

No. 06-157

IN THE
Supreme Court of the United States

JAY F. HEIN, DIRECTOR, WHITE HOUSE OFFICE OF
FAITH-BASED AND COMMUNITY INITIATIVES, ET AL.,
Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

**BRIEF OF *AMICUS CURIAE* AMERICAN
ATHEISTS, INC. IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICUS CURIAE*¹

American Atheists, Inc. is a volunteer organization active in protecting the rights of nonbelievers and promoting tolerance and understanding of the atheist viewpoint. Its perspective is rooted in the philosophy of materialism,

¹ The parties have consented to the filing of this brief. Copies of the letters of consent are on file with the Clerk of the Court. Counsel for American Atheists authored this brief in its entirety. No person or entity, other than American Atheists, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

“which holds that nothing exists but *natural* phenomena.”² Founded in 1963 by Dr. Madalyn Murray O’Hair,³ American Atheists has been dedicated for over forty years to advocating the separation of church and state. American Atheists founded the first known atheist library and archives in the United States, produced American Atheist Forum, the first regularly scheduled television program produced, directed, and broadcast by atheists, and founded the American Atheist Press, the American Atheist magazine, and the American Atheist Radio Series. The organization also engages in legal actions to preserve First Amendment values. Accordingly, American Atheists submits this brief in support of Respondents Freedom from Religion and its members and urges the Court to affirm the decision of the Seventh Circuit Court of Appeals.

BACKGROUND

On January 29, 2001, nine days after his inauguration as President of the United States, George W. Bush issued an Executive Order that created the White House Office of Faith-Based and Community Initiatives (“OFBCI”) for the express purpose of using federal funds to “expand the role” of religious organizations and “increase their capacity.” Exec. Order No. 13,199, § 3(a), 66 Fed. Reg. 8,499 (2001). The Executive Order directed OFBCI to “coordinate a national effort to expand opportunities” for religious organizations and undertake “a comprehensive effort to enlist, equip, enable, empower and expand the work” of religious organizations. Exec. Order No. 13,199, pmb. & § 2. That same day, in a separate Executive Order, President Bush directed five

² Madalyn Murray O’Hair, *Atheism*, American Atheists, available at www.atheists.org/Atheism/atheism.html (last visited Jan. 29, 2007).

³ American Atheists was founded following this Court’s ruling in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), overturning the Maryland Court of Appeals’ approval of public school Bible readings in *Murray v. Curlett*, 228 Md. 239 (1962).

federal agencies to establish Executive Department Centers for Faith-Based and Community Initiatives (“Faith-Based Agency Centers”), and instructed the Faith-Based Agency Centers to incorporate religious organizations “in department programs and initiatives to the greatest extent possible.” Exec. Order No. 13,198, § 3(b), 66 Fed. Reg. 8,497 (2001).⁴ On December 12, 2002, President Bush signed Executive Order 13,279, which weakened the separation between federally-funded services and inherently religious activities, allowing religious organizations to provide federally-funded services in facilities permeated by “religious art, icons, scriptures, or other symbols.” Exec. Order No. 13,279, § 2(f), 67 Fed. Reg. 77,141 (2002).

To further this campaign of channeling government money to religious organizations, OFBCI in 2002 began to orchestrate a series of Faith-Based Conferences and to date has held 29 such events.⁵ The Faith-Based Conferences operate as training and recruiting grounds that favor religious applicants for government grants and thereby give religious groups an advantage over secular groups in the process of applying for grants. The conferences generate a steady stream of well-crafted applications from religious groups by “provid[ing] participants with information about the government grants process and available funding opportunities”

⁴ In subsequent Executive Orders, President Bush directed other federal agencies to establish similar Faith-Based Agency Centers. Exec. Order No. 13,280, 67 Fed. Reg. 77,145 (2002); Exec. Order No. 13,342, 69 Fed. Reg. 31,509 (2004).

⁵ White House, *WHOFBCI Accomplishments in 2006* (“White House, *WHOFBCI Accomplishments*”), available at www.whitehouse.gov/government/fbci/2006_accomplishments.html (last visited Jan. 29, 2007); White House, *Logistics, Seattle, Washington, January 18, 2007* (“White House, *Logistics*”), available at www.dtiassociates.com/FBCI/logisticsWA.cfm?location=WA (last visited Jan. 29, 2007).

and offering “various grant writing tutorials.”⁶ Thousands of individuals attend the Faith-Based Conferences,⁷ which have trained 26,000 “new and potential federal grantees” since 2002.⁸

Apart from the grants themselves, the Faith-Based Conferences require substantial expenditures of government funds entirely separate from any costs attributable to the salaried time that Executive Branch officials use to orchestrate, manage, and attend the conferences.⁹ Expenses incurred by the Faith-Based Conferences include renting ballrooms, meeting rooms, and overflow space for the massive conferences at hotels across the nation;¹⁰ sending mailings prior to the conferences “to every church, synagogue, mosque, and social service organization within two hundred miles [of the conference location], about 20,000 invitations” per conference;¹¹ and allowing thousands of individuals to attend each conference. Attendance at the conferences is without charge to the participants, so that taxpayers and the public fisc bear the full financial burden of the events.¹²

The Faith-Based Conferences are designed to aid religious organizations. Atheists, agnostics, and other secular groups are discouraged from attending by the pervasively religious

⁶ White House, *Faith-Based & Community Initiative*, available at www.whitehouse.gov/government/fbci/president-initiative.html (last visited Jan. 29, 2007).

⁷ David Kuo, *Tempting Faith* 209 (2006); United States Department of Justice, *E-Alert*, available at www.ojp.usdoj.gov/fbci/newsletters/ealert002.htm (last visited Jan. 29, 2007).

⁸ White House, *WHOFBCI Accomplishments*.

⁹ Kuo, *Tempting Faith*, at 231.

¹⁰ *Id.* at 211; Amy Sullivan, “Patron Feint,” *New Republic*, Apr. 3, 2006.

¹¹ Kuo, *Tempting Faith*, at 209.

¹² White House, *Logistics* (stating that the conferences are free for attendees).

atmosphere of the Faith-Based Conferences, which include prayer and performances of “All Hail, King Jesus” by religious choirs.¹³ At a typical conference, President Bush opened his remarks by assuming that there was not a single atheist or agnostic in an audience of over one thousand: “You love God with all your heart and all your soul and all your strength.”¹⁴ The President’s assumption evidently was correct, for the audience responded enthusiastically to his speech by shouting “Preach on, brother!”¹⁵ In remarks at another Faith-Based Conference, then-Attorney General John Ashcroft, after identifying “faith” as a “fundamental value[] that define[s] our nation,” made the same assumption, telling the audience, “through the message of faith, you uphold our values.”¹⁶

American Atheists is unaware of any events designed to train atheist, agnostic, or other secular nonprofit groups to apply for grants. By singling out religious groups for special training, the government has provided a unique advantage over other groups in the process of applying for government funds.

By welcoming the faithful, and making it clear that atheists and agnostics need not attend, the Faith-Based Conferences ensure a constant flow of grant applications from religious organizations. The Executive Branch then discriminates further between applicants in selecting grantees on

¹³ Adelle M. Banks, “Bush Touts His Faith-Based Initiative Despite Congressional Foot-Dragging,” *Religion News Service*, June 2, 2004, available at pewforum.org/news/display.php?NewsID=3481 (last visited Jan. 29, 2007).

¹⁴ George W. Bush, Remarks at the White House Conference on Faith-Based and Community Initiatives, Philadelphia, Pennsylvania (Dec. 12, 2002).

¹⁵ *Id.*

¹⁶ Prepared Remarks of Attorney General John Ashcroft, White House Faith-Based Conference, Tampa, Florida (Dec. 5, 2003).

the basis of religion. According to a former Special Assistant to President Bush, the grants process is rife with religious discrimination. Kuo, *Tempting Faith*, at 212-16. In awarding grants from the Compassion Capital Fund, a grants program created by Congress in 2002 under the Taxing and Spending Clause, the Department of Health and Human Services convened “an overwhelmingly Christian group of monks, ministers, and well-meaning types” whose “biases were transparent.” *Id.* at 213-14. The group was tasked with rating organizations on a scale from 1 to 100, and these ratings determined which organizations would receive grants.¹⁷

According to Kuo, “[i]t was obvious that the ratings were a farce.” Kuo, *Tempting Faith*, at 214. In fact, one of the raters stated that “when [she] saw one of those non-Christian groups in the set [she] was reviewing,” she “just stopped looking at them and gave them a zero.” *Id.* at 215-16. She further stated that such behavior was typical among the raters. *Id.* at 216. Due to such conduct, “Jesus and Friends Ministry from California, a group with little more than a post office box,” scored much higher than Big Brothers/Big Sisters of America and other leading national charities. *Id.* at 214.

This system of using Faith-Based Conferences to give religious organizations an advantage in applying for grants and then selecting grantees on the basis of religion has achieved the desired result. According to the congressional testimony of a Department of Housing and Urban Development (HUD) official, the Faith-Based Conferences contributed to a major increase in HUD funding for religious

¹⁷ Kuo, *Tempting Faith*, at 214-15. See also Government Accountability Office, *Faith-Based and Community Initiative 6* (June 2006) (“GAO Report”) (stating that the decisions to award grants “were generally based on applicants’ scores” assigned by raters).

organizations between Fiscal Years 2002 and 2004,¹⁸ and in Fiscal Year 2005, religious organizations received \$2.1 billion in federal grants, nearly twice what they received in Fiscal Year 2003.¹⁹ The White House announced that “[d]ue to the President’s leadership, more faith-based organizations are participating in the Federal grants process,” and that the Department of Health and Human Services has nearly doubled the number of grants to religious organizations since Fiscal Year 2002.²⁰

Additionally, after channeling unprecedented levels of monetary aid to religious organizations, the Executive Branch has turned a blind eye when recipients divert the money to inherently religious activities. On paper, a religious organization is not allowed to misuse federal funds by offering activities such as prayer during government-funded services, such as counseling.²¹ According to GAO, however, religious organizations often flout this requirement in practice. *GAO Report* at 6-7, 34-36. After surveying 13 organizations that receive federal grants and offer voluntary religious services, GAO found that four of these organizations “did not appear to understand the requirement to

¹⁸ See *Federal Agencies and Conference Spending, Hearings Before the Subcomm. on Federal Financial Management, Government Information and International Security of the S. Comm on Homeland Security and Government Affairs*, 109th Cong. 58 (2006) (statement of James M. Martin, Acting Deputy Chief Financial Officer, HUD).

¹⁹ White House, *Fact Sheet: Compassion in Action* (March 2005) (“White House, *Fact Sheet*”), available at www.whitehouse.gov/news/releases/2005/03/20050301-1.html (last visited Jan. 29, 2007); White House, *WHOFBCI Accomplishments*.

²⁰ White House, *Fact Sheet*.

²¹ See Exec. Order No. 13,279, § 2(e) (“[O]rganizations that engage in inherently religious activities, such as worship, religious instruction, and proselytization, must offer those services separately in time or location from any programs or services supported with direct Federal financial assistance . . .”).

separate [inherently religious] activities in time or location from their program services funded with federal funds.” *Id.* at 7. One religious organization official told GAO “that she discusses religious issues while providing federally funded services,” and others stated that they “pray with beneficiaries during program time.” *Id.* Another religious organization official confessed that she began government-funded social services for children by reading from the Bible. *Id.* at 35.

According to GAO, several federal agencies fail to visit more than 5 to 10 percent of grant recipients in a given year. *Id.* at 37. GAO further stated that “[f]ew government agencies administering [grant] programs monitor organizations to ensure compliance with [] safeguards” regarding inherently religious activities. *Id.* at 6-7, 29. GAO reviewed financial and performance reports submitted to federal agencies by religious organizations that received federal grants, but “none of the reports . . . contained any questions related to compliance with the safeguards” that prohibit the use of government funds in inherently religious activities. *Id.* at 36. GAO also reported that the Department of Justice’s Community Corrections Contracting program contained “no reference to the prohibition on inherently religious activities,” which “could be read as allowing all providers of social services in [correctional] settings to engage in worship, religious instruction, or proselytization.”²² In sum, GAO concluded that “the government has little assurance” that safeguards surrounding the use of federal funds are enforced. *Id.* at 52.

GAO further found that in many cases federal agencies not only fail to monitor the use of grant money but neglect even to inform religious organizations of their legal obligations. *Id.* at 30-34. In fact, most federal agencies that provide grants to religious organizations do not even tell grant recipients that

²² GAO Report at 32. See also 28 C.F.R. § 38.2(b)(2).

