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

BRIEF OF APPELLANTS AND APPENDIX

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August 27, 2007

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT
(formerly known as Certificate of Interest)

Appellate Court No: **07-1292**
Short Caption: **Freedom From Religion Foundation, Inc., et al. v. R. James Nicholson, et al.**

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement stating the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1. Each attorney is asked to complete and file a Disclosure Statement with the Clerk of the Court as soon as possible after the appeal is docketed in this Court. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):
Freedom From Religion Foundation, Anne Nicol Gaylor, Annie Laurie Gaylor, Dan Barker

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
Boardman, Suhr, Curry & Field LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and
N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:
N/A

The Court prefers the statement be filed immediately following docketing; but, the disclosure statement shall be filed with the principal brief or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. The attorney furnishing the statement must file an amended statement to reflect any material changes in the required information. The text of the statement (i.e. caption omitted) shall also be included in front of the table of contents of the party's main brief.

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I. APPELLANTS' JURISDICTIONAL STATEMENT

The District Court had federal question jurisdiction pursuant to 28 U.S.C §1331. The Appellants alleged that the Government violated the Establishment Clause of the First Amendment to the United States Constitution.

The Court of Appeals has jurisdiction pursuant to 29 U.S.C. §1291. The Appellants appealed the Summary Judgment Order that the District Court entered on January 8, 2007. The Appellants filed their Notice of Appeal on February 6, 2007.

II. STATEMENT OF THE ISSUES

1. Whether taxpayer funding of religion as part of the VA's model of medical treatment violates the Establishment Clause.

> District Court Answer: The District Court concluded that the integration of religion into a holistic model of medical treatment is constitutionally permissible as long as patients are not coerced. The District Court held that the government can fund explicitly religious programming subject only to the requirement that patients voluntarily accept faith-based treatment.

2. Whether taxpayer funding for pastoral care provided to VA outpatients violates the Establishment Clause.

> District Court Answer: The District Court concluded that the VA's provision of pastoral care to outpatients is constitutionally permissible because of its alleged therapeutic value, even if VA outpatients do not lack access to Free Exercise opportunities because of incapacity.

3. Whether the appearance of religious endorsement by the VA is a disputed issue of fact that the District Court should not have decided on summary judgment.

District Court Answer: The District Court found that the VA integrates religion into the delivery of health care as a matter of treatment. The District Court concluded, however, that the resulting religious indoctrination cannot be attributed to the government because the VA does not coerce patients. The District Court ruled as a matter of law that only voluntariness is required in order for the government to constitutionally fund religious indoctrination, even as to government-funded programs not involving vouchers.

4. Whether the Appellants have standing as taxpayers to challenge the alleged misuse of government appropriations for Congressionally mandated health care services that integrate religion as a part of medical treatment.

District Court Answer: The Government did not contest standing in the District Court.

III. STATEMENT OF THE CASE

The Appellants commenced this action on April 19, 2006. (R. 2.) The Appellants are federal taxpayers who oppose the use of taxpayer appropriations to promote the establishment of religion. The Appellants allege that VA chaplains are integrating religion into the VA's model of clinical health care, rather than merely providing chaplain services as an accommodation of the Free Exercise rights of hospitalized individuals.

The Government moved to dismiss the Complaint for failure to state a claim upon which relief may be granted. (R. 5.) The District Court denied the Appellees' motion on September 5, 2006. (R. 14.)

The Appellees then moved for summary judgment on October 16, 2006. (R. 17.) The Appellants opposed the motion, but the District Court granted

summary judgment on January 8, 2007. (R. 35.) The Appellants filed their Notice of Appeal on February 6, 2007. (R. 37.)

IV. SUMMARY OF DISTRICT COURT OPINION[1]

The District Court found that during the past ten years, the VA chaplaincy has developed a clinical focus. (A - 4.)

The District Court also found that the VA believes that the spiritual dimension of health must be integrated into all aspects of patient care, as part of the chaplaincy's clinical focus. (A - 5.)

The District Court further found that VA chaplains have recently expanded their services to include care for outpatients. (A - 10-11.) The VA's reason for providing pastoral care to VA outpatients is based upon the VA's belief that the integration of religion into health care is substantively desirable:

> The [VA's] goal is to provide care from a veteran's initial visit that continues as he or she receives any VA services necessary to sustain his or her spiritual health. The VA believes that it is imperative for veterans living outside the local daily distances to major VA health care facilities to have access to professional spiritual and pastoral care because research studies have shown that "when outpatients have access to quality spiritual and pastoral care, significant improvement in quality of life, reduced inpatient admissions, and cost savings result." Additionally, the VA believes that holistic health care and spiritual and religious needs go "hand-in-hand." (A - 11.)

The District Court also found that the VA provides treatment programs that substantively integrate religion, including the explicit use of religion in the

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[1] The District Court's decision is included in the Appendix to this Brief. Specific page references to the Appendix are referred to hereinafter as "A - ___"

treatment of patients with post-traumatic stress disorder. (A - 12.) Another program provides religious intervention and support to veterans suffering from low self-esteem because of "spiritual injury." (A - 12-13.) A Spiritual Recovery Support Group is used in this program as an attempt to bring the spiritual components of faith and God's grace to bear on treatment. (A - 13.) The Spiritual Recovery Support Group is also seen as a vehicle for change and growth because, according to the VA, when "God's gift of spiritual faith and grace is applied, it is good medicine." (A - 13.)

The District Court focused its constitutional analysis on the issue of governmental religious indoctrination. (A - 25-29.) The Court initially noted that all aspects of the VA's chaplaincy program, as challenged by the Appellants, do integrate religion or spirituality. In fact, the Court found that "as part of its clinical chaplaincy focus, the VA believes that the spiritual dimension of health must be integrated into all aspects of patient care." (A - 25.) The Court also found that VA chaplains provide spiritual care and counseling to outpatient veterans, "whose free exercise rights arguably are neither burdened nor restrained, because the VA believes that holistic health care and spiritual and religious needs go hand-in-hand." (A - 25.) The District Court found that many of the VA's treatment programs integrate religion and/or spirituality into their protocols, including by "bringing the spiritual components of faith and God's grace to bear on treatment." (A - 25-26.)

The District Court felt, however, that religious indoctrination cannot be attributed to the government because the VA's chaplaincy program does not coerce veterans to accept religion. (A - 26.) But the Court did not find that the decision to fund religious programming as a substantive component of the VA's model of medical care was the result of many private decisions allocating vouchers to a particular program. (A - 26.) The Court instead concluded that the government's decision to fund religion as a substantive component of a holistic model of health care delivery "cannot reasonably be attributed to governmental as opposed to private action" because veterans are not coerced. (A - 26.)

According to the District Court, only voluntariness is required in order for the government to constitutionally integrate religion as a substantive component of treatment programming, despite the Supreme Court's recognition that coercion is not an essential requirement of an Establishment Clause violation. The District Court felt that coercion should be a necessary requirement of an Establishment Clause violation, except when school-age children are involved. (A - 27-28.) If religious programming promoted by the government to adults is "voluntary," the District Court decided that such programming involves no indoctrination that can be attributed to the government. (A - 28.)

Finally, the District Court concluded that providing religious care to outpatients, regardless of any need to accommodate the Free Exercise rights of such patients, does not violate the Establishment Clause. (A - 29.) The Court did

not premise its holding on lack of patient mobility. Instead, the Court determined that chaplains should treat outpatients because "allowing the chaplain to counsel outpatients has the same therapeutic value as letting her counsel inpatients." (A - 29.)

V. STATEMENT OF FACTS

A. Integration of Religion

The VA believes that the spiritual dimension of health, including religious involvement, must be integrated into all aspects of patient care, research, emergency preparedness, and healthcare education. (R. 25, Ex. 1 at 5.) The VA believes that spiritual and pastoral care must be integrated into the total program of healthcare provided to veterans. (R. 25, Ex. 1 at 5.)

The term "spiritual injury," as used within the VA Chaplaincy, "may be referred to as a religious pathology index." (R. 25, Ex. 3 at 1.)

The spiritual care provided by VA Chaplains is fully integrated into the medical care provided to veterans, including specialized clinical spiritual assessments, through which healthcare providers identify a patient's spiritual needs pertaining to their healthcare. (R. 25, Ex. 4 at 5.) The vision of the VA Chaplain Service is to integrate the spiritual dimension of healthcare into all aspects of the patient care. (R. 25, Ex. 4 at 14.)

In its early beginnings, the primary focus of the VA Chaplain Service was sacramental in nature, caring for seriously ill and dying patients, leading worship,

and administering the sacraments. In the past ten years, however, VA Chaplaincy has assumed a clinical focus; the clinical chaplain draws from both the behavioral sciences and theological reflection in understanding the human condition. (R. 25, Ex. 4 at 15.) The VA Chaplain Service, in fact, was recently reorganized to recognize the chaplaincy as a clinical, direct patient care discipline. (R. 25, Ex. 6 at 2.)

Clinical chaplaincy is mandated by the VA. The VA Chaplain Center fully expects each VA medical center to provide "Clinical Chaplaincy," evidenced by spiritual assessments, interpretation of assessments in terms of needs, treatment or intervention planning, involvement with the treatment team, and assessment of outcomes. (R. 25, Ex. 9 at 3.)

B. Outpatient Pastoral Care

VA medical centers now even perform spiritual assessments of outpatients. (R. 25, Ex. 8 at 1.) Since 1995, the Asheville VA Medical Center, for example, provides pastoral care in ambulatory, outpatient and primary care settings; the Asheville VA Medical Center developed, tested, and "validated" a spiritual screening tool that is given to all new patients in primary care clinics and the preventative health clinic, which begins a continuum of pastoral care that not only addresses each patient's immediate purported need for chaplain intervention, but follows the patient through all future visits to the medical center. (R. 25, Ex. 10.)

VA Chaplains only recently have extended their service to include spiritual care and counseling to veterans who are outpatients. (R. 25, Ex. 11 at 1.) The VA's goal is to provide spiritual care from a veteran's first visit to a medical center that continues as the veteran receives any VA services through his/her lifetime of involvement with the VA system. (R. 25, Ex. 11 at 1.) The VA requires clinical chaplains for all persons receiving VA care, including outpatients, which constitute approximately 80% of the veterans seen at some centers. (R. 25, Ex. 11 at 1.) No determined boundaries exist for the outpatient care of veterans. (R. 25, Ex. 11 at 6.) All ambulatory and same-day admit surgery patients and their families are seen by a Chaplain at the VA Medical Center in Asheville. (R. 25, Ex. 11 at 7.)

The VA considers it imperative that its healthcare facilities provide spiritual and pastoral care for outpatients because "holistic healthcare and spiritual and religious needs are thought to go hand-in-hand." (R. 25, Ex. 12 at 11.)

C. Spiritual Assessments Required

The VA utilizes a holistic healthcare model that requires a Spiritual Assessment done by a professional Chaplain. Addressing the spiritual dimension of each patient is recognized by the VA as necessary, if one believes in holistic care, and the prerequisite of having clinically trained Chaplains is deemed essential. (R. 25, Ex. 13 at 1.) When holistic care is advocated and spirituality is considered important, as in the VA system, then it is important to ensure that

patients know that clinical pastoral care is provided by the Chaplaincy. (R. 25, Ex. 13 at 3.)

"Spiritual Assessment" involves an analysis of collected data, noting how theological understandings coupled with various belief structures affect each individual's physical or psychological condition. (R. 25, Ex. 13 at 4.) A theological perspective guides spiritual assessments and interventions in situations of spiritual need and distress. (R. 25, Ex. 13 at 5.)

Through theology, a Chaplain allegedly gains a broader understanding of the spiritual dimension by addressing a person's beliefs about the nature of God or acknowledged Higher Power and the authority or guidance provided by this Higher Power; a person's theology serves to shape beliefs about life and the meaning of life experiences. (R. 25, Ex. 13 at 5.)

D. Spiritual Assessments Measure Religious Indices

The VA conducts Spiritual Assessments to measure religious characteristics. The VA Chaplain Service, by way of background, has long utilized a Computer Assessment Program ("CAP") developed by Gary Berg at the VA Medical Center in St. Cloud, Minnesota. (R. 26, Ex. 15.) The CAP is specifically intended to better understand the role of religious faith in the maintenance of health, the healing of diseases, and the coping of chronic illness with losses in people's lives. (R. 26, Ex. 15 at 4.) The CAP focuses on the alleged

importance of assessing religious beliefs in order to make an accurate religious diagnosis. (R. 26., Ex. 15 at 6.)

The CAP is structured to measure information about Organized Religious Activity, Non-Organized Religious Activity, and Intrinsic Religious Values, which together provide the CAP with a Total Religious Index. (R. 26, Ex. 15 at 20-22.) The CAP elicits questions to measure a patient's religiosity. (R. 26., Ex. 15 at 25-28.) The CAP then places two dimensions of human experience alongside each other: it makes an analysis of the human experiential condition, using a Spiritual Injury Index; alongside the situational stress index are placed the symbols of religious faith as expressed by organized and non-organized religious faith and practice, including a dimension of intrinsic religious faith. (R. 26, Ex. 15 at 86.) The CAP allows Chaplains to address the question of whether religious symbols address human need, i.e., does religion heal? (R. 26, Ex. 15 at 88.)

E. Spiritual Assessments Have Religious Bias Seen By Looking At The Questions Asked

The VA requires Spiritual Assessments for every patient. A VA medical center completes a Spiritual Assessment for every patient, which is entered in the patient's medical record following admission to the medical center, and chaplains are encouraged to use Spiritual Assessments that have been developed for use in specific clinical programs or areas. (R. 26, Ex. 16.)

The VA National Chaplain Center provides VA medical centers information about Spiritual Assessment tools recommended for use, including

assessments that can be completed by computer or on paper. (R. 26., Ex. 17 at 1.) But like the CAP developed by Gary Berg, the Spiritual Assessment Inventory recommended by the National VA Chaplain Center purports to measure only religious resources, as well as experiential patient circumstances causing stress. (R. 26, Ex. 17 at 3.)

The Spiritual Assessment Inventory recommended by the VA includes a scoring index, whereby a "score on the Religious Resource Index of 15 or lower indicates that the patient should be referred to Chaplain Service." (R. 26, Ex. 17 at 4.)

Spiritual Assessment forms utilizing Berg's program to measure religious resources also are still being used by the VA. (R. 26, Ex. 18 at 1-3.) The VA Chaplain Center is still using Berg's CAP software program, now known as the "Living Water Computer Assessment Program." (R. 26, Ex. 19 at 1-4.) The questions asked of patients, therefore, continue to focus on measuring religious resources. (R. 26, Ex. 19 at 63-72.)

The Berg Spiritual Assessment Form, measuring religious resources, is still being presented as the standard at VA Basic Chaplain Orientation Courses. (R. 26, Ex. 20 at 2-3.)

The Spiritual Assessments actually being used in VA Medical Centers emphasize formal religious belief systems and resources. (R. 27, Ex. 21.) They inquire about organized religious resources, as well as stress factors that

purportedly increase the need for religious resources. The Chaplain Spiritual Assessment Form used by the VA Medical Center in Richmond, Virginia is such an example. (R. 27, Ex. 21 at 15-16.)

The Spiritual Needs Assessment for the VA Healthcare Network in Upstate New York also emphasizes that "we believe that faith plays an important role in a person's sense of health and wellness." (R. 27, Ex. 21 at 24.)

The Spiritual Needs Assessments Form used by the VA Medical Center in Bath, New York, advises patients that the medical center "believes that faith plays an important role in a person's sense of health and wellness." The Spiritual Needs Assessments also emphasizes formal religious affiliation, involvement and resources. (R. 27, Ex. 23.)

The Spiritual Assessment used at the VA Medical Center in Sheridan, Wyoming, further exemplifies the focus on organized religious activity and involvement. (R. 27, Ex. 24.)

F. The VA Offers Treatment Programs Integrating Religious Indoctrination

The Dayton VA Medical Center integrates the use of "lament" and Fowler's Stages of Faith Development into actual treatment of patients with post traumatic distress disorder. (R. 27, Ex. 25.)

Dayton VA Chaplain Nancy Dietsch seeks to develop a faith and understanding of God by each patient, as part of a PTS treatment modality, using lament as a form of prayer, with each lament being addressed to God. (R. 27, Ex.

25 at 20.) Chaplain Dietsch uses the lament and Fowler's Stages of Faith Development in a series of lectures, after which veterans are invited to create a group lament. (R. 27, Ex. 25 at 4-5.)

The VA Medical Center at Sheridan, Wyoming, provides a drug and alcohol treatment program that also involves explicit religious indoctrination. (R. 27, Ex. 26.) The Sheridan Medical Center uses a Spiritual Recovery Support Group ("SRSG") as an intervention program recommended for veterans who are identified as having significant spiritual injuries, measured by a Multi-Level Spiritual Assessment ("MLSA"); the SRSG "is an attempt to bring the spiritual component of faith and God's grace to bear on treatment." (R. 27, Ex. 26 at 1; Answer to Paragraphs 63-65 of Complaint.) The Sheridan Medical Center uses the SRSG as a "vehicle for change and growth. When God's gift of spiritual faith and grace is applied, it is good medicine." (R. 27, Ex. 26 at 1.)

A recommended intervention is made to veterans at Sheridan to attend the SRSG, whenever a veteran scores a significant spiritual injury as measured by the MLSA. (R. 27, Ex. 26 at 3.) The MLSA is given to all veterans at the Sheridan Medical Center who enter the Alcohol and Drug Program there. (R. 27, Ex. 26 at 5.)

The SRSG used at the Sheridan Medical Center deliberately utilizes "the idea that God sees them [veterans] of infinite worth and value, and that God wants them to treat themselves with His grace and mercy as His precious child." (R. 27,

Ex. 26 at 6.) The SRSG used at the Sheridan Medical Center is an explicit program of religious content. (R. 27, Ex. 26.)

The VA Medical Center in Gainesville, Florida, also utilizes a treatment program that is explicitly faith-based, in detoxification treatment. (R. 27, Ex. 27.) Spirituality is presented as an important dimension of treatment through use of an AA 12-step program. (R. 27, Ex. 27 at 3.) The program has an express religious component, including the concept of the mind-body-spirit connection affects self esteem, relationships with others, and relationships with a Higher Power. (R. 27, Ex. 27 at 10.)

The Recovery Spirituality and Detoxification Program at the Gainesville VA Medical Center utilizes a spiritual questionnaire focused upon the concept of God and/or a Higher Power. (R. 27, Ex. 27 at 34.) The Faith-Based Detox Program at the Gainesville VA Medical Center is a program that incorporates religious indoctrination. (R. 27, Ex. 27.)

The VA Medical Center in Detroit, Michigan, likewise has integrated spirituality into a treatment program, in the form of a 12-step chemical dependency treatment program. (R. 27, Ex. 28 at 4.) The Drug Treatment Program at the Detroit VA Medical Center utilizes a Spiritual Assessment to measure the spiritual or existential substance of the patient. (R. 27, Ex. 29 at 3.) Existentialism, as understood in the Detroit program, means "the search for that which makes life complete, i.e., God...The believer or the supernatural man, understands exactly

what the existential natural man is seeking, for meaning ultimately is found only in union with God." (R. 27, Ex. 29 at 3.) At the Detroit VA Hospital, the Spiritual Assessment is equal with other clinical documents that the hospital team provides in patient treatment. (R. 27, Ex. 29 at 4.) Once the Spiritual Assessment is administered, the information is interpreted by a clergyman, who renders a spiritual diagnosis, and develops a treatment plan. (R. 27, Ex. 29 at 11-12.) The chemical dependency program used at the VA Medical Center in Detroit is a faith-based 12-step program, incorporating the concept of a Higher Power. (R. 27, Exs. 28-29.)

VI. SUMMARY OF ARGUMENT

The Government provides health care services to veterans pursuant to Congressional statutory mandate. That mandate is funded by Congressional appropriations administered by the Veterans Health Administration ("VHA"), which includes VA chaplains. The alleged misuse of such funds to promote religion in the administration of a Congressional social welfare program can be challenged by taxpayers, even when the Congressional mandate does not facially violate the Establishment Clause.

VA chaplains obviously perform religious activities, which they can do to a limited extent to accommodate the constitutional Free Exercise rights of hospitalized patients. Accommodation, however, is not a *carte blanche* to promote religion without restraint, even if chaplains avoid overt coercion and

denominational preference. Constitutional limits on VA chaplains prohibit activities intended to promote religion over non-religion, as well as religious services provided to persons whose Free Exercise rights are not burdened or restricted. Here, the VA is operating its healthcare system as the nation's largest pervasively faith-based provider because of administrative choices regarding the therapeutic value of religion.

Accommodation of Free Exercise rights has been deemed to be constitutionally acceptable to remove burdens on religious practice. That is the reason chaplains have been publicly funded in the military, prisons and hospitals. The intentional promotion of religion for purposes other than removing burdens, however, is not a safe-harbor from which to establish religion. Government support and sponsorship of religion as being preferable to non-religion gives the appearance of endorsement. It is endorsement.

VA chaplains recently have changed their historical focus. They now engage in "clinical chaplaincy," which is not intended to accommodate Free Exercise rights. Instead, VA chaplains are engaging in activities intended to promote religion over non-religion. Toward this end, VA chaplains undertake to assess every VA patient to determine the patient's religious characteristics, affiliations and practices. The assessments purport to measure religious characteristics, while conveying a message linking religion to health. VA chaplains have undertaken to diagnose spiritual injury and to offer religious cures,

including treatment programs that include explicitly religious indoctrination. And chaplains have undertaken to provide services to non-hospitalized outpatients -- not to accommodate Free Exercise rights, but because outpatients are deemed to need religion as much as hospitalized patients.

VA chaplains are impermissibly promoting religion as a preferred treatment. They are not merely pursuing objectives consistent with religion. The chaplains are espousing religion as the means to accomplish desired outcomes. This gives not just the appearance of endorsement. VA chaplains actually intend to promote religion over non-religion.

VA chaplains cannot constitutionally assess the religious characteristics of veteran patients, any more than legislative chaplains can constitutionally perform spiritual assessments of legislators. VA chaplains cannot constitutionally design, implement and promote religious treatment programs that inculcate religious indoctrination. VA chaplains cannot constitutionally provide out-reach religious services to non-hospitalized patients whose Free Exercise rights are not burdened.

VA chaplains, however, are purposefully promoting religion as a health benefit, rather than merely to facilitate Free Exercise rights. A reasonable observer, familiar with the government's actions and intentions, would perceive the government to be endorsing religion over non-religion -- and that is exactly what the VA chaplains are intending to do. The Constitution prohibits such endorsements.

VII. ARGUMENT

A. The Supreme Court's Hein Decision Does Not Preclude Taxpayer Standing to Challenge the Use of Congressional Appropriations For Statutorily-Mandated Medical Services

The Appellants have standing to challenge the VA's use of Congressional tax appropriations, in violation of the Establishment Clause, to provide statutory medical services to veterans. The Supreme Court's recent decision in Hein v. Freedom From Religion Foundation, ____U.S.____, 127 S.Ct. 2553, 168 L.Ed. 2d 424 (June 25, 2007), confirms the standing of taxpayers to object to the unconstitutional use of tax appropriations in the administration of a Congressional spending program.

Here, Congress has mandated medical services for veterans; Congress has created the Veterans Health Administration to administer the provision of such services; and Congress finances such services with annual taxpayer appropriations. The Hein decision, in these circumstances, fully supports the Government's original decision to raise no standing objection in the District Court. Standing was evident to the government under Flast v. Cohen, 392 U.S. 83 (1968), and Bowen v. Kendrick, 487 U.S. 589 (1988). Hein reaffirms that assessment.

1. Congress Has Mandated Health Care Services for Veterans

Title 38 of the United States Code, enacted by the United States Congress, establishes a benefit programs for veterans. Chapter 17 establishes a comprehensive program of medical services for eligible veterans, including §1710

which specifically directs the Secretary of the Department of Veterans Affairs to furnish hospital care and medical services to eligible veterans.

Chapter 73 of Title 38 of the United States Code creates an organizational structure to provide mandated medical services to veterans. 38 U.S.C. §7301(a) provides that there shall be "in the Department of Veterans Affairs a Veteran's Health Administration. The Undersecretary for Health is the head of the Administration. The Undersecretary for Health may be referred to as the Chief Medical Director." Section 7301(b) further provides that "the primary function of the [Veteran's Health] Administration is to provide a complete medical and hospital service for the medical care and treatment of veterans, as provided in this Title and in regulations prescribed by the Secretary pursuant to this Title."

Providing medical services by the VHA to eligible veterans is part of a Congressionally-mandated spending program. The Veterans' Health Care Eligibility Reform Act of 1996, codified at 38 U.S.C. §1704 et seq., directs the Department of Veterans Affairs to establish and operate an annual patient enrollment system for providing hospital and medical care to veterans. Eastern Paralyzed Veterans Association v. Principi, 257 F.3d 1352, 1354 (Fed. Cir. 2001). Congress' statutory directive to the Veterans Administration, moreover, specifically and "substantially limits VA's obligation to provide care. The scope of VA's mandate reaches only to the extent and in the amount provided in advance in appropriations Acts for these purposes." Id. at 1362.

In order to receive hospital care at VA expense, a veteran must meet the basic statutory eligibility requirements set forth in 38 U.S.C. §1710. Cantu v. Principi, 2004 U.S. App. Vet. Claims LEXIS 304, 16 (2004). A veteran who meets the requirements of §1710 "shall" be provided hospital care by the VA. Zimick v. West, 1998 U.S. Vet. App. LEXIS 75, 13 (1998). "Where Congress has enacted an intricate and all-encompassing statutory scheme, however, expenditures must be specifically authorized by statute," and an officer or employee of the United States government may not make or authorize an expenditure or obligation exceeding an amount available in appropriation or fund for the expenditure or obligation. Malone v. Gober, 1997 U.S. Vet. App. LEXIS, 1060, 10 (1997).

The VHA provides health care services under the authority of a "license" provided exclusively via congressional legislation, especially 38 U.S.C. §1710, which authorizes the operation of Veterans Administration Hospitals. Romero v. United States, 865 F. Supp. 585, 590 (E.D. Mo. 1994).

2. VHA Funding for Medical Services Comes From Congressional Appropriations

Health care benefits, including pastoral and spiritual care, provided to veterans by the VHA are funded by annual Congressional appropriations, which total $37.1 billion for FY2008. (See Congressional Research Service Report ("CRS") for Congress: *Veterans' Medical Care FY2008 Appropriations*, previously filed with this Court as Exhibit A to "Appellants' Statement Regarding Standing in Light of Supreme Court's Hein Decision.") This amount includes $29 billion for

medical services. (Id.) With this funding, the VHA purportedly operates the nation's largest integrated direct health care delivery system. (Id. at CRS-3.) This system is administered by the VHA, which is funded through multiple Congressional appropriation accounts from Congress. (Id. at CRS-10.) The medical services account covers expenses for furnishing inpatient and outpatient care and treatment of veterans. (Id.)

3. Funding For Religious Treatment of Veterans is Appropriated Pursuant to a Congressional Spending Program

The expenditures at issue in the present case are made pursuant to an express Congressional mandate and specific Congressional appropriations. See Hein, 168 L.Ed.2d at 440. Because the alleged Establishment Clause violation in this case, as in Flast, is funded by specific Congressional appropriations, and undertaken pursuant to an express Congressional mandate, the Appellants have established the requisite "logical link between [their taxpayer status] and the type of the legislative enactment attacked." Id. at 441. By contrast, the present case is different than the challenge in Hein, where the expenditures at issue were not made pursuant to any Act of Congress, but rather, Congress provided "general appropriations to the Executive Branch to fund its day-to-day activities." Id. In the present case, core program dollars are at issue, not "petty cash" accounts for administration.

The Appellants' standing in the present case is consistent with the Supreme Court's holding in Bowen v. Kendrick, 487 U.S. 589 (1988), wherein the Court

found a sufficient nexus between the taxpayer's standing and the 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." Id. at 620. The Supreme Court in Hein reaffirmed the principle of Bowen, while noting that the key to standing in Bowen was the Court's recognition that the challenged expenditure was authorized by a specific Congressional spending program. Hein, 168 L.Ed.2d at 442-43. Unlike the situation in Hein, Bowen involved an expenditure of funds pursuant to Congress' taxing and spending powers that Congress had created and authorized. Id. at 443.

The challenge in the present case does not involve a "lump sum Congressional appropriation for the general use of the Executive Branch." Id. at 443. Standing in the present case, therefore, would not "enlist the federal courts to superintend, at the behest of any federal taxpayer, the speeches, statements and myriad daily activities of the President, his staff, and other Executive Branch officials." Id. at 446. In fact, nothing in Hein suggests that the Supreme Court meant to exclude major Congressional spending programs, including health care, from Constitutional scrutiny.

The Appellants' standing in this case, previously unchallenged, falls squarely within the bounds of the Supreme Court's holdings in Flast, Bowen, and Hein. The Appellants are specifically challenging the integration of religion as part of the health care delivery services administered by the VHA, including as a routine part

of outpatient care, and in specific treatment programs conducted by VHA health care facilities. Pastoral services are provided by the VHA as part of the interdisciplinary medical treatment provided to eligible veterans – and the funding for such medical services is pursuant to annual appropriations by Congress for the purpose of implementing Congress' mandate to provide medical services to eligible veterans.

To deny standing in this case would contradict the Supreme Court's holding in Bowen by effectively recognizing standing only to make facial challenges to Congressional spending mandates. Significantly, in Bowen, the Court explicitly held that Congress' statutory mandate did not facially violate the Establishment Clause. The Court, instead, found that the administration of the spending program, as applied, violated the Establishment Clause by using Congressional appropriations to implement the underlying Congressional spending program. The fact that administration of the program required the exercise of discretion, moreover, did not preclude standing. On the contrary, virtually all Congressional spending programs involve administrative discretion to make specific funding decisions, but such discretion does not implicate the Executive's inherent separation of power authority. Bowen, otherwise, cannot be reconciled with either Flast or Hein.

Here, as in Bowen, Congress has not facially mandated an impermissible integration of religion into the delivery of medical services to veterans, but the VHA allegedly has improperly integrated religion into the provision of medical

services in administering Congress' mandate to provide such services to veterans. If taxpayers cannot challenge the VHA's administration of Congressional appropriations in these circumstances, then only facial challenges to Congressional action may be brought by taxpayers. That is not the Supreme Court's holding in Bowen, nor is it the Supreme Court's holding in Hein.

4. Congressional Appropriations for Medical Services for Veterans Are Distinguishable From Winkler v. Gates

Congressional appropriations for medical services for eligible veterans constitute spending authorized by the Taxing and Spending provision of Article 1, Section 8, of the United States Constitution. The Congressional mandate to provide medical services to veterans, and the resulting appropriations by Congress, constitute a classic exercise of Congress' Taxing and Spending power, as the Second Circuit Court of Appeals has already held in Katcoff v. Marsh, 755 F.2d 223, 231 (2nd Cir. 1985) (taxpayer standing to challenge Army chaplaincy program).

Unlike the situation in Winkler v. Gates, 481 F.3d 997 (7th Cir. 2007), Congressional appropriations to pay for medical services for veterans involve a true Congressional spending program, such as in Bowen v. Kendrick, 487 U.S. 589 (1988), rather than the disposition of surplus property that was at issue in Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982). The Congressional mandate to provide medical services for

veterans is essentially a social benefit program funded pursuant to Congress' Taxing and Spending authority.

Taxpayer standing to challenge governmental chaplaincy programs has already been upheld – even as to army chaplains providing services to active members of the armed services. In Katcoff v. Marsh, 755 F.2d at 231, the Second Circuit Court of Appeals rejected a taxpayer standing argument similar to that just made by the Government in the present case. The Court stated:

> The threshold question, whether plaintiffs have standing to litigate the constitutionality of the Army's military chaplaincy, need not detain us long. For reasons fully stated by Judges Mishler and McLaughlin, see 599 F.Supp. 987, and 582 F.Supp. 467-71, we agree that as federal taxpayers, the plaintiffs satisfy the two-pronged test of Flast v. Cohen, 392 U.S. 83, 20 Lawyer Ed.2d 947, 88 Sup. Ct. 1942 (1968). Unlike the issue in Valley Forge, supra, relied on by defendants, which involved only "a decision by HEW to transfer a parcel of federal property," 454 U.S. at 479, the attack here is directly upon the constitutionality of Congress' exercise of its taxing and spending power under Const. Art. I §8.

In Katcoff, the defendants argued that the Constitutional source of Congress' power over the Chaplaincy Program traced to the War Powers Clauses of Article I, §8, rather than the Taxing and Spending clause. The District Court rejected this argument, with reasoning adopted by the Court of Appeals. The District Court explained its holding as follows:

> It is also noteworthy that the Taxing and Spending Clause itself expressly states that one of the purposes of taxing and spending is to "provide for the common defense." Art. I, §8, Cl. 1. In their affidavits and memoranda, Army personnel and defendants argued that the Chaplaincy is necessary for the efficient functioning of the Army. It would therefore be disingenuous, at best, to conclude that Congress was not acting under the Taxing and

> Spending Clause when it provided funding for the Chaplaincy. Katcoff v. Marsh, 582 F.Supp. 463, 471 (E.D. NY 1984).

The argument for standing is even more compelling in the present case, involving the provision of medical services and benefits to veterans. VA benefits are comparable to other social service programs, as the Court of Appeals for the District of Columbia held in Quiban v. Veterans Administration, 928 F.2d 1154, 1162 (D.C. Cir. 1991):

> We appreciate the service-based criterion for veterans' benefits, but ultimately cannot agree that the benefits at issue here are so sharply distinguishable from other social welfare or insurance benefits as to render Rosario and Torres uninstructive. Veterans' benefits, like other social welfare benefits, including Social Security, are funded by tax revenues. Essentially they transfer funds from one class – United States taxpayers – to another – persons Congress determines to be worthy or in need of financial assistance.

Congressional appropriations for VA medical services cannot be analogized to the assistance provided by the United States military to the Boy Scouts of America ("BSA") for its National Jamboree. In Winkler v. Gates, 481 F.3d 977 (7th Cir. 2007), this Court found assistance to the BSA to be more like the regulation of government property at issue in Valley Forge than the spending program at issue in Bowen.

In Winkler, this Court concluded that the plaintiff satisfied the Flast requirement that a nexus exist between a person's status as a taxpayer and the constitutional infringement that is alleged, i.e., violation of the Establishment Clause. The Court then identified the more difficult question to be whether the

Jamboree statute "is the type of legislative enactment that the Flast court had in mind. Is it an exercise of Congressional power under the Taxing and Spending Clause of Art. I, §8, or do we have only an incidental expenditure of funds in the administration of an essentially regulatory statute?" 481 F.3d at 981. The Court compared "the two most important cases" for evaluating the issue posed, including Valley Forge and Bowen. After describing the Congressional program at issue in each of those cases, this Court again identified the decisive issue in Winkler to be "whether the Jamboree statute is more like the Surplus Property Act in Valley Forge or more like the AFLA Program in Bowen." Id. at 982.

This Court concluded in Winkler that the Government's assistance to the BSA Jamboree was more like the Surplus Property Act in Valley Forge, than the social service program at issue in Bowen. The Court's understanding of Valley Forge was significant to its conclusion.

The Court recognized that "in Valley Forge, the plaintiffs challenged the decision of the Secretary of Health, Education & Welfare to transfer a defunct property that had once been a military hospital to Valley Forge Christian College. The Secretary was authorized to make that decision under a Federal Statute permitting the transfer of surplus property to private and public entities that might make use of it." Id. at 981. The Supreme Court concluded in Valley Forge that the plaintiffs lacked standing to challenge the Secretary's action because the challenged action was not in essence an exercise of the Taxing and Spending power, but

instead, the statute authorizing the administrative decision depended upon Congress' power under the U.S. Constitution's Property Clause, Art. IV, Section 3, cl. 2. Id. The disposition of government property in Valley Forge, therefore, was far removed from the imposition and appropriation of any tax.

The property that spawned the litigation in Valley Forge had been acquired by the Department of the Army in 1942 as part of a larger tract of approximately 181 acres of land northwest of Philadelphia. Id. at 467. The Army built on that land the Valley Forge General Hospital, and for thirty years thereafter, the hospital provided medical care for members of the Armed Forces. In April, 1973, as part of a plan to reduce the number of military installations in the United States, the Secretary of Defense proposed to close the hospital, whereupon the General Services Administration declared the hospital to be "surplus property." Id. at 468.

The above facts were important to the Supreme Court's decision in Valley Forge, just as case-specific facts were important to this Court's decision in Winkler, including the fact that the statute authorizing assistance to the BSA requires that equipment and services be "lent" to BSA; and "no expense shall be incurred" by the United States government; and the BSA must provide "good and sufficient bond for the safe return" of property lent by the United States. Winkler, 481 F.3d at 982-83. The statutes at issue in Winkler, according to this Court, simply "do not establish the kind of classic taxing and spending program that the Court evaluated in Flast or Bowen," including because "no governmental office gives out any grants to the

BSA or any other group or institution, religious or otherwise, and much of the support given is in the form of loans." Id. at 984.

Based on the relevant facts in Winkler, this Court concluded that the Jamboree statute was not a taxing and spending statute, but rather, the statute was authorized by Congress' powers under the Property Clause; the military is, in other words, just regulating its own property and manpower. Id. at 985-86. Although some support of BSA does occur, the statutes at issue in Winkler do not "turn money or services over to the BSA to handle any way it wants, indeed, most of the services the military furnishes are underwritten by BSA because Congress has insisted on revenue-neutrality for the United States." Id. at 986. This Court concluded, therefore, that the statute at issue in Winkler was "first and foremost a statute about the use, disposal, and provision of military resources – including equipment, land, and soldiers." Id. at 986.

The statutes that compel the VA to provide medical services to veterans, by contrast to the statutes at issue in Valley Forge and Winkler, establish a "classic taxing and spending program" to provide services to an intended population. Unlike Valley Forge and Winkler, the statutes establishing and mandating a system for providing medical services to veterans is not simply intended to regulate the use and disposal of government property. The provision of such services mandated by Congress, such as by 38 U.S.C. §1710, constitutes an appropriation for services

"more like" the spending program at issue in Bowen than the Surplus Property Act in Valley Forge.

The Government's apparent reliance on Winkler to now question this Court's jurisdiction is misplaced. The spending program involved in the present case clearly arises under Congress' Taxing and Spending authority, rather than the Property Clause or the War Power Clauses of the Constitution. The Government's argument, moreover, illustrates the difference between this case and the Supreme Court's recent Hein decision, in which purely executive action was found to exist. In the present case, as the Government implicitly acknowledges, a Congressional spending program is plainly and unambiguously at issue. The Appellants, as a result, do have taxpayer standing in this matter.

B. VA Chaplains Are Promoting, Sponsoring, and Endorsing Religion Over Non-Religion, Rather than Merely Accommodating Free Exercise Rights

1. The Establishment Clause Prohibits Public Funding of Religious Indoctrination

The Government undeniably directly funds religious activity through its chaplaincies at medical centers throughout the United States. These activities clearly violate the Establishment Clause, except where justifiable as appropriate accommodations to the Free Exercise rights of hospitalized patients.

The Government argues that publicly funded faith-based health services inherently do not violate the Establishment Clause without coercion. This is an unprecedented argument outside the context of accommodating Free Exercise

rights. Direct public funding of religious activity violates the Establishment Clause, except for publicly funded social service vouchers. Direct public funding otherwise evinces the appearance of endorsement.

The Establishment Clause guarantees that the "government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a religion or religious faith, or tends to do so." Lee v. Weisman, 505 U.S. 577, 587 (1992). The coercion prohibited by the Establishment Clause includes financial support of religious activities from government appropriations. The Supreme Court described this fundamental limitation imposed by the Establishment Clause in Everson v. Board of Education, 330 U.S. 1, 15-16 (1947): "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

The Supreme Court has consistently held that government tax appropriations may not be used for religious indoctrination. Public officials may not subsidize activities that inculcate religion. The government may not subsidize activities, whether in cash or in kind, when the effect of the aid is a direct subsidy of religious activities. Witters v. Washington Dept. of Svs. for Blind, 474 U.S. 41, 47 (1986). The Establishment Clause prohibits government-financed or government-sponsored indoctrination and the Supreme Court accordingly has struck down programs that

entail an unacceptable risk that government funding will be used to advance a religious mission. Bowen v. Kendrick, 487 U.S. 589, 611-612 (1988).

In Bowen, the Supreme Court considered whether a grant program that provided funding for services relating to adolescent sexuality and pregnancy violated the Establishment Clause. The Court concluded that grants given to sectarian organizations could violate the Establishment Clause, and specific instances of constitutionally impermissible use of funds should be addressed insofar as they shed light on the manner in which the program was being administered. Id. at 620-21. The Supreme Court then directed the district court to consider whether aid was being used to fund specifically religious activities." Id. at 621. The Court further directed the district court to determine whether AFLA grantees used materials with an explicitly religious content or that were designed to inculcate the views of a religious faith.

The Supreme Court continues to construe the Establishment Clause to prohibit direct public funding of religious content, including the Court's plurality decision in Mitchell v. Helms, 530 U.S. 793 (2000). In Mitchell, the Court considered a federal school aid program in which secular materials were loaned to parochial schools. Justice Thomas announced the judgment of the Court and wrote a four person plurality opinion in which he concluded that the funding scheme did not violate the Establishment Clause, in part, because the program did not fund impermissible religious content. Id. at 820. Justice Thomas also specifically

recognized the special Establishment Clause dangers when money is used to directly support religious activity; the purpose of the distinction is "to prevent subsidization of religion." Id. at 815-816. The concurrence and dissent in Mitchell, moreover, were more emphatic that direct funding of religious content violates the Establishment Clause. Cf. Agostini v. Felton, 521 U.S. 203, 223 (1997) (government inculcation of religious beliefs has the impermissible effect of advancing religion).

The Supreme Court has consistently recognized that direct funding of substantive religious content violates the Establishment Clause, while programs that allocate funding by individual private choices do not run afoul of the Establishment Clause. For example, in Zelman v. Simmon-Harris, 536 U.S. 639, 649 (2002), the Court considered whether a school finance program had the forbidden "effect" of advancing religion; the Court's decision's relied on the distinction between government programs that provide direct funding and programs of true private choice, in which government aid reaches a religious use only as a result of the genuine and independent choices of many private individuals. In the latter situation, the funding decision is not the government's, so no public advancement of religion occurs.

Here, the Government has made the decision to allocate resources to religious treatment programs offered to patients. The District Court erred, therefore, in concluding that government-sponsored religious programming is

constitutionally permissible whenever participation is voluntary. The allocation of funding by private decision makers, through vouchers as in Zelman, is essential to break the circuit of governmental sponsorship and endorsement. Here, government funding decisions are not based upon the individual allocation of personal vouchers.

Even a secular purpose and facial neutrality do not satisfy the Establishment Clause if in fact the government is lending direct support to a religious activity. Roemer v. Bd. of Public Works of Maryland, 426 U.S. 736, 747 (1976). Public funding has the primary effect of advancing religion "whenever it funds a specifically religious activity in an otherwise substantially secular setting." Hunt v. McNair, 413 U.S. 734, 743 (1973).

Finally, public funding of religious activity that endorses, indoctrinates or inculcates religion is prohibited by the Establishment Clause, regardless whether program participation is voluntary -- and regardless whether non-religious programs also are funded. Engel v. Vitale, 370 U.S. 421, 430 (1962). Coercion is not a necessary element of the prohibition against compelled taxpayer support of religion, contrary to the District Court's conclusion.

2. The Accommodation Of Free Exercise Rights Is Triggered By A Purpose To Remove Burdens

The Government argues that the accommodation of Free Exercise rights does not have to be perfectly limited to that which is required by the Free Exercise Clause. The VA argues that "benevolent play in the joints" allows for accommodations that may be broader than absolutely required to avoid a Free

Exercise violation. The Appellants, however, object to VA chaplain activities that are intended to promote religion over non-religion, rather than having a purpose to facilitate Free Exercise rights. The Appellants also object to religious activities provided to persons whose Free Exercise rights are not even burdened, i.e., outpatients of the VA health care system. These activities are not protected as mere "benevolent" imprecision, regardless of alleged "therapeutic" value.

Only the purpose to alleviate significant governmental interference with Free Exercise rights constitute permissible "play in the joints." Corporation of Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327, 336 (1987). The government may and some times must accommodate religious practices without violating the Establishment Clause. Id. at 334. The government may act, if with the proper purpose, to lift regulations that burden the exercise of religion. Id. at 338. While there is room under the Establishment Clause for "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference, at some point, accommodation devolves into an unlawful fostering of religion." Id. at 334-35.

In assessing the tension between the accommodation of Free Exercise rights and the proscription against establishing religion, the government's purpose must be considered. For example, in Amos, the Supreme Court concluded that "Congress' purpose was to minimize governmental interference with the decision-making process in religions." Id. at 336. The Court went on state that where government

action "is neutral on its face and motivated by the permissible purpose of limiting governmental interference with the exercise of religion," then no justification for applying strict scrutiny would exist. Id. at 339. Further, government action is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden "effects" it must be fair to say that "the government itself has advanced religion through its own activities and influence." Id. at 337.

The Government's purpose is important because otherwise "judicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause. Any statute pertaining to religion can be viewed as an accommodation of free exercise rights." Id. at 347 (O'Connor, J., concurring). Justice O'Connor explains further that the necessary step to separate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance is to inquire as to the government's purpose. Id at 348.

A preference for the dissemination of religious ideas "offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable." Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 29 (1989) (Blackmun, J., concurring). See also, Cutter v. Wilkinson, 544 U.S. 709, 720 (2005) (RLUIPA's institutionalized-persons provision found compatible with the Establishment Clause because it alleviated exceptional government-created burdens

on private religious exercise); Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687, 705 (1994) (the government does not need to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice).

The Seventh Circuit, and other Courts of Appeals, have consistently limited government accommodation to situations where religious opportunity is burdened. For example, in Charles v. Verhagen, 348 F. 3d 601, 611 (7th Cir. 2003), the Court upheld the constitutionality of the RLUIPA "because the enactment of RLUIPA does not exalt belief over non-belief," and as a means to remove burdens on Free Exercise rights. The Court described the interaction between the Free Exercise Clause and the Establishment Clause as follows:

> The Supreme Court has stated that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause. Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334 (97 L.E.D. 2d 273, 107 S. Ct. 2862 (1987) (upholding the exemption of religious organizations from Title VII's prohibition of religious discrimination in employment.) With respect to the second part of the test, "for a law to have forbidden "effects" under Lemon, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." Id. at 337 (emphasis in original). Id. at 610.

The Court concluded that the provision of the RLUIPA could not be fairly said to amount to government advancement of religion through the government's own activities or influence, including because the RLUIPA "seeks to remove only the

most substantial burdens that States impose on prisoners' religious rights." Id. at 611.

Permissible accommodations must not involve the government in the active promotion of particular religious viewpoints "or even religion in general." Madison v. Riter, 355 F. 3d 310, 317 (4th Cir. 2003). Again, in considering the RLUIPA, the Fourth Circuit concluded that "Congress has not sponsored religion or become actively involved in religious activity, and RLUIPA in no way is attempting to indoctrinate prisoners in any particular belief or to advance religion in general in the prisons. Congress has simply lifted government burdens on religious exercise." Id. at 318.

The risk of government sponsorship increases when the government becomes actively involved in providing religious services, rather than merely removing burdens upon the free exercise of religion. The Supreme Court recognized this concern as early as the decision at Walz v. Tax Commission, 397 U.S. 664 (1970), in which the Court considered a tax exemption for churches. The Court first noted that "obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of the statutory or administrative standards." Id. at 675. Granting tax exemptions to churches, however, affords only an indirect economic benefit and involves lesser involvement

by the government because "there is no genuine nexus between tax exemption and establishment of religion." Id at 675-76.

Evaluating a purported justification under the Free Exercise Clause requires more analysis than the Government suggests in this case. The VA claims simply that the activities of VA chaplains should be considered as mere accommodations of Free Exercise rights, but this argument gives more deference to the "play in the joints" paraphrase than courts deem appropriate. "The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." Lee v. Weisman, 505 U.S. 577, 587 (1992); Cutter, 544 U.S. at 714 ("accommodation may devolve into an unlawful fostering of religion"); Kiryas Joel Village School, 512 U.S. at 706 (accommodation is not a principle without limits); Mercier v. City of La Crosse, 305 F. Supp. 2d 999, 1016 (W. D., Wis. 2004) (the principle that government may accommodate Free Exercise rights does not supersede fundamental limitations imposed by the Establishment Clause; the Supreme Court has approved governmental aide to religion in two circumstances: (1) when special treatment is necessary to lift a burden to an adherent's ability to practice his or her religion; and (2) when the benefit is an incidental effect of a neutral program that does not take religion into account).

The relevant question in this case, applying the above principles, must focus on whether the clinical activities of the VA chaplains are intended to alleviate

burdens on Free Exercise rights and/or whether their actual activities give the appearance of preference for religion over non-religion, rather than merely neutral non-interference.

The District Court incorrectly analyzed the constitutional question by focusing on the government's belief in the utility of religion.

3. VA Chaplain Services to Outpatients Are Not Intended to Remove Burdens on Free Exercise Rights; In Fact, No Such Burden Exists

Providing faith-based health services to outpatients is not necessitated by an inability of patients to otherwise freely exercise religious rights. The VA, instead, argues that faith-based health services are beneficial to all veterans. This argument, however, would justify direct public funding of religious services in virtually any context where a sincere belief exists in the utility of religion to help achieve desirable social outcomes.

The VA directive to integrate religion into medical services provided to outpatients is not based upon any purpose to remove burdens on Free Exercise rights, nor is it limited to patients allegedly needing accommodation. The VA instead merely seeks to attract veterans to chaplaincy services earlier in their health care interactions with the VA. The VA would provide "cradle-to-grave" chaplaincy, if possible.

The obligation to accommodate Free Exercise rights of patients, however, is based upon the lack of access to religious services caused by remote military

service, confined hospitalization, forced imprisonment, etc. Veteran outpatients do not lack such opportunities to freely exercise religious rights; nor is that even the VA's stated justification for providing religious services to veteran outpatients.

Government-financed chaplain services might be justified for persons who otherwise lack access to religious services, such as due to military service. Justice Brennan recognized this rationale in Abington School District v. Schempp, 374 U.S. 203, 296 (1963) (concurring opinion), noting that certain practices that conceivably violate the Establishment Clause, if denied, might seriously interfere with certain religious liberties also protected by the First Amendment. "Provisions for churches and chaplains at military establishments for those in the armed services may afford one such example." Justice Brennan further explained the limited justification for government chaplains:

> The state must be steadfastly neutral in all matters of faith, and neither favor nor inhibit religion. In my view, government cannot sponsor religious exercises in the public schools without jeopardizing that neutrality. On the other hand, hostility, not neutrality, would characterize the refusal to provide chaplains in places of worship for prisoners and soldiers cut off by the state from all civilian opportunities for public communion, the withholding of draft exemptions for ministers and conscientious objectors, with the denial of the temporary use of an empty public building to a congregation whose place of worship has been destroyed by fire or flood. Id. at 298-99.

The funding of army chaplaincies, if viewed in isolation, would fail to meet the Establish Clause requirements of Lemon v. Kurtzman, 403 U.S. 602 (1971). See Katcoff v. Marsh, 755 F. 2d 223, 233 (2d Cir. 1985). The immediate purpose

of an army chaplaincy, after all, is to promote religion by making it available to the armed forces, which has the affect of advancing the practice of religion. The courts have concluded, however, that military chaplains constitute a permissible Free Exercise accommodation "since the government has deprived such persons of the opportunity to practice their faith at places of their choice." Id. at 334, n.4, quoting Abington at 296-98. Justice Stewart expressed similar views in his dissent in Abington, noting that "a lonely soldier stationed at some far away outpost could surely complain that a government which did not provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion." 374 U.S. at 308-09.

Despite the limited permissible role for military chaplains, the courts have always recognized constraints. The Katcoff Court, for example, recognized that military chaplain services in urban areas might not be permissible, in the absence of burdens on Free Exercise rights, unless there is a showing that such chaplains are relevant to and reasonably necessary for the conduct of our national defense." 755 F. 2d at 738.

Courts have allowed the provision of chaplaincy services in other circumstances, but again only in cases of restricted access. For example, prison officials may provide chaplains based on the premise of restricted access. The Court described this rationale in Johnson-Bey v. Lane, 863 F.2d 1308, 1312 (7th Cir. 1988):

> Patients in public hospitals, members of the armed forces in some circumstances (e.g., the crew of a ballistic missile submarine on duty) -- and prisoners -- have restricted or even no access to religious services unless government takes an active role in supplying those services. That role is not an interference with, but a precondition of, the free (or relatively free) exercise of religion by members of these groups. The religious establishments that result are minor and seem consistent with, and indeed required by, the overall purpose of the First Amendment's religion clauses, which is to promote religious liberty.

Similarly, in Baz v. Walters, 782 F.2d 701, 709 (7th Cir. 1986), the Court noted that "the VA provides a chaplain service so that veterans *confined* to its medical facilities might have the opportunity to participate in worship services, obtain pastoral counseling and engage in other religious activities if they so desire." (Emphasis added).

No known decision has upheld a government chaplaincy program as an accommodation of Free Exercise rights for persons that do not have restricted access. Even the decision in Carter v. Broadlawns Medical Center, 857 F.2d 448, 457 (8th Cir. 1988), relied upon by the Government, rejected a Free Exercise justification for government hospital chaplains as to unrestricted veterans. In regard to the Free Exercise justification for public hospital chaplains, the Court stated as follows:

> Though we disagree with the district court's conclusion that the Broadlawns chaplaincy violated the Establishment Clause, we agree with the district court's alternative theory that the chaplaincy is a permissible accommodation of at least some patients' free exercise rights. There was evidence that a large percentage of Broadlawns' patients were subject to restrictions on their movement attributable to the state by virtue of the fact that the patients were prisoners or had been involuntarily committed by virtue of hospital rules in the psychiatric ward. Such restrictions constitute a state-imposed burden on

> the patients' religious practices that the state may appropriately adjust for." See Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 107 Sup. Ct. 2862, 2869, 97 L.Ed.. 2d 273 (1987); Id. at 2874-75 (O'Connor, J., concurring in judgment; Katcoff v. Marsh, 755 F.2d at 234; Baz v. Walters, 782 F.2d 701, 709 (7th Cir. 1986).

The VA misunderstands the necessary burdens that will justify an accommodation to Free Exercise rights. The VA argues that veterans are entitled to government-financed medical benefits, including outpatient medical benefits, which veterans will not be able to procure with religious content unless VA chaplains can provide outpatient chaplaincy services. The VA concludes, therefore, that the right of veterans to avail themselves of government-financed religious services will be burdened for outpatients unless VA chaplains are permitted to provide religious services on an outpatient basis. This argument by the Government, if correct, would require the government to finance religious content for all social services to which the public may be entitled, including public education -- but that is not the law.

The Supreme Court has rejected the argument that religion-infused social services must be government financed in order to accommodate Free Exercise rights, including as to important rights like public education. The Free Exercise Clause of the First Amendment cannot be used as a justification for government-financed religious education; in fact, the infusion of religion into government-financed social services provided directly by the government quite clearly violates the Establishment Clause. The Supreme Court explained this conclusion in

Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973).

Limiting government-financed chaplaincy services to confined persons is supported by sound logic. If the government could pay for religion-infused social services, regardless of unrestricted physical access, as an accommodation of Free Exercise rights, then the proscriptions of the Establishment Clause would be vitiated. Direct-funded social services could always be justified after the fact as a means of accommodating the Free Exercise rights of persons to whom such services are provided. That is true not only in the case of public education, but similarly in the case of military chaplain services, VA chaplaincy services, prison chaplain services, etc. The courts have rejected this rationale, however, which is wholly applicable as a matter of law and logic in this case as to VA funded religious services for veteran outpatients.

Chaplain services for outpatients, moreover, cannot be justified as an accommodation of Free Exercise rights because that is not the government's actual intent. VA chaplains have expanded their services to include outpatients because religion is deemed to be desirable for outpatients, just as it is deemed to be desirable for confined patients. That is a purpose, however, that is distinct from a purpose to merely make religious services available, without a value judgment that religion is preferred over non-religion.

The VA cannot deny that providing religious services to outpatients gives the appearance of religious endorsement, unless such services are justified to accommodate Free Exercise rights. The VA, however, cannot justify providing religious services to outpatients as an accommodation of Free Exercise rights because such religious services are not provided, despite sponsorship by the government, as a means to alleviate a burden on Free Exercise rights. That is not the government's actual purpose.

4. VA Spiritual Assessments and 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; VA Spiritual Assessments and Treatment Programs Give The Appearance of Government Endorsement

a. Spiritual assessments elicit religious information for analysis of patient religiosity

The VA requires VA chaplains to perform "spiritual assessments" of every patient. These assessments are not intended as mere accommodations of Free Exercise rights. VA chaplains are directed to perform spiritual assessments to determine the existence of spiritual injuries so that religious treatment can be implemented as part of the hospital's medical protocol. As a result of the VA's programmatic incorporation of religion into medical treatment, VA hospitals have effectively become sectarian facilities, rather than medical facilities that also make pastoral care available. The VA's institutional preference for religion over non-

religion is not permissible under the guise of accommodating Free Exercise rights because core values of the Establishment Clause are thereby nullified.

The VA unpersuasively tries to justify its position by describing chaplaincy services as nothing more than benign and empathetic listening. In fact, however, VA chaplains do much more than merely listen. They conduct Spiritual Assessments that project an implied, and often explicit, message that religion is important to successful treatment. The spiritual assessments, moreover, when examined, elicit primarily information about patient religious affiliations, practices, and beliefs -- which information is then analyzed to make assessments of spiritual injury for purposes of developing treatment plans. The assessments go beyond any accrediting requirements, which could not override the Constitution in any event.

The suggestion that VA chaplaincy is no more than passive listening is belied by the evidence of what VA chaplains actually do. The Spiritual Assessments do not ask broad questions about spirituality; they ask focused questions about organized religious affiliations, practices and beliefs. The Spiritual Assessments ask these questions precisely because they seek to determine the need for spiritual intervention by reference to measures of organized religious orientations. The actual questions asked, and the VA's interpretations of those answers, are based explicitly upon organized religious belief systems.[2]

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[2] Given the explicitly religious content of the Spiritual Assessments, and their stated and/or implied message that religion enhances health, and given the interpretation applied to the Spiritual Assessments, the VA's attempt to distinguish between spirituality and religion becomes irrelevant. The VA's "broader" definition of spirituality, moreover, does not take spirituality out

VA hospitals use a variety of Spiritual Health Assessments to determine the spiritual health needs of VA patients. These assessments seek detailed information about the patient's religious belief systems, as well as the strength and intensity of religious belief. Patients are asked to disclose how often they pray and to question themselves about how God would feel about different matters.

In the Chaplain Spiritual Assessment form used by the Dayton, Ohio VA Medical Center, the chaplains make an assessment as to whether a patient is functionally impaired, moderately spiritually functional, or spiritually impaired.

The Richmond, Virginia VA Medical Center Chaplain Spiritual Assessment form includes inquiries about the importance of faith in the patient's life, as well requests for patients to describe their thoughts about God and their current relationship with God, and inquiries as to the importance of prayer.

The VA Healthcare Network Upstate New York Mini-Spiritual Assessment form inquires as to how often a patient attends church, spends time in private religious activities, such as prayer, meditation or Bible study. This spiritual assessment also asks patients whether they have experienced the presence of the Divine, whether a patient's beliefs/philosophy are what lie behind the patient's

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of the realm of religion. The VA defines spirituality as a search for meaning or transcendent understanding, but this is merely religion by another name. See Kaufman v. McCaughtry, 419 F.3d 678, 681-82 (7th Cir. 2005). The VA's purported distinction between spirituality and religion turns on the question of formal religious affiliation versus non-organized religions beliefs, which is not a meaningful distinction.

approach to life, and inquires whether the patient tries to carry his beliefs into all other dealings in life.

b. VA treatment programs substantively incorporate explicit religious indoctrination

VA medical centers also administer specific treatment programs that have explicitly religious content. These programs are not passive listening exercises by VA chaplains. They involve programs of defined and express religious content. These are programs of religious content that the VA sponsors, offers to veterans, endorses, and funds with tax appropriations. These explicitly religious treatment programs show an incorporation of religion into programming that contradicts the VA's claims in this case. These programs, moreover, incorporate specific religious indoctrination, rather than the broad definition of spirituality urged by the VA. The VA's arguments notwithstanding, VA chaplains are implementing religious programs, as a matter of fact, based upon the Government's choice of religious content.

For example, one VA medical center has created a Spiritual Recovery Support Group ("SRSG") to provide intervention for veterans "suffering from low self-esteem because of significant spiritual injuries as listed in the Multi-Level Spiritual Assessment ("MLSA"). This assessment and intervention "is an attempt to bring the spiritual components of faith and God's grace to bear on treatment and to enhance the healthcare recovery of Veterans. The SRSG is not only a quest to find and/or renew one's spiritual vitality, it becomes a vehicle for change in growth.

When God's gift of spiritual faith and grace is applied, it is good medicine." If a spiritual injury is diagnosed, Bible study is offered to SRSG members because "bringing in the idea that God sees them [patients] of infinite worth and value, and that God wants them to treat themselves with His grace and mercy as His precious child, can be an important concept that can help them [patients] to recover and move out of the pit toward healing, growth, change, and a more positive self - esteem and self-worth." The process of recovery, involving change and growth, is premised in the SRSG on a recognition of God's grace working in each patient:

> The concept of God's grace, defined as God's ability working in man, making him able to do what he cannot do in his own ability, is a liberating and powerful concept. God's grace becomes the power to help us change and alter our history, our thinking, feeling, and behavior.
>
> Using this concept of God's grace, the SRSG becomes not only a quest to find our spiritual vitality, but it becomes a journey of change in growth.
>
> Grace becomes the vehicle (the power) that moves us from darkness to the light, from the negatives to the positives. It improves our self-esteem. The process of grace moves us from the alienation of guilt to the reconciliation of forgiveness. God's grace is His ability working in us, to help us change and grow! (R. 27, Exhibit 26.)

The Dayton VA Medical Center similarly has incorporated the use of "lament as prayer" and Fowler's Stages of Faith Development as part of its medical protocol for treating post-traumatic stress disorder patients. The premise of this intervention, again, is the "insight that unless one's spirituality or soul is addressed in one's journey in recovering, the healing will not be internalized and embraced out

of choice, enabling wholeness. While emotional catharsis and insight may occur, its impact will remain largely cerebral and external."

The VA has implemented other such treatment programs throughout the country, including an explicitly faith-based treatment program at the VA Medical Center in Gainesville, Florida. The program has an express religious content, and utilizes a spiritual questionnaire focused upon the concept of God and/or a Higher Power. The VA Medical Center in Detroit, Michigan, likewise has integrated spirituality into a chemical dependency treatment program.

c. The VA intends to link recovery and religion

The VA is motivated by a purpose to promote religion in preference to non-religion, as a means of accomplishing perceived beneficial outcomes from chaplaincy interventions. That is why VA chaplains are doing spiritual assessments, diagnosis, planned interventions, and providing religious programming. Significantly, those reasons are not based upon an intent to remove burdens to the free exercise of religious rights -- which a reasonable observer would know. They are intended to prefer religion over non-religion as a means of medical treatment.

The VA cannot justify its religious activities as accommodations of Free Exercise rights where that is not its actual purpose. The VA also cannot substantively justify its activities under the Free Exercise Clause where such activities conflict with core values of the Establishment Clause. Here, the VA's

integration of religion into VA medical treatment constitutes active sponsorship and promotion of religion as being preferable to non-religion. This is prohibited by the Establishment Clause, and it cannot be justified as merely an accommodation of Free Exercise rights -- even if the VA is promoting religion in general, rather than promoting a specific denominational preference.

The Establishment Clause absolutely prohibits government actions intended to promote religion over non-religion. In Abington, 374 U.S. at 216, the Court stated that "this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another. Almost twenty years ago in *Everson, supra.,* at 15, the Court said that "neither a state nor the Federal Government can set up a church, neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." See also American Jewish Congress v. City of Chicago, 827 F.2d 120, 124 (7th Cir. 1987) (the Religion Clauses have come to stand for the principle of government neutrality, meaning not only that government should not favor one religion over another, but also that government should not favor religion over non-religion).

The VA argues incorrectly that it inhabits the "wiggle room" between the Free Exercise and the Establishment Clauses of the First Amendment. In the first place, the VA argues incorrectly that neutrality is measured solely by the absence of denominational preference. Neutrality between religion and non-religion is itself a core value of the Establishment Clause, which the Government is contravening.

The VA also unpersuasively seeks protection from the Establishment Clause due to the alleged absence of coercion. The VA claims that because chaplains are not overtly coercing any veterans to accept religion, then they may at least promote religion in general as a means of accommodating Free Exercise rights. The VA's reasoning is flawed, of course, because the Establishment Clause prohibits the promotion and sponsorship of religion even as an aspirational rather than coerced objective. Again, Abington, 374 U.S. at 221, is instructive: "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct government compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not." See also Nyquist, 413 U.S. at 786; Tarsney v. O'Keefe, 225 F.3d 929, 935 (8th Cir. 2000).

The VA is left then to argue that government support for the integration of spirituality into healthcare delivery is justified by our nation's history as a religious people. The Government demands slack in the area of medical services because many people allegedly believe that faith and health are positively correlated, and further, because Americans supposedly are a religious people. Neither argument is sustainable as a constitutional standard. Cf. Freedom From Religion Foundation v. Montana Office of Rural Health, 2004 U.S. Dist. LEXIS 29139 (D. Mt. 2004) (invalidating Montana's participation in a faith-health cooperative, despite state's belief that faith and health were positively related).

The VA's justification for integrating religion into its medical health care model fails because of its intent to promote religion over non-religion. The VA's justification also fails because of the objective appearance that the VA is endorsing religion over non-religion, which appearance of endorsement violates the Establishment Clause. See Amos, 483 U.S. at 348. The VA's active involvement in the promotion of spirituality, including by the VA's own activities, distinguish the claims in this case from merely making available pastoral services to VA patients without the VA's value-laden encouragement. The VA's active promotion of spirituality certainly is not neutral. The VA is endorsing religion.

d. The VA's spiritual assessments give the appearance of endorsement

Systematically assessing spirituality, by itself, conveys an endorsement of religious belief. Whether the key word is "endorsement," "favoritism," or "promotion," the essential prohibition of the Establishment Clause remains the same. "The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief." County of Allegany v. Americans Civil Liberties Union, 492 U.S. 573, 593-94 (1989). In cases involving government participation in religious activity, therefore, the relevant question is whether an objective observer, acquainted with the government's activities, the history of that activity, and implementation of the activity, would perceive it as a government endorsement, regardless of the listener's support for, or

objection to, the endorsement. Santa Fe Independent School District v. Doe, 530 U.S. 290, 308 (2000).

The active involvement of VA chaplains as part of a "multi-disciplinary healthcare team" sends a message of religious endorsement. An "ordinary reader" or "ordinary listener" of the VA's spiritual assessments would conclude that religion is preferred, or else the detailed inquiries of religious history and belief would not be made. Cf. Jancik v. Department of Housing and Urban Development, 44 F.3d 553, 556 (7th Cir. 1995) (housing advertisements are tested for discrimination by "ordinary reader" test, whereby advertisement is deemed discriminatory if it suggests to an ordinary reader that a particular protected group is preferred or dispreferred for the housing in question); Housing Rights Center v. Sterling, 2004 U.S. Dist. LEXIS 28880, at 36-37 (C.D. Cal. 2004) (publication of housing notices and banners written only in Korean suggest to the ordinary reader a racial preference for Korean tenants). In fact, some of the Spiritual Assessments explicitly state that faith promotes health. The information from the assessments, moreover, is processed to measure patient religious resources in determining treatment interventions by chaplains.

The detailed spiritual assessments of VA patients, and other forms of spiritual "diagnosis," send a message of more than casual interest. Just like exclusively Korean language rental notices convey a preference for Korean tenants, the VA's spiritual assessments convey an unmistakable and often express

encouragement of religious belief as a means for achieving better medical outcomes. The spiritual assessments convey an impression that the VA's medical providers officially believe that patients, if prudent, should include spirituality as part of their treatment, or otherwise risk unfavorable outcomes. This endorsement violates the core values of the Establishment Clause every bit as much as religious assessments by prison chaplains, which have been found to be unconstitutional. See Theriault v. Carlson, 339 F. Supp. 375, 381-82 (N. D. Ga, 1972) (submission of religious assessments by prison chaplains violates the neutrality that the government must maintain with respect to religion).

The integration of VA chaplains into each hospital's medical treatment protocol creates an unavoidable entanglement between religion and government. The VA chaplains, by formal recognition as part of a multi-disciplinary medical treatment team, in which each patient is spiritually assessed, creates an excessive entanglement with religion, in which the government must determine the appropriate "therapeutic role of religion."

e. Religious treatment programs endorse religion

The VA's administration of treatment programs that are explicitly religious in content also clearly goes beyond what a chaplaincy can provide as an accommodation. Such programs, even if voluntary, give the appearance that the government sponsors and approves the program content. The program content, moreover, is based upon administrative choices as to the religious content

incorporated. Such treatment programs, in other words, necessarily are not neutral, *vis-a-vis* non-religion, or as to the religious beliefs not incorporated into the program.

The Government, whether by chaplains or others, cannot administer and implement programs containing religious indoctrination, any more than the government can determine religious orthodoxy in the form of nondenominational prayers. Lee v. Weisman, 505 U.S. 577, 616 (1972) (Souter, J. concurring.); see also Hinrichs v. Bosma, 440 F.3d 393 (7th Cir. 2006) (rejecting legislative prayer with Christian content). The problem with such programs, in other words, is that they are not passive reflections of patient religious preferences -- VA hospital chaplains have determined the religious dogma that will be provided.

The VA cannot justify its actions, in short, by claiming to merely accommodate the Free Exercise of religious rights by veteran patients. The expanding role that VA chaplains are assuming to play is not intended to accommodate Free Exercise rights. The expansive role that VA chaplains are assuming to play in the VA's healthcare delivery system is based upon an institutional preference for religion over non-religion. The preference is not concealed by claiming that spirituality is different than religion. Chaplains must be ecclesiastically endorsed, and their predilections are borne out in their actions. The role of VA chaplains violates core values of the Establishment Clause because

government cannot choose to sponsor and promote religion, even if motivated by a belief that healthcare treatment is enhanced by patient religiosity.

VIII. CONCLUSION

The Court of Appeals should reverse the District Court's decision and remand to the trial court for further proceedings. The VA's use of a faith-infused model of medical treatment is not something the government can constitutionally do under the Establishment Clause.

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

1. This brief complies with the type-volume limitation of Fed. R. App. P.32(a)(7)(B) whereby this Brief contains 13,573 words, excluding the part of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(I).

2. This 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 Brief was prepared in a proportionally-spaced typeface using WordPerfect 12 in 13 point, Times New Roman.

Dated this 27th day of August, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served three copies of the foregoing Brief of Appellant and Appendix upon opposing counsel via Federal Express and addressed to the following:

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Dated this 27th day of August, 2007.

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 31(e)

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

Dated this 27th day of August, 2007.

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(d)

Pursuant to Rule 30(d), I hereby certify that all of the materials required by Part (a) and (b) of this Rule are included in the Appendix bound with Appellants' main brief.

Dated this 27th day of August, 2007.

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APPENDIX

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