Appeal No. 07-1292

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, INC.,
ANNE NICOL GAYLOR,
ANNIE LAURIE GAYLOR, and
DAN BARKER,

Plaintiffs-Appellants,

v.

R. JAMES NICHOLSON,
JONATHAN PERLIN, M.D.,
HUGH MADDRY,
A. KEITH ETHRIDGE, and
JENI COOK,

Defendants-Appellees.

On Appeal from the United State District Court
For the Western District of Wisconsin
Case No. 06-C-212-S
The Honorable John C. Shabaz Presiding

REPLY BRIEF OF APPELLANTS

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I. TAXPAYER STANDING DOES NOT REQUIRE LEGISLATION THAT FACIALLY MANDATES FUNDING FOR RELIGION.

The VA contends on appeal that taxpayers only have standing to challenge Congressional spending programs that statutorily require sectarian or religious content. If a Congressional program, statutorily established, does not facially require the use of disbursements in a manner that violates the Establishment Clause, then the VA posits that taxpayers do not have standing -- even if the program is administered in a way that violates the Establishment Clause. This argument requires that Congressional programs must facially mandate the use of funds for the delivery of services that incorporate religion. If a facially-neutral Congressional program, without express religious content, is administered so as to incorporate religious content, then taxpayers allegedly have no standing to complain.

The VA misconstrues the requirements of taxpayer standing. Taxpayer standing does not require a Congressional program that facially incorporates religious content. Rather, standing only requires that a taxpayer challenge the use of Congressional appropriations that are specifically authorized to fund a Congressionally-established program. If funds appropriated by Congress to support a specific Congressional program are administered so as to violate the Establishment Clause, then taxpayers do have standing to object.

Here, the VA concedes that VA health services are provided pursuant to a spending program statutorily enacted by Congress. Unlike in Hein v. Freedom From Religion Foundation, Inc., 127 S.Ct. 2553 (2007), which involved expenditures in support of a program established by Executive Order of President Bush, VA health services are Congressionally mandated.

The VA also concedes that VA health services are funded by annual Congressional appropriations, earmarked for such health services, including "for necessary expenses for furnishing, as authorized by law, inpatient and outpatient care and treatment to beneficiaries of the Department of Veterans Affairs . . . including medical supplies and equipment, and salaries and expenses of health-care employees hired under Title 38, United States Code." (Appellees' Brief at 29.)

The Appellees, nonetheless, urge that the use of program funds to inculcate religion cannot be challenged by taxpayers because the statutory authorization for the VHA to provide complete medical care and treatment of veterans does not facially require a medical treatment model that integrates religious content. The VA maintains that the provision of medical care and treatment to veterans, pursuant to 38 USC §7301, can be freely administered to incorporate religion, free of taxpayer challenge, because the statutory authorization to provide medical services does not require a model of care that integrates religion.

The VA misapprehends the Supreme Court's recent decision in Hein. The Court emphasized throughout its decision in Hein that no Congressionally-created program was at issue. The Court stated that "no Congressional legislation specifically authorized the creation of the White House Office or the Executive Department Centers. Rather, they were created entirely within the Executive Branch . . . by presidential executive order." 127 S. Ct. at 2560. The Court further stated that the link between Congressional action and constitutional violation was missing in Hein "because the expenditures at issue were not made pursuant to any Act of Congress; rather, Congress provided general appropriations to the Executive Branch to fund its day-to-day activities." Id. at 2566.

By contrast, the Supreme Court noted in Hein that its prior decision in Bowen v. Kendrick, 487 U.S. 589, 620 (1988), found "a sufficient nexus between the taxpayers' standing as a taxpayer and a Congressional exercise of taxing and spending power, notwithstanding the fact that the funding authorized by Congress had flowed through and been administered by an Executive Branch official." The Hein plurality went on to state about Bowen that "the key to that conclusion was the Court's recognition that AFLA was at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers and that the Plaintiffs' claims called into question how the funds authorized by Congress were being disbursed pursuant to AFLA's statutory mandate." Id. at 2567. Finally, Justice Alito emphasized that the Court's plurality decision did not mean to overrule Flast

v. Cohen, 392 U.S. 82 (1968), or extend Flast to the limits of logic because "Flast itself spoke in terms of legislative enactments and exercises of Congressional power." Id. at 2572.

The Hein decision requires that taxpayer standing be directed at the administration of a Congressionally-created program; the misuse by the Executive Branch of Congressional appropriations not made to fund a specific program will not support taxpayer standing. But the VA misreads Hein and Bowen to mean that facially-neutral appropriations, to fund a specific Congressional program, can be unconstitutionally administered by a Federal agency without recourse by taxpayers.

This Court's recent decision in Hinrichs v. Speaker of the House of Representatives of the Indiana General Assembly, 2007 WL 3146453 (7th Cir. Oct. 30, 2007), is consistent with Hein and Bowen. The VA cites Hinrichs for the proposition that taxpayers only have standing to challenge an appropriation made pursuant to a legislative enactment that expressly mandates the allegedly unconstitutional activity.

The VA misconstrues the Hinrichs decision. The key fact in this Court's application of the rules of standing in Hinrichs was that "the program, as it is presently administered, is not mandated by statute." Id. at 12. The "Minister of the Day" program challenged in Hinrichs was not a statutory program, just like the Executive Orders at issue in Hein. The minimal taxpayer money used to administer the program, moreover, was not appropriated for a specific statutory

program. The plaintiffs in Hinrichs did not point to any specific appropriation of funds by the legislature to implement a statutory program. Id. Under these circumstances, the Court concluded that the nexus requirement of Flast, as explained in Hein, was not met. The plaintiffs simply did not tie their status as taxpayers to the allegedly unconstitutional practice of regularly offering a sectarian prayer.

The VA in this case misreads Hinrichs to require the appropriation of funds for an explicitly unconstitutional purpose in order to provide the link between a taxpayer and an expenditure necessary to support standing. Hinrichs recognizes that an appropriation must be earmarked for a specific program, but that does not require the program itself to be facially unconstitutional. As Bowen recognized, the alleged misuse of funds appropriated for a specific program will support taxpayers' standing. This Court recognized such distinction in explaining the Supreme Court's recent Hein decision:

> The plurality [in Hein] determined that the difference between a specific Congressional enactment authorizing the expenditure of funds and an expenditure made from general funds appropriated to the Executive Branch was a critical one; the necessary link between "Congressional action and constitutional violation as supported taxpayer standing in Flast was missing." Hein, 127 S. Ct. at 2566. The plurality explained that "the Respondents do not challenge any specific Congressional action or appropriation; nor do they ask the Court to invalidate any Congressional enactment or legislative created program as unconstitutional. That is because the expenditures at issue were not made pursuant to any act of Congress. Rather, Congress provided general appropriations to the Executive Branch to fund its day-to-day activities." Hinrichs, 2007 WL 3146453 at 11.

The present case does involve a specific Congressional program, which mandates providing medical services to veterans. This case also involves specific annual appropriations for the purpose of providing medical services to veterans. Finally, the taxpayer-appellants challenge the use of those specific funds to carry out the Congressional mandate to provide medical services to veterans.

The VA's interpretation of Hein, to require an express statutory mandate that appropriations be used in an improper manner, is contrary to the Supreme Court's holding in Hein and Bowen. The Court in Bowen, in fact, concluded that the Congressional program involved there did not mandate appropriated funds to be used in an unconstitutional manner. The Court concluded, however, that taxpayers could make an as-applied challenge to the administration of program funds in an unconstitutional manner -- as in the present case where the taxpayers challenge the administration by the VHA of funds specifically appropriated to provide health care to veterans. The VA claims that a holistic model of health care, including spirituality, is an appropriate health care delivery model. The taxpayer funds at issue, therefore, are being used by the VHA ostensibly to provide the health care statutorily mandated by Congress.

The VA's argument ultimately reduces to a claim of constitutional inscrutability whenever Congress has enacted a facially-neutral program. According to the VA, if funds are appropriated by Congress to a program that does not expressly mandate the unconstitutional use of such funds, then Federal

agencies may administer those funds in violation of the Establishment Clause without challenge by taxpayers. That is not what the Hein decision holds. That is not what the Bowen decision holds. That is not what the Hinrichs decision holds.

The VA's argument is contrary not only to Hein, Bowen, and Hinrichs; the argument is also contrary to the established requirement that even neutral Congressional programs must have sufficient safeguards to prevent the constitutional misuse of funds. In Laskowski v. Spellings, 443 F.3d 930, 937-38 (7th Cir. 2006), for example, this Court recognized as continued good law "the requirement that there be safeguards to prevent the diversion of appropriations from secular to sectarian activities." Similarly, in Freedom From Religion Foundation, Inc. v. Bugher, 249 F.3d 606, 612-13 (7th Cir. 2001), the Court held that even a secular purpose and statutory facial neutrality will not justify a program lending direct support to a religious activity, particularly where there is no statutory prohibition against sectarian use or administrative enforcements in place. The VA in the present case implicitly denies the continued validity of these principles, as well as underlying Supreme Court precedents, such as Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), and Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976).

The VA ultimately tries to limit taxpayer standing to facial challenges of Congressional spending programs. But that is not the law, nor is it supported by the authorities cited by the VA.

The Court of Appeals for the District of Columbia has stated very well the taxpayer standing issues in as-applied challenges, in American Jewish Congress v. Corporation for National and Community Service, 399 F.3d 351, 355-356 (D.C. Cir. 2005):

> Whatever doubt there might have been before Bowen v. Kendrick, it is now clear that the exception [for taxpayer standing] includes more than just taxpayer suits based on the Establishment Clause attacking taxing-and-spending statutes on their face. Also, within the exception are taxpayer actions claiming a violation of that constitutional provision because of the manner in which the Executive Branch is administering the statute. A claim that funds appropriated by Congress are being used improperly by individual grantees is no less a challenge to Congressional taxing-and-spending power simply because the funding authorized by Congress has flowed through and been administered by an executive official.
>
> As the case [before the Court] now stands, it therefore fits comfortably within the rationale of Bowen: the National Community Service Act is at heart a program of disbursements of funds pursuant to Congress' taxing and spending power and AJC calls into question how the funds authorized by Congress are being disbursed pursuant to the Act's statutory mandate. It follows that there is a sufficient nexus between the taxpayer standing as a taxpayer and the Congressional exercise of taxing-and-spending power notwithstanding the role the Corporation for National and Community Service plays in administering the statute.

Finally, nothing in the logic or rationale of the Hein and Bowen decisions warrants the immunity sought by the VA in the present case. The logic and language of the Hein decision do not support the conclusion that the Supreme Court meant to immunize the administration of major federal programs from judicial scrutiny whenever the statutory program does not facially require agency misuse of appropriated funds. To require facial program invalidity, as urged by the

VA, would nullify the law and logic of the Supreme Court's prior decisions. Federal agencies like the VA are not insulated from judicial scrutiny, initiated by taxpayers, merely because they have chosen to administer program funds in violation of the Establishment Clause, rather than being facially compelled to commit such a violation.

II. THE CONGRESSIONAL MANDATE TO PROVIDE VETERANS MEDICAL CARE CONSTITUTES CLASSIC TAX-AND-SPEND LEGISLATION.

The VA also argues unpersuasively that Congress' statutory mandate to provide health care benefits to veterans is not a classic tax-and-spend program under Article I, §8, cl. 1.

This Court recognized in Winkler v. Gates, 481 F.3d 977, 981 (7th Cir. 2007), that standing depends on the type of legislative enactment at issue: "Is it an exercise of Congressional power under the taxing-and-spending clause of Article I, §8, or do we have only an incidental expenditure of tax funds in the administration of an essentially regulatory statute?" In framing that issue, the question, briefly put, is whether a statute "is more like the Surplus Property Act in Valley Forge or more like the AFLA program in Bowen." Id. at 982.

The answer to the above questions, as discussed in Appellants' Brief-in-Chief, is clear: The statutory mandate to provide health care services to veterans is a classic taxing-and-spending program, such as the Supreme Court evaluated in Flast and Bowen, and such as this Court considered in Laskowski. In fact, the

VA's argument that the provision of health care benefits rests on the Property Clause is disingenuous; Congress' mandate to provide health care benefits to veterans is "not first and foremost a statute about the use, disposal, and provision of military resources." Id. at 987.

The VA further ignores the actual language of Article I, §8, cl. 1, which provides that Congress can lay and collect taxes only to pay the debts, or provide for the "common defense," or provide for the general welfare of the United States, which language measures the purpose for which taxes may be levied and collected. See Kansas Gas & Electric Company v. City of Independence, Kansas, 79 F.2d 638-39 (10th Cir. 1935). Only Congress has the constitutional prerogative to appropriate such funding, and under Article I, §8, only Congress has the power of the purse, including to lay and collect taxes for the "common defense."

The VA's attempt to disengage Clause 1 of Article I, §8 from any fiscal effect related to the "common defense" is simply unwarranted. On the contrary, Congress' subsequent specific appropriations under Article I, §9, cl. 7, the Appropriations Clause, for the purpose of carrying out its mandate to provide health care benefits, clearly provides the nexus to Congress' taxing-and-spending authority.

The Supreme Court's decision in Hein makes clear why the Jamboree Statute at issue in Winkler did not involve a "classic taxing-and-spending program." The Jamboree Statute did not involve any supporting appropriations by

Congress specific to that statute. The expenditures complained of in that case, on the contrary, were only expenditures incidental to the Jamboree Statute. Winkler, in short, did not involve appropriations specific to the Boy Scouts Jamboree Statute, contrary to the requirements of Hein.

The present case does involve a "classic" taxing-and-spending program. Congress' mandate to provide health benefits is a classic spending program, such as in Flast and Bowen. Congress, moreover, makes annual appropriations specific to the VHA to provide the health care services required by statute. Even under the VA's argument, moreover, the mandated spending is within Congress' authority to tax and spend for the general welfare and the common defense. The same would be true of the Jamboree Statute if Congress made appropriations specific to that statute -- but it did not, precisely because the Jamboree Statute was intended to be revenue-neutral.

The case is different with VA health care benefits, which are not revenue-neutral, and as to which Congress makes annual appropriations. The problem in this case, therefore, is not that Congress exceeded its authority to tax and spend for health care benefits, but that the funds allocated to help support that program are being administered contrary to the Establishment Clause. That is a proper subject of taxpayer complaint.

III. THE ALLEGED UTILITY OF RELIGION IS NOT AN ESTABLISHMENT CLAUSE DEFENSE.

The VA argues on the merits that the integration of religion into the VA's model of medical treatment is permissible because it is "utilitarian." By this argument, the VA means that religion allegedly furthers the secular objective of facilitating desirable health-care outcomes. Because religion is allegedly incorporated into the VA's health-care model for secular reasons, therefore, the VA argues that it should be allowed to continue its practice as long as it is not coercive.

The Establishment Clause does not allow the government to directly provide religious services whenever such services are believed to be effective in promoting secular objectives, such as positive health care outcomes. It is not the case that the government can fund religion as long as it is consistent with secular objectives. Although religious organizations are not prohibited from receiving government funding merely because they hold religious views consistent with secular objectives, religious content cannot be funded just because it is allegedly consistent with secular goals.

A "utilitarian" exception to the Establishment Clause would be contrary to the consistent precedent and purpose of that constitutional requirement. An exception to the Establishment Clause, whenever the government deems religion to be useful, would be merely self-serving. Government actors have always

promoted religion, throughout history, on the basis that it is useful and benign. Historically, however, the premise has been flawed and unworkable. If government is allowed to promote religion in doses considered useful, who is going to determine utility, and who is going to determine which religious beliefs and practices are most useful?

The VA argues that the constitutional measure for acceptable religious utility should be determined by pervasiveness. The integration of religion as part of a medical model of treatment should be allowed, according to the VA, because the medical profession allegedly agrees by consensus that religion is a useful health-care tool. The VA argues that "everybody is doing it," i.e., integrating religion as a part of substantive medical treatment. The Establishment Clause, however, for known and obvious reasons, has never included a majoritarian exception. Just as confessions of religious faith have become a litmus test for seeking public office, that does not reduce the protections of the Establishment Clause -- nor eliminate the wisdom of such protections.

The VA makes the repeated refrain that "religion works." The VA tries to doll up its argument a little by using the term "spirituality", but the record clearly shows undisguised religion. The VA then defends its practice on grounds of alleged effectiveness. For example, the VA states that the its decision to provide chaplain services to outpatients complies with the Establishment Clause "because it has a secular purpose and secular effects." (Appellees' Brief at 50.) By this

argument, however, the VA incorrectly collapses the Establishment Clause to a test of purpose and effect. This argument is wrong as a matter of law.

IV. THE GOVERNMENT CANNOT CONSTITUTIONALLY ESTABLISH RELIGION EVEN IF IT DOES NOT COERCE.

The District Court in its findings recognized the religious content of services provided by the VHA, including specific treatment programs imbued with religious content. The District Court dismissed the taxpayers' complaint, however, for want of evidence of coercion. Coercion, of course, is not a necessary predicate to invoke the protections of the Establishment Clause, so the VA now argues that this is essentially a voucher case, such as in Zelman v. Simmons-Harris, 536 U.S. 639 (2002). The argument is specious.

The VA argues without basis that the integration of religion into its overall health care program does not result in any indoctrination of religion that can be attributed to the government because of the "genuine and independent choices of private individuals." (Appellees' Brief at 42.) The argument fails because the VA is not paying for religious services indirectly by providing veterans vouchers; instead, the VA has determined that religion desirably should be integrated into its health care system, and the VA, therefore, has chosen to provide and endorse programs of explicit religious content.

One of the few absolutes in Establishment Clause jurisprudence is the prohibition against government-financed or government-sponsored inculcation of

religion. Bowen, 487 U.S. at 611. The greatest risk of impermissibly advancing religion, moreover, occurs when the government itself applies resources to provide religious services that it has determined to be desirable. See Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819, 842 (1995). In terms of public perception, a government program directly providing religious content differs meaningfully from the government distributing aid to individuals who, in turn, decide to use the aid to pay for religious-imbued services. See Mitchell v. Helms, 530 U.S. 793, 842-43 (2000) (J. O'Conner Concurrence.) Even the plurality in Mitchell agreed that the Establishment Clause requires that government services not be impermissibly religious in nature. Id. at 820.

Here, the District Court erred by basing its Establishment Clause analysis on the requirement of coercion, which error the VA cannot hide by comparing the VA's health care system to a voucher program of many private and individual choices. This is not a voucher case and the VA clearly has chosen to provide and endorse programs of explicit religious content. (See Appellants' Brief-in-Chief at 12-15.) The evidence of such religious content is seemingly undisputed, but at a minimum, constitutes a disputed issue of material fact that the District Court should not have decided on summary judgment. The VA's argument in this court, moreover, that the VHA's integration of religion into health care is justifiable under Zelman, is simply disingenuous.

V. ACCOMMODATION OF FREE EXERCISE RIGHTS IS NOT ALLOWED SIMPLY AS A MATTER OF CONVENIENCE.

The VA alternatively argues that it has chosen to integrate religion into its health care delivery model as an accommodation of the Free Exercise Rights of veterans. This argument is belied by the VA's companion argument that it has integrated religion for its desirable effects. The VA's accommodation argument, moreover, would be legally misplaced even if standing alone. The VA incorrectly premises its accommodation argument as depending on mere convenience to veterans.

The VA does not dispute that the accommodation of Free Exercise Rights is triggered by a purpose to remove government-imposed burdens. In this case, however, the record does not support such a predicate for government supported religious-services, including as to out-patient care. The record that is of evidence also does not support the VA's suggestion on appeal that its purpose was merely to accommodate Free Exercise Rights.

VA Spiritual Assessments, and VA substantive treatment programs, are not intended as mere accommodations of Free Exercise Rights, but rather they are intended to promote religion as being preferable to non-religion as an alleged means to achieve desirable health care outcomes. The VA has decided to incorporate religion into its health-care delivery model, therefore, so that religion is conveniently offered and accessible to veterans. That is not a permissible basis

to directly fund faith-based medical treatment. The VA cannot operate as a faith-based service provider.

The Establishment Clause prohibition against government-funded public services, moreover, does not evince an impermissible hostility to religion. The VA argues that if religion is not incorporated into its health-care delivery services, then the government is impermissibly showing hostility to religion. This argument assumes to prove more than it really does. If accepted, the VA's argument would mean that the government must fund religious-imbued services if it otherwise funds social services at all. This argument is not supported by logic or law. It would totally eviscerate the Establishment Clause prohibition on direct public support of religion.

The VA really contends in this case that the Establishment Clause should not apply to health care. The VA implies that health care is beyond the scope of the Establishment Clause, including because religion allegedly correlates positively with desirable health care outcomes.[1] According to the VA, if religion is shown to be desirable as an "evidence-based" matter, then the Establishment Clause does not apply.

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[1] This premise is itself questionable, contrary to the VA's argument. See, Dolan, Mary Jean, "Government-Sponsored Chaplains and Crisis: Walking the Fine Line in Disaster Response and Daily Life," Hastings Constitutional Law Quarterly, Vol. 35, No. 3 2008 (available at http://ssrn.com/abstract=1014842).

Is there really an Establishment Clause exception for health care? Is there also an "evidence-based" exception to the Establishment Clause for prison programming? Is there too an "evidence-based" exception for addiction treatment? Is there an "evidence-based" exception to the Establishment Clause for mentoring programs? Does the Establishment Clause include an "evidence-based" exception for programs designed to promote marriage or abstinence? Is religion acceptable in public schools if "evidence-based?"

The common answer to the above questions is "no." The Establishment Clause prohibitions are not subject to the vagaries as to whether religious programs are effective, or the uncertainties in how to measure "effectiveness," or the presumption to determine which religious programs are most effective.

The alleged difficulty with this case is not based on the Establishment Clause being uncertain. The difficulty is manufactured by the VA's formulation of the Establishment Clause to allow the government to promote religion if it is "sufficiently" correlated to achieving desirable secular objectives. Under that formulation, the Establishment Clause merely prohibits government support of "bad religion." The promoters of religion, however, have historically always believed that their religion was positively desirable or, at a minimum, benign. That test for government-sponsored religion has never been effective, for obvious reasons. That is also not the test under the Establishment Clause, with demonstrably good results.

VI. CONCLUSION.

For all of the above reasons, as well as those in the Appellees' Brief-in-Chief, this Court should reverse the judgment of the District Court.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPE FACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This reply brief complies with the type-volume limitation of Fed. R. App. P.32(a)(7)(B) whereby this Brief contains 4,263 words, excluding the part of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This reply brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) whereby this reply brief was prepared in a proportionally-spaced typeface using WordPerfect 12 in 13 point, Times New Roman.

Dated this 16th day of November, 2007.

/s/ Richard L. Bolton
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served three copies of the foregoing Reply Brief of Appellants upon opposing counsel via First-Class US Mail and addressed to the following:

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I also hereby certify that I have on this day emailed a PDF version of the foregoing Reply Brief of Plaintiffs-Appellants to Attorney Lowell V. Sturgill at lowell.sturgill@usdoj.gov.

Dated this 16th day of November, 2007.

/s/ Dorothee A. Pelech
Dorothee A. Pelech

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 31(e)

The undersigned hereby certifies that I have electronically filed this reply brief, pursuant to Circuit Rule 31(e).

Dated this 16th day of November, 2007.

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