RECORD 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.

NORTH CAROLINA VALUES COALITION; THOMAS MORE LAW CENTER; BRENDA BUMGARNER; CHRISTIAN LEGAL SOCIETY; NATIONAL ASSOCIATION OF EVANGELICALS,

Amici Supporting Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA AT ASHEVILLE

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Defendant-Appellee argues that Plaintiffs-Appellants lack taxpayer standing to raise a First Amendment challenge to Senate Bill 2 ("SB2"), a law passed in response to this Court's ruling in *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014), *cert. denied sub nom.* SB2 allows magistrate judges to recuse themselves, based upon any "sincerely held religious objection,"[1] from the judicial duty of solemnizing non-religious civil marriages. By permitting this recusal option, SB2 authorizes magistrate judges to not be bound by their Article VI oath to uphold the federal constitution. Defendant-Appellee admits that SB2 has mandated spending to move willing magistrates to any judicial district where all magistrates have objected to performing marriages, and to purchase retirement service credits for magistrates who resigned rather than perform marriage duties under *Bostic*. But Defendant-Appellee argues that the funds involved are not substantial, and although spent as mandated, have not been specifically appropriated; therefore, Defendant-Appellee asserts, taxpayer standing does not apply.

[1] SB2 does not establish a measure of how "sincerely" the religious belief must be held.

Despite the express title of the legislation,[2] Defendant-Appellee casts SB2 as an effort by the General Assembly to compromise "between reasonable accommodations for the sincerely held religious objections of public officials, and the right of same sex couples to marry." [Red Br. at 2]. To support that description, Defendant-Appellee asks this Court to focus specifically on Section 4 of SB2, which "assigned the authority to perform marriage ceremonies to magistrates collectively, instead of making it the duty of any individual magistrate." [Red Br. at 7]. Based upon Section 4, Defendant-Appellee contends that "SB2 neither facially nor substantively targets same-sex couples, neither benefits nor endorses any particular set of religious beliefs, and does not serve to establish any religion." [Red Br. at 2–3]. Section 4's "collective duty to marry" was written to avoid Equal Protection or Due Process challenges to religious recusals of magistrates by not blocking or impeding any marriages. However, this "collective duty" concept does not protect SB2 from First Amendment scrutiny as Defendant-Appellee urges.

Contrary to Defendant-Appellee's argument, the Complaint adequately alleges that SB2 violates the Establishment Clause of the First Amendment, and that Plaintiffs-Appellants have taxpayer standing, as last articulated in *Ariz.*

[2] "AN ACT TO ALLOW MAGISTRATES AND REGISTERS OF DEEDS TO RECUSE THEMSELVES FROM PERFORMING DUTIES RELATED TO MARRIAGE CEREMONIES DUE TO SINCERELY HELD RELIGIOUS OBJECTION." 2015 N.C. ALS 75, 2015 N.C. Sess. Laws 75, 2015 N.C. Ch. 75, 2015 N.C. SB 2.

Christian School Tuition Org. v. Winn, 563 U.S. 125 (2011), to challenge SB2's constitutionality in the federal courts. Section 4 of SB2 plays a vital role in Defendant-Appellee's enforcement of Sections 1(c) and 5, and all three provisions depend *entirely* upon the legislatively-mandated spending of tax dollars to succeed. Those funds pay to transport magistrates across judicial district lines to perform marriages where other magistrates are unwilling to do so as an article of religious belief; and Section 5 authorized and required the judicial branch to pay the retirement service credits of reinstated magistrates for the period in which they had resigned rather than accept the holding in *Bostic*. That is, SB2 works only because Defendant-Appellee spends legislatively-mandated tax dollars. Even though a modest sum, this spending is not just incidental to implementing Sections 1(c) and 5 of SB2—it is essential to it. That makes SB2 unconstitutional.

For the following reasons, as well as those articulated in the Opening Brief, this Court should find that Plaintiffs-Appellants have taxpayer standing, reverse the district court's dismissal of Plaintiffs-Appellants' Complaint for lack of subject-matter jurisdiction, and remand for further proceedings.

ARGUMENT

I. This Court Does Not Have Jurisdiction to Review Defendant-Appellee's Personal Jurisdiction Argument.

In the district court, Defendant-Appellee moved to dismiss the Complaint for lack of subject-matter jurisdiction, lack of personal jurisdiction, improper venue, and failure to state a claim, invoking Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), 12(b)(3), and 12(b)(6). [JA 39]. On the issues of personal jurisdiction and venue, the district court ruled in favor of Plaintiffs-Appellants. [JA 162–74]. Specifically, the court below found that Defendant Warren was a proper party under *Ex parte Young*, 209 U.S. 123 (1908), and that venue was proper in the Western District of North Carolina.

The district court also rejected in a footnote Defendant-Appellee's argument that the *Flast* exception does not apply to state taxpayers who raise Establishment Clause challenges to sectarian state spending, but then dismissed the Complaint for lack of taxpayer standing under *Flast* and its progeny. [JA 174–88, 191]. The district court did not address the merits of Defendant-Appellee's Rule 12(b)(6) motion.

Plaintiffs-Appellants appealed from the dismissal of their First Amendment claim for lack of standing. [*See* Blue Br. at 1]. Defendant-Appellee did not cross-appeal, but now asks this Court in his Response Brief to review and reverse the district court's ruling adverse to him on personal jurisdiction, thus modifying the

Order below. Defendant-Appellee, also without cross-appealing, asks this Court to declare that *Flast* taxpayer standing is not available to state taxpayers and to dismiss the Complaint for failing to state a First Amendment claim. [Red Br. at 9–10].[3]

Asking this Court to review and modify portions of the Order below without filing a cross-appeal is unsupported by the authority Defendant-Appellee cites to justify his request. *See Rosenruist-Gestao E Servicos LDA v. Virgin Enters.*, 511 F.3d 437, 447 (4th Cir. 2007). In fact, this Court held in *Rosenruist-Gestao E Servicos LDA*, "[i]f the prevailing party raises arguments that seek to alter or modify the judgment below, then a cross-appeal is required." *Id.* While a "prevailing party may urge an appellate court 'to affirm a judgment on any ground appearing in the record,' and may do so without having to file a cross-appeal," *id.*, it can only present arguments that "would not lead to a reversal or modification of the judgment rather than an affirmance." *JH v. Henrico County Sch. Bd.*, 326 F.3d 560, 567 n.5 (4th Cir. 2003).

[3] In their Opening Brief, Plaintiffs-Appellants noted Defendant-Appellee's failure to cross-appeal the district court's personal jurisdiction ruling. [Blue Br. at 12, n. 8].

To accept Defendant-Appellee's personal jurisdiction argument, this Court would have to modify the district court's Order of dismissal.[4] Similarly, with the argument that *Flast* standing is not available to state taxpayers, this Court would have to modify that aspect of the Order below. Accordingly, this Court should find that these arguments were not preserved by cross-appeal.[5]

II. Plaintiffs-Appellants Have Taxpayer Standing to Challenge State Legislation that Authorizes and Mandates Public Spending for a Sectarian Purpose.

Plaintiffs-Appellants' standing to challenge SB2 fits squarely within the taxpayer standing doctrine first articulated in *Flast v. Cohen*, 392 U.S. 83 (1968), and clarified more recently in *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587 (2007) and *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011). Taxpayer standing turns on two clear principles after *Hein* and *Winn*. First, under

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[4] This Court "views the cross-appeal requirement as one of practice, rather than as a strict jurisdictional requirement." *Am. Roll-On Roll-Off Carrier, LLC v. P&O Ports Balt., Inc.*, 479 F.3d 288, 295 (4th Cir. 2007). Plaintiffs-Appellants note, however, that at least two other federal circuits view the cross-appeal as "a strict jurisdictional requirement." *See Art Midwest Inc. v. Atl. Ltd. P'ship XII*, 742 F.3d 206, 212–13 (5th Cir. 2014) ("[T]his circuit has characterized the cross-appeal rule as 'jurisdictional.'"); *JP Morgan Chase & Co. v. Commissioner*, 458 F.3d 564, 570 n.3 (7th Cir. 2006) ("[C]ross-appeal is a jurisdictional prerequisite to our reversing any part of a district court's order."). Plaintiffs-Appellants ask this Court to adopt the Fifth and Seventh Circuit's rulings that the cross-appeal requirement is jurisdictional.

[5] Should this panel consider Defendant-Appellee's personal jurisdiction argument, however, Plaintiffs-Appellants hereby adopt the district court's rationale on that issue as its own. [*See* JA 162–74].

Hein, public spending "expressly authorized or mandated" by a specific legislative "enactment" to accomplish an avowedly religious purpose creates "the 'logical nexus' between taxpayer status 'and the type of legislative enactment attacked.'" 551 U.S. at 608–09. And second, under *Winn*, the "'extract[ion] and spen[ding]' of 'tax money' in aid of religion" *in any amount* creates taxpayer standing. 563 U.S. at 140.

Under the requirements of *Hein*, Plaintiffs-Appellants challenge a specific legislative enactment that authorizes and requires the judicial department to spend state tax revenues to accomplish a religious purpose: to exempt magistrate judges holding a "sincerely held religious objection" to this Court's marriage ruling in *Bostic* from their Article VI oath to uphold the supremacy of the federal constitution. And the "three pence only" holding of *Winn* directly contradicts Defendant-Appellee's repeated assertion that taxpayer standing requires "substantial" spending. Under *Winn*, SB2 modest amount of spending is simply no barrier to taxpayer standing.

Though modest in amount, that spending is legislatively mandated for a decidedly sectarian purpose. The religious exemption from the Article VI judicial oath, the goal that SB2's spending is designed to accomplish, aids only one theology—a faith-based rejection of the constitutional right to marriage equality. Plaintiffs-Appellants adamantly reject that religious belief, but are nonetheless

compelled as taxpayers to support it through the public spending ordered by the General Assembly per SB2. That compulsion "violates conscience" as declared in *Winn* and thus provides the injury required for taxpayer standing.

Defendant-Appellee accepts, as it must at this procedural juncture, that SB2 "arguably" *requires* him to spend public funds in two different ways to accomplish this religious goal: to pay the cost of transporting magistrates across jurisdictions to provide services in judicial districts where all magistrates have recused themselves, and to pay for retirement system service credit for magistrates who resigned rather than abide by *Bostic*. [Red Br. at 15]. Despite this necessary concession, Defendant-Appellee urges this Court to accept the district court's holding that because these expenditures are made by the judicial branch, and are neither "substantial" nor specifically appropriated, they are merely "incidental" to a regulatory scheme. [Red Br. at 16].

Defendant-Appellee's argument is doubly misguided. First, the State's expenditures are not incidental to SB2; they are its lifeblood. The legislatively authorized and mandated expenditure of tax funds to move magistrates across state lines to fill-in for the religious objectors is the *sine qua non* of SB2. Without them, magistrate recusals would threaten access to civil marriage ceremonies in every county. And SB2's directive to the judicial branch to purchase service credit for magistrates who resigned in the face of *Bostic* is clearly a legislatively mandated

taxpayer expenditure in support of a specific religious rejection of the constitutional right to marry. These are not "incidental" regulatory provisions devised by Defendant-Appellee, but specific legislative mandates that spend money for a sectarian end. Thus, they create taxpayer standing under *Hein*.

Second, both the district court and Defendant-Appellee have failed to square their view of "incidental" spending with *Winn*'s declaration that the "'extract[ion] and spen[ding]' of 'tax money' in aid of religion," in any amount, even "three pence," creates taxpayer standing. *Winn*, 563 U.S. at 140. In the face of that holding in *Winn*, Defendant-Appellee still quotes from Justice Harlan's dissent in *Flast* that there must be a "substantial" expenditure of tax funds to create taxpayer standing. [Red Br. at 15–16]. *Winn* puts that argument to rest.

The district court erred in finding under *Winn* that the spending "expressly authorized or mandated" by SB2 was incidental, discretionary spending by the judicial branch under a regulatory scheme, and thus did not confer taxpayer standing. Defendant-Appellee repeats and relies on this error in his brief. Indeed, Defendant-Appellee's exposition of *Valley Forge Christian College v. American United for Separation of Church & State*, 454 U.S. 464 (1982), *Hein*, and *Winn* utterly fails to recognize that this lawsuit fits squarely within the parameters of *Flast* articulated in those cases.

A. *Valley Forge* Has No Bearing on the Issue of Taxpayer Standing in This Case.

Like the district court below, Defendant-Appellee cites to *Valley Forge* to urge that Plaintiffs-Appellants have not challenged legislative spending and present only a "generalized grievance" against SB2 that would be common to all taxpayers. [Red Br. at 8]. Defendant-Appellee asserts that *Valley Forge* requires an allegation of legislative spending, but does not recognize that Plaintiffs-Appellants have, in fact, alleged that SB2 involves legislative spending. [Red Br. at 16–17; JA 15–17].

Defendant quotes from *Valley Forge* gratuitously—and in light of the issues at stake, unfairly—for the condescending proposition that "the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing." [Red Br. at 19]. The *Valley Forge* plaintiffs were the Americans United for Separation of Church & State, Inc., whose organizational headquarters were located in Washington, D.C., as well as four of its directors, who resided in Maryland and Virginia. 454 U.S. at 469, 487. Those plaintiffs brought suit to challenge the donation of federal land in Pennsylvania to a religious college. 454 U.S. at 469.

In stark contrast, Plaintiffs-Appellants are North Carolina residents and taxpayers who abhor the religious views that SB2 forces them to support. Plaintiffs-Appellants Ansley and McGaughey are a married lesbian couple living in McDowell County where all magistrates recused themselves under SB2. Plaintiffs-Appellants

Penn and Goodman are an engaged lesbian couple in Graham County, where a magistrate resigned rather than accept *Bostic*. And the Persons are a now-married interracial couple whom two magistrates refused to marry in 1976 because of strongly and bluntly professed "religious objections" to interracial marriage, almost a decade after *Loving v. Virginia*, 388 U.S. 1 (1967).

SB2 authorized and funded the program allowing for the full recusal of all magistrates in McDowell County; offered the resigned magistrate in Graham County service credit for resigning over his religious objection to *Bostic*; and codified *any* "sincerely held religious beliefs"—even racial supremacy—as superior to the judicial oath to support and be bound by the U.S. Constitution. Plaintiffs-Appellants did not "roam the country in search of governmental wrongdoing." It was imposed on them by the General Assembly's enactment of SB2.

The district court below erred when it found *Valley Forge* "indistinguishable" from the case at bar, and that the express mandate of SB2 "implicitly authorizes the use of funds by the judicial branch, not the legislature." [JA 186]. As set out above, SB2 explicitly mandates that Defendant-Appellee produce a magistrate from another judicial district when all magistrates in one judicial district opt out. That requires spending. SB2 also mandated funding of the gap in service credits for any reinstated magistrates who had resigned after two North Carolina's federal courts adhered to *Bostic*. The General Assembly authorized and funds both of these expenditures from

its taxing power. [JA 17]. SB2 expressly *requires* the judicial department to spend funds from its tax-funded budget appropriation to effectuate SB2.

The spending ordered to enforce SB2 bears no relationship to the issues in *Valley Forge*, where the Department of Health Education and Welfare, acting pursuant to the Federal Property and Administrative Services Act of 1949. That provision authorized federal agencies to dispose of surplus war-time property, and HEW elected to donate a closed Army hospital campus to a Christian college in 1976 as a "public use." 454 U.S. at 467–68. Congress expressed no religious intent in the 1949 authorization for agencies to sell excess property. The decision to donate the land did not involve any spending, let alone legislatively-mandated spending for an expressly avowed religious purpose like here.

Both the district court and Defendant-Appellee err in finding the basis for rejecting standing in *Valley Forge* as "indistinguishable" from this case. [JA 182]. The comparative explication of *Valley Forge* and *Bowen v. Kendrick*, 487 U.S. 589 (1988) by the Supreme Court in *Hein*, described *infra*, illuminates that error below of finding the expenditures mandated by SB2 as "incidental" to a "regulatory" scheme rather for what it is: legislatively-compelled spending for a sectarian end.

B. *Hein* Confirmed that Religious Spending Specifically Authorized or Mandated by Legislation Confers Taxpayer Standing.

Defendant-Appellee also cites extensively to *Hein*, the First Amendment challenge to President George W. Bush's "Faith Based Initiatives" program, as defeating Plaintiffs-Appellants' claim to taxpayer standing. [Red Br. at 4–5, 17, 21, 25–28]. Plaintiffs-Appellants agree with Defendant that *Hein* limited taxpayer standing to challenges of legislatively-mandated spending, and that is exactly what their Complaint alleges: public spending "expressly authorized or mandated" by a specific legislative "enactment" (SB2) to accomplish an explicitly religious purpose. *Hein*, 551 U.S. at 608–09. Defendant-Appellee also relies on language from *Hein* to claim that there must be a specific appropriation for standing to apply, and argues that SB2 does not contain any such appropriation. The facts and holding of *Hein*, including its comparison of *Valley Forge* and *Kendrick*, shows, however, that there is no such specific appropriation requirement—only the obligation to identify the specific legislative mandate to spend tax dollars to accomplish a religious purpose.

In *Hein*, the plaintiffs challenged President Bush's expenditure from his annual Congressional allotment of discretionary funds to support religious groups engaged in social service programs. The use of the funds to support religious groups was a matter of "executive discretion, not congressional action." *Id.* at 605. The Supreme Court held that those plaintiffs lacked standing to challenge the President's discretionary spending of a portion of this general allotment from Congress. The

Court reiterated that taxpayer standing is limited to challenges to religious spending specifically authorized or mandated by legislation. *Id.* Such specified spending is precisely what Plaintiff-Appellants allege in this matter.

The error in the district court's reliance on *Valley Forge* for its "discretionary" agency spending ruling below, and in Defendant-Appellee's same argument here, is vividly illustrated by the analytical distinction that *Hein* drew between *Valley Forge*, where it had denied standing, and *Kendrick*, where the Court had found it:

> In *Valley Forge*, we held that a taxpayer lacked standing to challenge "a decision by [the federal Department of Health, Education and Welfare] to transfer a parcel of federal property" to a religious college because this transfer was "not a congressional action." In fact, the connection to congressional action was closer in *Valley Forge* than it is here, because in that case, the "particular Executive Branch action" being challenged was at least "arguably authorized" by the Federal Property and Administrative Services Act of 1949, which permitted federal agencies to transfer surplus property to private entities. Nevertheless, we found that the plaintiffs lacked standing because *Flast* "limited taxpayer standing to challenges directed 'only [at] exercises of congressional power'" under the Taxing and Spending Clause.

Hein, 551 U.S. at 605. The Court then contrasted *Valley Forge* with *Kendrick*, where it found taxpayer standing to challenge the distribution of funds to religious groups by the Secretary of Health and Human Services:

> In [*Kendrick*], we held that the taxpayer-plaintiffs had standing to mount an as-applied challenge to the Adolescent Family Life Act (AFLA), which authorized federal grants to private community service groups including religious organizations. The Court found "a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power," notwithstanding

> the fact that "the funding authorized by Congress ha[d] flowed through and been administered" by an Executive Branch official.
>
> But the key to that conclusion was the Court's recognition that AFLA was "at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers," and that the plaintiffs' claims "call[ed] into question how the funds authorized by Congress [were] being disbursed *pursuant to the AFLA's statutory mandate*." … AFLA not only expressly authorized and appropriated specific funds for grantmaking, it also expressly contemplated that some of those moneys might go to projects involving religious groups. Unlike this case, *Kendrick* involved a "program of disbursement of funds pursuant to Congress' taxing and spending powers" that "Congress had created," "authorized," and "mandate[d]."

Hein, 551 U.S. at 606–07 (internal citations omitted, original emphasis).

After detailing these differences between *Valley Forge* and *Kendrick*, the Court then explained how the *Hein* plaintiffs—unlike Plaintiffs-Appellants here—could not point to any statute authorizing or mandating the President's spending on religious groups:

> The best they can do is to point to unspecified, lump-sum 'Congressional budget appropriations' for the general use of the Executive Branch—the allocation of which 'is a[n] administrative decision traditionally regarded as committed to agency discretion.'

Id. at 607–08 (internal citations omitted). The district court below missed this key point from *Hein* and *Valley Forge*: the complete inability of those plaintiffs to point to specific legislation that authorized or compelled the challenged spending for religious ends precluded taxpayer standing. As the Court emphasized in *Hein*:

> Because the expenditures that respondents challenge *were not expressly authorized or mandated by any specific congressional enactment*, respondents' lawsuit is *not* directed at an exercise of congressional power, *see Valley Forge*, 454 U.S. at 479, and thus lacks the requisite 'logical nexus' between taxpayer status 'and the type of legislative enactment attacked.'

Id. at 608–09 (quoting *Flast*, 392 U.S. at 102) (emphasis added).

Plaintiffs-Appellants have identified the specific legislation that authorizes and compels public spending for a religious purpose: SB2. The Complaint alleges that SB2 authorizes and mandates public spending by Defendant-Appellee for a sectarian end. The legislation authorizes and compels the judicial department to spend the funds needed to move magistrates to make the recusal process work, and thereby elevate a magistrate judge's personal religious beliefs about marriage above the judicial oath to uphold the constitution; it further requires the judicial department to purchase service credit for those who resigned as magistrates out of religious objection to *Bostic*. Under *Hein* and *Kendrick*, these allegations that the state legislature "expressly authorized or mandated" the challenged spending provides "the requisite 'logical nexus' between their taxpayer status "and the type of legislative enactment attacked." *Id.*

Hein's explication of *Kendrick* is critical then in two respects. First, it shows that the district court mistakenly denied standing by finding the spending that SB2 explicitly authorizes and mandates to accomplish its goal is merely funding "implicitly authorized by legislation" to be used "by the North Carolina judicial branch, not the legislature." [JA 186]. Like in *Kendrick*, the spending "flow[s] through

and [is] administered by" Defendant-Appellee's agency, but is spending directly traceable to a specific legislative enactment: SB2. The judicial branch's spending to effectuate SB2 was "created, authorized, and mandated" by the General Assembly through SB2, and passed pursuant to its powers to tax and spend. The district court misconstrued these spending allegations. Under *Hein* and *Kendrick*, they provide for taxpayer standing.

Second, *Hein*'s clarification of *Kendrick* shows that taxpayer standing does not require a "specific appropriation," as Defendant-Appellee repeatedly contends. In *Kendrick*, the challenged legislation did not specify the amount of money that would be distributed to religious organizations, but "expressly contemplated that *some* of those moneys might go to projects involving religious groups." *Hein*, 551 U.S. at 608 (citing *Kendrick*, 487 U.S. at 595–96, emphasis added). Legislative knowledge that "some" authorized money "might" be used for religious purposes was sufficient in *Kendrick* and *Hein* to confer taxpayer standing.

While SB2 did not specifically set out the amount of money the judicial branch should spend to move magistrates across county lines or to bridge gaps in religious objectors' service as judges, it authorized and mandated spending of tax revenues by Defendant-Appellee's office to make SB2 work. That mandate to spend "some" of the tax funds appropriated to the judicial branch to accomplish the religious goal of SB2 is enough to confer taxpayer standing under *Kendrick* and *Hein*.

C. *Winn* Established that Legislative Spending Need Not be Substantial to Violate the First Amendment and Confer Taxpayer Standing.

The Court's most recent taxpayer standing decision in *Winn* made clear that any amount of legislatively-mandated spending for "sectarian ends" can confer taxpayer standing., even if "three pence only." 563 U.S. at 141–42. As set out more fully in Plaintiffs-Appellants' Opening Brief, *Winn* involved a First Amendment challenge to an Arizona statute that created "student tuition organizations," or "STOs," which were designed, through the issuance of tax credits, to raise scholarships for students to attend private and religious schools. *Id*. at 136. The law awarded state income tax credits for STO donations, *id.* at 129, and generated hundreds of millions of dollars for religious schools. *Id*. at 147, 158 (Kagan, J., dissenting).

The *Winn* majority held that the plaintiffs lacked taxpayer standing because the STO program, though substantial in scope and benefitting religious schools, involved a tax *credit* rather than tax spending. *Id.* at 141–43. In response to the dissent's arguments about the scope and budgetary impact of the STO program on the states' education system, and that Court precedent had treated tax credits as a form of government spending, the majority held that *Flast* standing did *not* turn on the amount of money generated, but on the act of collecting and spending taxes:

> *Flast* thus understood the injury alleged in Establishment Clause challenges to federal spending to be the very extract[ion] and spen[ding] of tax money in aid of religion alleged by a plaintiff. Such an injury, *Flast* continued, is unlike generalized grievances about the conduct of government and so is appropriate for judicial redress.

563 U.S. at 140 (internal citations and quotations omitted). The Court reviewed the writings of James Madison that underpin the First Amendment and declared what is a key to Plaintiffs-Appellants' standing argument here:

> Madison objected to the proposed assessment on the ground that it would coerce a form of religious devotion in violation of conscience…. This Madisonian prohibition does not depend on the amount of property conscripted for sectarian ends. Any such taking, even one amounting to "three pence only," violates conscience.

Id. at 141 (internal citations and quotations omitted). Thus, legislatively-mandated spending in aid of religion, even in small amounts, "violates conscience." Plaintiffs-Appellants embrace that holding in challenging SB2; the spending under that statute to promote, aid, and endorse religious objections to their right to marry "violates conscience." It offends their religious beliefs.

Defendant-Appellee avoids this critical holding of *Winn*, insisting that the spending must be substantial. Defendant-Appellee acknowledges the holding, but declares in a footnote that *Winn*'s affirmation of Madison's "three pence" principle "serves to undercut" taxpayer standing in this case because SB2 "does not support any church." [Red Br. at 22 n. 6]. The Supreme Court gave a sharp retort to that view of the First Amendment in explaining Madison's concerns over 60 years ago in

Everson, stating that "[n]o 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." 330 U.S. at 15–16 (emphasis added).

In sum, under a proper reading of *Flast*, *Valley Forge*, *Kendrick*, *Hein*, and *Winn*, Plaintiffs-Appellants have standing as taxpayers to challenge SB2 for spending tax dollars to give state court judges a religious exemption from upholding the Supremacy Clause.

III. *Flast* Standing Applies to State Taxpayers.

Defendant-Appellee also contends that "the Supreme Court has not concluded that the *Flast* exception to taxpayer standing unavailability should apply to state taxpayers." [Red. Br. at 23]. Defendant-Appellee tells this Court that the Supreme Court has never addressed this question and thus, it can and should find that state taxpayers lack standing to challenge state legislative spending on First Amendment grounds. Defendant-Appellee argues that "Plaintiffs overemphasize the significance of several decisions that merely assume state taxpayer standing in Establishment Clause cases." [Red Br. at 23. *See* Blue Br. at 23, 23 n.12]. These would include the landmark ruling in *Everson*, *supra*, a state taxpayer case, that the First Amendment applies to the States through the Fourteenth Amendment; the seminal in *Lemon v. Kurtzman*, 403 U.S. 602 (1970), a state taxpayer case where the Court articulated its

First Amendment balancing test; the legion of state taxpayer First Amendment challenges the Supreme Court decided on the merits,[6] including *Winn* which did not question the ability of state taxpayers to challenge state *spending* that violates the First Amendment. Moreover, Defendant-Appellee's argument that the Supreme Court has never addressed this question directly is wrong. It did so in *Sch. Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985), *overruled in part on other grounds by Agostini v. Felton*, 521 U.S. 203 (1997).

A. *Ball* Supports Plaintiffs-Appellants' Contention that the *Flast* Exception Applies to State Taxpayers.

In *Ball*, six Michigan state taxpayers filed a lawsuit in the U.S. District Court for the Western District of Michigan against the Grand Rapids school district and several state officials. *See Americans United for Separation of Church & State v.*

[6] *See*, *e.g.*, *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 666–67 (1970) (property tax exemptions for religious organizations); *Hunt v. McNair*, 413 U.S. 734, 735–36, 738–39 (1973) (tax-exempt bonds to sectarian institutions); *Comm. For Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 789–94 (1973) (maintenance grants and state tax deductions for tuition for religious schools); *Mueller v. Allen*, 463 U.S. 388, 390–91 (1983) (state tax deductions costs of attending religious schools); and summary affirmance of lower court decisions. *Byrne v. Public Funds for Public Schools of N.J.*, 442 U.S. 907 (1979), *summarily aff'g*, 590 F.2d 514, 516 n. 3 (3d Cir. 1979) ("[P]laintiffs, as taxpayers, have standing under *Flast*" to challenge a tax deduction for dependents attending religious schools); *Grit v. Wolman*, 413 U.S. 901 (1973), *summarily aff'g Kosydar v. Wolman*, 353 F. Supp. 744, 749 (S.D. Ohio 1972) (tax credits for private-school tuition payments); *Franchise Tax Bd. of Cal. v. United Ams. for Public Schools*, 419 U.S. 890 (1974), *summarily aff'g*, No. C–73–0090 (N.D. Cal. Feb. 1, 1974) (invalidating a tax credit for children attending private schools).

School Dist., 546 F. Supp. 1071 (W.D. Mich. 1982). The plaintiffs alleged that Michigan's Shared Time and Community Education programs, which spent state tax dollars to provide remedial classes to students at religious schools, violated the Establishment Clause of the First Amendment. *Ball*, 473 U.S. at 375. Defendants answered, in part, that these state taxpayers lacked standing under *Flast* and *Valley Forge*. The district court rejected that taxpayer standing argument, finding that the six state taxpayers had satisfied *Flast*'s two-part test. 546 F. Supp. at 1075–76. The Sixth Circuit expressly affirmed the lower court's taxpayer standing ruling. *Americans United for Separation of Church & State v. School Dist.*, 718 F.2d 1389, 1390–91 (6th Cir. 1983).

In the Supreme Court, defendants renewed their argument that *Flast* did not apply to state taxpayers. The Supreme Court expressly affirmed the Sixth Circuit's ruling on that issue, "relying on the numerous cases in which [the Court had] adjudicated Establishment Clause challenges by state taxpayers to programs for aiding nonpublic schools." 473 U.S. at 380 n.5. The "numerous cases" listed in the footnote, with the exceptions of *Hunt v. McNair*, 413 U.S. 734 (1973), and *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), each involved a *federal* lawsuit in which *state* taxpayers challenged education programs funded by *state* tax dollars under the First

Amendment.[7] The highest court has not assumed *sub silentio* that state taxpayers have *Flast* standing; it has held that they do, and has specifically rejected the argument Defendant-Appellee raises.[8]

B. Defendant-Appellee Has Yet to Address *Ball*.

Plaintiffs-Appellants cited to *Ball* in their Response to Defendant's Motion to Dismiss. [*See* Dist. Ct. Dkt. ECF No. 46 at p. 13]. Yet Defendant-Appellee failed to address *Ball* in his district court Reply Brief. [*See* Dist. Ct. Dkt. ECF No. 49]. Instead, Defendant-Appellee argued below, as it does now, that "Plaintiffs overemphasize the significance of several decisions, (most decided in the 1970s during the infancy of post-*Flast* inquiries into taxpayer standing), that merely assume State taxpayer standing in Establishment Clause cases." [Dist. Ct. Dkt. ECF

[7] *See e.g.*, *Wolman v. Walter*, 433 U.S. 229 (1977) (Ohio taxpayers in the Southern District of Ohio); *Roemer v. Bd. of Public Works*, 426 U.S. 736 (1976) (Maryland taxpayers in the District of Maryland); *Meek v. Pittenger*, 421 U.S. 349 (1975) (Pennsylvania taxpayers in the Eastern District of Pennsylvania); *Sloan v. Lemon*, 413 U.S. 825 (1973) (Pennsylvania taxpayers in the Eastern District of Pennsylvania); *Comm. For Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (New York taxpayers in the Southern District of New York); *Levitt v. Comm. For Public Educ. & Religious Liberty*, 413 U.S. 472 (1973) (New York taxpayers in the Southern District of New York); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (Pennsylvania taxpayers in the Eastern District of Pennsylvania).

[8] Defendant-Appellee contends that most of the cases Plaintiffs-Appellants rely upon "were decided in [the] 1970s during the confusing infancy of post-*Flast* inquiries into taxpayer standing." [Red Br. at 23]. But the Court decided *Ball* in 1985, seventeen (17) years after *Flast* and thirty-three (33) years after *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952).

No. 49 at p. 10]. Plaintiffs-Appellants cited *Ball* in their Opening Brief in this Court, to show that the *Flast* exception applies to state taxpayers. [Blue Br. at 23]. Yet again, in his Answering Brief, Defendant-Appellee fails to address *Ball*. [*See* Red Br. at iii–ix].

What Defendant-Appellee continues to misunderstand—and the district court also failed to consider even in rejecting Defendant-Appellee's argument below—is that the Supreme Court held in *Ball* that state taxpayers have standing under *Flast* to challenge on First Amendment grounds state funded programs that aid religion. 473 U.S. at 380 n.5.

IV. Plaintiffs-Appellants Have Properly Stated an Establishment Clause Claim Pursuant to Rule 12(b)(6).

As Plaintiffs-Appellants allege in their Complaint, there are three aspects of SB2 that raise concerns under the Establishment Clause. First, although the funds involved in implementing SB2 are a small portion of the state budget, it is well-settled that "[n]o 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." *Everson*, 330 U.S. at 15–16. Second, the state legislature exceeded its constitutional powers in codifying support for a religious rejection of the constitutional right to and a religious usurpation of the Article VI judicial oath. *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963) ("[W]hat are the purpose and the primary effect of the enactment? If

either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.") And third, there are constitutional limits on the primacy of religious belief in our public life:

> The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.' … To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.

Emp't Div. v. Smith, 494 U.S. 872, 879 (1990).[9]

In addition to these three Establishment Clause concerns, SB2 supersedes Article VI on religious grounds. This Article, which precedes the Bill of Rights, requires that every state's judicial officers take an oath to uphold the supremacy of the federal constitution:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; . . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.
>
> The . . . members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution.

U.S. Const., art. VI, cl. 2 and cl. 3.

[9] Justice Scalia wrote in the majority opinion in *Smith* that religious beliefs could not excuse application of neutral criminal drug laws. Here, SB2 creates a religious exception from a neutral criminal law enacted to ensure the faithful performance of judicial duties. *See* N.C. Gen. Stat. § 14-230(a) (2014).

It is fundamental to our national experiment that "the judges in every state shall be bound" by the Constitution, and that all state legislators and state judicial officers "shall be bound by oath or affirmation" to "support the Constitution." Under SB2, religious belief supplants the Supremacy and Oath Clauses. And the judicial department has been authorized and ordered to expend public funds to achieve that sectarian end. The law, both on its face and as applied, violates the Establishment Clause. It authorizes a religious disavowal of the Constitution by judges and spends public funds to "make the professed doctrines of religious belief superior to the law of the land." *Smith*, 494 U.S. at 879.

In asking this Court to declare under Rule 12(b)(6) that SB2 is merely a neutral accommodation of competing interests that does not implicate the Establishment Clause, Defendant-Appellee and his *amici* never address this concern, plainly set out in Plaintiffs-Appellants' Complaint and Opening Brief, that SB2 creates for judges a religious exemption from their judicial oath to be bound by the Constitution. This exemption was created without any balancing of individual and state interests. The legislation mentions nothing about protecting the Fourteenth Amendment right to marriage equality.

Further, the magistrate's religious abdication of the judicial oath to uphold the Constitution remains completely confidential. Magistrates who opt-out of performing marriage ceremonies under SB2 because they do not believe and cannot

abide by the fundamental right to marriage described in *Bostic* and *Obergefell v. Hodges*, 576 U.S. __, 135 S. Ct. 2584 (2015) and even *Loving*, are permitted to adjudicate cases and perform all other magistrate duties without informing the parties before them. [JA 72, 74–75, 106, 131].

Defendant-Appellee does not mention Article VI or the Supremacy Clause until page 37 of his Response, and then only to argue that the Article VI "claim" does not provide standing and is deficient and non-justiciable. To be clear, Plaintiffs-Appellants do not present an Article VI claim, but a claim that this confidential religious exemption from the Article VI oath, under a scheme funded by the taxpayers, violates the Establishment Clause of the First Amendment; it makes a specific religious belief superior to the Constitution.

Defendant-Appellee's four *amici* do not once mention this religious exemption from the Supremacy Clause. Only one *amicus*—Brenda Bumgarner, a sitting magistrate in Alexander County—even cites to Article VI, but does so to argue that SB2 protects magistrates from an "abhorrent" "religious test" for judicial office imposed by *Bostic* and *Obergefell*. [Doc. 38 at 15]. Her characterization of the marriage equality decisions as a religious test for office leaves little doubt about the religious objection to constitutional right to marriage equality that is root and branch of SB2.

That is Plaintiffs-Appellants' fundamental concern: that religious belief has been declared superior both to constitutional rights and the sworn judicial duty to uphold them. That Defendant-Appellee argues alternatively for dismissal under Rule 12(b)(6) without directly addressing this vital First Amendment concern demonstrates that the motion should be denied.

Finally, assuming that this religious exemption from judicial fealty to the Supremacy Clause is defensible at all, it is well-settled that any balancing of interests for a First Amendment claim is fact-intensive. *See*, *e.g.*, *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1971). This Court cannot complete a fact-intensive balancing test before Defendant-Appellee even answers the Complaint. To accept the accommodation/balancing argument that Defendant-Appellee and his *amici* put forth would require the Court to consider facts in the light least favorable to Plaintiffs-Appellants. It cannot do so at this stage.

CONCLUSION

For the foregoing reasons, this Court should REVERSE the District Court's Order granting Defendant-Appellee's Motion to Dismiss for lack of standing, and REMAND for further proceedings.

Date: February 10, 2017

Respectfully submitted,

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Dated: February 10, 2017

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I hereby certify that on February 10, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all the registered CM/ECF users.

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