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Regina N. Kaley

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NOTE

CAN TAXPAYERS STAND DISCRIMINATION?: LACK OF STANDING AND THE RELIGIOUS FREEDOM RESTORATION ACT PERMITS THE EXECUTIVE BRANCH TO FUND DISCRIMINATION WITHIN RELIGIOUS ORGANIZATIONS

REGINA N. KALEY[†]

INTRODUCTION

> In August 1998, I was working as a therapist and residential counselor for Kentucky Baptist Homes for Children . . . in Louisville. I could never have foreseen that by the end of the month I would be riding an emotional roller-coaster that would end with my being fired on Oct. 23.[1]

Alicia Pedreira wrote these words after Kentucky Baptist Homes for Children ("KBHC") fired her from her position as a Family Specialist at one of its facilities.[2] KBHC is a government-funded Baptist organization that cares for juvenile offenders and abused or neglected youth.[3] There, Alicia hoped to gain experience under a well-known clinician while counseling adolescents in a special unit for behavior-disordered boys.[4] KBHC became alarmed when a picture of Pedreira and her partner appeared in an amateur photo contest at the Kentucky State Fair.[5] The organization fired Pedreira because of her

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[†] J.D. Candidate, 2010, St. John's University School of Law; B.A., 2007, Fordham University.

[1] Alicia Pedreira, People for the American Way, http://www.insideout.org/documentaries/faith/pop/pedreira.html (last visited Sept. 22, 2010).

[2] Pedreira v. Ky. Baptist Homes for Children, Inc., 579 F.3d 722, 725 (6th Cir. 2009).

[3] *Id.*

[4] Pedreira, *supra* note 1.

[5] *Pedreira*, 579 F.3d at 725.

homosexual lifestyle, which it claimed undermined its core Christian values.[6] Fellow clinicians and social workers were outraged by KBHC's behavior and have stood by Pedreira in her plight.[7] Still, the government continues to fund organizations like KBHC that fire employees who do not conform to the organization's religious values.[8] How can the government fund such discrimination?

The Supreme Court has recognized that "total separation [of church and state] is not possible in an absolute sense," and as a result, "[s]ome relationship between government and religious organizations is inevitable."[9] Today, as economic troubles, natural disasters, and failures in education become more prevalent, political leaders have embraced the help of religious organizations to alleviate these problems. As a result, the government has created funding programs that aid religious institutions in fighting the problems that plague the nation.[10]

To validly fund religious organizations, the government must abide by the Establishment Clause of the Constitution, which states that "Congress shall make no law respecting an establishment of religion."[11] The authors of the Constitution "did not simply prohibit the establishment of a state church or a state religion."[12] More broadly, the Establishment Clause prohibits any law "respecting an establishment of religion."[13] The Supreme Court has noted that while a law respecting a certain religion is not always as easily identified as one establishing a certain religion, respecting is just as dangerous since it could be the first step toward establishing a religion.[14] Thus, the Court engages in careful analysis to ensure that statutes and

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[6] *See id.*

[7] Pedreira, *supra* note 1.

[8] Pedreira v. Ky. Baptist Homes for Children, Inc., 553 F. Supp. 2d 853, 857 (W.D. Ky. 2008), *rev'd*, 579 F.3d 722 (6th Cir. 2009).

[9] Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

[10] For example, the White House Office of Faith-Based and Community Initiatives, established under President George W. Bush, sought to advance societal goals by providing aid to religious organizations. *See* Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 21, 2001). Under President Barack Obama, the office has become the White House Office of Faith-Based and Neighborhood Partnerships. *See* Exec. Order No. 13,498, 74 Fed. Reg. 6533 (Feb. 5, 2009).

[11] U.S. CONST. amend. I.

[12] *Lemon*, 403 U.S. at 612.

[13] U.S. CONST. amend. I.

[14] *See Lemon*, 403 U.S. at 612.

governmental actions do not violate the Establishment Clause. Often, the Court applies either the *Lemon* test from *Lemon v. Kurtzman*[15] or Justice O'Connor's endorsement test from her concurring opinion in *Lynch v. Donnelly*.[16] The *Lemon* test has three components: (1) the statute must have a secular legislative purpose; (2) the primary effect of the statute must be one that neither advances nor prohibits religion; and (3) the statute must not foster an excessive government entanglement with religion.[17] According to Justice O'Connor's concurring opinion in *Lynch*, a statute or conduct violates the Establishment Clause when it endorses or disapproves of a particular religion.[18] Under these two tests, the government may be able to provide aid to religious institutions without respecting any particular religion as long as religious organizations use the money for the secular programs that they operate, such as a soup kitchen or an adolescent pregnancy counseling service.[19]

Despite the protections that the Court has given to the Establishment Clause, the Court in *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* held that religious organizations are free to discriminate on a religious basis in hiring.[20] In *Amos*, the Court held that although Title VII prohibits employment discrimination based on religion,[21] religious organizations are exempt from following Title VII and are free to engage in discrimination even when filling secular positions like that of a building engineer.[22] As a result, through the government's funding programs, tax dollars reach religious groups that engage in employment discrimination. While workers like Alicia Pedreira suffer, the government claims that it does not respect certain religions when it provides aid to religious organizations that hire only members of their particular faith.

For two reasons, the executive branch in particular is responsible for funding this discrimination. First, the Supreme Court's decision in *Hein v. Freedom from Religion Foundation,*

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[15] *Id.* at 612–13.

[16] *See* Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring).

[17] *See Lemon*, 403 U.S. at 612–13.

[18] *See Lynch*, 465 U.S. at 694 (O'Connor, J., concurring).

[19] *See* Bowen v. Kendrick, 487 U.S. 589, 623 (1988) (O'Connor, J., concurring).

[20] *See* 483 U.S. 327, 339 (1987).

[21] *See* 42 U.S.C. § 2000e-2 (2006).

[22] *See Amos*, 483 U.S. at 339.

Inc. to deny taxpayer standing to challenge executive branch spending permits the executive branch to spend taxpayers' money unchecked.[23] Through this ruling, the Supreme Court makes it nearly impossible for taxpayers to claim that executive branch expenditures violate the Establishment Clause. Second, the executive branch interprets the Religious Freedom Restoration Act[24] ("RFRA") to justify employment discrimination within federally funded religious organizations. RFRA established that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."[25] The executive branch claims that requiring religious organizations to refrain from religious employment discrimination burdens their free exercise of religion and violates RFRA.

Part I of this Note focuses on the standing limitation. Part I.A examines the Supreme Court's limitation on taxpayer standing and how it has prevented taxpayers from challenging employment discrimination within government-funded institutions. Part I.B argues that because taxpayers cannot challenge executive branch conduct, the executive branch is free to fund discrimination and organizations that misuse government money in violation of the Establishment Clause. Part I.C recommends three approaches that taxpayers may take to achieve standing to challenge employment discrimination within government-funded religious organizations.

Part II of this Note examines RFRA. Part II.A discusses the passage of RFRA and the executive branch's argument that RFRA justifies employment discrimination within government-funded religious organizations. Part II.B argues that the executive branch's reliance on the Free Exercise Clause to justify religious discrimination is unconvincing because it ignores the requirements of the Establishment Clause. Finally, Part II.C recommends three specific responses to the executive branch's RFRA argument.

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[23] *See* 551 U.S. 587, 608–09 (2007).

[24] 42 U.S.C. § 2000bb-1 (2006).

[25] *Id.* § 2000bb-1(a).

I. THE EXECUTIVE BRANCH CAN FUND DISCRIMINATION BECAUSE TAXPAYERS DO NOT HAVE STANDING TO CHALLENGE ITS EXPENDITURES

To satisfy the "case or controversy" requirement of Article III of the Constitution, a plaintiff must establish standing.[26] Standing requires a plaintiff to "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[27] In addition, the injury must be concrete and particularized, not merely conjectural or hypothetical.[28] Requiring standing ensures that a litigant is entitled to have his or her case heard by the court.[29] Standing is also important because it preserves the separation of powers by limiting the power of the judiciary to hear only cases where real injuries are likely to be redressed by the court's relief.[30] Specifically, the requirement that the injury bear a causal connection to the defendant's action confines "the business of federal courts to questions presented in an adversary context."[31] In general, standing limits "the floodgates of litigation" by allowing only cases where the courts actually can resolve a person's real injury.[32]

In *Frothingham v. Mellon*, the Court found that generally, a federal taxpayer lacks standing to challenge government funding appropriations unless he is capable of showing that he "sustained or is immediately in danger of sustaining some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally."[33] While *Frothingham* upheld standing for local or municipal taxpayers whose interests were

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[26] *See* U.S. CONST. art. III, § 2, cl. 1 (limiting the judicial power of the Supreme Court to "[c]ases" and "[c]ontroversies"); Flast v. Cohen, 392 U.S. 83, 98–99 (1968).

[27] Allen v. Wright, 468 U.S. 737, 751 (1984).

[28] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[29] *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 612 (1989).

[30] *See Lujan*, 504 U.S. at 559–60.

[31] *Flast*, 392 U.S. at 95.

[32] KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 41 (17th ed. 2010).

[33] 262 U.S. 447, 488 (1923). The plaintiff asserted standing to challenge the Maternity Act, which provided funding for the purpose of reducing "maternal and infant mortality and protect[ing] the health of mothers and infants." *Id.* at 478. The plaintiff claimed that she had standing to challenge the Act because she was a taxpayer who would suffer an injury when her taxes were used in a way she deemed unconstitutional, but the court denied the claim. *See id.* at 486.

"direct and immediate," it denied federal taxpayers standing to challenge funding appropriations that they thought unconstitutional.[34]

Since *Frothingham*, the Court has found that taxpayers have a limited ability to challenge congressional appropriations. In 1968, the Court in *Flast v. Cohen* finally created an exception to the general rule laid down in *Frothingham*.[35] In *Flast*, taxpayers claimed that a federal statute providing for the expenditure of funds on textbooks and other materials used in parochial schools violated the Establishment and Free Exercise Clauses.[36] There, the Court found that when deciding whether a litigant is the appropriate party to bring a suit, "it is both appropriate and necessary . . . to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated."[37] More specifically, the Court described two aspects of the nexus as it applied to citizens asserting standing as federal taxpayers.[38] According to the Court, the taxpayer first must show "a logical link between [taxpayer] status and the type of legislative enactment attacked."[39] The Court explained that it would be logical for a taxpayer to challenge the constitutionality of congressional power under the Taxing and Spending Clause of Article I, Section 8 of the Constitution.[40] Second, the Court found that a taxpayer must show "a nexus between that status and the precise nature of the constitutional infringement alleged" by showing that "the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, s 8."[41] The Court held that the taxpayers met both of these requirements by challenging congressional taxing and spending power and by asserting that the challenged taxing and spending exceeded constitutional limitations because it violated the Establishment and Free Exercise Clauses of the

[34] *Id.* at 486–87.
[35] *See Flast*, 392 U.S. at 83.
[36] *Id.* at 85–86.
[37] *Id.* at 102.
[38] *Id.* at 102–03.
[39] *Id.* at 102.
[40] *See id.*
[41] *Id.* at 102–03.

Constitution.[42] Thus, the Court distinguished the taxpayers from those in *Frothingham* who simply asserted that Congress had exceeded its general powers.[43] While *Flast* opened the door to taxpayer standing, the Court subsequently was reluctant to expand its application beyond its facts, particularly when taxpayers challenged pure executive branch expenditures rather than congressional appropriations.[44]

A. *Limited Taxpayer Standing*

After *Flast*, the Court granted standing strictly where the taxpayer challenged congressional action under the taxing and spending power. For example, in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, the Court held that a taxpayer did not have standing to challenge the Department of Health, Education, and Welfare ("HEW") when it conveyed seventy-seven acres of land to a church pursuant to the Federal Property and Administrative Services Act.[45] The Court found that unlike the taxpayers in *Flast*, the taxpayers in *Valley Forge* failed the first part of the test for standing because they were not challenging the constitutionality of the Federal Property and Administrative Services Act or any congressional action, but rather the particular action of HEW, an executive agency.[46]

Despite the strict holding in *Valley Forge*, the Court upheld taxpayer standing in *Bowen v. Kendrick* because it found a close relationship between the challenged executive branch action and Congress's power to tax and spend.[47] In that case, taxpayers first challenged the constitutionality of the Adolescent Family Life Act ("AFLA"),[48] which established a federal grant program to provide funding to religious and other institutions that administered counseling on adolescent sexuality and pregnancy, but restricted

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[42] *See id.* at 103.

[43] *See id.* at 105.

[44] *See* Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 609 (2007).

[45] 454 U.S. 464, 468 (1982).

[46] *See id.* at 479. The Court found that the taxpayers additionally failed the *Flast* test because even if they were construed to have challenged congressional action, the conveyance would be pursuant to power under the Property Clause in Article IV, Section 3, Clause 2, and not the congressional power to tax and spend. *See id.* at 480.

[47] 487 U.S. 589, 619–20 (1988).

[48] 42 U.S.C. § 300z-10a (2006).

grants to organizations that provided abortion services.[49] The Court rejected the taxpayers' claim that the AFLA was invalid on its face, and found that the statute was valid under the *Lemon* test.[50] Alternatively, taxpayers made an as applied challenge to the statute, meaning that they challenged the constitutionality of specific grants that the Secretary of Health and Human Services made pursuant to the AFLA.[51] Even though here, taxpayers challenged the action of the Secretary of Health and Human Services, a member of the executive branch, the Court held that the AFLA was "at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers."[52] Therefore, the taxpayers met the *Flast* exception because there existed "a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of the taxing and spending power."[53] As a result, the Court remanded the case to the District Court to determine whether or not these specific grants violated the Establishment Clause.[54]

1. The Supreme Court Denies Taxpayers Standing To Challenge Executive Expenditures

In *Hein v. Freedom from Religion Foundation, Inc.*, the Court certified that the *Flast* exception would go no further than it did in *Kendrick*.[55] *Hein* involved a dispute over President George W. Bush's creation of the White House Office of Faith-Based and Community Initiatives within the Executive Office of the President.[56] The purpose of the Office was to ensure that faith-based community groups would be eligible to compete for federal financial assistance, as long as they did not use funding

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[49] *See Bowen*, 487 U.S. at 593.

[50] *See id.* at 602, 616. First, the Court found that the AFLA was primarily motivated by the clear secular purpose of eliminating social and economic problems associated with adolescent pregnancies. *See id.* at 602. Second, the Court found that the funding program's primary effect neither advanced nor prohibited religion since there was no requirement that grantees be affiliated with any particular religion. *See id.* at 604. Third, the Court found that even though the funding program required the government to oversee organizations and ensure that the organizations use the money in accordance with the Establishment Clause, there was no excessive government entanglement with religion. *See id.* at 615–16.

[51] *See id.* at 619.

[52] *Id.* at 619–20.

[53] *Id.*

[54] *See id.* at 620–21.

[55] *See* 551 U.S. 587, 609–10 (2007).

[56] *See id.* at 593–94.

toward any inherently religious activities such as worship, religious instruction, or proselytization.[57] No congressional legislation authorized the Office or specifically appropriated money for the Office's activities.[58] Rather, the Office was funded by "general Executive Branch appropriations."[59] In *Hein*, taxpayers claimed that speeches and conferences related to the program violated the Establishment Clause because they "praised the efficacy of faith-based programs in delivering social services."[60] The Court contrasted the expenditures used to fund the Office with those in *Flast*, which were made pursuant to an express congressional mandate and specific congressional appropriation.[61] The Court found that unlike the taxpayers in *Flast*, the *Hein* taxpayers had not established a sufficient nexus between their status as taxpayers and the congressional power to tax and spend.[62] As a result, the Court strictly construed the *Flast* exception to apply only to funding made in accordance with specific legislative action.[63] The Court upheld taxpayer standing in *Kendrick* by distinguishing *Hein*'s pure executive spending from the AFLA's program of disbursement of funds that Congress had created, authorized, and mandated pursuant to its taxing and spending powers.[64] On the other hand, it relied heavily on *Valley Forge* for its proposition that specific congressional legislation pursuant to the taxing and spending powers is necessary to establish a sufficient nexus between taxpayer status and the constitutional challenge.[65]

2. An Inability To Challenge Executive Branch Expenditures Has Resulted in an Inability To Challenge Employment Discrimination

The Supreme Court's ruling in *Hein* has severely limited taxpayers' ability to bring Establishment Clause challenges in cases of religious employment discrimination within

[57] *See id.* at 594.
[58] *See id.* at 595.
[59] *Id.*
[60] *Id.* at 592.
[61] *See id.* at 603.
[62] *See id.* at 604–05.
[63] *See id.* at 604.
[64] *Id.* at 607 (citing Bowen v. Kendrick, 487 U.S. 589, 619–20 (1988)).
[65] *See id.* at 605.

organizations that receive funding from the executive branch.[66] In particular, two appellate court decisions involving religious employment discrimination illustrate the hardships that taxpayers face: *In re Navy Chaplaincy*[67] and *Pedreira v. Kentucky Baptist Homes for Children*.[68] In *In re Navy Chaplaincy*, a group of Protestant Navy chaplains alleged that the Navy's retirement system favored Catholic chaplains in violation of the Establishment Clause.[69] The complaining chaplains conceded, however, that they themselves were not among the chaplains who suffered the alleged discrimination.[70] As a result, they asserted standing pursuant to an injury as taxpayers.[71] The court explained that although there was a statute that established the Navy Chaplaincy Corps, no legislative enactment expressly authorized expenditures to be used for the Navy's retirement funds.[72] The court also found that a challenge to the statute that established the chaplaincy was too broad since the taxpayers were not challenging the existence of the chaplaincy itself.[73] Thus, the court held that in light of *Hein*, the taxpayers' claim did not fit into the narrow *Flast* exception because no specific congressional act directed money toward the challenged behavior.[74]

Similarly, in *Pedreira v. Kentucky Baptist Homes for Children*, taxpayers alleged an Establishment Clause violation after KBHC fired Alicia Pedreira for not conforming to the

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[66] *Hein* has limited taxpayers' ability to bring Establishment Clause challenges based on claims other than employment discrimination, but this Note discusses only employment discrimination. *See, e.g.*, Freedom from Religion Found., Inc. v. Nicholson, 536 F.3d 730, 741 (7th Cir. 2008) (holding that taxpayers did not have standing to challenge funding of Chaplain Service of the Veterans Health Administration); Hinrichs v. Speaker of House of Representatives of Ind. Gen. Assembly, 506 F.3d 584, 598–99 (7th Cir. 2007) (holding that taxpayers did not have standing to challenge funding of Indiana House of Representatives' "Minister of the Day" program).

[67] 534 F.3d 756 (D.C. Cir. 2008).

[68] 579 F.3d 722 (6th Cir. 2009).

[69] 534 F.3d at 758.

[70] *Id.*

[71] *Id.*

[72] *See id.* at 762.

[73] *See id.*

[74] *See id.* Although *In re Navy* did not involve Executive Branch appropriations, the case is still relevant because it demonstrates how *Hein* has limited taxpayer standing in religious employment discrimination cases. It will also be relevant to the discussion in Part I.C, which discusses alternative ways for taxpayers to achieve standing after *Hein*.

organization's Baptist values.[75] The court dismissed Pedreira's religious discrimination claims.[76] Alternatively, several taxpayers filed a complaint alleging that the government funds provided to KBHC violated the Establishment Clause because they "were used to finance staff positions which were filled according to religious tenets, and to provide services designed to instill Christian values and teachings in the children."[77] According to both the district and appellate courts, the taxpayers failed to meet the *Flast* exception for federal taxpayer standing. The district court found that *Hein* precluded relief because only general executive branch expenditures reached the various Kentucky agencies that contracted with KBHC to provide children's services.[78] While the court of appeals acknowledged that specific federal legislation governing Social Security and other income programs authorized federal funding for states to provide foster care and maintenance for children, it found that the taxpayers failed to allege how these federal programs were related to the constitutional violation.[79] The court explained that the taxpayers did not meet the *Flast* nexus because the federal provisions simply contemplated child care, not unconstitutional religious indoctrination.[80] The court distinguished this case from *Kendrick*, where the plaintiffs alleged a nexus between specific provisions of the AFLA prohibiting grants to organizations that offered abortion services and a violation of the religion clauses.[81]

In contrast, the district and appellate courts reached different determinations on whether the plaintiffs had alleged state taxpayer standing. In denying the state taxpayer claim, the district court relied on the Supreme Court's holding in *DaimlerChrysler Corp. v. Cuno*, which states that the *Flast* analysis also applies to state taxpayers who bring Establishment

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[75] *See* 579 F.3d 722, 724–25 (6th Cir. 2009).

[76] *Id.* at 727–28. The court dismissed Pedreira's discrimination claim because a Title VII plaintiff must allege that a religious aspect of her conduct motivated her employer's decision to terminate her; Pedreira, however, "[did] not allege that her sexual orientation [was] premised on her religious beliefs or lack thereof." *Id.* at 728.

[77] Pedreira v. Ky. Baptist Homes for Children, Inc., 553 F. Supp. 2d 853, 857 (W.D. Ky. 2008), *rev'd*, 579 F.3d 722 (6th Cir. 2009).

[78] *See id.* at 861.

[79] *See Pedreira*, 579 F.3d at 730–31.

[80] *See id.* at 731.

[81] *See id.* (citing Bowen v. Kendrick, 487 U.S. 589, 620 (1988)).

Clause challenges.[82] Applying *Hein*'s nexus requirement to state taxpayers challenging state executive branch expenditures, the district court reasoned that state taxpayers did not have standing because there was no nexus between any state legislation and the alleged violation.[83] On the other hand, the circuit court found that the Kentucky taxpayers sufficiently demonstrated a nexus between specific state legislation and the Establishment Clause violation.[84] The court found that the plaintiffs pointed to specific Kentucky legislation that appropriated money to KBHC, and therefore, the plaintiffs "demonstrated a nexus between Kentucky and its allegedly impermissible funding of a pervasively sectarian institution."[85] Although, the state taxpayers succeeded in the circuit court, *Pedreira* demonstrates the hurdles and legal complexities that taxpayers face in alleging Establishment Clause violations.

B. *The Executive Branch's Unchecked Spending Risks Constitutional Violations*

While enlisting the help of religious groups may help to solve social problems, the executive branch's unchecked spending is dangerous. In cases where the Court upholds funding to religious organizations, it recognizes that society could benefit from religious assistance. For example, in *Kendrick*, Congress "recognized that legislative or governmental action alone would be insufficient" in dealing with the adverse health, social, and economic consequences of adolescent pregnancy.[86] Similarly, in *Hein*, the President recognized that religious groups had a role to play in achieving public purposes.[87] Still, allowing the executive branch to spend money unchecked risks constitutional violations for two reasons. First, the judiciary will not remedy Establishment Clause injuries to taxpayers because under *Hein*, the executive branch is allowed to continue funding religious discrimination without the courts even having to consider the

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[82] *See Pedreira*, 553 F. Supp. 2d at 858–59 (citing DaimlerChrylser Corp. v. Cuno, 547 U.S. 332, 345 (2006)).
[83] *See id.* at 861.
[84] *Pedreira*, 579 F.3d at 733.
[85] *See id.*
[86] Bowen v. Kendrick, 487 U.S. 589, 595 (1988).
[87] Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 593–94 (2007).

constitutionality of this conduct under the *Lemon* or endorsement tests. Second, while the Court in *Hein* claimed that allowing the judicial branch to rule on executive branch activity would disturb the separation of powers,[88] not giving the courts the power to hear these cases actually disturbs the separation of powers.

1. Unchecked Spending Allows Establishment Clause Violations

Because *Hein* denied taxpayers standing to challenge executive expenditures, it is very difficult for a taxpayer to get beyond the standing requirement and actually have the judiciary address his or her claim. Courts dismiss cases like *Pedreira* and never reach the important Establishment Clause questions raised by the *Lemon* or endorsement tests.[89]

Taxpayers' ability to bring Establishment Clause challenges against religious discrimination is crucial because Title VII discrimination claims are not successful. Section 702 of the Civil Rights Act of 1964 exempts religious organizations from Title VII's prohibitions against discrimination.[90] In *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, the Court held that this exemption applies even when religious organizations engage in employment discrimination within their secular programs.[91] In that case, the Church of Jesus Christ of Latter-Day Saints ran a nonprofit facility open to the public and fired the building's engineer because he failed to qualify for membership of the church.[92] The Court concluded that although the engineer held a secular position, section 702 covered all activities of religious employers, and as a result, the Court found no discrimination.[93] Because Title VII claims fail, taxpayers must fight discrimination through Establishment Clause challenges; but, without standing, taxpayers' efforts are futile.

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[88] *See id.* at 611.

[89] *See* Pedreira v. Ky. Baptist Homes for Children, Inc., 553 F. Supp. 2d 853, 856 (W.D. Ky. 2008), *rev'd*, 579 F.3d 722 (6th Cir. 2009).

[90] *See* 42 U.S.C. § 2000e-1 (2006).

[91] *See* 483 U.S. 327, 329–30 (1987).

[92] *Id.* at 330.

[93] *See id.* at 339.

Finally, Establishment Clause challenges are important because funding religious discrimination is not the only Establishment Clause violation that the government is in danger of committing when it funds organizations like KBHC. When religious organizations are allowed to hire only people who share the organization's beliefs, these organizations become more likely to use taxpayers' money for proselytization, rather than for secular purposes. The Court in *Kendrick* accepted that there exists "pervasively sectarian" institutions whose religion is "so pervasive that a substantial portion of [their] functions are subsumed in the religious mission."[94] The Court recognized that within these types of organizations there "is a risk that direct government funding, even if it is designated for specific secular purposes, may nonetheless advance" religious missions.[95] This was exemplified in *School District of Grand Rapids v. Ball*.[96] In that case, the Court evaluated a publicly financed program that held classes at private schools for private school students.[97] The Court considered the fact that the teachers mostly were, or had been, private school teachers in concluding that the private school was pervasively sectarian.[98] The Court found that the teachers "may subtly or overtly indoctrinate the students in particular religious tenets at public expense."[99] Even though the teachers were supposed to be teaching a secular class, the teachers might "knowingly or unwillingly tailor the content of the course to fit the school's announced goals."[100]

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[94] Bowen v. Kendrick, 487 U.S. 589, 610 & n.12 (1988) (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)).

[95] *Id.*

[96] *See* 473 U.S. 373 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

[97] *See id.* at 375.

[98] *See id.*

[99] *Id.* at 397.

[100] *Id.* at 388. The *Grand Rapids* Court ultimately declared the school funding program invalid because the schools were "pervasively sectarian." *Id.* The Court held that because the schools were "pervasively sectarian," any instruction that took place on school grounds would not be purely secular. *Id.* at 388–89. *Grand Rapids* was overruled in *Agostini v. Felton*, which held that instruction taking place on nonpublic school grounds does not necessarily imply that the instruction contains some religious indoctrination. *See* 521 U.S. 203, 230 (1997). Later, in *Mitchell v. Helms*, the Court stated in a plurality opinion that the government should not assume that funding private schools will necessarily violate the Establishment Clause simply because the schools are "pervasively sectarian." *See* 530 U.S. 793, 826 (2000). Although the Supreme Court is hesitant to deny aid to a school simply because it is "pervasively sectarian," *Grand Rapids*'s acknowledgement that teachers who subscribe to a certain religion may have difficulty leaving that religion

Although they were the subject of *Grand Rapids*, schools are not the only religious organizations whose employees could either intentionally or inadvertently let religious doctrine influence the services the organization provides. For example, in *Kendrick*, the organizations that received funding under the AFLA were intended to provide various services to adolescents, including pregnancy and pregnancy prevention counseling, as well as education on family life and problems associated with adolescent sexual relations.[101] Although the Court found the statute valid on its face, it recognized that as the statute was applied, there was a possibility that funding could be abused by a "pervasively sectarian" organization that let religious tenets influence its teaching on adolescent sexuality.[102] Organizations like KBHC in *Pedreira*, who argue that they need to hire only people with conforming beliefs in order to retain their religious missions, create a risk that some employees will let religious doctrine influence the organization's secular mission. This risk results in a greater likelihood of Establishment Clause violations because government funding reaches a mixture of secular and religious purposes. Taxpayers need standing to prevent these violations from occurring.

2. Denying Taxpayers Standing Disturbs, Rather than Upholds, the Separation of Powers

While the Court in *Hein* stated that granting taxpayer standing to challenge executive actions would disturb the separation of powers, denying standing actually causes this disturbance. In *Hein*, the Supreme Court cautioned that since "almost all Executive branch activity is ultimately funded by some congressional appropriation, extending the *Flast* exception . . . would effectively subject every federal action—be it a conference, proclamation or speech—to Establishment Clause challenge by any taxpayer in federal court."[103] Further, the Supreme Court stated that giving taxpayers standing to challenge spending made pursuant to executive action would

out of their lessons is still a valid point in considering whether government-funded religious institutions should be allowed to discriminate in employment.

[101] *See Kendrick*, 487 U.S. at 594.

[102] *See id.* at 611.

[103] Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 610 (2007).

"raise serious separation-of-powers concerns," as it would result in the federal courts overly monitoring the executive branch.[104]

Both the court of appeals and the Freedom from Religion Foundation proposed ways to grant taxpayers standing while still limiting checks on the executive branch, but neither of these suggestions alleviated the Court's separation of powers concerns.[105] The court of appeals suggested a "zero-marginal-cost test" that would deny taxpayer standing when the marginal cost to the taxpayer of the alleged Establishment Clause violation is zero.[106] The court of appeals proposed that under its test a taxpayer would not have standing to make frivolous challenges.[107] For example, a taxpayer would not be able to challenge a President's favorable religious reference in a speech because the costs associated with the speech would not increase just because the President mentioned a particular religion.[108] The Supreme Court rejected this approach because taken literally, the test actually could "create difficult and uncomfortable line-drawing problems."[109] It discussed, for example, that a speech-writer could have spent extra time doing research for the purpose of using certain "religious imagery" in a speech, and this extra time would result in having to pay the writer more money.[110] The Freedom from Religion Foundation took a different approach and proposed that to achieve standing, "a challenged expenditure [should] be 'fairly traceable to the conduct alleged to violate the Establishment Clause.' "[111] The Supreme Court, however, found "little comfort in this vague and ill-defined test" because, in its view, all executive branch activities could be traced to some general congressional appropriation that was financed by taxpayer money.[112]

By rejecting the proposals, the Court claimed that it was preventing an overly scrutinized executive branch; but, in reality, the Court created an overly dominant executive branch that gained a great deal of power at the judiciary's loss. Instead of

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[104] *Id.* at 611–12.
[105] *See id.* at 612–13.
[106] *Id.* at 612.
[107] *See id.*
[108] *See id.*
[109] *Id.* at 613.
[110] *See id.*
[111] *See id.*
[112] *Id.*at 613–14.

maintaining a balance, the Court has permitted "the encroachment or aggrandizement of one branch at the expense of the other" that the Framers were so cautious to avoid.[113] The Court should have accepted one of the proposals or suggested its own test. A test is necessary to prevent frivolous challenges and still allow taxpayers a chance to challenge executive branch expenditures in court.

C. RESPONDING TO STANDING LIMITATIONS

After *Hein*, citizens cannot depend on a taxpayer's injury to assert standing. In pursuit of having their Establishment Clause claims against the executive branch heard, taxpayers should consider three alternate routes.

Taxpayers can achieve standing by asserting an injury other than the government's misuse of tax money, thereby avoiding having to satisfy the *Hein* Court's narrow interpretation of *Flast*.[114] For example, the taxpayers in *In re Navy Chaplaincy* made a second standing claim, asserting that they had suffered an injury resulting from having to endure the Navy's " 'message' of religious preference."[115] The petitioners claimed that their awareness of discrimination at the workplace forced them to endure a message of discrimination similar to that invoked by religious displays on public property.[116] The court found that the Navy was not actively communicating a religious message like those who made public religious displays and found that the chaplains were simply observing conduct with which they disagreed.[117] Although the court disagreed with the chaplains' "creative analogy,"[118] there is merit to the argument. The chaplains were not simply bystander taxpayers who were removed from the situation. They actually worked for the Navy, personally witnessed the alleged discrimination, and had to endure it to carry out their work.[119] While the court opined that

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[113] Buckley v. Valeo, 424 U.S. 1, 122 (1976).

[114] *See Hein*, 551 U.S. at 615.

[115] 534 F.3d 756, 760 (D.C. Cir. 2008).

[116] *See id.* at 763.

[117] *See id.* at 764.

[118] *Id.* at 765.

[119] *See id.* at 767 (Rogers, J., dissenting) ("Appellants have suffered particularized Article III injury because they are not strangers to the Navy's 4109 program. Their membership within the Chaplain Corps and their resulting receipt of a message of denominational preference make them comparable to a citizen who has

allowing the plaintiffs to achieve standing through the "message" claim "would extend the religious display and prayer cases in a significant and unprecedented manner and eviscerate well-settled standing limitations,"[120] this would only occur if anyone who observed a religious message had standing to sue. To preserve limitations, the court could allow standing for people like the chaplains who suffered a direct injury from close proximity to the discrimination.[121]

State taxpayers, who may have an easier time establishing a nexus between legislative action and the challenged activity, may also be able to achieve standing. The Supreme Court held in *DaimlerChrysler Corp. v. Cuno* that the "rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers."[122] As a result, courts have concluded that the Supreme Court's interpretation of *Flast* in *Hein* also applies to state taxpayers.[123] Still, it is often easier for state taxpayers to establish the nexus that *Flast* requires because state legislation often does what a federal administrative agency directs.[124] For example, in *Pedreira*, the Sixth Circuit found that while the taxpayers could not point to specific federal legislation that directed money to KBHC allegedly in violation of the Establishment Clause, the taxpayers had identified specific state legislation that appropriated funds for child maintenance and educational services at KBHC.[125] Whenever possible, plaintiffs should look for state legislation that could yield a nexus between legislation and the challenged activity sufficient to sustain state taxpayer standing.

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personal contact with the alleged establishment of religion, such as in the religious display cases." (internal quotation marks and citation omitted)).

[120] *Id.* at 764 (majority opinion).

[121] *See id.* at 767–68 (Rogers, J., dissenting).

[122] DaimlerChrylser Corp. v. Cuno, 547 U.S. 332, 345 (2006).

[123] *See* Hinrichs v. Speaker of House of Representatives of Ind. Gen. Assembly, 506 F.3d 584, 598 (7th Cir. 2007) (holding that *Hein* applies to state taxpayers); Pedreira v. Ky. Baptist Homes for Children, Inc., 553 F. Supp. 2d 853, 855–56 (W.D. Ky. 2008), *rev'd*, 579 F.3d 722 (6th Cir. 2009).

[124] *See* Ira C. Lupu & Robert W. Tuttle, *Alicia M. Pedreira (and others) v. Kentucky Baptist Homes for Children (and others)*, ROUNDTABLE ON RELIGION & SOCIAL WELFARE POL'Y, Apr. 8, 2008, http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=65.

[125] Pedreira v. Ky. Baptist Homes for Children, Inc., 579 F.3d 722, 732–33 (6th Cir. 2009); *see* Lupu & Tuttle, *supra* note 124.

Finally, to achieve standing, taxpayers can find someone who has suffered a direct injury and persuade him or her to bring an Establishment Clause claim. For example, the court in *In re Navy Chaplaincy* stated that if the chaplains who had actually been discriminated against had sought standing, they would have achieved it.[126] It is uncertain why she did not, but if Alicia Pedreira had brought an Establishment Clause challenge, she could have achieved standing by claiming that her direct injury was the termination of her employment. While this strategy is definitely an option, it still would not allow the taxpayer to directly address his or her grievance, the misuse of his or her tax dollars through the funding of religious activities. Instead, taxpayers would have to rely on others who perhaps are also taxpayers, but are bringing the Establishment Clause challenge based on a different injury.

Even if taxpayers can achieve standing, there is no guarantee that their claims will succeed. Once taxpayers obtain an opportunity to challenge executive spending, they still need to defeat the government's arguments that funding discrimination is constitutional, including the executive branch's reliance on RFRA.

II. THE EXECUTIVE BRANCH USES THE RELIGIOUS FREEDOM RESTORATION ACT TO CONDONE FUNDING DISCRIMINATION

The executive branch argues that under RFRA, federally funded religious organizations are exempt from laws that forbid them to engage in religious employment discrimination because these laws burden the organizations' free exercise of religion.[127] RFRA recognizes that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."[128] RFRA states that the "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is in

[126] *See* 534 F.3d 756, 760 (D.C. Cir. 2008) ("If plaintiffs had alleged that the Navy discriminated against them on account of their religion, plaintiffs would have alleged a concrete and particularized harm sufficient to constitute injury-in-fact for standing purposes.").

[127] *See, e.g.*, Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act, 31 Op. O.L.C. 1, 76–77 (2007) [hereinafter Application of the Religious Freedom Restoration Act].

[128] 42 U.S.C. § 2000bb(a)(2) (2006).

furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."[129] Thus, RFRA establishes a strict scrutiny test to determine whether or not a law may burden religious exercise. Although the Court has since found that the Act does not apply to state laws, RFRA is still valid in its application to federal laws.[130] As a result, the executive branch has used RFRA to exempt religious organizations from having to follow federal statutes that create grants for religious groups and condition the funding on the organization refraining from religious employment discrimination. The executive branch claims that these federal statutes place a burden on free exercise of religion by forcing organizations to hire people outside of their particular religion.

For example, the Office of Legal Counsel issued an opinion explaining that requiring World Vision, a federally funded religious organization targeted at preventing youth gangs, to refrain from discrimination substantially burdens the organization's free exercise of religion.[131] World Vision received a $1.5 million grant from the Office of Justice Programs ("OJP") pursuant to the Juvenile Justice and Delinquency Prevention Act of 1974 ("JJDPA").[132] While World Vision hired only Christians, upon approving the grant, OJP informed World Vision that it was subject to a religious nondiscrimination provision of the JJDPA that prohibited employment discrimination for

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[129] *Id.* § 2000bb-1(b).

[130] *See* City of Boerne v. Flores, 521 U.S. 507, 535 (1997). In imposing its requirements on state law, Congress relied on its power provided in section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation" that no state shall make a law that deprives "any person of life, liberty, or property without due process of law" or "equal protection of the laws." *Id.* at 516–17 (citing U.S. CONST. amend. XIV, §§ 1, 5). That provision includes power to enforce the Free Exercise Clause through the Due Process Clause, which the Court has determined includes the liberties guaranteed by the First Amendment. *See id.* at 519 (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)). In *Flores*, the Court held that Congress, in enacting RFRA, exceeded its enforcement power from section 5 of the Fourteenth Amendment. *See id.* at 532. It held that while Congress could prevent unconstitutional behavior, it could not make a substantive change to the governing law by requiring strict scrutiny. *See id.* at 534. The Court held that in applying RFRA to the states, Congress upset the separation of powers by interfering in a decision that should be left to the judiciary. *See id.* at 536.

[131] Application of the Religious Freedom Restoration Act, *supra* note 127, at 1.

[132] *See id.* at 3 (citing 42 U.S.C. §§ 5601–5792a (2006)).

grantees.[133] The Office of Legal Counsel's opinion maintains that the nondiscrimination provision should not apply to World Vision because it would burden the organization's religious exercise.

A. *The RFRA Argument Justifies Employment Discrimination with the Free Exercise Clause*

Prior to RFRA, *Employment Division v. Smith*[134] required only a rational basis on the part of the state to validate laws that burden the exercise of religion. In *Smith*, the Court found that two members of a Native American church were not exempt from laws prohibiting the use of hallucinogenic drugs even though they claimed they used the drugs for "sacramental purposes."[135] The Court applied a rational basis test to the challenged statutes and held that the right of free exercise does not relieve a citizen from having to obey valid laws prohibiting conduct that a state is free to regulate.[136] Three years later, in 1993, Congress passed RFRA,[137] replacing the rational basis test with a strict scrutiny test and making it more difficult for the state to enforce laws that burden free exercise.

Since RFRA is still applicable to federal laws,[138] the government has attempted to use it to exempt federally funded religious institutions from federal laws that prohibit employment discrimination. The World Vision opinion discussed the White House Office of Faith Based and Community Initiative's insistence that faith-based funding recipients "should retain their fundamental civil rights, including their ability . . . to take their faith into account when they make employment decisions."[139] It asserted that although a statutory provision

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[133] *See id.* ("No person in any State shall on the ground of . . . religion . . . be subjected to discrimination under or denied employment in connection with any programs or activity funded in whole or in part with funds made available under this chapter." (quoting 42 U.S.C. § 3789d(c)(1))).

[134] *See* 494 U.S. 874, 878–79 (1990).

[135] *Id.* at 872.

[136] *See id.* at 878–79. The Court specifically rejected a test requiring the state to show a compelling governmental interest in the law, stating that using that type of test in this case would produce a "constitutional anomaly" by creating "a private right to ignore generally applicable laws." *Id.* at 886.

[137] 42 U.S.C. § 2000bb-1 (2006).

[138] *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (finding RFRA invalid only as to state law).

[139] *See* Application of the Religious Freedom Restoration Act, *supra* note 127, at 4–5.

attached to the World Vision grant prohibited religious employment discrimination, under RFRA, prohibiting discrimination would be a substantial burden on World Vision's ability to freely exercise its religion.[140] The Office of Legal Counsel found that requiring World Vision to hire non-Christians would stifle the organization's religious exercise by forcing it to compromise its identity and strength.[141] Accordingly, the opinion did not find a compelling governmental interest that justified prohibiting religious discrimination in World Vision's hiring system.[142] In a broad conclusion, the opinion claimed that "religious organizations that administer federally funded social services be exempted from restrictions on religious hiring under RFRA where it is reasonably construed to require that result."[143]

B. *Reliance on the Free Exercise Clause Does Not Justify Discrimination*

The government's interpretation of RFRA "subvert[s] Congressional and constitutional intent in pursuit of a forbidden goal: discrimination in hiring."[144] Although *Amos* allows religious organizations to discriminate on a religious basis in employment within secular functions, the Office of Legal Counsel goes one step further and proposes that it is acceptable for the government to fund this discrimination with tax dollars.[145] Although the opinion relies on the Free Exercise Clause to justify discrimination, this reliance is not convincing for two reasons. First, the opinion ignores the Establishment Clause in its analysis. Second, by implying that in the performance of a single function, an organization is both exercising its religion and a candidate for federal aid, it assumes that an organization can be both religious and secular at the same time; however, this is a doubtful assumption.

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[140] *See id.* at 9.

[141] *See id.* at 17–18.

[142] *See id.* at 22.

[143] *Id.* at 25.

[144] Charlie Savage, *Bush Aides Say Religious Hiring Doesn't Bar Aid*, N.Y. TIMES, Oct. 18, 2008, at A11 (quoting Barry Lynn, President of Americans United for Separation of Church and State).

[145] Application of the Religious Freedom Restoration Act, *supra* note 127, at 1.

The two religion clauses of the First Amendment, the Establishment Clause and the Free Exercise Clause, "are frequently in tension."[146] In its opinion, the Office of Legal Counsel focused almost entirely on the burden that a nondiscrimination statute places on World Vision's exercise of religion while ignoring the Establishment Clause.[147] Under RFRA, the definition of an "exercise of religion" includes "any exercise of religion, *whether or not compelled by, or central to, a system of religious belief.*"[148] As a result, the opinion concluded that even if World Vision's charitable works could be conceived as noncentral to its Christian values, they would still qualify as an exercise of religion under RFRA.[149] The opinion explained that if World Vision were required to hire without religious favor within the federally funded program, it would not be able to freely carry out its charitable works; in other words, it would not be able to freely exercise its religion.[150] The opinion established that to receive funding, World Vision would have to alter its behavior in a way that would prevent it from staying true to its mission, and this would constitute a substantial burden.[151]

The government's argument, however, essentially pits the Free Exercise Clause and the Establishment Clause against one another, as its protection of the former substantially inhibits the latter. The opinion ignores the fact that government funds are reaching religious organizations that favor their own believers. It ignores the burdens to those who lose jobs and the burdens to taxpayers who are forced to fund government policies that favor certain religions. Protecting the Free Exercise Clause at the expense of the Establishment Clause is not a noble effort because it perpetuates discrimination that injures both employees and taxpayers.

Further, justifying employment discrimination within federally funded programs with the Free Exercise Clause is unpersuasive because it implies that an organization's activities can be considered religious and secular at the same time. For purposes of asserting a Free Exercise Clause violation, the

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[146] Locke v. Davey, 540 U.S. 712, 718 (2004).

[147] Application of the Religious Freedom Restoration Act, *supra* note 127, at 1.

[148] *See id.* at 6–7.

[149] *See id.* at 8.

[150] *See id.* at 10–11.

[151] *See id.* at 17–18.

programming is considered to be religious enough that the possibility of having an employee of a different religion threatens its free exercise of religion.[152] On the other hand, for purposes of qualifying for government aid, the programs are considered to be secular enough so as not to violate the Establishment Clause.[153] It is contradictory for the government to consider an organization to be both secular and religious at the same time in the performance of a single function; however, the organization can be both secular and religious in the performance of different functions. The problem is that religious organizations have a difficult time viewing any of their activities as secular, and it is the government that chooses to call certain religious activities "secular" to justify funding. Still, when a function has already been deemed secular and qualifies for government aid, it cannot change character and become religious for purposes of protecting its free exercise of religion.

C. RESPONDING TO THE RFRA ARGUMENT

In its memorandum opinion, the Office of Legal Counsel makes various legally dubious arguments that anti-discrimination regulations should not apply to religious organizations.[154] There are three arguments that can be used to refute the government's use of RFRA to justify discrimination.

Citizens can argue that there is a compelling governmental interest in requiring federally funded faith-based organizations not to discriminate in employment. The World Vision opinion compares the governmental interest discussed in *Gonzales v. O Centro Esperita Beneficente Uniao do Vegetal*[155] to the governmental interest in World Vision's case, but this comparison is poorly supported. In *Centro Esperita*, the Court held that there was not a compelling governmental interest in preventing a religious sect from ingesting an illegal hallucinogen for sacramental use.[156] The World Vision opinion analogizes that just as the Court did not find a compelling interest to enforce the drug use prohibition, there is no compelling interest that

[152] *See id.* at 9.
[153] *See id.* at 1–2.
[154] Savage, *supra* note 144.
[155] *See* 546 U.S. 418, 433–34 (2006).
[156] *See id.* at 439.

requires courts to enforce a discrimination prohibition.[157] There may not be a compelling interest in preventing minimal controlled drug use in a religious service, but there is a compelling interest in preventing the evils of discrimination and the Establishment Clause violations that potentially flow from such discrimination.

While the Office of Legal Counsel acknowledges that "Congress's interest in forbidding religious discrimination in employment is arguably stronger in the context of federally funded programs," it dismisses this interest because many programs do not impose nondiscrimination requirements on the employment practices of grantees.[158] The Office of Legal Counsel simply states that since statutes exempt religious organizations from antidiscrimination policies,[159] the government must not have a very strong interest in preventing discrimination.[160] The Office of Legal Counsel's argument is weak because even though Congress has mistakenly ignored compelling governmental interests in the past, the government cannot ignore its compelling interest in preventing discrimination and Establishment Clause violations from occurring.

The second response to the RFRA argument maintains that enforcing antidiscrimination provisions would not substantially burden World Vision because it is allowed to continue discriminating, it just cannot do so with taxpayer money. This idea is consistent with *Locke v. Davey*.[161] In *Davey*, the Court rejected a Free Exercise challenge to a state scholarship program that prohibited recipients from studying theology under the state grants.[162] There, the Court held that the program did not substantially burden recipients' rights to practice religion because recipients could use the grants for pursuing a secular

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[157] *See* Application of the Religious Freedom Restoration Act, *supra* note 127, at 20.

[158] *Id.* at 21.

[159] *See, e.g.*, Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 329–30 (1987) (holding that Title VII does not apply to religious organizations).

[160] *See* Application of the Religious Freedom Restoration Act, *supra* note 127, at 20 ("Given that many statutes exempt religious organizations from prohibitions on religious discrimination in employment, we conclude that applying . . . [a] nondiscrimination provision to World Vision . . . would not further a compelling government interest.").

[161] *See* 540 U.S. 712, 720–21 (2004).

[162] *Id.* at 725.

degree and still study theology with their own money.[163] The Office of Legal Counsel finds the burden imposed on World Vision to be much greater than the burden imposed in *Davey* because to comply with antidiscrimination statutes, World Vision must substantially change its behavior and alter its religious mission.[164] On the contrary, the burden imposed in *Davey* is similar to the burden imposed on World Vision.[165] Like the student in *Davey*, World Vision is free to pursue its religious interests without federal funding and use the grant for secular purposes. In *Davey*, the Court found that the government "[h]ad merely chosen not to fund a distinct category."[166] Similarly, the government may choose not to fund those types of services that embrace employment discrimination. *Davey* suggests that religious organizations like World Vision can choose to secularize their programs to the point where they qualify for federal aid or else they should find other forms of funding.

Finally, challengers can argue that when religious organizations accept government aid for a certain function, that function is deemed "secular," and for purposes of RFRA, the organization relinquishes any free exercise of religion argument. The argument that RFRA allows religious organizations to discriminate upon hiring within federally funded programs hinges upon the assumption that these programs constitute an exercise of religion.[167] Thus, to refute this argument, one can argue either that: (1) religious organizations are not exercising their religion when they engage in such activities; or (2) even though religious organizations are exercising their religion, they relinquish certain protections when the government chooses to call them "secular" and they accept federal aid.

To argue that religious organizations are not exercising their religion is more difficult. As noted in the World Vision opinion, the Supreme Court has held that the exercise of religion

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[163] *See id.* at 720–21.

[164] *See* Application of the Religious Freedom Restoration Act, *supra* note 127, at 25.

[165] *See* Savage, *supra* note 144 ("In the same way, Mr. Lederman said, World Vision is free to have an antigang program that hires by faith without using taxpayer money." (quoting Marty Lederman, a Georgetown University law professor)).

[166] *See Davey*, 540 U.S. at 721.

[167] *See* Application of the Religious Freedom Restoration Act, *supra* note 127, at 6–9.

protected by the First Amendment is not limited to beliefs, but it also includes the performance of physical acts.[168] The actions of faith-based organizations are often backed by values that are central to religious ideas about justice and charity.[169] As a result, it is difficult to argue that while these programs might fit within the secular goals of the government, they are not exercises of religion.

The remaining response argues that even though these groups are exercising religion, they must accept certain limitations on that freedom when they accept government aid. Religious organizations that do not accept government funding may very well succeed in claiming that prohibiting them from employment discrimination burdens their free exercise.[170] On the other hand, organizations that accept aid must accept limitations on their ability to bring free exercise claims because the very reason they are allowed to receive aid in the first place is that their programming can be considered a "secular" goal of the government.[171] Through its funding, the government has already given organizations like World Vision the benefits of a secular institution.[172] Even though these organizations may be exercising their religion through charity and other forms of social justice, they should not also be entitled to claim the benefits of religious exercise. In return for government aid, religious organizations should treat their programs as secularly as they can and abandon employment discrimination. In this way, the religious organization is still able to assert its full religious identity in its nonsecular functions, and it can still achieve the charitable goals that it sets out in its secular functions. Separating secular and religious functions in this manner is the only way that religious organizations are able to take advantage of government aid without violating the Establishment Clause.

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[168] *See id.* at 7–8; Wisconsin v. Yoder, 406 U.S. 205, 219–20 (1972) (holding that the Free Exercise Clause protected the Amish practice of sending children to school only up to the eighth grade).

[169] *See* Application of the Religious Freedom Restoration Act, *supra* note 127, at 8.

[170] *See* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 339 (1987).

[171] *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[172] *See* Application of the Religious Freedom Restoration Act, *supra* note 127, at 2.

CONCLUSION

Unfortunately, the government that is supposed to protect Alicia Pedreira's rights and liberties is actually condoning the discrimination against her. Although it may be difficult, taxpayers should not give up the fight against the errors of the executive branch. Taxpayers should argue for standing, especially where state legislation yields a nexus between state congressional action and the challenged activity. In addition, taxpayers should attack the weaknesses of the executive branch's arguments. While total separation of church and state may not be possible or ideal, separation of the state from discrimination is crucial to upholding the Constitution.