NO. 16-2082

In the
United States Court of Appeals
for the Fourth Circuit

KAY DIANE ANSLEY; CATHERINE MCGAUGHEY; CAROL ANN PERSON; THOMAS ROGER PERSON; KELLEY PENN; SONJA GOODMAN,

PLAINTIFFS-APPELLANTS,

v.

MARION WARREN, in his official capacity as Director of the North Carolina Administrative Office of the Courts,

DEFENDANT-APPELLEE.

On Appeal from the United States District Court
for the Western District of North Carolina at Asheville

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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No. 16-2082 Caption: Kay Ansley v. Marion Warren

Pursuant to FRAP 26.1 and Local Rule 26.1,

Christian Legal Society
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

N/A

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: Kimberlee Wood Colby Date: January 24, 2017

Counsel for: Amicus Christian Legal Society

CERTIFICATE OF SERVICE

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I certify that on January 24, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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January 24, 2017
(date)

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No. 16-2082 Caption: Kay Ansley v. Marion Warren

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Association of Evangelicals (NAE)
(name of party/amicus)

who is amicus, makes the following disclosure:
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1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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Signature: Kimberlee Wood Colby Date: January 24, 2017

Counsel for: Amicus NAE

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January 24, 2017
(date)

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STATEMENT OF IDENTITY OF *AMICI CURIAE*, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE[1]

Christian Legal Society (CLS) is an association of attorneys, law students, and law professors founded in 1961. CLS has long believed that pluralism, essential to a free society, prospers only when the First Amendment rights of all Americans are protected. To that end, CLS was instrumental in passage of the federal Equal Access Act that protects the right of students to meet for "religious, political, philosophical or other" speech on public secondary school campuses. 20 U.S.C. §§ 4071-4074. *See* 128 Cong. Rec. 11784-85 (statement of Sen. Hatfield) (1982). For over 30 years, the Act has protected both religious and LGBT student groups seeking to meet for disfavored speech. *See, e.g., Bd. of Educ. v. Mergens,* 496 U.S. 226 (1990) (requiring access for religious student group); *Straights and Gays for Equality v. Osseo Area Sch. No. 279*, 540 F.3d 911 (8th Cir. 2008) (requiring access for LGBT student group). Through its Center for Law & Religious Freedom, CLS works in the courts, legislatures, and public square to

[1] In accordance with FRAP 29(a)(4)(E), *amici* state that no party's counsel authored this brief in whole or in part, and that no party, party's counsel, or person other than *amici*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief. A motion for leave to file accompanies this brief.

protect the right of all citizens to speak their minds freely and to live freely according to their religious consciences.

National Association of Evangelicals (NAE) is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 41 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries and independent churches. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries.

SUMMARY OF ARGUMENT

Plaintiffs-Appellants have failed to meet their burden of showing that the federal district court has subject matter jurisdiction. The district court, therefore, properly dismissed this lawsuit for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1) & 12(h)(3).

Six state taxpayers in North Carolina filed this lawsuit in federal court challenging the constitutionality of legislation enacted to bring relief to state magistrates and county clerks in the wake of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). When the North Carolina Administrative Office of the Courts ruled that magistrates could not avoid conducting same-sex marriages by declining to

officiate at any marriages, there ensued at least 32 resignations with the explanation that the magistrates' religious beliefs did not permit them to perform same-sex marriages. The legislature responded with the passage of Senate Bill 2 permitting magistrates to decline for reasons of faith to solemnize any marriage, while ensuring that same-sex couples have a ready alternate to perform the ceremony. The statutory accommodation extends to deputy and assistant clerks who have duties that entail the issuance of marriage licenses.

Senate Bill 2 further allowed for reinstatement of those magistrates that had resigned, and to do so without any loss of retirement benefits because of the break in service. It is the latter expenditure of tax funds, along with any added costs to provide an alternate official to perform the marriage ceremony, which gives rise to Plaintiffs-Appellants' claimed taxpayer standing.

The Plaintiffs-Appellants fall into two categories. All six are state taxpayers. Four of the six identify as gay or lesbian, with two in a same-sex marriage and two engaged to join in a same-sex marriage. Plaintiffs' Compl. ¶¶ 1, 2, 3. All six seek to bring the claim under the Establishment Clause, whereas only the four gay or lesbian Plaintiffs seek to bring claims under the Equal Protection and Due Process

Clauses. Compl. ¶¶ 95, 104. Concerning all three claims, the only allegation of standing to sue is as state taxpayers. Compl. ¶ 7.

Senate Bill 2 is a typical religious exemption to a general law governing the conduct of public officials. On the merits, Plaintiffs-Appellants allege they will suffer harm as a result of the exemption. Religious exemptions often have an impact on third parties.

But in a century-old line of seven cases, the Supreme Court has upheld religious exemptions in the face of arguments that they violate the Establishment Clause. *See Cutter v. Wilkinson,* 544 U.S. 709, 720 (2005); *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-335 (1987); *Gillette v. United States*, 401 U.S. 437, 448-60 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664, 667-680 (1971); *Zorach v. Clauson*, 343 U.S. 306, 308-315 (1952); *Selective Service Draft Law Cases*, 245 U.S. 366, 389-390 (1918); *Goldman v. United States*, 235 U.S. 474, 476 (1918). *See also* Carl H. Esbeck, *When Religious Exemptions Cause Third-Party Harms: Is the Establishment Clause Violated?*, 58 Oxford J. of Church & State 6-7 nn.10, 22-26 (March 15, 2016) (discussing these cases). The key is not to confuse a religious exception with a religious preference, the latter being more problematic. *Id.* at 4, 7-13 (explaining difference between religious exemption and religious preference).

The leading case is *Amos*. Title VII of the 1964 Civil Rights Act exempts religious employers from claims of employment discrimination when the employer is acting out of its sincere religious beliefs. An employee who lost his job for religious reasons sued and alleged that the statutory exemption violated the Establishment Clause. The Court disagreed and rejected the claim that the exemption advanced religion. It was not Congress advancing religion but the religious employer, which is the very purpose for which the employer exists. 483 U.S. at 337 n.15 ("Undoubtedly, [the employee's] freedom of choice in religious matters was impinged upon, but it was the Church … and not the Government, who put him to the choice of changing his religious practices or losing his job."). Unlike a naked religious preference, an exemption from otherwise applicable regulatory duties is leaving religion alone. And the government does not advance religion by leaving it alone.

Concerning claims under the Equal Protection and Due Process Clauses, the Plaintiffs' complaint is oddly composed. Early on, and with rising indignation, the pleading avers that after *Obergefell* obedience to a magistrate's oath of office, entailing—as judicial oaths routinely do—the upholding of state and federal constitutions, requires that a magistrate marry same-sex couples. But *Obergefell*

held that same-sex couples have the same right to marry as do opposite-sex couples, not that a couple (gay or straight) has a right to demand marriage by a government official of the couple's unilateral choice. A state retains authority to arrange the many duties of its judicial officers so that they might reasonably be available for the performance, *inter alia,* of a civil marriage ceremony. But the state also retains discretion to accommodate the religious conscience of employees where alternate personnel are provided to the same-sex couple. Moreover, the putative violation of a state judicial oath is entirely a state-law matter. Any duties thought to be attendant to a state oath can be modified by the North Carolina legislature, and that is just what happened upon the passage of Senate Bill 2. In any event, such state law issues are of no concern to a federal court not sitting in diversity. The pleading goes on to allege that Plaintiffs, as gay and lesbian individuals, may in future have to appear before a reinstated magistrate, thus being subject to a judge that allegedly harbors prejudice. Speculation as to such possible future harm is not ripe for review.

Getting to the merits will require that Plaintiffs first establish federal subject matter jurisdiction, which is here based on taxpayer standing, a jurisdictional claim much diminished from its Golden Age under *Flast v. Cohen*, 392 U.S. 83 (1968).

Even in the heady days following *Flast*, taxpayer standing was never permitted except to entertain a claim under the Establishment Clause. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 347–49 (2006) (denying taxpayer standing in suit alleging a rights violation under the Dormant Commerce Clause); *see Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 609–10 (2007) (plurality op.). Plaintiffs-Appellants' claims under the Equal Protection and Due Process Clauses are speculative as to any future harm and thus do not give rise to a justiciable claim. Therefore, Plaintiffs-Appellants' claims under the Equal Protection and Due Process Clauses must be dismissed.

Likewise Plaintiffs-Appellants lack taxpayer standing to pursue their Establishment Clause claim under the Supreme Court's recent decisions in *Hein* and *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2009). Plaintiffs-Appellants fail to satisfy the criteria laid out in those cases for taxpayer standing, and they have alleged no other basis for standing to maintain this claim. Accordingly, the district court's dismissal for lack of subject matter jurisdiction must be affirmed.

ARGUMENT

I. Plaintiffs-Appellants' Claim To Taxpayer Standing To Bring An Establishment Clause Claim Fails Under The Governing Supreme Court Decisions In *Hein v. Freedom from Religion Foundation, Inc.*, And *Arizona Christian School Tuition Organization v. Winn*.

A. The Judicial Branch Has No Jurisdiction to Hear a Claim that the Government Is Violating the Law Without the Complainant Having Some Specific Injury Attributable to the Alleged Violation.

Standing is a doctrine of justiciability derived from the Cases or Controversies Clause in art. III, § 2, cl. 1 of the Constitution. It implicates separation of powers in the sense of being a limit on the judiciary's subject matter jurisdiction. Standing has three requirements: injury in fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-62 (1992) (holding, *inter alia*, that a congressional grant of standing to all U.S. citizens to challenge certain regulatory actions was unconstitutional). "Injury in fact" means that the plaintiff has suffered some actual or imminent harm. *Id.* at 560. Causation means that the harm is fairly traceable to the defendant. *Id.* Finally, redressability means that the harm can be redressed by a remedy traditionally known to Anglo-American courts of law and equity. *Id.* at 560-61.

Just because the Constitution is alleged to be violated does not give a plaintiff standing to sue. Rather, the complainant must be someone who is

specifically injured by the putative violation. As the Court has explained:

> Although [plaintiffs] claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by [plaintiffs] *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.

Valley Forge Christian Coll. v. Americans United for Separation of Church & State, 454 U.S. 464, 485-86 (1982).

A claim that the government is not following the Constitution, without more, is what the Court calls a "generalized grievance." A "generalized grievance" is one suffered by the entire body politic when the government does not follow the law. A "generalized grievant" is thus without standing because he or she is without concrete injury. It is not a numbers game; it is not that the plaintiff lacks standing because many others also suffer the same injury. *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23-25 (1998) (stating that a "generalized grievance" lacks the necessary concreteness, not because the alleged injury is widespread, but because of the abstract nature of the asserted interest or injury).

Rather, it is that the judicial branch has no jurisdiction to hear a claim that the government is violating the law without the complainant having some specific

injury attributable to the alleged violation. That causes one to ask: How is it that the Constitution can be violated and yet no one is individually harmed?

The United States Constitution is composed of rights and structure. Rights vest in people, as well as the associations they form. Structure is usefully envisioned as the framework of the government, which is that of a federal republic. The presence of a "generalized grievance" never occurs when a plaintiff's claim is that an individual constitutional right has been violated. Rights violations always produce a victim. This is because rights run in favor of people. Thus, when a right is violated, there is always someone or some group that is specifically harmed. And this individualized harm satisfies the "injury in fact" requirement for standing.

It is different with respect to a violation of a structural clause in the United States Constitution. The nature of a structural clause speaks to the government's powers and duties. The national government is one of limited, delegated powers. There are checks and balances running between and among the three branches. These limits on power are structural in nature, and the checks run against the government or the branches and officials thereof. These limits or checks on the power of the various branches of the government sometimes yield individual liberty, but this liberty comes only as a consequence of the structural clauses

working to check and balance the power of the government. Accordingly, sometimes structure can be violated but no person or organization suffers a concrete injury; that is, there is no individualized "injury in fact." When this occurs, no person or group has standing to sue. Instead, there is a "generalized grievance."

Ex parte Levitt, 302 U.S. 633 (1937) (per curiam), is an early example of a structural violation where no one was specifically injured, so no one had standing to sue. Albert Levitt, in his capacity as a citizen and as a member of the Supreme Court's bar, petitioned the Court to delay President Roosevelt's appointment of Hugo Black to the United States Supreme Court because, when nominated, Black was a Senator. Congress had recently voted to increase the retirement benefits of members of the Court. Levitt argued that the Appointments Clause, U.S. Const., art. I, § 6, cl. 2, prohibits a member of Congress from immediately assuming an appointment in the judicial branch when, during the member's elected term, "the Emoluments" of the office were increased via retirement benefits for the Court's Justices. The purpose of this structural clause is a good one, namely, to prevent members of Congress from using their offices for personal, albeit future, financial gain. Instead of reaching the merits, however, the Supreme Court dismissed for

lack of standing. The Court said that to invoke its jurisdiction the petitioner "must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action[,] and it is not sufficient that he has merely a general interest common to all members of the public." *Id.* at 634. Levitt was a "generalized grievant."

Similarly, in *United States v. Richardson*, 418 U.S. 166 (1974), the Court denied standing to a plaintiff who claimed the Account Clause, U.S. Const., art. I, § 9, cl.7, required Congress to disclose the appropriation of all public monies. The purpose of this structural clause is also a good one because it compels Congress to be transparent in how public funds are appropriated. The plaintiff sought disclosure of the Central Intelligence Agency (CIA) budget, which, if brought to light, would have revealed covert operations and other state secrets. *Id.* at 175 & n.8. Although the government ostensibly violated a structural duty by classifying as secret all appropriations to the CIA, no one suffered a concrete injury. The absence of a personalized injury required dismissal for lack of standing. *Id.* at 180. Richardson's assertions of standing both as a citizen and as a taxpayer were rejected, *id.* at 176-80, and the claim was dismissed as a "generalized grievance."

Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974), was decided the same day as *Richardson*. Plaintiffs claimed that members of Congress who also drew pay as reserve officers in the armed forces violated U.S. Const., art. I, § 6, cl. 2, a structural clause prohibiting members of Congress from simultaneously holding positions in the executive branch. The structural clause is a good one, seeking to prevent conflicts of interest where members of Congress have divided loyalties because they hold jobs in two branches. But no one was specifically injured as a result of the ostensible violation, so again the Court dismissed the matter because it was a "generalized grievance." *Id.* at 216-27.

It follows that when a "generalized grievance" occurs, the nature of the constitutional clause alleged to be violated is structural as opposed to rights-based. This would be true of the Establishment Clause.

B. The Limited Exception to the Rule Against Taxpayer Standing in *Flast v. Cohen* Does Not Help Plaintiffs-Appellants.

The rule is that there is no standing to sue as a federal taxpayer when alleging a violation of the United States Constitution. *Massachusetts v. Mellon*, 262 U.S. 447 (1923).[2] When one sues asserting taxpayer standing, the plaintiff is

[2] The rule against taxpayer standing does not apply to situations where the claimant is suing as a taxpayer because she is due a tax refund or because she is the victim of an illegal tax. In these latter instances, there is individualized "injury in fact."

not asking for a portion of his or her taxes to be lowered or refunded. Nor is the focus of the plaintiff on the lawfulness of the tax. Rather, the focus is on some generalized constitutional violation that the plaintiff wants stopped. However, for a federal court to enjoin the alleged constitutional violation, the plaintiff must first have standing; hence, one must have "injury in fact." A complaint invoking taxpayer standing is a "generalized grievance." Justice Alito said as much in *Hein* when he wrote that "if every federal taxpayer could sue to challenge any Government expenditure, the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus." *Hein,* 551 U.S. at 593.

In 1968, the Court handed down *Flast v. Cohen*, 392 U.S. 83 (1968), which made an exception to the foregoing rule. At issue in *Flast* was the Elementary and Secondary Education Act of 1965, a provision of which provided federal funding to nonpublic schools for educational equipment, as well as for classes in reading and arithmetic. Funding was available to K-12 nonpublic schools without regard to possible religious affiliation. Insofar as funding was made available to religious schools, plaintiffs sued under the Establishment Clause.[3] Plaintiffs were not

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[3] The plaintiffs in *Flast* also brought a claim under the Free Exercise Clause. 392

individually harmed by the federal funding. Rather, they remained at liberty to exercise their own religion, if they had one. But they had no specific "injury in fact," and thus no standing to sue. Indeed, no one had "injury in fact." For example, the public schools were not harmed. Just because religious schools were funded did not mean that public schools would get less money; government aid to education is not a zero sum game. And religious schools receiving federal funding were not harmed because the funding was optional; no nonpublic school was forced to take the government aid. Because plaintiffs had no specific harm, the complainants in *Flast* sued in their capacity as federal taxpayers. *Id.* at 85, 88.

Following longstanding precedent, the lower federal court dismissed for lack of standing. *Flast v. Gardner*, 271 F. Supp. 1 (1967). The Supreme Court reversed. The plaintiffs' alleged injury was that the government's money went in support of religion, a "generalized grievance." Rather than dismiss, the Court adopted a legal

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U.S. at 85, 103. In remanding for further proceedings, however, the Court only permitted the taxpayer-plaintiffs to proceed with their claim under the Establishment Clause. *Id*. at 103-06. That makes sense. The Free Exercise Clause is rights-based. If there was a rights violation, there would be a victim, and thereby a plaintiff with "injury in fact" and standing to sue. Taxpayer standing is never needed for claims under the Free Exercise Clause. For this reason, the Court has twice rejected taxpayer standing claims brought under the Free Exercise Clause. *Tilton v. Richardson*, 403 U.S. 672, 689 (1971) (federal taxpayers lacked the requisite burden on religion to pursue free exercise claim); *Bd. of Educ. v. Allen*, 392 U.S. 236, 248-49 (1968) (same holding with respect to state taxpayers).

fiction. The fiction was that every taxpayer has an individualized interest, safeguarded by the Establishment Clause, understood as a power-denying restraint on congressional appropriations in aid of religion. 392 U.S. at 105 ("We have noted that the Establishment Clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I, § 8.").

The *Flast* Court had earlier characterized the Establishment Clause as, *inter alia*, having two purposes, the second being implicated here: "Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Id.* at 103.

When *Flast* permitted taxpayer standing, the claim on the merits was not that the plaintiffs were individually coerced against their religious conscience to pay taxes to support the religion of others—for that would be attempting to assert a Free Exercise Clause violation where the Supreme Court has consistently ruled that there is no such right. *See supra* n. 3.[4] Rather, damages in the form of an

[4] The Court has taken up a personal violation-of-conscience claim brought under the Free Exercise and Establishment Clauses and rejected both of them. The plaintiffs in *Flast* claimed that payment of a general federal tax, the monies of which were appropriated to religious schools, was religious coercion in violation of

indeterminate (and surely *de minimis*) amount of taxes paid are a proxy in *Flast* for what is otherwise a "generalized grievance" caused by an improper relationship between church and state—here, a relationship in the form of the government funding K-12 religious schools.

Taxpayer standing under *Flast* is not characterized as a legal fiction by *Amici* to disparage the holding. Nor is it called a fiction because *Flast* over-reads the Establishment Clause. Rather, *Flast* standing is called a legal fiction simply as an apt description. Adoption of the fiction of taxpayer standing permitted the Court to reach the merits in the absence of a complainant suffering specific or actual harm. This is unique, for no claim on the merits other than one brought under the

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the Free Exercise Clause. 392 U.S. at 103, 104 n.25. The Court chose to defer deciding whether that averment stated a claim, and declined to decide whether a federal taxpayer even had standing to raise such a claim. In *Tilton*, the Court returned to the issue and held that a federal taxpayer's claim of religious coercion did not state a claim for which relief can be granted under the Free Exercise Clause. 403 U.S. at 689. In *Valley Forge*, claimants challenged the transfer of government property at no charge to a religious college as in violation of the Establishment Clause. 454 U.S. 464. Several asserted bases for standing were unsuccessful because claimants lacked the requisite "injury in fact." One of the rejected bases was that claimants had a "spiritual stake" in not having their government give away property for a religious purpose or to act in any other way contrary to no-establishment values. The Court held that a "spiritual stake" in having one's government comply with the Establishment Clause is not a cognizable injury. *Id.* at 486 n.22.

Establishment Clause has ever been permitted in a federal court by a plaintiff asserting taxpayer standing. *See Hein*, 551 U.S. at 608-610 (plurality opinion), 642 n.4 (Souter, J., dissenting) (conceding that taxpayer standing has been recognized only in claims brought under the Establishment Clause); *DaimlerChrysler Corp*., 547 U.S. at 347-49 (denying taxpayer standing in complaint alleging a violation of the Dormant Commerce Clause).

Referencing the period 1776-1786 when the State of Virginia disestablished the Anglican Church, the *Flast* Court said that the "concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers" to directly aid religion. 392 U.S. at 103-104. The principles behind the Virginia disestablishment were then equated by the Court with the meaning of the Establishment Clause. And the meaning, in the Court's view, was that the Establishment Clause was a restraint "designed as a specific bulwark against such potential abuses of governmental power, and that clause . . . operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8." *Id.* at 104.[5]

[5] This attribution of the ideas behind the Virginia experience of 1776-1786 to the intended meaning of the Establishment Clause as drafted by the First Congress in

Like all legal fictions, the fiction in *Flast* was adopted for instrumental purposes. If the *Flast* Court had not entertained the fiction, legislative bodies could appropriate money for general aid-to-education programs and allow religious schools to be equally eligible for the programs without anyone having standing to challenge the programs as possible violations of the Establishment Clause. A starker example would be Congress appropriating money to pay the salaries of all clergy who applied for the funds. Without taxpayer standing, no one would have standing to challenge such a law in federal court.

Flast thus enabled a more expansive judicial enforcement of the Establishment Clause. Indeed, after *Flast*, a complainant may also assert state or local taxpayer standing in order to pursue a claim that the Establishment Clause is violated.

This follows because what matters with the legal fiction in *Flast* is not the particular government promulgating the tax, but that the claim on the merits is a legislative appropriation said to be in violation of church-state separation. On the other hand, by allowing the legal fiction, *Flast* weakened the requirements of

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1789, and its subsequent ratification by the states during 1789-1791, is open to question as a matter of history. *See* Carl H. Esbeck, *The 60th Anniversary of the Everson Decision and America's Church-State Proposition*, 23 J.L. & Religion 15, 17-26 (2007-2008).

standing, which in turn weakened the doctrine of separation of powers.[6] It was a trade-off.[7] The *Flast* Court believed that there was a compelling need for such a trade-off, which tells us something very important about the structural character of the Establishment Clause.

Between *Flast* and the recent cases of *Hein* and *Winn*, two Supreme Court cases examined assertions of taxpayer standing where the underlying claim on the merits was brought under the Establishment Clause. In *Valley Forge*, 454 U.S. 464 (1982), the Court held that taxpayers lacked standing to challenge a decision by a federal executive agency to declare certain government-owned real estate as surplus and then transfer the real estate free of charge under the Property Clause, U.S. Const., art. IV, § 3, cl. 2, to a Christian college. *Id.* at 466–69. But *Flast* permitted taxpayer standing only when the taxpayer-plaintiff was challenging

[6] When *Flast* permits state or local government taxpayer standing, the trade-off is not with the doctrine of separation of powers but with federalism. That is, federal court jurisdiction results in judicial intervention into the affairs of legislative bodies at the state and local level. *See Hein*, 551 U.S. at 617 (Kennedy, J., concurring).

[7] Justice Kennedy acknowledged this trade-off: "The Court's decision in [*Flast*] and in later cases applying it, must be interpreted as respecting separation-of-powers principles but acknowledging as well that these principles, in some cases, must accommodate the First Amendment's Establishment Clause." *Hein*, 551 U.S. at 615 (Kennedy, J., concurring) (citation omitted).

Congress's use of its Taxing and Spending Power, U.S. Const., art. I, § 8, cl. 1. *Id.* at 478–82. In *Bowen v. Kendrick*, 487 U.S. 589 (1988), the Court held that taxpayer-plaintiffs had standing to challenge a congressional social service program that provided grant funding to counseling centers promoting teen sexual risk avoidance, expressly requiring that religious as well as secular centers be considered. *Id.* at 618–20. The Court went on to uphold the constitutionality of the program on its face, but remanded for further proceedings with respect to "as applied" challenges. *Id.* at 600–18, 620–22.

C. The Supreme Court's Recent Rulings in *Hein* and *Winn* Have Constricted the Availiability of Taxpayer Standing Under the Establishment Clause.

Taxpayer standing under *Flast* came under serious challenge in *Hein*. The *Hein* plurality held that taxpayer standing did not extend to a general appropriation by Congress to fund the day-to-day operations of the Executive Office of the President, especially where the Executive had broad discretion concerning how those funds were spent in furtherance of presidential policy initiatives. *Hein*, 551 U.S. at 609-614. The plurality framed the issue of executive discretion as a concern for separation of powers—*i.e.*, the judiciary not trenching upon the authority of the President—being equal to if not prior to any concern that the President was using

his authority to improperly advance religion. *Id*. at 611–12; *see id*. at 615–18 (Kennedy, J., concurring) (emphasizing separation of powers). *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146-47 (2013) (emphasizing the origin of standing doctrine in separation of powers).

In addition to not wanting the Judicial Branch to oversee discretionary spending by the Executive Branch, *Hein* insisted that taxpayer standing be allowed only when the legislative program in question expressly contemplated that the appropriated monies would go to religion. *Hein*, 551 U.S. at 603-609.

The circle connecting taxpayer standing with Madison and Virginia's disestablishment, events which were in turn linked by the modern Supreme Court with the meaning of the Establishment Clause in separating church and state, *Everson v. Bd. of Educ.*, 330 U.S. 1, 11-13 (1947), was finally completed in *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011). The *Winn* Court denied taxpayer standing to challenge a recently adopted provision in Arizona's income tax law that provided credits to taxpayers making charitable donations to nonprofit corporations organized for the purpose of awarding scholarships to K-12 students attending private schools, including religious schools.

For purposes of taxpayer standing, the first thing *Winn* required was that a taxpayer's injury must entail the "extraction and spending of tax money in aid of religion." *Id.* at 140 (quotation marks and brackets omitted). This limitation on the nature of the taxpayer-plaintiff's injury or personalized harm was attributable to the origin of the Establishment Clause in Madison's *Memorial and Remonstrance*, a protest petition circulated in Virginia in 1785 in opposition to a bill in the state legislature proposing a religious assessment for the support of Christian clergy.[8] As the *Memorial* makes clear, for Madison it was not the dollar amount of the tax; he opposed the levy even if the assessment were "three pence only." Rather "[i]n Madison's view, government should not 'force a citizen to contribute three pence only of his property for the support of any one establishment.'" *Id*. at 141 (*quoting Flast*, 392 U.S. at 103, *quoting* 2 *Writings of James Madison* 183, 186 (G. Hunt ed. 1901)). Rather, for Madison the relevant injury was that the religious tax payments were involuntary and thus contrary to the principle of voluntaryism. For Madison, as well as for the Baptists and Presbyterians who joined him in opposing the Virginia assessment, as a matter of religious belief, any contribution or tithe to

[8] For a full account of the historical events contributing to disestablishment in Virginia, see Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776–1786*, 7 GEO. J. OF L. & PUB. POLICY 51 (2009), which parses Madison's arguments in his *Memorial*. *Id*. at 82–85, 92–98.

one's church must be voluntary. It made no difference to Madison that the Virginia bill permitted each taxpayer to designate the church of his choice to receive his tax allotment via the county collector. The tax was still involuntary.

As *Winn* explained, because the history of this no-establishment principle limited claims by taxpayer-plaintiffs to involuntary extractions of their money to be applied in aid of religion, the Court would deny taxpayer standing on the facts in *Winn*. The Arizona tax credit did not involve the involuntary extraction of tax money from the plaintiffs who filed the lawsuit.

Winn also indicated that monetary appropriation in aid of "religion" must be present to make sense of taxpayer standing. The earning of a tax credit by a charitable donor was not an act of legislative appropriation in aid of religion. *Id.* at 139-143. Hence, there was no constitutionally cognizable injury in the sense contemplated by the principle of voluntaryism. This goes to causation. A taxpayer-plaintiff's tax monies must be traceable through the general treasury and then later appropriated toward religion or a religious organization. Only when there is such a causal link can it be said that there is an unwilling taxpayer-plaintiff caused to aid religion. The *Winn* plaintiffs could not, of course, trace their own tax payments to the religious schools. As the Court explained:

> [Taxpayer-plaintiffs] cannot satisfy the requirements of causation and redressability. When the government collects and spends taxpayer money, governmental choices are responsible for the transfer of wealth. In that case a resulting subsidy of religious activity is, for purposes of *Flast*, traceable to the government's expenditures. And an injunction against those expenditures would address the objections of conscience raised by taxpayer-plaintiffs.

Id. at 143.

The *Winn* taxpayer-plaintiffs' state income tax money went elsewhere, not to the religious schools. Moreover, this requirement was not redressable by an injunction against a legislative appropriation to the religious schools in question. As the *Winn* Court noted, there was never any such appropriation in Arizona to enjoin. *Id*. at 143-144.

D. Under *Hein* and *Winn*, Plaintiffs-Appellants Lack Standing to Bring an Establishment Clause Claim.

The test in *Winn* for taxpayer standing is not satisfied by any of the six Plaintiffs-Appellants, who we assume are North Carolina taxpayers. The operation of the religious exemption in Senate Bill 2 costs no new money for which there was an appropriation. This is true even though, "[a]s with all regulatory statutes, some sort of expense can be expected to accompany the goals of the statute." *Ansley v. Warren*, 2016 WL 5213937 *14 (W.D.N.C. Sept. 20, 2016).

But such incidentals are not good enough under *Winn*. The expenditure of new money as a requirement for taxpayer standing is illustrated by *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952). There the Court rejected an assertion of taxpayer standing to challenge a state law authorizing devotional Bible reading in public schools because "the grievance which [the plaintiff] sought to litigate [*i.e.*, their unwanted exposure to the Bible reading] . . . is not a direct dollars-and-cents injury [to the taxpayer]." *Id.* at 434. The teachers were paid the same regardless of whether they prayed.

Moreover, the exemption in Senate Bill 2 serves religious liberty, not religion. *Winn* requires that the appropriated money go to aiding religion or a religious organization.

Senate Bill 2 provides that a same-sex couple is not left without remedy but rather is provided an alternate official to conduct the marriage ceremony. Supplying the alternate official costs the state no new money because he or she is another magistrate or judge. Once again, there are always incidental costs associated with most any regulatory statute. Such incidentals do not satisfy *Winn*. And providing an alternate serves marriage equality not religion. Standing under *Winn* requires that the law aid religion.

Erasing the gap in retirement benefits for those few magistrates that resigned but were later reinstated may require the expenditure of new money. But Senate Bill 2 is not an appropriation statute. The "offending appropriation" would have been in a budget bill that concerned salaries and benefits, including retirement benefits. But even that is not money going to religion or a religious organization. Rather, the money goes to pay the retirement benefits of court personnel, including a small handful of magistrates that invoked Senate Bill 2. *Winn* requires that the "offending appropriation" go in aid of religion. It does not. The appropriation goes to restore a retirement benefit. In this manner, the magistrates are not to be penalized for their conscientious objection. The retirement benefit appropriation indirectly serves religious liberty, not religion. *Winn* standing requires that Senate Bill 2 monetarily aid religion, not religious liberty.

The logic of the Court's distinction between "aiding religion" and aiding religious liberty is fundamental. All agree that the First Amendment is pro-freedom of speech and pro-freedom of the press. By the same token, the First Amendment is pro-religious freedom. This is as true of the Establishment Clause as it is true of the Free Exercise Clause. Government supporting religion, on the one hand, and Government supporting acts of religious freedom, on the other hand, are two quite

different things. Although the Establishment Clause prohibits state governments from supporting religion, it does not prohibit a state from supporting religious freedom. Government does not establish religion by leaving its private exercise alone, which is exactly what a legislative religious exemption like Senate Bill 2 does. *See Amos*, 483 U.S. at 334-336; *see also, supra,* pp. 4-5. Religious exemptions not only allow for private acts of religious exercise, but they also reinforce the desired separation of church and state. *See, e.g., Walz v. Tax Comm'n*, 397 U.S. 664, 674-76 (1970) (tax exemptions for religious organizations tend to reinforce the desired separation of church and state).

As filtered down from *Flast* to *Hein*, and eventually to *Winn*, taxpayer standing requires an involuntary extraction of tax monies from plaintiff-taxpayers that are paid into the general treasury, and in turn such monies are later appropriated in an allegedly offending statute "in support of religion" (*e.g*., to clergy salaries (Virginia, 1784-85)). Senate Bill 2 is not an appropriation statute. And religious liberty—not religion—is aided.

Other than taxpayer standing, Plaintiffs-Appellants allege no other basis for standing to bring their claim under the Establishment Clause. *Ansley v. Warren*, 2016 WL 5213937 *15 (W.D.N.C. Sept. 20, 2016) ("Plaintiffs have not alleged, let

alone submitted affidavits or other evidence, showing any injury in the form of direct harm that might allow the court to find standing on grounds other than taxpayer status.").

II. Plaintiffs-Appellants Have Alleged No Basis For Standing To Bring Claims Under The Equal Protection And Due Process Clauses Because Their Claims of Injury Are Not Actual Or Imminent, But Speculative As To Possible Future Harm.

Only four of the named Plaintiffs-Appellants attempted to state claims under the Equal Protection and Due Process Clauses. These were the gay and lesbian Plaintiffs, two of whom are in a same-sex marriage and two are engaged to marry. Compl. ¶¶ 95, 103.

Taxpayer standing to raise federal claims is permitted only under the Establishment Clause. *See supra,* pp. 7, 18. The Complaint avers various fears and speculations in the nature of Plaintiffs-Appellants suffering future discrimination on the basis of sexual orientation by magistrates reinstated under Senate Bill 2. Compl. ¶¶ 96-98, 104-07. Speculative harm at some indefinite future time is neither injury-in-fact nor a claim ripe for review. Thus, Plaintiffs-Appellants have no standing to sue as taxpayers or on any other basis.

A little more needs to be said. The Complaint avers that a magistrate who is a conscientious objector to same-sex marriage harbors religious prejudice against

gays and lesbians such that he or she cannot perform the judicial task of equal justice under the law. Such a presumption, if categorical, would be tantamount to imposing a religious test for public office: those with traditional religious beliefs about confining sexual intimacy to marriage between one man and one woman cannot hold public office. Such a religious test is prohibited by the U.S. Const., art. VI, cl. 3. *See McDaniel v. Paty*, 435 U.S. 618 (1978) (finding unconstitutional state constitutional prohibition on clergy holding public office).

In dicta, the district court said that in the future it would look favorably on a claim that Senate Bill 2 violates the Constitution because it permits a magistrate, one declining to marry a same-sex couple, to not disclose the reason. *Ansley v. Warren*, 2016 WL 5213937 *3, *15 (W.D.N.C. Sept. 20, 2016). That is not – and should not be – the law. Intrinsic to the office of magistrate is the duty to set aside personal beliefs, be they moral, religious, political, or social-economic, and decide the case on the law and the facts. It is what is meant by the United States being a nation under the rule of law. Judicial recusal is a discrete matter already fully and more properly addressed by each state's Code of Judicial Ethics, with very limited instances where recusal is accompanied by a required public disclosure of the reason therefor. Moreover, the nondisclosure protection in Senate Bill 2 protects a

handful of magistrates – those who exercise their statutory right to live according to their religious beliefs regarding marriage – from public "shaming," an overbearing tactic aimed at stifling dissent by punishing conscientious objectors. This feature of Senate Bill 2 is not the cause of invidious discrimination and does not violate any right of marriage equality announced in *Obergefell*. Instead, this provision protects conscientious objectors from invidious discrimination based on their religious beliefs.

CONCLUSION

Plaintiffs lack standing to pursue their claims as taxpayers. Additionally, Plaintiffs' claims under the Equal Protection and Due Process Clauses are speculative as to any future harm and thus do not give rise to a justiciable claim. Accordingly, Plaintiffs have failed to meet their burden of showing that the federal district court had subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1) & (h)(3).

The district court's dismissal for lack of subject matter jurisdiction should be affirmed.

Respectfully submitted,

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January 24, 2017

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