

UNITED STATES COURT OF APPEALS
for the
SIXTH CIRCUIT

ALICIA PEDREIRA, KAREN VANCE, PAUL SIMMONS, JOHANNA W.H. VAN WIJK-BOS, AND
ELWOOD STURTEVANT

Plaintiffs-Appellants,

v.

KENTUCKY BAPTIST HOMES FOR CHILDREN, INC.; ROBERT STEPHENS, SECRETARY, JUSTICE
CABINET; VIOLA P. MILLER, SECRETARY, COMMONWEALTH OF KENTUCKY CABINET FOR
FAMILIES AND CHILDREN

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF KENTUCKY, JUDGE CHARLES R. SIMPSON, III.,
NO. 3:00-CV-00210-CRS-JDM

PROOF BRIEF FOR APPELLANTS ALICIA PEDREIRA, *et al.*

David B. Bergman
Elizabeth Leise
Alicia A.W. Truman
Joshua P. Wilson
ARNOLD & PORTER LLP
555 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20004
202-942-5000

Ayesha N. Khan
Alex J. Luchenitser
AMERICANS UNITED
FOR SEPARATION OF CHURCH & STATE

Kenneth Y. Choe
James D. Esseks
ACLU LESBIAN, GAY, BISEXUAL &
TRANSGENDER PROJECT

David A. Friedman
William E. Sharp
ACLU OF KENTUCKY FOUNDATION, INC.

Daniel Mach
ACLU PROGRAM ON FREEDOM OF
RELIGION AND BELIEF

Vicki L. Buba
ACLU OF KENTUCKY COOPERATING
ATTORNEY
OLDFATHER & MORRIS

Of Counsel:
Murray Garnick

Dated: July 17, 2008

Counsel for Plaintiffs

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 08-5538

Case Name: Pedreira, et al. v. Kentucky Baptist Homes
for Children, et al.

Name of counsel: Joshua P. Wilson

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

Pursuant to 6th Cir. R. 26.1, Alicia Pedreira, Karen Vance, Paul Simmons, Elwood Sturtevant,
Name of Party Johanna W.H. Van Wijk-Bos

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This appeal addresses two complex issues. The first involves the standing of taxpayers to challenge governmental funding of religious indoctrination: how to interpret, and in what context to apply, case law requiring taxpayers to establish a link between challenged expenditures and legislative action. The second entails the scope of the prohibition on religious discrimination: whether Title VII permits an employer to require employees to conform their conduct to a religious code. Appellants request oral argument of thirty minutes per side in order to sufficiently address both topics.

JURISDICTIONAL STATEMENT

Plaintiffs' complaint alleges that the defendants violated the Establishment Clause of the First Amendment, Title VII, and the Kentucky Civil Rights Act. The district court accordingly had jurisdiction over this matter pursuant to 28 U.S.C. § 1331(a), 28 U.S.C. § 1343, 42 U.S.C. § 2000e *et seq.*, and 28 U.S.C. § 1367.

This Court has jurisdiction under 28 U.S.C. § 1291. The district court issued a judgment dismissing the entire case on March 31, 2008. Plaintiffs timely filed a Notice of Appeal on April 28, 2008.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether state taxpayers have standing to challenge the provision of state funds to a private childcare facility that religiously indoctrinates youths whom the state places there, where the Kentucky legislature authorized the provision of state

funds to private childcare providers and knew that the funds would go to religious organizations.

2. Whether federal taxpayers have standing to challenge the provision of federal funds to such a facility, where the federal funds were paid pursuant to programs enacted by Congress to fund childcare and governed by a statute requiring provision of funds to religious organizations.

3. Whether the requirement of a link between a challenged expenditure and legislative action, which is necessary for federal-taxpayer standing, applies to state taxpayers.

4. Whether an employer discriminates based on religion in violation of Title VII and the Kentucky Civil Rights Act when it refuses to employ persons who do not conform their conduct to the employer's religious belief that homosexuality is sinful.

5. Whether evidence that an employer requires its employees to conform their conduct to a religious code is relevant to showing that public funding of the employer supports a pervasively religious institution or religious indoctrination.

STATEMENT OF THE CASE

Defendant-appellee Kentucky Baptist Homes For Children ("Baptist Homes"),¹ a self-described "Christian ministry," provides residential care for

¹ According to its website, Baptist Homes has changed its name to "Sunrise Children's Services." But it has taken no steps to change its name in this litigation, so we refer to it as Baptist Homes here.

children. A ___, Docket Number (“DN”) 112, Am. Compl. ¶ 57. Baptist Homes is funded primarily by state and federal tax money. A ___, *id.* ¶¶ 19, 22-23, 47. The Commonwealth of Kentucky sends juvenile offenders and other vulnerable youths in state custody to Baptist Homes. A ___, *id.* ¶¶ 21-22, 49. Baptist Homes then indoctrinates the children in its religious beliefs by, among other things, pressuring the children to attend Baptist church services, forcing them to say prayers before meals, enrolling them in bible studies, and requiring its employees to act consistently with its religious beliefs. A ___, *id.* ¶¶ 26-27, 57-59.

Among the “core” religious values that Baptist Homes inculcates in the youth in its care is a belief that “the homosexual lifestyle is [not] one God intends for the human race.” A ___, *id.* ¶ 50. Plaintiff-appellant Alicia Pedreira worked as a social worker at Baptist Homes, where her direct supervisors regarded her as “exceptional,” “valuable,” and “very honest and hard working.” A ___, *id.* ¶ 17. In 1998, however, upon learning that Pedreira is a lesbian, Baptist Homes terminated her because her sexual orientation did not conform to Baptist Homes’ religious belief that homosexuality is sinful. A ___, *id.* ¶¶ 29-31, 36. At the same time, Baptist Homes encapsulated its religious beliefs in a formal policy of not employing lesbians and gay men. A ___, *id.* ¶ 37.

On April 17, 2000, Pedreira, who (in addition to being a former Baptist Homes employee) is a Kentucky and federal taxpayer, filed this action. Joining her as plaintiffs were Paul Simmons, Johanna W.H. Van Wijk-Bos, and Elwood Sturtevant, each of whom pays Kentucky and federal taxes; and Karen Vance, who is barred from employment at Baptist Homes by her lesbian sexual orientation, and

is a federal taxpayer as well. A ___, *id.* ¶¶ 4-7, 13, 43-46. They named as defendants Baptist Homes and the secretaries of the Kentucky Cabinet for Health and Family Services (“the Family Cabinet”) and the Kentucky Department of Juvenile Justice (“the Juvenile Department”), which are the two state agencies that provide state and federal funds to Baptist Homes. A ___, *id.* ¶¶ 10-12, 47.

As taxpayers, the plaintiffs alleged that the defendant state officials’ provision of governmental funding to Baptist Homes violated the Establishment Clause of the First Amendment for several reasons, including that Baptist Homes was a thoroughly religious institution, that the funding supported religious indoctrination of the youth in Baptist Homes’ care, and that the funding was being used to finance staff positions that were filled based on religious criteria. A ___, *id.* ¶¶ 57-59, 61-67.² In their employee capacities, Pedreira and Vance alleged that Baptist Homes discriminated against them based on religion in violation of the Kentucky Civil Rights Act (KY. REV. STAT. ANN. § 344.040(1) (West 2008)) by requiring employees to conform their sexual orientation to Baptist Homes’ religious beliefs. A ___, *id.* ¶¶ 68-76. Vance further alleged that Baptist Homes violated her rights under Title VII (42 U.S.C. § 2000e-2(a)(1)) in the same manner. A ___, *id.* ¶¶ 77-84.

² A long line of Supreme Court decisions prohibits governmental financing of religion. *See, e.g., Agostini v. Felton*, 521 U.S. 203, 219 (1997); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947).

On July 23, 2001, the district court dismissed Pedreira's and Vance's statutory employment-discrimination claims. A ___, DN53, July 23, 2001 Op. The district court concluded that Baptist Homes did not engage in religious discrimination by requiring Pedreira and Vance to *conform* their conduct to Baptist Homes' religious belief that homosexuality is sinful, because Baptist Homes did not require Pedreira and Vance to actually *hold* its religious beliefs about homosexuality. A ___, *id.* at 6-9. In the same opinion, the district court allowed Plaintiffs' Establishment Clause claim to proceed, but it dismissed the "portion" of the Establishment Clause claim that was "grounded on the premise that [Baptist Homes'] employment practices constitute religious discrimination." A ___, *id.* at 8.

Plaintiffs then filed a motion for reconsideration, asking the district court to (among other things) clarify that the court's ruling should not be construed to bar plaintiffs from presenting evidence of Baptist Homes' employment practices to support their Establishment Clause arguments that Baptist Homes is pervasively religious and uses government funds to religiously indoctrinate its youth. A ___, DN56, Pls.' Recon. Mot. at 3-7. The district court denied the motion without providing any clarification. A ___, DN64, Oct. 24, 2001 Order.

On April 16, 2003, the district court denied a motion by the defendants to dismiss the remaining portion of Plaintiffs' Establishment Clause claim on taxpayer-standing grounds, and the Court granted a motion by Plaintiffs to amend their complaint. A ___, DN110-11. The case later went into discovery, but plaintiffs received only limited discovery due to resistance by the defendants. *See* DN302, Mar. 3, 2008 Order at 1-2 ("Kentucky Baptist Homes For Children . . . has adopted

a strategy of minimizing disclosures and maximizing objections, and of carefully conceived delay.”).

On March 31, 2008, with discovery still ongoing, the district court reversed course and — relying on the Supreme Court’s recent decision in *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553 (2007) — concluded that Plaintiffs lacked standing as taxpayers to pursue their remaining allegations. A ___, DN308, Op. at 2. *Hein* reaffirmed prior case law holding that taxpayers can establish standing to challenge governmental expenditures in support of religion by demonstrating a nexus between the challenged expenditures and legislative action (127 S. Ct. at 2572), but the district court appeared to read *Hein* as requiring taxpayers to show that there were express legislative appropriations for religious organizations. See A ___, DN308, Op. at 12.³

In response to the attacks against Plaintiffs’ pleadings that Defendants made based on *Hein*, Plaintiffs had filed a precautionary motion to amend their complaint. DN288. In its March 31, 2008 decision, the district court denied that motion on futility grounds, concluding that Plaintiffs would lack standing even under their proposed Second Amended Complaint. A ___, DN308, Op. at 12-13.

³ Plaintiffs-appellants explain below both that they meet the “legislative nexus” test reaffirmed by *Hein* and that they can also establish standing as state taxpayers without meeting that test.

STATEMENT OF FACTS

A. Baptist Homes Is Pervasively Religious and Uses Public Funds to Indoctrinate Youths in its Sectarian Beliefs.

Kentucky maintains an “Alternatives for Children” program through which the Commonwealth places children “who are unable to remain in their own homes because of severe abuse, neglect, exploitation, abandonment, and/or because they have specialized treatment needs” in private childcare facilities. *See* A__, DN283, Pls.’ Opp. to *Hein* Mot. to Dismiss (“MTD”), Ex. 2, at 13. Baptist Homes is one of the facilities that participates in this program, and so the majority of the Homes’ funding comes from the Commonwealth. A__, DN112, Am. Compl. ¶¶ 19-21.

Baptist Homes uses its public funding to indoctrinate youths — who are wards of the state — in its religious views, coerce them to take part in religious activity, and convert them to its version of Christianity, and does so in part by requiring its employees to reflect its religious beliefs in their behavior. A__, *id.* ¶¶ 26-27, 57-59.

1. Baptist Homes Is Thoroughly Infused With Religion And Imposes Its Religious Beliefs Upon the Youth in Its Care.

Baptist Homes is a thoroughly religious institution that immerses the vulnerable youth committed to its care in Christian influences and teachings. In reports to the Kentucky Baptist Convention, Baptist Homes’ president has touted Baptist Homes’ success in converting children to Christianity, announcing that “[t]he angels rejoiced last year as 244 of our children made decisions about their relationships with Jesus Christ.” A__, *id.* ¶ 59. In its publication, “The Baptist Children’s Messenger,” Baptist Homes reported that its “goal is to keep Kentucky

Baptist Homes for Children a Christ-centered agency, not just in name, but in practice.” A___, *id.* In that same publication, Baptist Homes’ Vice President for Religious Life explained Baptist Homes’ approach to proselytizing the children in its care: “It isn’t too difficult to convince children that God exists. Kids are looking for someone, or something to believe in. What we have to do is give them an appropriate image of God. If they hear that and absorb it, most of them will give him a shot.” A___, *id.* And, in a news release, Baptist Homes’ president stated that Baptist Homes’ “mission is to provide care and hope for hurting families through Christ-centered ministries. I want this mission to permeate our agency like the very blood throughout our bodies. I want to provide Christian support to every child, staff member, and foster parent.” A___, *id.* ¶ 57.

Baptist Homes pursues this mission by “integrat[ing] religious or spiritual aspects into the treatment of every child or family member that [it] services.” A___, *id.* Baptist Homes strives to “permeate[] the environment of [its] programs with Christian influences,” to “confront [children] with their need for God,” and to “attempt to bring spiritual matters into their lives.” A___, *id.* The institution pressures its residents to attend Baptist church services, participate in on-campus Bible studies, and attend religious extracurricular activities such as concerts and camps. A___, *id.* ¶¶ 57, 59. Baptist Homes displays religious iconography in its facilities, leads its residents in prayer before meals, and provides the residents with Bibles and other Christian literature. A___, *id.* It also requires its employees to incorporate its religious tenets in their behavior in order to inculcate those tenets in its residents. A___, *id.* ¶¶ 26-27, 57.

Although discovery in this action was far from complete when the district court dismissed the case, information obtained to date confirms the allegations of the complaint. Annual reports prepared by the Children’s Review Program, a private contractor that the Commonwealth retained to monitor Baptist Homes’ facilities, show that residents have made numerous complaints regarding Baptist Homes’ coercive religious practices. A ___, DN243, Pls.’ Memo Re: Certain KY Statutes, Exs. 2-3, 5.⁴ From 2001 to 2005, the Review Program identified 296 exit interview responses by residents that described “unacceptable” religious practices at Baptist Homes. A ___, *id.*, Ex. 5. Children in Baptist Homes’ care complained that they were forced to attend “mandatory” Baptist church services and were denied the opportunity to attend other religious services. A ___, *id.* at 8. Interview responses from Baptist Homes’ residents included:

- “The child states that s/he was not allowed to choose when or when not to attend a religious service because ‘mandatory attendance.’” A ___, *id.*
- “The child alleged that s/he was not allowed to practice their own religion or attend a church of their belief because ‘Baptist Religion — so had to go to Baptist or Christian church.’” A ___, *id.*
- “Child states s/he felt treated differently because of his/her religion. They would ask me to pray when I did not want to pray and stuff like that.” A ___, *id.* at 2.

⁴ As explained below, in evaluating the dismissal of a case based on standing, this Court can look both to the complaint and to extrinsic evidence. *See infra* p.24.

- “Child states that he/she felt uncomfortable attending religious services. I just felt I was being pressured into giving up my religion.” A___, *id.*
- “Child said he/she did not have a choice when or when not to attend religious services. ‘If you did not go you got into trouble.’” A___, *id.* at 26.
- “Child states that child was not allowed to practice own religion. They tried to more o[r] less force me to become Christian.” A___, *id.* at 2.

2. Baptist Homes Bars Lesbians and Gay Men From Employment Because Homosexuality Is Disapproved by the Religious Doctrines Baptist Homes Seeks to Inculcate In Its Youths.

When plaintiff-appellant Alicia Pedreira worked as a social worker at Baptist Homes, she was regarded by her supervisors as “exceptional,” “valuable,” and “very honest and hard working.” A___, DN112, Am. Compl. ¶ 17. She cared deeply about the youth she counseled, and she made great progress with youth whom no other counselor had been able to help. A___, *id.* ¶¶ 32-35, 49-50. In 1998, Baptist Homes learned that Pedreira is a lesbian. A___, *id.* ¶ 29. Baptist Homes then terminated Pedreira “because her admitted homosexual lifestyle is contrary to Kentucky Baptist Homes for Children core values” and “[i]t is important that we stay true to our Christian values.” A___, *id.* ¶ 36.

In connection with Pedreira’s termination, Baptist Homes formally adopted a policy providing that “[h]omosexuality is a lifestyle that would prohibit employment.” A___, *id.* ¶ 36. The adoption of this policy, like Baptist Homes’ termination of Pedreira, was based on Baptist Homes’ religious belief that

homosexuality is immoral. A___, *id.* ¶¶ 38, 50. The policy is, at least in part, intended to advance Baptist Homes’ goal of inculcating that religious doctrine in the youths in its care. A___, *id.* ¶¶ 38, 57. Baptist Homes’ president has explained, “We do not believe that the homosexual lifestyle is the one God intends for the human race and do not want to suggest the same to our children. . . . Having staff whose lifestyles demonstrate the opposite of the Judea-Christian values we build our mission upon working with our kids is a contradiction of who we are.” A___, *id.* ¶ 50.

Plaintiff-appellant Karen Vance is an experienced social worker, employed for more than ten years by the Los Angeles County Department of Children and Family Services. A___, *id.* ¶ 43. Vance holds a Bachelor’s degree from the University of Kentucky and has roots in the Louisville area, where her parents live. A___, *id.* ¶¶ 43-44. Vance would like to relocate to Louisville to be closer to her parents, and so would like to work at Baptist Homes. A___, *id.* ¶ 44. Baptist Homes has had open positions for which Vance is qualified. A___, *id.* ¶ 45. But Baptist Homes’ policy barring the employment of homosexuals makes it futile for her to apply, as Vance is a lesbian and — like Pedreira — she neither follows nor holds Baptist Homes’ religious beliefs concerning homosexuality. A___, *id.* ¶¶ 45, 71, 75.

B. The Kentucky Legislature Appropriates Taxpayer Dollars For Religious Organizations Through Legislatively Authorized Child Welfare and Juvenile Justice Programs.

It is undisputed that Baptist Homes is funded primarily by Kentucky and federal taxpayer dollars and has received more than \$100 million in government funds since 2000. *See* A__, DN312-2, Baptist Homes' Mot. for Fees at 16; A__, DN193, Baptist Homes' Obj. to Mot. to Amend at 4. That government money flows to Baptist Homes pursuant to direct legislative action. The Kentucky legislature (1) has enacted a comprehensive statutory program governing the funding and operation of entities such as Baptist Homes, (2) regularly appropriates money for programs that fund Baptist Homes and similar entities, and (3) is well aware that government funding is being channeled to religious organizations such as Baptist Homes. Substantial federal funding also goes to Baptist Homes pursuant to two congressionally authorized and funded programs which are subject to a federal statute that requires inclusion of religious organizations among the funding recipients.

1. The Kentucky Legislature Has Authorized Public Funding of Private Childcare Facilities.

The Kentucky legislature has authorized the two defendant government agencies — the Family Cabinet and the Juvenile Department — to “pay for such care and treatment as [they] deem[] necessary for the well-being of any child committed to [them], including medical expenses, room and board, clothing, and all other necessities for such children committed to [their] care and custody.” KY. REV. STAT. ANN. § 200.115(1) (West 2008). The legislature has further authorized

the Family Cabinet and the Juvenile Department to place children committed to state custody “in a child-caring facility operated . . . by a private organization willing to receive the child.” Ky. REV. STAT. ANN. § 605.090(1)(d) (West 2008); *see also* KY. REV. STAT. ANN. § 199.641 (West 2008) (defining “child-caring facility” as including private facilities).

Under the statutory scheme passed by the legislature, the Family Cabinet is “to expend available funds to provide for the board, lodging, and care of children who would otherwise be placed in foster care or who are placed by the cabinet in a foster home or boarding home.” Ky. REV. STAT. ANN. § 605.120(1) (West 2008). The legislature has provided that a Family Cabinet division — the Department for Community-Based Services (“the Community Department”) — must make payments to private childcare facilities with which the Community Department has chosen to contract. *See* Ky. REV. STAT. ANN. § 199.641(1)(b), (2). Indeed, the contract pursuant to which the Community Department places children with and pays state funds to Baptist Homes specifically mentions the statutory authority for such placement and funding. A ___, DN283, Pls.’ Opp. to *Hein* MTD, Ex. 10 (2004 Contract), at 2. Pursuant to its statutory authority, the Community Department operates the “Alternatives for Children” program, through which it places youths with private facilities such as Baptist Homes. A ___, DN283, Pls.’ Opp. to *Hein* MTD, Ex. 2, at 11, 13. The legislature has further established detailed standards for the Community Department to employ in setting rates for the funding of private childcare facilities. KY. REV. STAT. ANN. § 199.641(2)(a)-(c).

In addition to *funding* the “Alternatives for Children” program, the Kentucky legislature has established a comprehensive scheme *regulating* private childcare facilities participating in that program. The facilities must be licensed. Ky. REV. STAT. ANN. § 199.640(1) (West 2008). The legislature has set forth in detail the activities that the facilities may undertake. Ky. REV. STAT. ANN. § 199.650 (West 2008). And the legislature has required the Family Cabinet to promulgate regulations (which must adhere to nine particular principles) governing standards of care and service in the facilities, as well as regulations establishing record-keeping and reporting requirements for the facilities. KY. REV. STAT. ANN. § 199.640(5)(a)-(b).

Nowhere among these comprehensive statutory directives did the Kentucky legislature impose any restrictions that might prevent the distribution of taxpayer dollars to private childcare facilities with religious environments or prevent the use of taxpayer dollars to fund religious activities at such facilities.

2. The Kentucky Legislature Has Regularly Passed Appropriations For Programs That Fund Baptist Homes and Other Religious Childcare Facilities.

The Kentucky legislature has not only created the legislative framework for the “Alternatives for Children” program; the legislature has also funded it and related programming. The Kentucky legislature appropriates funds to Kentucky executive-branch agencies through its Operating Budgets, which are enacted every other year for two-year terms and are published as part of the Kentucky Acts. A___, DN275, Commw. *Hein* MTD, Ex. 1 (Close Aff. ¶¶ 3, 4, 8, 12, 17). Through these

Budgets, and pursuant to the statutory scheme described above, the Kentucky legislature has regularly appropriated funds for private childcare provided by Baptist Homes and other religious organizations.

In the 2004-2006 fiscal years, for instance, the legislature appropriated money to the Family Cabinet's Community Department for Out-of-Home Care, the direct source of the funding received by Baptist Homes. *A___, id.* ¶¶ 14-16, Ex. C. The legislatively enacted budget expressly provided for the Community Department to spend funds on care for children in state custody, stating, "[i]ncluded in the above General Fund appropriation is \$20,309,700 in fiscal year 2005-2006 which is necessary to support and sustain the increased number of court-committed children in the care of the [state]." *A___, id.* ¶ 15, Ex. C. Further, that budget expressly directed state funds to Baptist Homes, for it included "\$200,000 in General Fund support in fiscal year 2005-2006 for Alternatives for Children educational classrooms at the Kentucky Baptist Children's Home Youth Ranch" — one of the facilities at issue in this case. *A___, id.*, Ex. C, § 10(5).

The legislatively enacted budget for the Community Department for the 2006-2008 fiscal years similarly allocated funds for custodial childcare of the kind provided by Baptist Homes (though Baptist Homes was not specifically mentioned). *A___, DN275, Commw. Hein MTD, Ex. 1 (Close Aff. ¶¶ 20-21, Ex. D)*. In addition, the 2006-2008 budget provided specific sums to the Community Department to cover an increase in "Private Childcare Provider" reimbursement rates, and "to create a pool to serve hard-to-place youth by providing performance incentives to private childcare providers." *A___, id.* (Close Aff. ¶ 21, Ex. D, §

10(7)-(8)). In the 2000 through 2004 fiscal years, the legislature also appropriated funds to the Community Department that were then paid to Baptist Homes. A ___, *id.* (Close Aff. ¶¶ 6-7, 10-11, Exs. A and B).

Pursuant to statutory authority, the Juvenile Department has requested and received funding for the placement of youths in private childcare facilities as well. A ___, DN283, Pls.’ Opp. to *Hein* MTD, Ex. 16, at 4. The Juvenile Department uses “[p]rivate child care facilities and therapeutic foster care programs . . . to alleviate facility capacity problems and to provide specialized treatment for youths.” A ___, *id.*

3. The Kentucky Legislature Is Well Aware That Its Childcare Funding Is Channeled to Religious Organizations.

Multiple sources of information — including reports from Kentucky’s Legislative Research Commission, annual budget submissions, and media reports — demonstrate that the Kentucky legislature has long understood that its child welfare and juvenile justice programming appropriations are funneled to private and religious organizations in general and Baptist Homes specifically.

In 1998, the Kentucky Legislative Research Commission (a legislative agency that provides various kinds of information and services to Kentucky legislators) submitted a report to the legislature about the care of minor wards of the state. A ___, DN283, Pls.’ Opp. to *Hein* MTD, Ex. 1, at 2-3, Ex. 9. The report explained that state funds were being paid to private childcare facilities, stating that facilities serving children include both state-operated and privately-operated facilities with which the state has a contract, and that “[i]t is costing over \$35

million to keep 1,350 children in private care.” A___, *id.*, Ex. 1, at 2. Because it is common knowledge that many private childcare providers are religious in nature — in Kentucky, at least 21 of the 55 private childcare entities with which the Family Cabinet maintained active contracts as of March 2006 were religious (A___, *id.*, Ex. 11, at CHFS/MILL012857-64) — the legislature plainly knew that its childcare funds were going to religious entities. In fact, the Research Commission’s report specifically informed the legislature that Baptist Homes itself was receiving state funding, mentioning Baptist Homes in its description of the placement history of children with twenty or more private placements by the state. A___, *id.*, Ex. 1, at 150.

Biennial budget recommendations and submissions also make clear that the Kentucky legislature understands that taxpayer funds are paid from its appropriations to organizations like Baptist Homes. For example, the Kentucky governor’s 2006-2008 budget recommendation for the Community Department sets forth projected expenditures for the Department’s Alternatives for Children program, explains that the program funds private childcare for children who cannot stay in their own homes, and cites the statutory authority for the program. A___, *id.*, Ex. 2, at 11, 13; *see also* A___, *id.*, Exs. 13 & 16 (Executive Budget Recommendations to the Family Cabinet and the Juvenile Department containing similar information for earlier budget cycles). Likewise, the Family Cabinet and the Juvenile Department themselves send the legislature comprehensive budget requests, which describe in detail the nature of state-funded private childcare services, provide data on the numbers of children placed in state-funded private

childcare facilities, and provide information about the costs incurred per child for such placements. *See* A__, *id.*, Exs. 20-21.

What is more, in 2006, a chamber of the legislature issued a “legislative citation” to Baptist Homes, praising it for its “extraordinary efforts in assisting those children within the Commonwealth in need.” KY H.R. Jour., 2006 Reg. Sess. No. 57, Mar. 24, 2006, Legislative Citation No. 142. And numerous newspaper articles have discussed Baptist Homes’ extensive receipt of state funds, including front-page articles in the Louisville Courier-Journal that reported that Baptist Homes is Kentucky’s largest provider of private childcare services, a fact that Baptist Homes itself confirms on its website. *See* A__, DN283, Pls.’ Opp. to *Hein* MTD, Exs. 3, 5-6, 22-31.

C. Baptist Homes Also Receives Federal Funds Through Particular Programs Authorized and Funded By Congress.

Baptist Homes not only receives *state* funds through programs authorized and funded by the Kentucky legislature; it also receives *federal* funds through programs authorized and funded by Congress. Indeed, since at least 2000, federal funds have been the single largest source of the Kentucky legislature’s regular appropriations to the Family Cabinet. *See* A__, DN275, Defs.’ MTD, Exs. 1A-1D. The federal dollars that Kentucky pays to Baptist Homes come from two federal programs: the Social Security Act’s Title IV-E program (42 U.S.C. §§ 670-79), and the Supplemental Security Income (“SSI”) program (42 U.S.C. §§ 1381-1383f). *See* A__, DN283, Pls.’ Opp. to *Hein* MTD, Ex. 20, at 223.

Congress established a detailed statutory scheme through which these two programs support private childcare. Statutes governing the Title IV-E program (1) explain that a purpose of the program is to enable the states to provide care for children, (2) require the federal government to make payments to the states of program funds based on certain formulas, and (3) specifically authorize states to make payments to and enter into contracts with private childcare providers. *See* 42 U.S.C. §§ 670, 671(b), 672(a)(1), 672(a)(2)(C), 672(b)(2), 672(c)(2), 674(a)-(b). Similarly, the statutes governing the SSI program (1) explain that a purpose of the program is to aid individuals with disabilities, (2) require payments to be made to aid eligible children pursuant to specific benefit formulas, and (3) contemplate the payment of SSI funds for children placed in private institutions, as well as contracts with such institutions. *See* 42 U.S.C. §§ 1381, 1381a, 1382(b), 1382(e), 1382(e)(1)(E), 1382(e)(1)(G), 1382c(a)(1)(C), 1382e(e)(1), 1383.

To support these two programs, Congress has regularly appropriated specific sums. *See* Revised Continuing Appropriations Resolution, 2007, Pub. L. No. 110-5, § 110(b)(3)-(5), 121 Stat. 8, 10 (2007); Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-149, 119 Stat. 2833, 2853, 2856, 2877 (2005).⁵

⁵ *See also* Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 3132, 3135, 3160 (2004); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3, 246, 249, 274 (2004); Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11, 317-18, 320, 341 (2003); Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-116, 115 Stat. 2177, 2194,

[Footnote continued on next page]

Furthermore, the Title IV-E and SSI programs are covered by a federal welfare reform act's "Charitable Choice" provision (*see* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 108(d), 200-32, 110 Stat. 2105, 2166, 2185-98 (1996) (codified in scattered sections of 42 U.S.C.)) that promotes the payment of funds covered by it to religious organizations (*see* 42 U.S.C. § 604a(b)).⁶ The Charitable Choice provision requires states and the federal government to allow religious entities to compete for covered funds on an equal basis with secular organizations. *Id.* § 604a(c). The provision also sets forth detailed requirements regulating state contracts with religious institutions. *See id.* § 604a(d)-(j).

[Footnote continued from previous page]

2197, 2215-16 (2002); Consolidated Appropriations — FY 2001, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-21, 2763A-24, 2763A-27 (2000); Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-232-33, 1501A-235, 1501A-271 (1999).

⁶ The welfare reform act's Charitable Choice provision applies to any program "established or modified under Title I or II of [the act], that -- (i) permits contracts with organizations; or (ii) permits certificates, vouchers, or other forms of disbursement to be provided to beneficiaries, as a means of providing assistance." 42 U.S.C. § 604a(a)(2)(B) (Pub. L. No. 104-193, § 104(a)(2)(B), 110 Stat. at 2162). Section 108(d) of the act, which is part of the act's Title I, modifies the Title IV-E program; and Title II of the act (sections 200 through 232) modifies the SSI program. Pub. L. No. 104-193, §§ 108(d), 200-232, 110 Stat. at 2166, 2185-98. As described above, the Title IV-E and SSI programs permit contracts with organizations and other disbursements to aid children. *See supra* p.19.

SUMMARY OF ARGUMENT

The taxpayer plaintiffs have standing to challenge Kentucky's provision of millions of dollars per year to Baptist Homes, a thoroughly religious organization that proselytizes the vulnerable youth placed by the Commonwealth there. Under the Supreme Court's precedents, taxpayers can establish standing to challenge governmental funding of religious organizations by demonstrating that there is a link between the challenged expenditures and legislative action. To do so, taxpayers need only show that the expenditures are made under a program that is authorized and funded by the legislature.

The taxpayers easily made this showing here with respect to the state funds paid to Baptist Homes. The Kentucky legislature has adopted a public policy of using private childcare facilities to provide care to wards of the state. Pursuant to this policy, the legislature has enacted a comprehensive statutory scheme — and has regularly passed appropriations — through which the state funds such facilities. The legislature has been well aware for years that its funding was going to religious organizations, including Baptist Homes.

What is more, *state* taxpayers can establish taxpayer standing without demonstrating a nexus between the expenditures they challenge and legislative action. The requirement of such a nexus appears in Supreme Court cases concerning only *federal* taxpayers and is based on the doctrine of separation of powers, which is inapplicable to the federal judiciary's relationship with the states. Under this Court's precedents, *state* taxpayers need only allege that a

governmental expenditure of funds was used to aid religion, a standard that is plainly satisfied here.

The taxpayer plaintiffs also have standing to challenge the provision of federal tax funds to Baptist Homes, for there is a close link between congressional action and the contested expenditures. The federal tax funds paid to Baptist Homes come from two federal programs that were established by Congress to aid the needy, are regularly funded by Congress, and are covered by a federal statute that promotes funding of religious organizations.

In denying standing, the district court improperly expanded the Supreme Court's recent decision in *Hein v. Freedom from Religion Foundation*, 127 S. Ct. 2553 (2007), to effectively hold that taxpayers can sue only when a legislature designates funds specifically for religious organizations. *Hein* held only that taxpayers lack standing to challenge internal executive-branch expenditures that are paid out of unrestricted, general funds that can be used for any purpose. The circumstances of *Hein* are a far cry from those here, where the legislature created a comprehensive program and left to executive-branch officials only the discretion to select the specific recipients of funding under the program. If upheld, the district court's holding would allow governmental bodies to commit widespread, egregious violations of the Establishment Clause (such as those alleged here) without fear of being sued, for the kind of legislative appropriations that the district court required for standing are very rare, while other methods of funding religious groups are quite common.

The district court also misread applicable case law in dismissing the statutory employment discrimination claims of plaintiffs Pedreira and Vance. The court concluded that employers may require employees to conform their conduct to a religious code so long as the employees are not forced to profess the underlying religious beliefs. But such a rule is contrary to numerous cases within and outside this Circuit, as well as the text of Title VII itself. What is more, the district court's rule would allow employers to exercise intrusive control over their employees' private lives based on the employers' faiths.

Finally, to the extent that the district court may have barred Plaintiffs from presenting evidence of Baptist Homes' religion-based employment practices in support of their Establishment Clause claim, that too was error. As numerous courts have recognized, evidence of religious employment practices is relevant to showing that an institution is pervasively religious and indoctrinates persons under its supervision in its religious teachings.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's determination of standing. *Schultz v. United States*, 529 F.3d 343, 349 (6th Cir. 2008). The district court's dismissal of the statutory claims of religious employment discrimination is also subject to *de novo* review. *Moon v. Harrison Piping Supply*, 465 F.3d 719, 723 (6th Cir. 2006).

In determining whether to reverse the dismissal of a complaint, this Court "treat[s] all well-pleaded allegations in the complaint as true." *Id.* (citation

omitted). The dismissal is to be upheld “only ‘if it appears beyond doubt that the plaintiff can prove no set of facts in support of [his] claims that would entitle [him] to relief.’” *Id.* Moreover, this Court “construe[s] the complaint in the light most favorable to the non-moving party.” *Id.* “If an allegation is capable of several inferences, the allegation must be construed in a light most favorable for the plaintiff.” *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993). Further, in evaluating the dismissal of a case on standing grounds, this Court may examine extrinsic evidence in addition to the complaint. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Kardules v. City of Columbus*, 95 F.3d 1335, 1347 n.4 (6th Cir. 1996).

Denial of a motion for leave to amend a complaint is ordinarily reviewed for abuse of discretion, as are evidentiary rulings. *Shanklin v. Norfolk S. Ry. Co.*, 369 F.3d 978, 988 (6th Cir. 2004); *Wade v. Knoxville Utils. Bd.*, 259 F.3d 452, 459 (6th Cir. 2001). But, in both contexts, an abuse of discretion occurs when the district court applies the wrong legal standard or misapplies the correct standard. *See Shanklin*, 369 F.3d at 988; *Shields v. Fox Television Station, Inc.*, 215 F.3d 1327, No. 98-6689, 2000 WL 658054, at *4 (6th Cir. May 9, 2000) (unpublished).

ARGUMENT

I. The Taxpayer Plaintiffs Have Standing To Challenge The Provision of State and Federal Funds to Baptist Homes.

To establish standing to challenge the expenditure of state or federal funds to support religion, a taxpayer must do no more than show that there is a nexus between the challenged expenditure and the exercise of legislative power. We explain below that, unlike federal taxpayers, *state* taxpayers need not even do this

much. However, because the plaintiffs here so plainly satisfy this “legislative nexus” test and because the Court will need to apply the “legislative nexus” test to the federal funding at issue in any event, we first discuss that test and its application to both the state and the federal tax funding of Baptist Homes.

A. A Taxpayer Can Establish Standing to Challenge Governmental Funding of Religious Activity by Identifying a Link Between Legislative Action and the Challenged Expenditures.

A taxpayer can establish standing to challenge governmental expenditures in aid of religion by demonstrating that the legislature established the program through which the expenditures were disbursed. The Supreme Court has consistently applied this rule in three critical cases. First, in *Flast v. Cohen*, 392 U.S. 83, 102-03 (1968), the Court held that taxpayers have standing in Establishment Clause cases where there is a link between the challenged spending and the exercise of legislative spending power. In *Bowen v. Kendrick*, 487 U.S. 589, 619-20 (1988), the Court clarified that, where the legislature authorizes a program, taxpayers have standing to challenge particular expenditures even when the expenditures result from the Executive Branch’s exercise of discretion under that program. And last year, in *Hein*, 127 S. Ct. 2553, the Court held that federal taxpayers lack standing to challenge expenditures when those expenditures are not made pursuant to any legislative program but are made pursuant to general, wholly unrestricted legislative appropriations that are used for internal executive-branch operations. We review these cases and then demonstrate that the taxpayer plaintiffs have standing under them.

1. *Flast*.

In *Flast*, taxpayers challenged the expenditure of funds under the Elementary and Secondary Education Act of 1965 (“ESEA”). *Flast*, 392 U.S. at 85-86. ESEA provided federal funds to state educational agencies, which then passed the payments to local agencies in the form of grants. *Id.* The plaintiffs challenged under the Establishment Clause a provision in ESEA mandating that local agencies use the grants to provide educational services and materials to schoolchildren and teachers in private schools. *See id.* at 86-87.

The Court held that a federal taxpayer has standing to challenge an expenditure of tax funds when he establishes two “nexuses”:

First, the taxpayer must establish a logical link between [taxpayer] status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution.

* * *

Second[], the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show 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, § 8.

Id. at 102-03. The Court concluded that the plaintiff taxpayers had standing, because the first nexus was satisfied by Congress’s passage and funding of ESEA, and the second nexus is satisfied whenever taxpayers sue under the Establishment Clause. *Id.* at 103-104.

2. *Bowen*.

Twenty years later, in *Bowen*, the Court made clear that executive discretion in disbursement of funds — when exercised to implement a legislatively authorized program — does not defeat standing. *Bowen* involved facial and as-applied challenges to the Adolescent Family Life Act (“AFLA”), which established a federal grant program relating to teen sex and pregnancy. *Bowen*, 487 U.S. at 593. Under the statute, the Secretary of the Department of Health and Human Services had complete discretion to select the organizations that would receive grants, so long as he effectuated the purposes of AFLA. *Id.* at 597, 604-05, 608, 610. AFLA permitted but did not require grants to religious organizations. *See id.* at 598, 604.

The Court held that taxpayers had standing to challenge the Secretary’s discretionary decisions to award particular grants to certain religious organizations. *Id.* at 619-20. In so ruling, the Court noted that it had not questioned the standing of taxpayer plaintiffs to raise Establishment Clause challenges in prior cases that had “raised questions about administratively made grants.” *Id.* The Court also noted that “*Flast* itself was a suit against the secretary of HEW, who had been given the authority under the challenged statute to administer the spending program that Congress had created.” *Bowen*, 487 U.S. at 619. Indeed, in *Flast*, while the challenged program required that aid be provided for children and teachers in private schools, it allowed for discretion by state and local administrative officials in *how* to provide that aid. *See* 392 U.S. at 85-87.

Other Supreme Court cases decided after *Flast* have likewise permitted taxpayer suits where executive or administrative bodies had significant discretion over implementation of the challenged program. See *Sch. Dist. v. Ball*, 473 U.S. 373, 380 n.5 (1985) (expressly affirming standing of taxpayer plaintiffs), *aff'g* 718 F.2d 1389, 1390-91 (6th Cir. 1983), *aff'g* 546 F. Supp. 1071, 1076-77 (W.D. Mich. 1982) (explaining in detail that local school districts had substantial discretion over implementation of challenged program and determination of which institutions would benefit from it), *and overruled in part on other grounds by Agostini v. Felton*, 521 U.S. 203 (1997); *see also Mitchell v. Helms*, 530 U.S. 793 (2000) (adjudicating Establishment Clause claim brought by taxpayer plaintiffs challenging implementation by a particular locality of program similar to one at issue in *Flast*); *Agostini*, 521 U.S. 203 (adjudicating Establishment Clause claim brought by taxpayer plaintiffs challenging method chosen by local educational agencies to provide services to parochial-school students entitled to aid under program that was subject of *Flast*).

3. *Hein*.

In *Hein*, a fragmented 5-4 decision, the Court clarified that taxpayers lack standing to challenge “a purely discretionary Executive Branch expenditure” paid out of funds that are not designated for any particular purpose or program but are appropriated for general executive-branch operations. 127 S. Ct. at 2572. *Hein* did not overrule the principle established in *Flast* and *Bowen* that a taxpayer has standing to challenge an executive-branch expenditure where the legislature

established the program under which the executive distributed the funds. *See id.* at 2567-68, 2572.

Hein involved a challenge to the Executive Branch’s use of “unspecified, lump-sum ‘Congressional budget appropriations’” to fund conferences during which federal officials used religious imagery and praised the provision of social services by faith-based organizations. *Id.* at 2567-68. The conferences were put on by “faith-based” offices and centers that were created by executive orders of the President. *Id.* at 2559-60. Congress did not “enact[] any law specifically appropriating money for these entities’ activities.” *Id.* at 2560. Instead, their activities were funded through appropriations for general executive-branch operations. *Id.* Justice Alito stated in a plurality opinion that federal taxpayers lacked standing to challenge the conferences “[b]ecause the expenditures that respondents challenge were not expressly authorized or mandated by any specific congressional enactment.” *Id.* at 2568.

Separation-of-powers concerns were critical to the Court’s decision in *Hein*. *Id.* at 2569-70. The plurality’s opinion explained that permitting standing in *Hein* would “enlist the federal courts to superintend, at the behest of any federal taxpayer, the speeches, statements, and myriad daily activities of the President, his staff, and other Executive Branch officials.” *Id.* at 2570. Furthermore, Justice Kennedy, who joined the plurality’s opinion and cast the deciding vote in the 5-4 case, wrote a concurrence that focused exclusively on the separation-of-powers doctrine. *Id.* at 2572-73. Emphasizing that the *Hein* plaintiffs were challenging the content of speeches given by executive-branch officials, Justice Kennedy

explained that allowing *Hein* to proceed would lead to “intrusive and unremitting judicial management” of executive-branch speech and internal operations. *Id.* at 2573.

Justice Kennedy also affirmed the continuing vitality of prior Supreme Court Establishment Clause and taxpayer-standing precedents. Justice Kennedy noted that “the First Amendment’s Establishment Clause . . . expresses the Constitution’s special concern that freedom of conscience not be compromised by government taxing and spending in support of religion,” and he stressed that “the result reached in *Flast* is correct and should not be called into question.” *Id.* at 2572.⁷ Likewise, the plurality in *Hein* expressly stated that *Flast* remains good law and discussed and relied upon *Bowen*. *Id.* at 2567, 2572.

At the end of its opinion, the *Hein* plurality summarized its holding: *Flast* does not apply “to a purely discretionary Executive Branch expenditure.” *Id.* at 2572. The plurality opinion emphasized, “[w]e need go no further to decide this case” and “we decide only the case at hand.” *Id.* Thus, *Hein* left undisturbed the principle that taxpayer standing exists to challenge payments to religious organizations that are made under a legislatively authorized or funded program,

⁷ Although Justice Kennedy joined Justice Alito’s plurality opinion, it is appropriate for this Court to consider Justice Kennedy’s concurrence in resolving or interpreting any ambiguity in the plurality’s opinion. See Igor Kirman, *Standing Apart to be a Part: the Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2090-96 (1995), and cases cited therein; *Horn v. Thoratec Corp.*, 376 F.3d 163, 174-76 (3d Cir. 2004); *United States v. Puerta*, 982 F.2d 1297, 1304 (9th Cir. 1992).

including where executive-branch officials exercise discretion in selecting the recipients of funding.

B. As in *Flast* and *Bowen*, the Funding Challenged Here Was Paid Pursuant to Detailed Programs Established and Funded by Legislative Action.

Plaintiffs have standing as both state and federal taxpayers to challenge governmental funding of Baptist Homes. As in *Flast* and *Bowen* — and unlike in *Hein* — the money at issue flows to the recipient organizations under a legislatively created and legislatively funded program.

The Kentucky legislature created a comprehensive statutory structure authorizing the placement of children in state custody with private childcare facilities, providing for the payment of public funds to such facilities, and establishing detailed standards governing the facilities. See Statement of Facts, *supra*, at 12-14. This legislative scheme consists of at least seventeen statutes that were principally enacted through two pieces of legislation. See 1986 Ky. Acts ch. 423 (enacting KY. REV. STAT. §§ 199.645, 605.090, 605.100, 605.120, 605.130, 605.150); 1950 Ky. Acts ch. 125 (enacting KY. REV. STAT. §§ 199.640, 199.650, 199.660, 199.670); KY. REV. STAT. ANN. §§ 199.641, 199.680, 199.801, 199.805, 200.115, 605.095, 605.160 (West 2008). In addition, the legislature has regularly appropriated funds to the defendant state agencies to spend on private childcare. See Facts at 14-16.

Likewise, Congress (1) enacted the Title IV-E and Supplemental Security Income programs to provide care for children and help persons with disabilities;

(2) mandated payments of program funds to the states; and (3) authorized the states to pay program funds to private childcare providers. *See* Facts at 19. And Congress has annually appropriated specific sums to fund these two programs. *See* Facts at 19-20.

C. As in *Flast* and *Bowen*, the Existence of Executive Discretion Does Not Defeat Taxpayer Standing.

The district court concluded that government funding of Baptist Homes is “provided through executive branch allocation rather than through legislative action,” because the defendant Kentucky agencies exercise discretion in selecting which childcare providers they contract with and fund. A___, DN308, Op. at 12. But, under *Flast* and *Bowen*, it is clear that taxpayers have standing to challenge discretionary executive-branch decisions over how to allocate funds under legislatively authorized programs. And although (contrary to what defendants argued below, *see* DN275, Commw. *Hein* MTD at 8-12; DN276, Baptist Homes *Hein* MTD at 8-11) there is no requirement of legislative intent or knowledge that the challenged funding would be paid to religious organizations, there is strong evidence of such intent here.

In *Bowen*, as explained above, the Supreme Court expressly and unambiguously held that taxpayers have standing to challenge an executive official’s decisions to select particular recipients of government grants. 487 U.S. at 619-20. *Hein* left that holding undisturbed. The plurality in *Hein* did note that the AFLA legislation at issue in *Bowen* “contemplated that some of [the grant] moneys *might* go to projects *involving* religious groups.” *Hein*, 127 S. Ct. at 2567

(emphases added). AFLA, however, merely indicated that funded projects could “emphasize the provision of support by,” “make use of,” and “involve” religious organizations. *Bowen*, 487 U.S. at 596, 604, 606-07. The Court in *Bowen* emphasized that AFLA did not require that any grants actually *be awarded* to religious groups. *Id.* at 604.

With respect to the ESEA legislation challenged in *Flast*, the *Hein* plurality stated in a footnote that “Congress surely understood that much of the aid mandated by the statute would find its way to religious schools.” 127 S. Ct. at 2565 n.3. But *Hein* did not hold that such knowledge is a requirement for taxpayer standing. And *Hein*’s conclusion that Congress possessed such knowledge when it passed ESEA was not based on anything in the statute, but rather on the widely known fact that many private schools are religious. *See id.* Moreover, *Flast* reveals that both the federal department and the state and local educational agencies that administered ESEA had substantial discretion in deciding how to provide program aid. *See* 392 U.S. at 85-87. Indeed, while ESEA demonstrated a general legislative intent to aid children in private schools, it did not require governmental educational agencies to provide services or materials directly to or within private or religious schools. *See id.* at 86-87. In fact, the plaintiffs in *Flast* contended that the aid to religious schools that they challenged was *not* authorized by ESEA. *Id.* at 87. Here, the discretion afforded to the defendant state agencies over which providers they can fund is no greater than in *Bowen* or *Flast*. *See* Facts at 12-14, 19-20.

Similarly, while legislative intent or knowledge that religious organizations would be funded is not required for taxpayer standing, here such legislative intent and knowledge plainly existed, not only with respect to religious organizations in general, but also with respect to Baptist Homes specifically. Kentucky's governor, the defendant agencies, and a legislative commission regularly informed the Kentucky legislature of the important role that private entities play in caring for wards of the state. *See* Facts at 16-18. As it is common knowledge that many private childcare facilities are religious — indeed, the record shows that at least 21 of the 55 private childcare providers with which one of the defendant agencies contracted had a religious affiliation (*see* Facts at 17) — the legislature “surely understood” that its childcare funding was going to religious entities. *Cf. Hein*, 127 S. Ct. at 2565 n.3.

What is more, the Kentucky legislature, in the 2005-2006 fiscal year, appropriated a specific sum for a Baptist Homes facility. A___, DN275, Commw. *Hein* MTD, Close Aff., Ex. C, § 10(5). The legislature previously received a report from the Kentucky Legislative Research Commission that specifically disclosed that Baptist Homes was receiving state funding. *See* A___, DN283, Pls.’ Opp. to *Hein* MTD, Ex. 1, at 150. In 2006, a chamber of the Kentucky legislature issued a “legislative citation” to Baptist Homes, praising it for its “extraordinary efforts in assisting those children within the Commonwealth in need” KY H.R. Jour., 2006 Reg. Sess. No. 57, Mar. 24, 2006, Legislative Citation No. 142. The state’s funding of Baptist Homes has also received extensive media attention. Facts at 18. Indeed, by its own account, Baptist Homes is the largest and best

known childcare provider in Kentucky. A __, DN283, Pls.’ Opp. to *Hein* MTD, Exs. 5-6.

Finally, the federal funds that are paid to Baptist Homes are covered by a federal “Charitable Choice” statute that expressly promotes the provision of federal funds to religious organizations. *See* 42 U.S.C. § 604a; Facts at 19-20. This statute prohibits states from discriminating against religious organizations in awarding covered funds. 42 U.S.C. § 604a(b). It also sets out detailed rules governing funding of religious organizations, prohibiting states from imposing certain restrictions as a condition of such funding. *Id.* § 604a(d)-(j).

D. The District Court Erred Both in Concluding That Plaintiffs’ First Amended Complaint Was Deficient and in Denying Plaintiffs Leave to File a Second Amended Complaint.

In denying taxpayer standing, the district court concluded, “the Amended Complaint fails to allege any *particular appropriation*, and thus obviously also fails to allege any legislative action through such appropriation which exceeded the taxing and spending powers of the legislature.” A __, DN308, Op. at 12 (emphases added). In fact, Plaintiffs’ Amended Complaint alleges that (1) the Kentucky General Assembly has authorized the defendant state agencies to “pay for such care and treatment as it deems necessary for the well-being of any child committed” to them, as well as to “expend available funds to provide for the board, lodging, and care of children . . . who are placed by the [state] in a foster home or boarding home,” and (2) “[t]he General Assembly has in fact regularly appropriated funds to the [defendant state agencies].” A __, DN112, Am. Compl. ¶

22 (quoting KY. REV. STAT. ANN. §§ 200.115(1), 605.120(1)). Further, in briefing before the lower court, Plaintiffs described in detail the comprehensive legislative programs through which state and federal funds are channeled to Baptist Homes, citing numerous particular appropriations by the Kentucky legislature and Congress for those programs. *See* A___, DN283, Pls.’ Opp. to *Hein* MTD, 18-20, 31 & n.28.

In addition, out of an abundance of caution, and in response to attacks by the defendants on the adequacy of the Amended Complaint, Plaintiffs moved for leave to file a Second Amended Complaint that incorporated the detail concerning the legislative authorizations and appropriations set forth in Plaintiffs’ district-court briefing. *See* A___, DN288, Pls.’ Proposed Second Am. Compl. ¶¶ 22, 66. The district court concluded that Plaintiffs would not have standing under their proposed Second Amended Complaint, and accordingly denied the proposed amendment as futile. A___, DN308, Op. at 2 & n.1, 12-13. The district court’s denial of the amendment should be reversed, for the amendment is not futile because Plaintiffs do have taxpayer standing (under both complaints).

In light of the district court’s rejection of both the Amended and the Second Amended complaints, the court’s demand for a “particular appropriation” (A___, DN308, Op. at 12) can only be understood as requiring an appropriation that specifically identifies Baptist Homes itself. But neither in *Flast* or *Bowen* — nor in the many other cases where the Supreme Court found taxpayer standing — was there a specific legislative appropriation to a particular religious organization. And nothing in *Hein* requires such a specific designation. In any event, the record here

did disclose one such appropriation. A ___, DN275, Commw. *Hein* MTD, Close Aff., Ex. C, § 10(5).

The district court's apparent view that taxpayers can challenge only specific appropriations for particular religious groups is not only contrary to Supreme Court precedent, but it also would allow government bodies to commit widespread Establishment Clause violations without fear of being sued. Most grant programs through which religious organizations are funded — including a number of the ones whose constitutionality has been adjudicated by the Supreme Court — are similar to the grant program here: the programs involve a statute and/or an appropriation that designates funds for specific purposes but does not require that the funds go to a particular organization. Instead, executive-branch officials select who receives the funds. Justice Kennedy's opinion in *Hein* — which emphatically reaffirmed *Flast* and the limits on tax funding of religion that *Flast* is designed to protect (*see Hein*, 127 S. Ct. at 2572) — makes clear that taxpayer standing remains in such cases. Only the Supreme Court can hold otherwise, and the district court erred in adopting its extremely narrow test for taxpayer standing.

E. Plaintiffs Also Have Standing as State Taxpayers Because the “Legislative Nexus” Requirement of *Flast* and *Hein* Is Inapplicable to *State* Taxpayers Under This Circuit's Law.

While Plaintiffs easily satisfy the requirement established by *Flast* of a link between a challenged expenditure and legislative action, the district court also erred by ruling that this requirement applies to *state* taxpayers at all. In *Johnson v. Economic Development Corp. of Oakland*, 241 F.3d 501, 507 (6th Cir. 2001), this

Court expressly rejected an argument that state taxpayers are required to show “a nexus between a legislative expenditure and the alleged Establishment Clause violation.” This Court held that state taxpayers challenging governmental support of religion can demonstrate standing simply by pointing to “a government expenditure of funds,” or a “measurable appropriation,” or “a loss of revenue.” *Id.* at 507-08 (interpreting *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434-35 (1952)); accord *Ward v. Santa Fe Indep. Sch. Dist.*, 393 F.3d 599, 606 (5th Cir. 2004) (state taxpayers challenging tax aid to religion need only “show that tax revenues are expended on the disputed practice”) (quotation marks and citation omitted); *Minn. Fed’n of Teachers v. Randall*, 891 F.2d 1354, 1357 (8th Cir. 1989) (state taxpayers in Establishment Clause cases must only demonstrate “a measurable expenditure of tax money”).

This Court’s ruling in *Johnson* is consistent with Supreme Court precedents and is unaltered by *Hein. Flast*, *Bowen*, and *Hein* each dealt with federal taxpayers. On three separate occasions, the Supreme Court has expressly upheld the standing of state taxpayers to challenge expenditures of state tax funds that allegedly violated the Establishment Clause. *See Ball*, 473 U.S. at 380 n.5; *Marsh v. Chambers*, 463 U.S. 783, 786 n.4 (1983); *Meek v. Pittenger*, 421 U.S. 349, 356 n.5 (1975), *overruled on the merits by Mitchell*, 530 U.S. 793. None of those cases held that state taxpayers had to demonstrate a link between challenged expenditures and legislative action. The same is true with respect to the numerous other Supreme Court cases that have adjudicated state-taxpayer suits under the Establishment Clause. *See, e.g., Mueller v. Allen*, 463 U.S. 388, 392 (1983);

Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 744 (1976); *Hunt v. McNair*, 413 U.S. 734, 735 (1973); *Sloan v. Lemon*, 413 U.S. 825, 827 (1973); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 762 (1973); *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 478 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 608, 610-11 (1971).

Furthermore, the logical underpinnings of *Flast*'s requirement of a nexus between challenged expenditures and legislative action are inapplicable to state taxpayers. In *Hein*, both the plurality and Justice Kennedy explained that the "legislative nexus" requirement arises out of the separation of powers. 127 S. Ct. at 2569-70 (plurality op.); *id.* at 2572-73 (Kennedy, J., concurring). But the federal constitutional requirement of separation of powers does not apply to the states. *See Whalen v. United States*, 445 U.S. 684, 689 n.4 (1980); *Uphaus v. Wyman*, 360 U.S. 72, 100 (1959); *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957). Nor does it apply to the federal judiciary's relationship with the states. *Elrod v. Burns*, 427 U.S. 347, 352 (1976) (plurality op.); *see also United States v. Gillock*, 445 U.S. 360, 370 (1980) (limits applicable to federal prosecutions of federal legislators held not applicable to federal prosecutions of state legislators, in part because limits were based on federal separation of powers); *Baker v. Carr*, 369 U.S. 186, 210, 217, 226 (1962) (political-question doctrine did not bar federal courts from adjudicating constitutionality of apportionment of state election districts because political-question doctrine is based on separation of powers).

To justify its failure to follow *Johnson*'s holding that the "legislative nexus" requirement is inapplicable to state taxpayers, the district court relied on

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006), and *Hinrichs v. Speaker of the House of Representatives of the Indiana General Assembly*, 506 F.3d 584 (7th Cir. 2007). A ___, DN308, Op. at 7. But *DaimlerChrysler* held only that state taxpayers should be treated similarly to federal taxpayers *outside* the Establishment Clause context (in that they do not have standing). See 547 U.S. at 342-46. *Hinrichs* is contrary to this Court’s precedent in *Johnson*, and the panel there did not consider the inapplicability of separation-of-powers concerns to state taxpayers. See 506 F.3d at 598, 600 n.9; compare *ACLU Found. of La. v. Blanco*, 523 F. Supp. 2d 476, 482-83 (E.D. La. 2007) (mentioning *Hein*, but then analyzing state-taxpayer standing under different test, asking only whether tax revenues are “expended on the challenged practice”).

Plaintiffs easily satisfy the test of *Johnson*, under which state taxpayers need only show “a government expenditure of funds,” *or* a “measurable appropriation,” *or* “a loss of revenue.” 241 F.3d at 507-08. Baptist Homes has received more than \$100 million from the Commonwealth of Kentucky since October 1998. Facts at 12. And the Kentucky legislature has passed numerous appropriations from which the state has made payments to Baptist Homes. Facts at 14-16. Plaintiffs thus have standing to challenge the provision of state tax dollars to Baptist Homes.

II. The District Court Erred in Dismissing Pedreira’s and Vance’s Statutory Claims of Religious Employment Discrimination.

A. Title VII Prohibits Discrimination Based on an Employee’s Failure to Conform Her Conduct to Her Employer’s Religious Beliefs.

Title VII proscribes employment discrimination “because of [an] individual’s . . . religion.” 42 U.S.C. § 2000e-2(a); *see also* KY. REV. STAT. ANN. § 344.040 (West 2008).⁸ “The term ‘religion’ includes *all* aspects of religious *observance* and practice, *as well as* belief” 42 U.S.C. § 2000e(j) (emphases added); *see also* KY. REV. STAT. ANN. § 344.030(7) (West 2008).

The district court acknowledged that religious employment discrimination encompasses not only discrimination based on an employee’s religion but also discrimination based on an employee’s failure to conform to her employer’s religion. A ___, DN53, July 23, 2001 Op. at 4. Indeed, it is well-established that an employee states a claim of religious employment discrimination where she alleges:

(1) that [she] was subjected to some adverse employment action; (2) that, at the time the employment action was taken, the employee’s job performance was satisfactory; and (3) some additional evidence to support the *inference* that the employment actions were taken because of a discriminatory motive based upon the employee’s failure to hold *or* follow . . . her employer’s religious beliefs.

⁸ “In order to establish [a] violation of the Kentucky Civil Rights Act, a plaintiff must prove the same elements as required for a prima facie case of discrimination under Title VII.” *Talley v. Bravo Pitino Rest., Ltd.*, 61 F.3d 1241, 1250 (6th Cir. 1995) (citation omitted).

Shapolia v. Los Alamos Nat'l Lab., 992 F.2d 1033, 1038 (10th Cir. 1993) (footnotes omitted) (emphases added); *see also id.* (looking to prima facie elements in reverse race and sex discrimination cases); *accord, e.g., Noyes v. Kelly Servs.*, 488 F.3d 1163, 1168-69 (9th Cir. 2007); *Venters v. City of Delphi*, 123 F.3d 956, 972 (7th Cir. 1997).

Nevertheless, the district court concluded that Pedreira and Vance have not stated claims of religious employment discrimination, reasoning that religious employment discrimination occurs only when an employee is penalized for failure to conform her *beliefs* to her employer's religion, but not when the discriminatory treatment is based on an employee's failure to conform her *conduct* to her employer's religion. A__, DN53, July 23, 2001 Op. at 6-9. Accordingly, the district court held that, because Baptist Homes does not require Pedreira and Vance to *hold* its religious belief that homosexuality is sinful, it is immaterial that Baptist Homes requires Pedreira and Vance to *observe* its religious belief that homosexuality is sinful.

Under the district court's view of the law, an employer could require its employees to conform all aspects of their lives to its religious beliefs — from diet (*e.g.*, abstaining from meat consumption), to dress (*e.g.*, abstaining from immodest clothing), to recreation (*e.g.*, abstaining from social dancing), to medical decisions (*e.g.*, abstaining from blood transfusions), to family relations (*e.g.*, abstaining from interfaith marriage), to community service (*e.g.*, abstaining from military participation) — so long as the employer did not require its employees to actually hold its religious beliefs.

By definition, however, discrimination based on an employee's failure to conform to her employer's "religion" includes discrimination based on the employee's failure to conform to any aspect of her employer's religious "belief[s]," "practice[s]," or "*observance[s]*." 42 U.S.C. § 2000e(j) (emphasis added). Moreover, as the court recognized in *Shapolia*, not only does unfavorable treatment premised on an employee's failure to conform her conduct to her employer's religion support an "inference" that the discrimination was due to the employee's failure to "hold" her employer's religious beliefs, but such unfavorable treatment also is impermissible in itself — because it amounts to requiring an employee to "follow" the employer's religious beliefs. *See* 992 F.2d at 1038.

This Court has treated an employer's requirement of religious conformity in behavior as no less discriminatory than a requirement of conformity in belief. In *Blalock v. Metals Trades, Inc.*, 775 F.2d 703 (6th Cir. 1985), this Court concluded that an employee would prevail on a claim of religious employment discrimination if he could show that his employer terminated him due to his failure to conform the dynamics of his relationship with his religious leader to the employer's religious beliefs about submissiveness to authority. The employer's objection was that the employee "refuse[d] to submit himself to those in authority over him and the Bible makes it clear that we are to be in submission." *Id.* at 706. The employer also pronounced that its "Company . . . rule book is the word of God." *Id.* at 705-06. This Court rejected the district court's focus on the fact that "[the employee] ha[d] not proved that [the employer] fired him because of his religion *or because of any particular religious beliefs he may have held*," and instead emphasized that

the district court's findings "reveal[ed] that *religion played a role* in [the employee's] discharge." *Id.* at 708 (emphases added). This Court went on to infer from the employer's objection to the employee's failure to conform his conduct to its religious beliefs that the employer objected to the employee's failure to hold its religious "views." *Id.*

District courts within the Sixth Circuit have long understood what *Blalock* illustrates: Religious discrimination exists where an employee suffers an adverse employment action because she has failed to conform her conduct to her employer's religion. For example, in *Turic v. Holland Hospitality, Inc.*, 842 F. Supp. 971, 980 (W.D. Mich. 1994), the court concluded that an employee had stated a claim of religious employment discrimination by alleging, *inter alia*, that she was terminated for violating an order not to discuss with her colleagues her consideration of having an abortion, which offended her colleagues' religious belief that abortion is sinful. The employer did not care whether the employee actually held the religious belief that abortion is sinful. *See id.* at 980 n.8. And the employee "ha[d] not alleged that her consideration of abortion was propelled by any religious belief or practice, or that the order not to discuss abortion at work was in conflict with a tenet of her faith." *Id.* at 979. Nevertheless, the court concluded that these facts did not preclude her suit, explaining that *Blalock* allows such claims of religious employment discrimination to proceed. *See id.* Ultimately, the fact that the employer prohibited the employee from discussing her consideration of abortion while allowing her colleagues to express anti-abortion views showed that the employer had engaged in differential treatment because the

employee “[had] not share[d] a certain set of religious beliefs.” *Id.* at 980; *see also Nichols v. Snow*, No. 3:03-0341, 2006 WL 167708, at *12 (M.D. Tenn. Jan. 23, 2006) (employee established inference of religious employment discrimination by showing, *inter alia*, that employer had “indicated that [employee’s] Rolex and Corvette were examples of [employee’s] ungodly life . . . [and] that his priorities were not in order because he . . . was not married”).

Similar decisions have been issued in other jurisdictions. For example, in *Henegar v. Sears, Roebuck & Co.*, 965 F. Supp. 833, 834 (N.D. W. Va. 1997), the court held that an employee stated a claim of religious employment discrimination when she alleged that her employer penalized her for engaging in an adulterous relationship that offended the employer’s religious beliefs. The court recognized that “the fact that [the employee] ha[d] not pled her own religious beliefs [did] not compel the conclusion that she ha[d] failed to state a claim upon which relief can be granted.” *Id.* at 837. It was enough that the employee had “allege[d] that [the employee] suffered an adverse hiring decision because her prior *conduct* had offended her former [employer’s] religious beliefs.” *Id.* at 838 (emphasis added); *see also, e.g., Venters*, 123 F.3d at 963 (employee established inference of religious employment discrimination by showing, *inter alia*, that employer had “criticized [employee] for living with another single woman, and . . . warned [employee] that, because she was a single woman, it was inappropriate for her to receive visits from [colleagues] who were married”); *Erdmann v. Tranquility, Inc.*, 155 F. Supp. 2d 1152, 1154 (N.D. Cal. 2001) (gay employee established inference of religious employment discrimination by showing, *inter alia*, that “[employer],

who is a member of the . . . []Mormon Church[], discriminated against [employee] and created a hostile and abusive work environment based on . . . her belief that homosexuality is immoral”); *Mandeville v. Quinstar Corp.*, No. 98-1408-MLB, 2000 WL 1375264, at *6 (D. Kan. Aug. 29, 2000) (“[employee’s] allegation of satisfactory performance closely followed by termination after questioning the dress code and no radio policy [was] sufficient to show *some* additional evidence supporting an inference the termination was the result of unlawful religious discrimination”) (emphasis in original).

B. The District Court Misread a Decision of This Court as Barring Pedreira’s and Vance’s Claims.

The district court erred in interpreting *Hall v. Baptist Memorial Health Care Corp.*, 215 F.3d 618 (6th Cir. 2000), as barring the claims at issue here. In *Hall*, a religiously affiliated college that considered homosexuality to be contrary to its religious beliefs terminated an employee not because she was a lesbian, but because she became a lay minister in a church that taught that homosexuality is not sinful. *Id.* at 622-23. The panel held that the college was entitled to the exemption in Title VII that allows certain religiously affiliated institutions to employ persons of a particular religion. *Id.* at 623-25 (citing 42 U.S.C. §§ 2000e-1(a), 2000e-2(e)(2)).⁹ The panel went on to opine that, even if the employer were not entitled to the exemption, the employee had failed to present sufficient evidence of religious employment discrimination. *Id.* at 625-27.

⁹ Baptist Homes has not claimed that this exemption applies in this case.

In claiming religious employment discrimination, the employee made two arguments to demonstrate disparate treatment. First, the employee contended that other employees had not been terminated when they had engaged in other conduct that the college considered to be contrary to its religious beliefs. *Hall*, No. 98-6761, Final Br. of Appellant at 16-17. The panel rejected this argument on the grounds that the plaintiff was not similarly situated to the other employees because the offending actions taken by the other employees were different from the action taken by the plaintiff. *Hall*, 215 F.3d at 627. Second, the employee argued that she had been terminated because of her “church related affiliation.” *Hall*, No. 98-6761, Final Br. of Appellant at 17. The panel rejected this contention because the evidence showed that the college would also have terminated the employee if she had assumed a leadership position in a *secular* pro-gay community organization. *Hall*, 215 F.3d at 627. It was in this context that the panel stated: “To show that the termination was based on her religion, [the employee] must show that it was the *religious* aspect of her leadership position that motivated her employer’s actions.” *Id.* (citation omitted) (emphasis in original).

Focusing on this passage in *Hall*, the district court erroneously concluded that *Hall* stands for the broad proposition that an employee claiming religious employment discrimination may not allege that her employer penalized her for failing to *observe* its religious beliefs, but rather must allege that her employer penalized her for failing to *hold* its religious beliefs. See A___, DN53, July 23, 2001 Op. at 7-8. But the panel in *Hall* never pronounced such a rule. Indeed, the employee in *Hall* never argued that the college terminated her for failing to

observe its religious beliefs about homosexuality, and the panel never considered such an argument. The panel only issued rulings on the circumscribed assertions (detailed above) raised by the employee of religion-related differential treatment. Unlike the employee in *Hall*, Pedreira and Vance are claiming that they have been discriminated against because their sexual orientation is inconsistent with Baptist Homes' religious beliefs.

And even if *Hall* does provide implicit support for the proposition ascribed to it by the district court, *Hall* is *not* binding precedent for it. Where a prior decision does not “squarely address[s] [an] issue,” an appellate court remains “free to address the issue on the merits” and to reach a ruling contrary to what the prior decision may have implicitly assumed. See *Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993). For example, in *Rinard v. Luoma*, 440 F.3d 361, 362-63 (6th Cir. 2006), this Court held that administrative exhaustion requirements must be met for *all* claims in a prisoner lawsuit or the *entire* case must be dismissed; in doing so, this Court recognized that a prior Sixth Circuit decision that had reached the opposite result was not binding precedent because the argument that complete dismissal was required had not been raised by the parties or considered by the panel. Accord *Webster v. Fall*, 266 U.S. 507, 511 (1925) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”) (citations omitted); *Nemir v. Mitsubishi Motors Corp.*, 381 F.3d 540, 559-60 (6th Cir. 2004) (holding that jury’s finding in automobile accident case that plaintiff was not wearing seatbelt did not render exclusion of evidence concerning

effectiveness of seatbelt harmless error because jury's finding may have been affected by exclusion; declining to follow earlier Sixth Circuit case that had reached opposite result on similar facts because decisive point had not been argued or considered).¹⁰

Moreover, interpreting *Hall* as the district court did would cause *Hall* to conflict with *Blalock*'s conclusion that religious employment discrimination occurs where an employer penalizes an employee for failing to conform her religious views and conduct to her employer's religious beliefs. "Cases should be construed to *avoid* intra-circuit conflicts, not to create them." *United States v. Humphrey*, 287 F.3d 422, 451 (6th Cir. 2002) (citation omitted) (emphasis in original), *overruled on other grounds by United States v. Leachman*, 309 F.3d 377 (6th Cir.

¹⁰ See also *Union Elec. Co. v. United States*, 363 F.3d 1292, 1297 (Fed. Cir. 2004) ("[W]e have repeatedly held that the disposition of an issue by an earlier decision does not bind later panels of this court unless the earlier opinion explicitly addressed and decided the issue."); *United Food & Commercial Workers Union, Local 1564 v. Albertson's, Inc.*, 207 F.3d 1193, 1200 (10th Cir. 2000) ("In order for a decision to be given *stare decisis* effect with respect to a particular issue, that issue must have been actually decided by the court.") (quoting 18 Moore's Federal Practice § 134.04[5]); *Indian Oasis-Baboquivari Unified Sch. Dist. No. 40 v. Kirk*, 91 F.3d 1240, 1244 (9th Cir. 1996) ("We have similarly declined to give controlling weight to our own implicit holdings."); *Houston Indus. Inc. v. United States*, 78 F.3d 564, 567 n.3 (Fed. Cir. 1996) ("[W]hen an issue is not argued or considered in a decision, such decision is not precedent on that issue."); *United States v. Vroman*, 975 F.2d 669, 672 (9th Cir. 1992) ("circuit precedent no longer controlling where prior panel did not consider an argument the later panel finds persuasive"); *Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d 103, 113 (2d Cir. 1988) ("[A] *sub silentio* holding is not binding precedent.") (internal quotation marks and citations omitted).

2002). And, to the extent that *Hall* conflicts with *Blalock*, *Blalock* controls, for “[w]hen an opinion of this court conflicts with an earlier precedent, [this Court is] bound by the earliest case.” *Habich v. City of Dearborn*, 331 F.3d 524, 530 n.2 (6th Cir. 2003) (citation omitted). This rule has added force here because *Hall* did not even mention *Blalock*, which the employee in *Hall* did not cite. See *N.Y. Life Ins. Co. v. Travelers Ins. Co.*, 92 F.3d 336, 340 n.4 (5th Cir. 1996).

C. Pedreira and Vance Have Sufficiently Alleged That Baptist Homes Penalized Them for Failing to Hold Its Religious Belief That Homosexuality Is Sinful.

Even if the district court was correct in ruling that a religion-based *conduct* requirement is insufficient to support a claim of religious discrimination, Pedreira and Vance have sufficiently alleged facts supporting a conclusion that Baptist Homes penalized them because they do not *hold* its religious belief that homosexuality is sinful.

Pedreira and Vance have alleged that “[Baptist Homes’] employees are expected to exhibit values in their professional conduct and personal lifestyles that are consistent with the Christian mission and purpose of the institution,” A___, DN112, Am. Compl. ¶ 57, and that such values include Baptist Homes’ religious belief that “the homosexual lifestyle is [not] the one God intends for the human race.” A___, *id.* ¶ 50; see also A___, *id.* ¶ 36 (“It is important that [Baptist Homes] stay true to [its] Christian values. Homosexuality is a lifestyle that would prohibit employment.”). Pedreira and Vance have further alleged that “[e]very employee is a role model for the children and families under [Baptist Homes’] care,” A___,

id. ¶ 57, that “[Baptist Homes is] committed to presenting a clear message of Christian values,” A ___, *id.*, and that such commitment includes “the religious goal of teaching youth that homosexuality is sinful and immoral,” A ___, *id.* ¶ 38. Moreover, Pedreira and Vance have specifically alleged that they do not hold Baptist Homes’ religious belief that homosexuality is sinful, and that Baptist Homes therefore penalized them. A ___, *id.* ¶¶ 71, 75.

As noted above, in determining whether to reverse a dismissal of a case for failure to state a claim, this Court treats the allegations of the complaint as true and draws all reasonable inferences in favor of the non-moving party. *See, e.g., Mayer*, 988 F.2d at 638. Under these well-established standards, Pedreira’s and Vance’s employment-discrimination claims should not have been dismissed, for Plaintiffs’ complaint alleges and substantiates that Pedreira and Vance suffered discrimination based on their failure to hold Baptist Homes’ religious beliefs concerning homosexuality.

III. The District Court Erred to the Extent That It Ruled That Plaintiffs May Not Present Evidence of Baptist Homes’ Employment Practices in Support of Their Establishment Clause Claim.

Plaintiffs’ complaint presents a single Establishment Clause claim alleging, *inter alia*, that Baptist Homes is a government-funded pervasively sectarian institution and that Baptist Homes engages in government-funded religious indoctrination of the youth in its care. A ___, DN112, Am. Compl. ¶¶ 57-59, 61-67. The district court, however, bifurcated the claim, “dismiss[ing]” “[t]hat portion of the claim that is grounded on the premise that [Baptist Homes’] employment

practices constitute religious discrimination.” A ___, DN53, July 23, 2001 Op. at 8. The sole basis for the district court ruling was that it had “rejected the [statutory] challenge to [Baptist Homes’] employee conduct requirement.” A ___, *id.*

Plaintiffs do *not* appeal the district court’s ruling to the extent that it holds that their allegations concerning Baptist Homes’ employment practices *standing alone* fail to state an Establishment Clause claim. Rather, Plaintiffs appeal *only* insofar as the district court’s ruling bars them from presenting *evidence* of Baptist Homes’ employment practices as one component of the overall proof of an Establishment Clause violation. *See* A ___, DN64, Oct. 24, 2001 Order. Plaintiffs’ position on appeal is simply that such evidence, like other evidence of Baptist Homes’ religious operation, is relevant to the analysis. *See Moeller v. Bradford County*, 444 F. Supp. 2d 316, 322 (M.D. Pa. 2006) (“No single allegation is its own claim, but all of the allegations are part of one Establishment Clause claim. These allegations are *relevant* to whether the program has the effect of advancing religion.”) (citation omitted) (emphasis added).

The evidence of Baptist Homes’ employment practices is relevant under the Establishment Clause in at least two ways. First, as this Court has twice reaffirmed in recent years, governmental funding of pervasively sectarian institutions — institutions that are thoroughly infused with a particular religion — violates the Establishment Clause. *Steele v. Indus. Dev. Bd.*, 301 F.3d 401, 407-09 (6th Cir. 2002); *Johnson*, 241 F.3d at 510 n.2; *accord Bowen*, 487 U.S. at 610-12, 621. Courts routinely look to evidence of employment practices in assessing whether an institution is pervasively sectarian. *See, e.g., Roemer*, 426 U.S. at 757; *Hunt*, 413

U.S. at 743; *Minn. Fed'n of Teachers v. Nelson*, 740 F. Supp. 694, 714-20 (D. Minn. 1990); *Va. Coll. Bldg. Auth. v. Lynn*, 538 S.E.2d 682, 697 (Va. 2000); *Horace Mann League of U.S., Inc. v. Bd. of Pub. Works*, 220 A.2d 51, 65-73 (Md. 1966).

Second, the Establishment Clause prohibits governmental financing of religious indoctrination. *Agostini*, 521 U.S. at 219; *Bowen*, 487 U.S. at 611. Evidence that Baptist Homes' employees are required to hold or observe certain religious beliefs would be probative of the fact that Baptist Homes is seeking to inculcate those beliefs in the youth in its care. For example, in *Freedom from Religion Foundation v. McCallum*, 179 F. Supp. 2d 950, 955, 968-70 (W.D. Wis. 2002), the court treated the fact that "Christian-based spirituality" was "a factor in the hiring process" for counselors in a rehabilitation program as evidence that the program inculcated Christian beliefs in its participants. *See also Moeller*, 444 F. Supp. 2d at 322 (in challenge to governmental funding of vocational training program, court refused to dismiss allegation that program discriminated based on religion in hiring, explaining that allegation "was one of many allegations regarding the [program's] religious activities" and that "[t]hese allegations [were] relevant to whether the program ha[d] the effect of advancing religion").

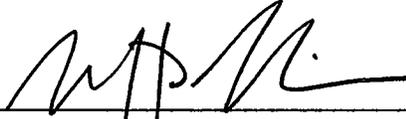
Thus, regardless of whether Baptist Homes' employment practices constitute *statutory* religious discrimination, they are relevant to Plaintiffs' Establishment Clause claim — the employment practices not only affect Baptist Homes' *employees*, but also affect the *youth* in Baptist Homes' care and shed light on the nature of the institution as a whole.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask this Court to (1) reverse the district court's ruling that the taxpayer plaintiffs lack standing to pursue their Establishment Clause claim, (2) reverse the district court's dismissal of the statutory employment-discrimination claims of Plaintiffs Pedreira and Vance, (3) clarify that Plaintiffs may present evidence of Baptist Homes' employment practices (together with other evidence) in support of their Establishment Clause claim, and (4) order that Plaintiffs' proposed Second Amended Complaint be filed.

Respectfully submitted,

Dated: July 17, 2008



Joshua P. Wilson

David B. Bergman
Elizabeth Leise
Alicia A.W. Truman
Joshua P. Wilson
ARNOLD & PORTER LLP
555 12th St., N.W.
Washington, D.C. 20004
(202) 942-5000 tel.
(202) 942-6226 fax

Ayesha N. Khan
Alex J. Luchenitser
Americans United for Separation of Church
and State
518 C St., NE
Washington, D.C. 20002
Phone: (202) 466-3234
Fax: (202) 466-2587
khan@au.org / luchenitser@au.org

Kenneth Y. Choe
James D. Esseks
ACLU Lesbian, Gay, Bisexual &
Transgender Project
125 Broad Street, 18th Floor
New York, New York 10004-2400
Phone: (212) 549-2627
Fax: (212) 549-2650
kchoe@aclu.org/jesseks@aclu.org

David A. Friedman
William E. Sharp
ACLU of Kentucky
Foundation, Inc.
315 Guthrie Street, Suite 300
Louisville, KY 40202
(502) 581-9746
(502) 589-9687 (fax)
dfriedman@ffgklaw.com
sharp@aclu-ky.org

Daniel Mach
ACLU Program on Freedom of Religion and
Belief
915 15th Street, NW
Washington, DC 20005
(202) 548-6604
dmach@aclu.org

Vicki L. Buba
ACLU of Kentucky Cooperating Attorney
Oldfather Law Firm
1330 South Third Street
Louisville, Kentucky 40208
(502) 637-7200
vlb@oldfather.com

Murray Garnick
101 Constitution Ave. N.W.
Washington DC 20001
(202) 354-1578
Murray.Garnick@altria.com

Counsel for Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 32(a)(7)(B) and (C) of the Federal Rules of Appellate Procedure, I hereby certify that this Brief for Appellants Alicia Pedreira, et. al., was prepared using a proportional 14-point typeface and contains 13,861 words (excluding parts of the brief exempted by Rule 32(a)(7)(B)(iii)) as calculated by the word processing system used to prepare the brief.



Joshua P. Wilson
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206
Tel: (202) 942-5000
Fax: (202) 942-5999

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CERTIFICATE OF SERVICE

In accordance with Sixth Circuit Rule 31(a), I hereby certify that on this 17th day of July 2008, I caused a true and correct copy of this **Proof Brief for Appellants Alicia Pedreira, et. al.**, to be served by U.S. Mail upon:

John O. Sheller, Esq.
Stoll Keenon Ogden
500 W. Jefferson Street
Suite 2000 PNC Plaza
Louisville, KY 40202

Jonathan D. Goldberg
Goldberg & Simpson
9301 Dayflower Street
Louisville, KY 40059

William H. Fogle
Justice & Public Safety Cabinet
125 Holmes Street, 2nd Floor
Frankfort, KY 40601



Joshua P. Wilson