonwealth because they believed that KBHC's religious views on homosexuality were compromising the quality of care that KBHC was providing to the youth in its care. They further believed that a continued contractual

relationship "[could] be construed as putting us in the position of endorsing – or at least through our funding – giving some sort of state sanction to a religious practice." At the eleventh hour, however, Governor Paul Patton, a Southern Baptist, overruled their decision at the request of KBHC and the Baptist community at large.

FIRST CLAIM FOR RELIEF

Violation of the Establishment Clause of the First Amendment, U.S. Constitution (Against Defendants Miller, Stephens and Kentucky Baptist Homes for Children)

61. Plaintiffs repeat, reallege and incorporate by reference the allegations contained in paragraphs 1 through 60 as if fully set out herein.

62. The Establishment Clause of the First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This Clause is applicable to the states and their political subdivisions through the Fourteenth Amendment of the U.S. Constitution.

63. The Commonwealth of Kentucky's practice of providing government funds to finance KBHC staff positions that are filled in accordance with religious tenets constitutes a violation of the Establishment Clause.

64. The Commonwealth of Kentucky's practice of providing government funds to finance KBHC services that seek to instill Christian values and teachings to the youth in its care constitutes a violation of the Establishment Clause.

65. The conduct of the Commonwealth of Kentucky described above has deprived and continues to deprive Plaintiffs of their rights, as taxpayers, that are protected by the First and Fourteenth Amendments to the United States Constitution and made actionable by 42 U.S.C. § 1983.

66. KBHC is named as a defendant in this claim, pursuant to Federal Rule of Civil Procedure 19, because in its absence complete relief cannot be afforded to Plaintiffs and because KBHC claims an interest relating to the subject of this action and its absence may as a practical matter impair or impede its ability to protect that interest.

67. As a result of Defendants' violations of Plaintiffs' rights as taxpayers, Plaintiffs are entitled to (1) a declaration that the Commonwealth of Kentucky has violated the Establishment Clause of the First Amendment of the United States Constitution by funding KBHC; (2) an order enjoining the Commonwealth of Kentucky from providing further funding to KBHC for staff positions as long as they continue to be filled in accordance with religious tenets and for services so long as they seek to instill Christian values and teachings to youth in KBHC's care; (3) an order requiring KBHC to reimburse the

Commonwealth of Kentucky for all Commonwealth funds it has received since ALICIA PEDREIRA's termination that have been used to fund PEDREIRA's former position and/or any other position that was filled pursuant to KBHC's unlawful employment policy, according to proof; and (4) an award of costs, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988.

SECOND CLAIM FOR RELIEF

Violation of KRS § 344.040(1)
(Religion-Based Employment Discrimination)
(By Plaintiffs Pedreira and Vance
Against Defendant KBHC)

68. Plaintiffs repeat, reallege and incorporate by reference the allegations contained in Paragraphs 1 through 67 as if fully set out herein.

69. KRS § 344.040(1) makes it an unlawful practice for an employer to discharge an employee, or to refuse to consider an applicant for employment, because of religion.

70. As President and Chief Executive Officer of KBHC, Smithwick is an agent of KBHC.

71. ALICIA PEDREIRA was discharged because of her failure to hold and adhere to the religious beliefs of Defendant KBHC and Smithwick concerning homosexuality, in violation of KRS § 344.040(1). Were it not for the impermissible religious motivation of Defendant KBHC and Smithwick, acting as an

agent for KBHC, PEDREIRA would not have been discharged.

72. At the time PEDREIRA was discharged, her job performance was highly satisfactory. She dutifully and faithfully performed her employment duties.

73. As a direct and proximate result of her unlawful discharge by Defendant KBHC and Smithwick, acting as an agent of KBHC, PEDREIRA has suffered and continues to suffer emotionally from humiliation and embarrassment.

74. As a direct and proximate result of the actions of Defendant KBHC and Smithwick, acting as an agent of KBHC, in unlawfully discharging PEDREIRA, she has suffered and continues to suffer other damages, including but not limited to past and future compensation; lost life insurance, health insurance, long- and short-term disability benefits; expenses involved in seeking other suitable employment; and attorney fees and costs.

75. KBHC will not consider KAREN VANCE for employment because of her failure to hold and adhere to KBHC's religious beliefs concerning homosexuality, in violation of KRS § 344.040(1), even though there are professional positions at KBHC which are open, for which KBHC has sought applicants, and for which VANCE is qualified. Were it not for the impermissible religious motivation and gross and pervasive discrimination of KBHC, VANCE would submit a bona fide application for employment.

76. As a direct and proximate result of KBHC's unlawful employment policy, VANCE has suffered and continues to suffer emotionally, among other reasons, because she cannot fulfill her plan to relocate to Louisville and provide increased care and company to her aging parents. In addition, VANCE has suffered and continues to suffer other damages, including but not limited to expenses involved in seeking other suitable employment and attorney fees and costs.

THIRD CLAIM FOR RELIEF

Violation of 42 U.S.C. §2000e-2(a)(1) (Religion-Based Employment Discrimination) (By Plaintiff Vance Against Defendant KBHC)

77. Plaintiffs repeat, reallege and incorporate by reference the allegations contained in paragraphs 1 through 76 as if fully set out herein.

78. 42 U.S.C. §2000e-2(a)(1) makes it an unlawful practice for an employer to refuse to hire an employee because of religion.

79. KAREN VANCE is barred from employment by KBHC because of her failure to hold and adhere to the religious beliefs of Defendant KBHC concerning homosexuality, in violation of 42 U.S.C. §2000e-2(a)(1). Were it not for the impermissible religious motivation and gross and pervasive discrimination of Defendant KBHC, VANCE would submit a bona fide application for a professional position at KBHC for which she is qualified.

80. KBHC has sought applicants for professional positions for which VANCE is qualified. VANCE would like to work for KBHC, but her application for employment with KBHC would be futile because VANCE is lesbian and therefore is barred from employment with KBHC.

81. The effect of KBHC's policy and practice of discriminating in employment on the basis of religion has been to deprive VANCE of equal employment opportunities.

82. VANCE is now suffering and will continue to suffer irreparable injury from KBHC's policy, practice and specific acts of discrimination as set forth herein.

83. Within 180 days of the occurrence of the acts alleged above, charges of discrimination were filed with the Equal Employment Opportunity Commission by VANCE. VANCE is awaiting receipt of her Right-to-Sue letter.

84. As a direct and proximate result of KBHC's unlawful employment policy, VANCE has suffered and continues to suffer emotionally because she cannot be reunited with her aging parents. In addition, VANCE has suffered and continues to suffer other damages, including but not limited to expenses involved in seeking other suitable employment and attorney fees and costs.

REQUEST FOR RELIEF

All Plaintiffs request a jury trial on all matters so triable.

All Plaintiffs except Plaintiff VANCE request the following relief:

1. A declaration that the Commonwealth of Kentucky has violated the Establishment Clause of the First Amendment of the United States Constitution by funding KBHC;

2. An order enjoining the Commonwealth of Kentucky from providing further funding to KBHC for staff positions as long as they continue to be filled in accordance with religious tenets and for services as long as they seek to instill Christian values and teachings to youth in KBHC's care;

3. An order requiring KBHC to reimburse the Commonwealth of Kentucky for any Commonwealth funds it has received since ALICIA PEDREIRA's termination that have been used to fund PEDREIRA's former position and/or any other position that was filled pursuant to KBHC's unlawful employment policy, according to proof;

4. An award of costs, including reasonable attorney's fees, pursuant to 42 U.S.C. §1988;

5. Such other relief as the Court deems just and appropriate.

Plaintiff PEDREIRA requests the following additional relief:

1. An order declaring that KBHC's policy barring lesbians and gay men from employment violates KRS § 344.040(1) because it constitutes employment discrimination because of religion;

2. Actual and compensatory damages against Defendant KBHC in an amount to be proven at trial;

3. An award of costs, including reasonable attorney's fees, pursuant to KRS §344.450.

4. Such other relief as the Court deems just and appropriate.

Plaintiff VANCE requests the following relief:

1. An order declaring that KBHC's policy barring lesbians and gay men from employment violates KRS § 344.040(1) because it constitutes employment discrimination because of religion;

2. An order declaring that KBHC's policy barring lesbians and gay men from employment violates 42 U.S.C. §2000e-2(a)(1) because it constitutes employment discrimination because of religion;

3. Actual and compensatory damages against Defendant KBHC in an amount to be proven at trial;

4. An award of costs, including reasonable attorney's fees, pursuant to KRS §340.450 and 42 U.S.C. §2000e *et seq*.

5. Such other relief as the Court deems just and appropriate.

Respectfully submitted,

/s/ Kenneth Y. Choe

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ALICIA M. PEDREIRA, PAUL SIMMONS, JOHANNA W.H. VAN WIJK-BOS, ELWOOD STURTEVANT, Plaintiffs v. SUNRISE CHILDREN'S SERVICES, F/K/A KENTUCKY BAPTIST HOMES FOR CHILDREN, INC.; JANIE MILLER, SECRETARY, CABINET FOR HEALTH AND FAMILY SERVICES, AND J. MICHAEL BROWN, SECRETARY, JUSTICE AND PUBLIC SAFETY CABINET, Defendants.	CIVIL ACTION NO. 3:00-CV-210-S **SECOND AMENDED COMPLAINT** (Filed Jul. 6, 2012)

INTRODUCTION

This lawsuit is brought on behalf of four Kentucky taxpayers who object to and have been injured by the Commonwealth of Kentucky's funding of the Sunrise Children's Services, formerly known as Kentucky Baptist Homes for Children, Inc. (hereinafter "KBHC"). KBHC uses Commonwealth funds to

hire employees who are required to accept and abide by the institution's religious beliefs, and to pay for services that seek to teach youth the institution's version of Christian values.

Alicia Pedreira was employed by KBHC and then terminated because her committed relationship with another woman was inconsistent with KBHC's religious beliefs. The other taxpayer Plaintiffs are clergy and concerned citizens who object to the use of their state tax dollars to fund KBHC.

Plaintiffs believe that the actions of the Commonwealth of Kentucky violate the Establishment Clause of the First Amendment of the United States Constitution.

JURISDICTION

1. This action involves a federal question under the First Amendment to the United States Constitution. Jurisdiction is founded upon 28 U.S.C. § 1331(a), which gives federal district courts original jurisdiction over cases involving federal questions and 28 U.S.C. § 1343. This Court has jurisdiction to grant the declaratory relief requested under 28 U.S.C. § 2201.

VENUE

2. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because some of the Defendants reside in this district, and a substantial number of

the events giving rise to these claims occurred in this district.

PARTIES

3. Plaintiff ALICIA M. PEDREIRA (hereinafter "Pedreira") is a resident of Louisville, Kentucky. PEDREIRA was employed as a Family Specialist at KBHC's Spring Meadows Children's Home. Pedreira has been, and now is, a taxpayer of the Commonwealth of Kentucky.

4. Plaintiff PAUL SIMMONS ("Simmons") is a resident of Louisville, Kentucky. At all relevant times, SIMMONS has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

5. Plaintiff JOHANNA W.H. VAN WIJK-BOS ("Bos") is a resident of Louisville, Kentucky. At all relevant times, BOS has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

6. Plaintiff ELWOOD STURTEVANT ("Sturtevant") is a resident of Louisville, Kentucky. At all relevant times, STURTEVANT has been, and continues to be, a taxpayer of the Commonwealth of Kentucky.

7. Defendant KBHC is a non-profit corporation organized under the laws of the Commonwealth of Kentucky, with its principal place of business located in Mt. Washington, Kentucky.

8. Defendant JANIE MILLER ("Miller") is the Secretary of the Cabinet for Health and Family

Services of the Commonwealth of Kentucky. In this capacity, MILLER is responsible for approving all contracts for services between the Cabinet for Health and Family Services and contracting agencies, including KBHC. MILLER's actions complained of were performed and undertaken under color of Kentucky law. She is sued in her official capacity only.

9. Defendant J. MICHAEL BROWN is the Secretary of the Justice and Public Safety Cabinet of the Commonwealth of Kentucky. In this capacity, BROWN is responsible for approving all contracts for services between the Justice and Public Safety Cabinet and contracting agencies, including KBHC. BROWN's actions complained of were performed and undertaken under color of Kentucky law. He is sued in his official capacity only.

10. Plaintiffs are all Kentucky state taxpayers. They have state taxpayer standing because KBHC is the recipient of state taxpayer dollars.

STATEMENT OF FACTS

11. ALICIA PEDREIRA holds a Bachelor of Science degree and a Master of Arts degree from the University of Louisville. PEDREIRA is a lesbian and, at the time of her employment with KBHC, was in a long-term committed relationship with her life partner, Nance Goodman.

12. In or about February 1998, PEDREIRA was recruited by Jack Cox, KBHC Program Director, to

apply for the publicly-funded position of Family Specialist at KBHC. PEDREIRA told Cox that she was a lesbian, and he still encouraged her to apply for the position. She applied, was offered and accepted the position, and began working full-time at the Spring Meadows Children's Home of KBHC on March 19, 1998.

13. PEDREIRA's job responsibilities included supervising adolescent youth in a transitional living cottage, teaching independent living skills, counseling, and assisting in individual case management.

14. PEDREIRA's job performance was outstanding throughout her employment with KBHC. PEDREIRA's six month performance evaluation lauded her "exceptional skills" and noted that she worked well with staff and was a "valuable part" of the KBHC program. PEDREIRA's direct supervisor, Jack Cox, described her as a good clinician and a "wonderful person to supervise," who was "very honest and hard working" and of the "highest moral and ethical character."

15. KBHC describes itself as the oldest Southern Baptist child care ministry and the largest private residential child care provider in Kentucky. It was founded in 1869 by the Ladies Aid Society of the Walnut Street Baptist Church, along with women from other Baptist churches in Louisville.

16. Although historically KBHC was financed primarily by contributions from Baptist churches, during the time of PEDREIRA's employment, and at

present, most of KBHC's budget comes from contracts with the Commonwealth of Kentucky.

17. KBHC also receives financial contributions from the Kentucky Baptist Convention and from individual Baptist churches. It is licensed by the Commonwealth of Kentucky as a child-care and child-placing agency.

18. KBHC contracts with Commonwealth of Kentucky agencies including, but not limited to, the Cabinet for Health and Family Services and the Justice and Public Safety Cabinet, to provide services to youth. Most of the youth in the care of KBHC are either temporary or permanent wards of the Commonwealth of Kentucky and are placed at KBHC by state or county social workers.

19. KBHC receives state funds through contracts with Kentucky state government agencies, including the Cabinet for Health and Family Services and the Justice and Public Safety Cabinet's Department of Juvenile Justice. The Kentucky General Assembly has authorized these two Kentucky agencies to distribute state funds through such contracts pursuant to its taxing and spending powers. Section 230 of the Kentucky Constitution provides that "[n]o money shall be drawn from the State Treasury, except in pursuance of appropriations made by law." The Kentucky Constitution gives the General Assembly the powers to tax and spend. *See* Ky. Const., §§ 36(1), 171. Pursuant to these powers, the General Assembly has provided that "[t]he [C]abinet [for Health and

Family Services] or the Department of Juvenile Justice, as appropriate, is authorized and may pay for such care and treatment as it deems necessary for the well-being of any child committed to it, including medical expenses, room and board, clothing, and all other necessities for such children committed to its care and custody." Ky. Rev. Stat. Ann. § 200.115(1). The General Assembly has also authorized the Cabinet for Health and Family Services "to expend available funds to provide for the board, lodging, and care of children . . . who are placed by the cabinet in a foster home or boarding home." Ky. Rev. Stat. Ann. § 605.120(1). The General Assembly has in fact regularly appropriated state funds to the Cabinet for Health and Family Services and the Department of Juvenile Justice.

20. The Commonwealth of Kentucky pays for most of the services provided to youth in the care of KBHC, including adolescent youth at Spring Meadows Children's Home. KBHC uses funds obtained from the Commonwealth to pay the salaries of most KBHC employees, including the salary for PEDREIRA's position while she was employed at KBHC.

21. KBHC elects its trustees in accordance with the conditions and bylaws of the Kentucky Baptist Convention. It maintains a close relationship with the Kentucky Baptist Convention and is committed to the same purposes, interests and concerns as the Convention. KBHC reserves its leadership positions for those who are professing Christians and active members of the Baptist Church. Among the KBHC positions

so restricted are: President, Executive Assistant to the President, Vice President of Development/ Communications, Vice President of Program Services, Regional Administrators, Cornerstone Counseling Directors, Director of Religious Life, and Special Representatives to the President.

22. KBHC's mission statement declares: "Kentucky Baptist Homes for Children provides care and hope for hurting families and children through Christ-centered ministries. . . . We are a Christian ministry that, through God's direction and leadership, reaches out to children and families with Christ's love and compassion. We are committed to presenting a clear message of Christian values."

23. On information and belief, KBHC seeks to instill its version of Christian values and teachings to the youth in its care by, among other things, taking the youth to Baptist church services, hiring only staff who model KBHC's version of Christian values and lifestyles, denying the youth access to healthy adult gay and lesbian role models, providing informal Christian training to the youth through KBHC staff, and placing foster children in Baptist foster homes. KBHC's Christ-centered mission permeates KBHC programs and the services that KBHC provides to youth in its care.

24. KBHC requires all employees to "exhibit values in their professional conduct and personal lifestyles that are consistent with the Christian mission and purpose of the institution."

25. William Smithwick ("Smithwick") is the President and Chief Executive Officer of Defendant KBHC. In that position, he is responsible for formulating and applying the employment policies of Defendant KBHC.

26. In or about August 1998, a photograph of PEDREIRA and her life partner appeared in a display at the Kentucky State Fair. The photograph of the couple was taken at an AIDS Walk fundraiser. Neither PEDREIRA nor her partner was aware that the photograph was on display at the State Fair until PEDREIRA was informed by KBHC co-workers. Smithwick and other members of KBHC management became aware that PEDREIRA is a lesbian as a result of the photograph.

27. In or about September 1998, the Cabinet of KBHC, which consisted of Smithwick and other members of the KBHC management team, met and discussed whether PEDREIRA should remain employed at KBHC in light of KBHC's religious belief that homosexuality is sinful and immoral.

28. Shortly thereafter, Jack Cox informed PEDREIRA that the KBHC Cabinet decided to ask PEDREIRA to resign because she is a lesbian. PEDREIRA refused to resign. Shortly thereafter, PEDREIRA was informed that she would be terminated because her sexual orientation was inconsistent with KBHC's religious beliefs.

29. PEDREIRA and Cox decided that it would be clinically dangerous if PEDREIRA's departure

were not explained to the youth in her care, who might feel abandoned if they thought her departure was voluntary, or might feel that their trust was violated unless they were told the true reason for her departure. Therefore, for therapeutic reasons, PEDREIRA agreed to explain to the youth the reason she was being fired, and she and Cox met with the young men for this purpose. PEDREIRA had never discussed her sexual orientation with any of the young men until this meeting.

30. PEDREIRA suffered great humiliation and embarrassment as a result of being forced to disclose her sexual orientation, and the fact that she was being terminated because of it, to the youth in her care. Nonetheless, she told the young men in order to protect their well-being.

31. The following day, PEDREIRA led a regularly scheduled group session with the young men. Several of them were upset because another KBHC staff member told them that PEDREIRA, who the young men had come to trust, was no better than a murderer because she was gay and therefore deserved to be fired. Several of the youth expressed fear that they could be expelled from KBHC if they were gay. PEDREIRA did her best to calm them and tried to reassure them that they would be protected.

32. PEDREIRA suffered further humiliation and embarrassment as she helped the young men in her care understand and accept her termination and

worked to repair the sense of abandonment, betrayal, and instability caused by KBHC.

33. On or about October 23, 1998, PEDREIRA met with Smithwick, who informed PEDREIRA that her employment with KBHC was being terminated because she is a lesbian. PEDREIRA was given a Termination Statement by Karen Hamilton, KBHC Vice President for Human Resources. The Termination Statement declares: "Alicia Pedreira is being terminated on October 23, 1998, from Kentucky Baptist Homes for Children because her admitted homosexual lifestyle is contrary to Kentucky Baptist Homes for Children core values." In a public statement to the media concerning PEDREIRA's termination, KBHC explained: "It is important that we stay true to our Christian values. Homosexuality is a lifestyle that would prohibit employment."

34. On the same date that PEDREIRA was terminated, KBHC management informed all KBHC employees that "in order to reaffirm and clarify our values," the Board of Directors of KBHC had that day adopted the following employment policy:

> Homosexuality is a lifestyle that would prohibit employment with Kentucky Baptist Homes for Children. The Board does not encourage or intend for staff to seek out people within the organization who may live an alternate lifestyle, we will, however, act according to Board policy if a situation is brought to our attention.

35. KBHC's termination of PEDREIRA and its simultaneous adoption of a policy barring gays and lesbians from employment was motivated by religious reasons. KBHC's decision to deny youth in its care adult role models who are gay or lesbian was motivated by the religious goal of teaching youth that homosexuality is sinful and immoral, thus causing KBHC to provide services based on religious criteria.

36. KBHC's religiously-motivated employment policy and its attempts to impart Christian teaching about homosexuality to youth in its care conflicts with widely-recognized best practices in the child welfare field, professional norms of social work, and the best interests of youth who are entrusted to KBHC's care by the Commonwealth of Kentucky. For example, the Code of Ethics for the National Association of Social Workers states: "Social workers should not practice, condone, facilitate, or collaborate with any form of discrimination on the basis of . . . sexual orientation. . . ."

37. As a result of KBHC's religiously-motivated employment policy and discriminatory stance concerning homosexuality, the Kent School of Social Work of the University of Louisville and the Department of Social Work of Spalding University informed KBHC that they would no longer use KBHC as a practicum placement site for their graduate students. The decisions of the Kent School of Social Work and the Spalding Department of Social Work were endorsed by the Kentucky Association of Social Work

Educators. The quality of the services that KBHC provides to youth in its care has suffered as a result.

38. As a result of KBHC's religiously-motivated employment policy and discriminatory stance concerning homosexuality, numerous KBHC employees, including trained counselors and social workers, have resigned their positions with the agency. These include, but are not limited to, PEDREIRA's direct supervisor, a KBHC cottage supervisor, and a KBHC residential counselor.

39. Numerous individuals, including trained counselors and social workers, have been unable to apply for employment at KBHC because of the agency's religiously-motivated and discriminatory policy. The quality of the services that KBHC provides to youth in its care has suffered as a result.

40. Despite KBHC's adoption of a religiously-motivated employment policy concerning homosexuality, the Commonwealth of Kentucky has continued to provide KBHC with most of its operating budget, including funds for staff positions. Defendant MILLER has continued to approve service contracts with KBHC on behalf of the Cabinet for Health and Family Services. Defendant BROWN has continued to approve service contracts with KBHC on behalf of the Justice and Public Safety Cabinet.

41. The Commonwealth of Kentucky's continued funding of KBHC has engendered deep political divisiveness along religious lines by creating public

questioning of the Commonwealth's neutrality on religious questions.

42. PAUL SIMMONS is an ordained Baptist minister who taught Christian ethics at the Southern Baptist Theological Seminary in Louisville for twenty three years. He is now a clinical professor in the Department of Family and Community Medicine, and an adjunct professor in philosophy at the University of Louisville. Reverend SIMMONS is a Kentucky taxpayer, and he objects to the receipt and use of taxpayer funds by KBHC in light of its religiously-motivated employment policy concerning homosexuality.

43. JOHANNA W.H. VAN WIJK-BOS is an ordained Presbyterian minister and has been a Professor of the Old Testament at the Louisville Presbyterian Theological Seminary for more than two decades. Reverend BOS is a Kentucky taxpayer, and she objects to the receipt and use of taxpayer funds by KBHC in light of its religiously-motivated employment policy and discriminatory stance concerning homosexuality.

44. ELWOOD STURTEVANT is an ordained Unitarian Universalist minister and is the pastor of the Thomas Jefferson Unitarian Church in Louisville. Reverend STURTEVANT is a Kentucky taxpayer, and he objects to the receipt and use of taxpayer funds by KBHC in light of its religiously-motivated employment policy and discriminatory stance concerning homosexuality.

45. As state taxpayers, Plaintiffs object to the receipt and use of taxpayer funds by KBHC in light of

the fact that it is pervasively sectarian and the fact that it uses taxpayer dollars for religious indoctrination.

46. KBHC is pervasively sectarian. The Baptist Children's Messenger, a publication of KBHC, says that KBHC's "efforts include permeating the environment of KBHC's programs with Christian influences such as music, magazines and Bibles, and giving children opportunities to explore spiritual matters in many different ways: Mid-week Bible studies, mission trips, camp and Christian concerns are some of the things KBHC strives to offer." As reflected in that statement, religion permeates all aspects of the lives of the youth in KBHC's care. Religion permeates their treatment, as demonstrated by statements of Jay Close, KBHC's regional minister for the Louisville area: "The goal is to integrate religious or spiritual aspects into the treatment of every child or family member that KBHC services. What we have to do is to confront them with their need for God and attempt to bring spiritual matters into their lives." Religion also permeates their extracurricular activities, such as Christian camps and speakers. Moreover, there is reason to believe that there is evidence of religious iconography on display at KBHC, and evidence that KBHC leads its staff in prayer during staff meetings. Such pervasive sectarianism is consistent with the message that KBHC sends to the community at large on its website: "We are a Christian ministry that, through God's direction and leadership, reaches out to children and families

with Christ's love and compassion. We are committed to presenting a clear message of Christian values." It is also consistent with the message that KBHC sends to the community at large through its employees: "Kentucky Baptist Homes for Children is a ministry operated under the direction of a board of directors elected by the Kentucky Baptists Convention. Our mission is to provide care and hope for hurting families and children through Christ-centered ministries. Every employee is a role model for the children and families under Kentucky Baptist Homes for Children's care, therefore, employees are expected to exhibit values in their professional conduct and personal lifestyles that are consistent with the Christian mission and purpose of the institution. Kentucky Baptist Homes for Children prohibits personal behavior which . . . interferes with KBHC's pursuit of its Christian mission and purpose." As summed up by KBHC's President William Smithwick in a news release, "[KBHC's] mission is to provide care and hope for hurting families through Christ-centered ministries. I want this mission to permeate our agency like the very blood throughout our bodies. I want to provide Christian support to every child, staff member, and foster parent."

47. The contracts between KBHC and the Commonwealth do not effectively restrict the use to which taxpayer dollars may be put. The Commonwealth does not effectively prohibit the use of taxpayer dollars by KBHC for religious purposes. No effective safeguards, statutory, administrative, or

otherwise, exist to prevent KBHC from putting government funds to religious uses. The Commonwealth does not effectively monitor KBHC to ensure that KBHC is not using government funds to finance religious activity. KBHC does not effectively attempt to use only private funds to pay for religious activity. KBHC uses government funds to pay the salaries of employees who engage in religious indoctrination and other religious activities as part of their duties at KBHC.

48. KBHC actually uses taxpayer dollars for religious activities, instruction, and indoctrination. For example, according to the Baptist Children's Messenger, KBHC's "goal is to keep Kentucky Baptist Homes for Children a Christ-centered agency, not just in name, but in practice." It quotes Mike Dixon, KBHC's Vice President for Religious Life, as saying, "It isn't too difficult to convince children that God exists. Kids are looking for someone, or something to believe in. What we have to do is give them an appropriate image of God. If they hear that and absorb it, most of them will give him a shot." It further quotes Dixon as saying that, of late, KBHC feels "a sense of urgency" in providing the "opportunity to experience God and accept Christ." Through an annual report, KBHC's President William Smithwick has made clear that KBHC dedicates staff resources to this goal: "We know that no child's treatment plan is complete without opportunities for spiritual growth. The angels rejoiced last year as 244 of our children made decisions about their relationships with Jesus Christ.

Because of that, we are committed to hiring youth ministers in each of our regions of service to direct religious activities and offer spiritual guidance to our children and families. We already have one of these positions filled." This specific dedication of staff resources supplements the religious indoctrination of the youth in KBHC's care that already occurs during the course of a typical day through KBHC's direct care counselors and other staff. In addition, KBHC pressures and coerces the youth in its care to attend Baptist church services twice a week, regardless of whether they are Baptist or even Christian. KBHC also leads the youth in its care in Christian prayer before meals; provides Bibles and other Christian literature to the youth in its care; has relationships with local churches that "come to campuses to lead Bible studies or to distribute Bibles and other materials;" makes efforts to increase the likelihood of child placement with Baptist families; and otherwise engages in religious indoctrination of the youth in its care – all regardless of whether the youth in its care are Baptist or even Christian.

49. After they learned of the circumstances of Plaintiff Pedreira's termination, Viola Miller and Robert Stephens, who were then the Secretaries of the Cabinet for Families and Children and the Justice Cabinet respectively, decided to terminate the contractual relationship between KBHC and the Commonwealth because they believed that KBHC's religious views on homosexuality were compromising the quality of care that KBHC was providing to the

youth in its care. They further believed that a continued contractual relationship "[could] be construed as putting us in the position of endorsing – or at least through our funding – giving some sort of state sanction to a religious practice." At the eleventh hour, however, Governor Paul Patton, a Southern Baptist, overruled their decision at the request of KBHC and the Baptist community at large.

FIRST CLAIM FOR RELIEF

Violation of the Establishment Clause of the First Amendment, U.S. Constitution (Against Defendants Miller and Brown)

50. Plaintiffs repeat, reallege and incorporate by reference the allegations contained in paragraphs 1 through 49 as if fully set out herein.

51. The Establishment Clause of the First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This Clause is applicable to the states and their political subdivisions through the Fourteenth Amendment of the U.S. Constitution.

52. The Commonwealth of Kentucky's practice of providing government funds to finance KBHC staff positions that are filled in accordance with religious tenets constitutes evidence of a violation of the Establishment Clause.

53. The Commonwealth of Kentucky's practice of providing government funds to finance KBHC services that seek to instill Christian values and teachings to the youth in its care constitutes a violation of the Establishment Clause.

54. The conduct of the Commonwealth of Kentucky described above has deprived and continues to deprive Plaintiffs of their rights, as Kentucky taxpayers, that are protected by the First and Fourteenth Amendments to the United States Constitution and made actionable by 42 U.S.C. § 1983.

55. Ky. Rev. Stat. Ann. § 200.115(1), Ky. Rev. Stat. Ann. § 605.120(1), and the appropriation acts by the Kentucky General Assembly that are referred to in paragraph 19 above are unconstitutional as applied. These statutes and appropriations acts violate the Establishment Clause as applied in the context of the provision of Commonwealth funds to KBHC because these statutes and appropriations acts authorize the provision of Commonwealth funds to private child-care providers (such as KBHC) but lack any restrictions or safeguards against religious use of the funds or provision of the funds to pervasively religious entities.

56. KBHC is named as a defendant in this claim, pursuant to Federal Rule of Civil Procedure 19, because in its absence complete relief cannot be afforded to Plaintiffs and because KBHC claims an interest relating to the subject of this action and its

absence may as a practical matter impair or impede its ability to protect that interest.

57. As a result of Defendants Miller's and Brown's and their predecessors' violations of Plaintiffs' rights as Kentucky taxpayers, Plaintiffs are entitled to (1) a declaration that the Commonwealth of Kentucky has violated the Establishment Clause of the First Amendment of the United States Constitution by funding KBHC; (2) an order enjoining the Commonwealth of Kentucky from providing further funding to KBHC for services so long as they seek to instill Christian values and teachings to youth in KBHC's care; and (3) an award of costs, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988.

REQUEST FOR RELIEF

All Plaintiffs request the following relief:

1. A declaration that the Commonwealth of Kentucky has violated the Establishment Clause of the First Amendment of the United States Constitution by funding KBHC;

2. An order enjoining the Commonwealth of Kentucky from providing further funding to KBHC for services as long as they seek to instill Christian values and teachings to youth in KBHC's care;

3. An award of costs, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988;

4. Such other relief as the Court deems just and appropriate.

Dated: January 10, 2012

Respectfully submitted,

s/ David B. Bergman

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COMMONWEALTH OF KENTUCKY
CABINET FOR HEALTH AND FAMILY SERVICES
PRIVATE CHILD CARE AGREEMENT

THIS AGREEMENT, made and entered into as of the 1st day of July, 2004, by and between the Commonwealth of Kentucky, Cabinet for Health and Family Services, hereinafter referred to as the Cabinet, and

Kentucky Baptist Homes for Children
10200 Linn Station Road, Suite 200
Louisville KY 40223
(502) 245-2101

Hereinafter referred to as the Agency,

To provide **Residential Treatment Program (Institution)**
Foster Placement Services (Foster Care, Therapeutic Foster Care, Independent Living services)

* * *

2 THE AGENCY AGREES TO PERFORM THE SERVICES AS FOLLOWS:

2.1 Services to Families and Children

Accept selected children that are referred by the Cabinet to their Agency for services and/or care in accordance with the Agency's Application to Provide Private Child Care Services to provide the following: ***Residential Treatment Program, Foster Care, Therapeutic Foster Care, Independent Living services.***

A. The Application is on file with the Cabinet for Health and Family Services and the Agency;

B. Document the Agency's action on each referral by completing Section G. of the CLIENT INTERAGENCY PCC REFERRAL FORM THE CABINET – 886, and sending it back to the Cabinet's office that made the referral;

C. Provide such child or children with a family type environment, including adequate food, shelter, clothing (except, as otherwise provided by the Cabinet under this agreement), incidental expenses, affection, training, recreation, education, and opportunities for religious, spiritual, or ethical development in the faith of the child's choice;

D. Provide each committed child with personal allowance of at least those amounts shown in Attachment A, and document the disbursements. Personal allowances are an entitlement of the child and may not be disbursed as contingent upon the child's behavior or taken or withheld as a means of punishment. This does not preclude reasonable restitution for intentional damage to property.

E. Admit all clients entering this program according to the needs of the child, the capacity of the Agency to meet those needs; and the program; type of commitment will not be a factor.

F. Prohibit the use of Corporal Punishment for children in the custody of the Cabinet as specified in 922 KAR 1:300, and 922 KAR 1:310.

G. Agree to report to the child's Cabinet social service worker and parent (when appropriate) within twenty-four (24) hours, or the next working day, any critical incidents. Critical incidents are defined as: 1) possession of deadly weapon, 2) serious injury requiring professional medical attention, to residents or staff, resulting from a conflict with a child, 3) AWOL, 4) suicide attempts requiring professional medical attention, and 5) criminal activity by a child requiring notification of law enforcement.

H. Agree to report to the Cabinet immediately the death of a child, psychiatric/ medical hospital hospitalization, and allegations of child abuse/neglect. Such reports shall be made to the child's Cabinet social service worker. In situations involving reports of suspected child abuse/neglect, the Cabinet for Health and Family Services, Division for Licensing and Regulation, Office of the Inspector General shall also be notified. Allegations of child abuse/neglect shall be reported in accordance with KRS 620.030 and to the Cabinet's Child Abuse Hotline at 1-800-752-6200.

I. Submit reports as requested by the Cabinet including a monthly progress report for each child receiving services and/or care under provision of this agreement to the Cabinet's local office having responsibility for planning with the Agency. These monthly progress reports may be replaced by the Cabinet's required progress reports (CRP-001 & 003) on those months where both are due.

J. Cooperate with the Cabinet's six-month review to determine the goals for children and length of stay. Justification for an extension for residential care beyond the time agreed to in the treatment plan shall be completed by the Treatment Team, which shall consist of Cabinet and provider staff.

K. Work in partnership with the Cabinet concerning the care of the children including scheduled treatment planning conferences. Participate in Cabinet Family Team Meetings and/or facilitated staffing when invited with appropriate prior notice and as the Agency has staff available.

L. Give two (2) weeks advanced notice prior to the discharge of a child which is unanticipated in the treatment plan, and prior to physically relocating a child to another address. Notice must be submitted in written form, with specific reasons for unanticipated discharge, and

recommendations for future treatment. This does not preclude medically necessary treatment (i.e. psychiatric hospitalization). The Agency shall maintain the child's placement if discharge from a hospital or detention center occurs prior to the two weeks advance notice expiring. Provide all information to the social services worker and to the next placement at the time of discharge.

M. Provide a two (2) week paid "bed hold" at the written request of the Cabinet for children furloughed from the facility or AWOL, assuring the child can return during that period of time. Paid bed holds are not applicable when an Agency transfers a child between its own programs. This may be extended at the written request of the Cabinet for two (2) additional paid weeks if medically necessary. If the absence exceeds 2 weeks (4 weeks with approved medical need), the child shall be treated as a new admission.

N. Cooperate with the Cabinet concerning the care of the children, including the assistance of staff with scheduled treatment planning conferences to meet federal and state requirements, and in plans for individual children receiving services and/or care from the Agency.

O. Provide the Cabinet's social service worker information needed to coordinate

plans and services to a child and a child's family (when appropriate) and to conduct required case reviews such as the Five (5) Day Case Planning Conference, Six (6) Month Case Planning Conference, Administrative Reviews, and Judicial Reviews;

P. Return such child or children to the authorized representative of the Cabinet at any time upon request;

Q. Provide appropriate social services to the child or children and family.

R. Inform the Cabinet social service worker prior to any off-campus employment of any child receiving services or care under provision of this agreement and screen proposed work assignments and off-campus employment for compliance with Child Labor Laws. KRS Chapter 339.

S. All personal clothing shall be given to the child, the child's social service worker, sent to the Cabinet's social service worker, or sent to a location designated by the child's social service worker within 7 days of the child's discharge from the placement. A written inventory of the child's clothing and a written accounting of the child's clothing allowance will be made available to the Child's social service worker upon request.

T. Maintain case records indefinitely in accordance with applicable laws and regulations. All other records shall be maintained at least six (6) years from the date of the last payment received for the agreement period, or until audited/ monitored and auditing/monitoring exceptions are resolved, whichever is later.

U. Develop and maintain a Life Book for each child receiving services or care under the provision of this agreement. Reimbursement of Life Book expenses is included in Attachment A, Rate Schedule.

V. The Agency agrees that Cabinet Social Service Workers conducting child abuse investigations in a non-familial Private Child Care setting have complete access to current clinical, historical, and contextual information and documentation.

W. Comply with Open Records Law as defined in KRS Chapter 61.

X. Transportation. The Agency will provide transportation regarding routine daily care within a 40 mile radius. The Cabinet's social service worker will give a one week advance notification when the Agency is to provide transportation within a 40 mile radius to appointments scheduled by the Cabinet. In addition to transportation related to routine daily care, mutually satisfactory arrangements for scheduled family visitation

and court appointments may be made between the Agency and Cabinet social service worker. The expectation would be that this is covered by the per diem.

Mutually satisfactory arrangements for scheduled visitation and court appointments or transportation needs exceeding the 40 mile radius may be made between Agency and Cabinet social service worker. The Cabinet social service worker would need to identify transportation requests a week in advance. If the Agency were able to meet the Cabinet social service worker's request, the Agency would be reimbursed $0.32 per mile beyond the 40 mile radius.

The Transportation Log will be used to track transportation expenses beyond the 40-mile radius. The Cabinet will also be completing this form and providing their logs to the regional billing clerk. PCC staff will complete the Transportation Log and submit it with their monthly billing invoice to the regional billing clerks. The regional billing clerk will compare pre-approved trips from the Cabinet's log with the invoice from the transportation log submitted by the Agency for payment.

2.2 Medical Treatment for Children

A. Inform the Cabinet's social service worker as soon as possible of any medical, dental, or surgical treatment planned or

provided for a child pursuant to this agreement;

B. Secure the necessary medical services for all children, with these services to be from physicians and other vendors participating in the Medical Assistance Program whenever possible if the child has a Medical Assistance Card. If the child is not eligible for Medical Assistance, the Agency shall direct the vendor to send any bills not covered by insurance or paid by the parents or third party sources to the Cabinet's office having case responsibility for approval. Provide documentation of medical provider's refusal to bill the Cabinet when seeking reimbursement for medical expenses paid on behalf of children placed in their care;

C. Give children all medications that have been prescribed by a physician in the amounts and at the times directed by the physician. Ensure that adequate supplies of medications and/or prescriptions go with children upon discharge.

D. Maintain the Cabinet's Medical Passport for all children in placement with the Agency. The Medical Passport shall be maintained through out the duration of the child's placement with the Agency and follows the child wherever the child is placed throughout the Agency. The Medical Passport shall be returned to

the child's Cabinet social service worker upon discharge from the Agency.

2.3 Religious and Spiritual Development Opportunities

Take affirmative action to assure that each child has the opportunity, without prejudice or penalty, for religious and spiritual development in the faith of the child or the faith of the family with whom the child resides if the child desires these types of opportunities and access can be reasonably provided in the community of residence.

2.4 Foster Parent Adoption

Agencies providing Foster Parent Adoption Services will do so in accordance with the provisions of Attachment B, Subagreement to Provide Adoption Services.

2.5 Monitoring

Permit staff of the Cabinet and persons acting for the Cabinet to monitor and evaluate services being performed under this agreement by providing access to physical facilities, foster homes, and to children for private interviews, any staff, all referrals, case records, foster and/or adoptive home studies, personnel records (except specific medical records exempt from disclosure under federal law unless a court order is obtained) and fiscal records, and documentation of service provision. This provision shall apply to all agreement services, including

subcontracted services under the control of the Agency:

Be responsible for monitoring, fiscal and/or program exceptions established by evaluation, monitoring and/or audit of this agreement, and to promptly settle any monitoring, fiscal and program audit exceptions by making direct payment, or reduction of future reimbursement, or by other methods approved by the Cabinet. Respond to any Statement of Deficiencies submitted by the Cabinet or persons acting for the Cabinet by submission of and compliance to a Corrective Action Plan based on monitoring results.

2.6 Guidelines for the Use of Restrictive Procedures

Agencies that use physical management shall have established guidelines and policies governing the use of the intervention that are consistent with accreditation standards.

Data on the use of physical management will be reported in a manner that is consistent with accreditation reporting formats and requirements to the Cabinet or its agent by the Agency in an accurate and timely manner. Each provider agrees to establish systems for tracking the frequency, location, and type of critical incidents involving physical management that occur.

When Agencies use restrictive interventions, written policy and procedure shall define an

administrative process to review all critical behavior incidents and restrictive procedures, incident by incident. Documentation of this administrative review shall record the assessment as to whether the restrictive procedure was necessary, conducted according to defined provider standards, documented and reported as required, and whether follow-up corrective action is warranted, and shall record that staff received this feedback.

Only a certified trainer who has completed a nationally recognized and professionally developed training program shall conduct crisis prevention and management training, including restraint and seclusion.

2.7 Attachment D

A. Prior to admitting any committed child to one of the Agency's foster homes, the Agency will execute a Subagreement for Foster Family Care, (Attachment D) when this is the plan of the Cabinet's social service worker. The Agency shall provide to the Cabinet, or its agent, a monthly listing of approved foster homes. The listing shall include the name, address, service region and phone number of all approved foster homes; the date the home was certified; and the date the home's certification expired; the Cabinet's children placed in each home; and for children admitted to a home since the last list, also the name of homes in

which the child was placed since the last list.

B. Any home study, child placement, record keeping, and related services shall be done in accordance with 922 KAR 1:310. Applicable records and interviews with foster parents shall be available to the Cabinet's social service workers who are planning to place a child in the home and/or providing follow-up planning services to a child in such home pursuant to KRS 605.150, 620.180(2);

C. Document, using the DSS 111A (Foster Home Contract Supplement), or a comparable form, notification to foster parent(s) of relevant child history and risk factors for the time a child is placed with one of the Agency foster homes.

* * *