**RECORD NO. 16-2082**

In The

# United States Court Of Appeals

## For The Fourth Circuit

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

***Plaintiffs – Appellants,***

**v.**

**MARION WARREN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS,**

***Defendant – Appellee.***

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

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# BRIEF OF APPELLANTS

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

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

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No. 16-2082 Caption: Ansley v. Warren

Pursuant to FRAP 26.1 and Local Rule 26.1,

Kay Diane Ansley
(name of party/amicus)

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

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

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

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

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

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

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

Signature: /s/ Jacob H. Sussman Date: October 5, 2016

Counsel for: Kay Diane Ansley

## CERTIFICATE OF SERVICE

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I certify that on October 5, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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Office of the Attorney General
NC Department of Justice
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Raleigh, NC 27602-0629

Amar Majmundar
Office of the Attorney General
NC Department of Justice
Post Office Box 629
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/s/ Jacob H. Sussman (signature) October 5, 2016 (date)

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Catherine "Cathy" McGaughey
(name of party/amicus)

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

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Counsel for: Kay Diane Ansley

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Carol Ann Person
(name of party/amicus)

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

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

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Counsel for: Kay Diane Ansley

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Thomas Roger Person
(name of party/amicus)

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

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Counsel for: Kay Diane Ansley

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Kelley Penn
(name of party/amicus)

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

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

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Counsel for: Kay Diane Ansley

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Sonja Goodman
(name of party/amicus)

who is appellant, makes the following disclosure:
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/s/ Jacob H. Sussman (signature) October 5, 2016 (date)

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## JURISDICTIONAL STATEMENT

Plaintiffs-Appellants appeal an Order of Dismissal issued by the U.S. District Court for the Western District of North Carolina. The district court granted Defendant-Appellee's Motion to Dismiss on September 20, 2016. [JA 155-192] Plaintiffs-Appellants timely filed a Notice of Appeal on September 21, 2016. [JA 194-196]

The district court had jurisdiction over Plaintiffs-Appellants' First and Fourteenth Amendment claims under 28 U.S.C. §§ 1331 and 1343(a)(3). This Court has jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

1. Whether the district court erroneously dismissed Plaintiffs-Appellants' First Amendment claim on the ground that Plaintiffs-Appellants lack *Flast* taxpayer standing, as last articulated by the U.S. Supreme Court in *Ariz. Christian School Tuition Org. v. Winn*, 563 U.S. 125 (2011).

2. Whether the district court erroneously held that Plaintiffs-Appellants' taxpayer standing arguments are indistinguishable from those dismissed in *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464 (1982).

## STATEMENT OF THE CASE

Plaintiffs-Appellants filed their Complaint on March 9, 2016, challenging the constitutionality of North Carolina's Senate Bill 2 ("SB2"), 2015 N.C. ALS 75, 2015 N.C. Sess. Laws 75, 2015 N.C. Ch. 75, 2015 N.C. SB 2. [JA 15-38] Enacted in 2015, in response to landmark rulings issued by this Court and lower federal courts in North Carolina concerning the fundamental right to marry, SB2 allows state magistrate judges to opt out of performing civil marriage ceremonies based upon a religious objection to the constitutionally-protected right of gay and lesbian Americans to marry.

Plaintiffs-Appellants have asserted taxpayer standing on the ground that SB2 mandates the spending of public funds to accomplish a religious goal in violation the Establishment Clause of the First Amendment, as applied to the States under the Due Process Clause of the Fourteenth Amendment. This legislative enactment creates a statutory right for magistrates to opt out their judicial oath and the specific duty to conduct civil marriage ceremonies based upon a religious rejection to this Court's ruling in *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014), *cert. denied sub nom. McQuigg v. Bostic*, 135 S. Ct. 314 (2014), which declared that the Fourteenth Amendment guarantees a fundamental right to marry for gay and lesbian citizens. Accordingly, SB2 gives magistrates the absolute right, based on "sincerely held religious belief," to disregard their judicial oath to

uphold the "laws of the United States," as required by Article VI of the U.S. Constitution.

Defendant-Appellee Warren is sued as the administrator of the state court system. He is charged with implementing SB2, using tax money as compelled by the North Carolina General Assembly to accomplish SB2's religious goal.

**The Role of Magistrates in North Carolina's State Court System**

In North Carolina's state courts, magistrates are appointed in each county[1] by the senior resident superior court judge,[2] and supervised by the chief district court judge.[3] Magistrates are empowered to assist with civil and criminal proceedings.[4] Magistrates also have statutorily specified judicial duties and powers, including all duties related to civil marriages. *See* N.C. Gen. Stat. § 7A-292. Magistrates are officers of the district court, *Foust v. Hughes*, 21 N.C. App. 268, 204 S.E.2d 230, *cert. denied*, 285 N.C. 589, 205 S.E.2d 722 (1974), who must swear or affirm the judicial oath of office to uphold "the laws of the United States," a requirement of Article VI of the federal constitution. U.S. Const. art. VI, §§ 2, 3; N.C. Gen. Stat. § 11-7; N.C. Gen. Stat. § 7A-170(a).

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[1] N.C. Gen. Stat. § 7A-133 (listing number of magistrates in each county and the seats of district court within those counties where they work).
[2] N.C. Gen. Stat. § 7A-171(b).
[3] N.C. Gen. Stat. § 7A-146.
[4] Article 16 of Chapter 7A of the General Statutes describes the judicial office and powers of the magistrate. *See* N.C. Gen. Stat. §§ 7A-170-178.

That oath is consequential. Under North Carolina law, magistrates who willfully refuse to discharge their judicial duties "shall be indicted" as Class 1 misdemeanants, and if convicted, "shall be removed" from office. N.C. Gen. Stat. § 14-230(a).

**The District Court Declares North Carolina's Ban on Marriage Equality Unconstitutional**

On October 10, 2014, just days after the Supreme Court denied certiorari of this Court's decision in *Bostic*, the same district court judge who dismissed Plaintiffs-Appellants' Complaint below, ruled that under *Bostic*, North Carolina's statutory and state constitutional proscriptions against marriage equality violated the Fourteenth Amendment. *General Synod of the United Church of Christ v. Reisinger*, Case No. 3:14-cv-00213-MOC-DLH (W.D.N.C. 2014).[5]

The following Monday, October 13, 2014, Defendant-Appellee's predecessor at the Administrative Office of the Courts ("AOC"), John Smith, directed that all magistrates should conduct marriage ceremonies for any couple presenting a valid marriage license. [JA 23] On October 14, 2014, counsel for the AOC issued a legal memo advising that magistrates who refused to marry a gay or lesbian couple presenting a valid marriage license would violate their judicial oath to uphold the federal constitution. [JA 23] The North Carolina Institute of Government sent a

[5] On October 14, 2014, the federal court in the Middle District ruled similarly in two related cases. [JA 23]

similar memo to the state's chief district court judges, who supervise magistrates, stating that magistrates were obligated by their judicial oath to conduct marriage ceremonies for gay and lesbian couples even if they objected personally. [JA 23-24] Rather than respect the court rulings and administrative directives to perform civil ceremonies for citizens marrying a person of the same sex, a number of magistrates resigned. [JA 25, 128]

On October 24, 2014, legislative leaders, some of whom had intervened to appeal the North Carolina federal courts' rulings, submitted a letter to Smith at the AOC asking for a "reasonable accommodation" for magistrates' religious objections to the exercise of the fundamental right by gay and lesbian Americans who want to marry in the State of North Carolina. [JA 24-25] Smith declined that request on November 5, 2014, explaining that while some magistrates had religious objections to the court rulings and had resigned as a result, other magistrates with equally sincere religious beliefs—both in agreement with and in opposition to marriage equality—were performing this non-religious, civil ceremony. [JA 25]

**The North Carolina General Assembly Passes SB2**

At the opening of the next legislative session in January 2015, the President Pro Tempore of the State Senate, one of the legislators who had moved to intervene in the federal lawsuits to defend the state's marriage bans, filed SB2, using the following formal title:

> AN ACT TO ALLOW MAGISTRATES AND REGISTERS OF DEEDS TO RECUSE THEMSELVES FROM PERFORMING DUTIES RELATED TO MARRIAGE CEREMONIES DUE TO SINCERELY HELD RELIGIOUS OBJECTION.[6]

2015 N.C. ALS 75, 2015 N.C. Sess. Laws 75, 2015 N.C. Ch. 75, 2015 N.C. SB 2.

Section 1 of SB2 established a new statute, N.C. Gen. Stat. § 51-5.5, which outlines the recusal process. Magistrates can be exempt from performing "all lawful marriages," and assistant registers of deeds also can be exempt from issuing marriage licenses, for renewable six-month blocks of time, "based upon any sincerely held religious objection." N.C. Gen. Stat. § 51-5.5 (2016). Subsection (c) of § 51-5.5 contains one of the spending directives by the state legislature that aids and endorses religion. It mandates that if all magistrates in a given jurisdiction recuse themselves from marriage duties, Defendant-Appellee "*shall* ensure that a magistrate is available in that jurisdiction for performance of marriages." (emphasis added). That provision specifically orders the AOC to spend Plaintiffs-Appellants' tax dollars for the costs of transporting an oath-abiding magistrate from another jurisdiction to perform civil marriages three separate days a week, a schedule required by SB2's amendment to § 7A-292(b). [JA 30, 158]

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[6] By the time the General Assembly enacted SB2, its formal title was ratified to: "AN ACT TO ALLOW MAGISTRATES, ASSISTANT REGISTERS OF DEEDS, AND DEPUTY REGISTERS OF DEEDS TO RECUSE THEMSELVES FROM PERFORMING DUTIES RELATED TO MARRIAGE CEREMONIES DUE TO SINCERELY HELD RELIGIOUS OBJECTION." [JA 157]

Section 2 of SB2 added a single, religious-based exception to N.C. Gen. Stat. § 14-230, the statute that criminally penalizes a magistrate for "[w]illfully failing to discharge duties." A new subsection (b) established that no magistrate could "be charged under this section for recusal to perform marriages" under § 51-5.5. N.C. Gen. Stat. § 14-230 (2016).

Section 3 of SB2 added a similar subsection (b) to N.C. Gen. Stat. § 167-27, to exempt assistant registers of deeds from criminal punishment and removal from office for recusing under § 51-5.5 from issuing marriage licenses on religious grounds.

Section 4 of SB2 amended N.C. Gen. Stat. § 7A-292 to add a subsection (b) that deemed the performance of marriages "a responsibility given collectively" rather than individually to all magistrates in a jurisdiction. (As explained *infra*, this provision made religious belief superior to the judicial oath each magistrate must under Article VI to uphold the federal constitution.) It also sets a requirement that some willing magistrate be available for marriages in each county at least 10 hours per week over three separate days. [JA 158]

Section 5 of SB2 also directs that any magistrate who resigned between October 6, 2014, the date *certiorari* was denied in *Bostic*, and the effective date of SB2, but then reapplied for their position and was hired within 90 days after SB2 became law, would be entitled to full state retirement system service credit for that

gap in service, including accrual of vacation and sick leave. [JA 159] To ensure payment of those benefits to the reinstated magistrates, the North Carolina General Assembly ordered Defendant-Appellee to place Plaintiffs-Appellants' tax dollars into the state retirement system, on behalf of each such magistrate, to cover the cost of bridging that gap in service for both the employer and employee contributions. 2015 N.C. ALS 75, 2015 N.C. Sess. Laws 75, 2015 N.C. Ch. 75, 2015 N.C. SB 2.

Finally, in addition to the General Assembly's orders to Defendant-Appellee to spend Plaintiffs-Appellants' tax dollars to aid and effectuate this religious purpose, the decision by a magistrate to opt out under SB2 is considered a confidential personnel matter under Chapter 126 of the General Statutes of North Carolina. [JA 72, 106] Thus, North Carolinians are not allowed to know whether a magistrate before whom they appear has declared a religious exemption from the judicial oath to uphold the constitution. As such, gay and lesbian North Carolinians would not know if a magistrate before whom they are appearing for any number of civil or criminal concerns had recused him or herself because of a religious objection to their fundamental right to marry.

The Senate approved these measures on February 25, 2015. John Smith stepped down as AOC Director and Defendant-Appellee replaced him, effective May 1, 2015. The House approved the legislation on May 28, 2015. [JA 28]

**The North Carolina General Assembly Overrides Governor's Veto**

The Governor then vetoed the bill. 2015 N.C. ALS 75, 2015 N.C. Sess. Laws 75, 2015 N.C. Ch. 75, 2015 N.C. SB 2. He issued a veto statement that "no public official who voluntarily swears to support and defend the Constitution and to discharge all duties of their office should be exempt from upholding that oath." [JA 28] The General Assembly overrode the veto on June 11, 2015.

Two weeks later, the U.S. Supreme Court issued *Obergefell v. Hodges*, 576 U.S. __, 135 S. Ct. 2584 (2015), declaring, consistent with *Bostic*, that the fundamental right to marry protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment applies to gay and lesbian Americans. [JA 29]

**All Magistrates in McDowell County Opt Out of Performing Civil Marriages Under SB2**

Plaintiffs-Appellants then learned that all magistrates in McDowell County had recused themselves from performing marriages under SB2. [JA 29] They further learned that, as commanded by the General Assembly under N.C. Gen. Stat. § 51-5.5(c), Defendant-Appellee Warren was expending tax dollars to transport an oath-abiding magistrate three days each week from Rutherford County to McDowell County to perform marriages. [JA 30, 158] In other words, Defendant-Appellee Warren, as ordered by the state legislature, spent Plaintiffs-Appellants' tax dollars to aid and endorse the religious views of all of McDowell County's magistrates who

refused to perform their judicial duties, and to uphold the oath required of all judges under Article VI of the U.S. Constitution, because of their personal religious beliefs.

**Plaintiffs-Appellants Challenge SB2**

Plaintiffs-Appellants include three sets of North Carolina taxpayers: a married lesbian couple (Ansley and McGaughey) who resides in McDowell County where all magistrates had disavowed the judicial oath by refusing to perform civil marriage ceremonies, thereby triggering one of SB2's spending provisions [JA 15-16]; a lesbian couple engaged to be married (Penn and Goodman) who reside in Swain County where a magistrate resigned rather than perform civil, non-religious marriage ceremonies between people of the same sex, making him eligible for the second spending provision in SB2 [JA 16]; and a now-married interracial couple (the Persons) who first sought to marry in Forsyth County in 1976, but were refused by two different magistrates because of the magistrates' declared religious beliefs against interracial marriage (an action endorsed and codified by SB2). The Persons had to sue successfully in federal court for the right to be married in a civil ceremony in Forsyth County. [JA 16]

Defendant-Appellee moved to dismiss Plaintiffs-Appellants' Complaint on May 5, 2016, on various grounds including lack of standing. [JA 39-40] After briefing, the court below heard oral arguments on August 8, 2016. [JA 42-154] During oral arguments and in its ultimate order, the district court expressed concern "that recusing magistrates are not required to publicly state whether they have recused themselves

from performing marriages." [JA 160] The court further acknowledged that gay and lesbian citizens appearing before a recusing magistrate on any criminal or civil issue other than marriage will not know if that presiding magistrate had recused him or herself from performing civil marriages, and whether the reasons for that recusal were because of a religious disagreement with *Bostic* and *Obergefell*, or perhaps with *Loving v. Virginia*, 388 U.S. 1 (1967), because the recusal decision is confidential. [JA 74-75, 131]

Yet despite its expressed view that Plaintiffs-Appellants should have standing to challenge this elevation of religious belief above the judicial oath and its concerns about SB2's confidentiality provision, the district court granted Defendant-Appellee's Motion to Dismiss on September 21, 2016, erroneously holding that Plaintiffs-Appellants lacked taxpayer standing under *Flast v. Cohen*, 392 U.S. 83 (1968), to challenge SB2. The district court did so based on its interpretation of *Ariz. Christian School Tuition Org. v. Winn*, 563 U.S. 125 (2011). The district court wrongly declared that the standing issue in this case was indistinguishable from the decision denying taxpayer standing in *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464 (1982). [JA 186] [7]

[7] Several parties moved to intervene to defend SB2, including two legislative leaders who championed the legislation and several magistrates who reject *Bostic* and *Obergefell* on religious grounds. The District Court found that Defendant-Appellee adequately represented their interests and denied their motions to intervene. Those proposed intervenors did not appeal that ruling. [JA 61]

Plaintiffs-Appellants filed a Notice of Appeal on September 21, 2016.[8] [JA 194-96]

## SUMMARY OF ARGUMENT

The district court erroneously dismissed Plaintiffs-Appellants' First Amendment claim on the ground that Plaintiffs-Appellants lacked taxpayer standing under *Winn* and *Valley Forge*. Plaintiffs-Appellants have standing as taxpayers to allege and prove that SB2 violates the Establishment Clause of the First Amendment because that legislation commands the AOC to spend tax dollars to accomplish its unconstitutional purpose: to aid and endorse magistrates' religious views as paramount to their judicial oath. That spending is essential to effectuating SB2, not incidental. The Complaint alleges and the legislation shows that the General Assembly compelled Defendant-Appellee to spend tax money in two ways in aid of religion: (1) to move magistrates across jurisdictional boundaries to effectuate a religious right of recusal from judicial duty to marry *all* licensed couples, and (2) to purchase retirement service credit for magistrates who resigned on religious grounds rather than perform *all* civil marriages under *Bostic*. This essential, non-discretionary, legislatively mandated spending to aid religion gives taxpayers like Plaintiffs-Appellants standing. It is the spending of tax dollars to elevate religion

[8] The district court discussed at length the other issues raised by Defendant-Appellee in his Motion to Dismiss. Defendant-Appellee has not cross-appealed on those issues, so the only issue before this Court is taxpayer standing.

above the constitution, *solely authorized by and occurring because of a legislative act*, that gives Plaintiffs-Appellants standing to challenge SB2 as violative of the Establishment Clause of the First Amendment.

The district court also erroneously held that Plaintiffs-Appellants' taxpayer standing arguments are indistinguishable from those dismissed in *Valley Forge*. The reasons for denying standing in *Valley Forge* do not apply to SB2. That case involved a federal agency's donation of surplus land to a religious college under authority of a 50-year-old property clause statute. *Valley Forge* did not, unlike here, involve *any* public spending and did not, unlike here, challenge the constitutionality of the legislation compelling that spending.

This case challenges the legislative act—SB2—that mandates the non-discretionary public spending by Defendant-Appellee to aid and promote religion; to elevate the religious viewpoints of magistrates above their judicial oath. Defendant-Appellee has no option but to take these actions. It is the mirror opposite of the standing issue in *Valley Forge*.

## ARGUMENT

### Standard of Review

This Court reviews a dismissal for lack of standing *de novo*. *See Cooksey v. Futrell*, 721 F.3d 226, 234 (4th Cir. 2013); *Frank Krasner Enters. v. Montgomery Cty.*, 401 F.3d 230, 234 (4th Cir. 2005). The burden of establishing standing lies

with the party asserting subject matter jurisdiction. *Krasner*, 401 F.3d at 234 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). Like any other dismissal, this Court must "assume all well-pled facts to be true" and "draw all reasonable inferences in favor of the plaintiff." *Cooksey*, 721 F.3d at 234.

## I. Plaintiffs-Appellants Have Taxpayer Standing to Challenge the Constitutionality of Public Spending Ordered by the Legislature That Aids, Promotes, and Endorses a Religious Purpose.

Plaintiffs-Appellants have standing as taxpayers to raise a First Amendment challenge to SB2. The spending required under Sections 1(c) and 5 of SB2, was ordered pursuant to the General Assembly's spending power to support a religious rejection of *Bostic*'s marriage equality ruling. It involves the very type of "justiciable injury" that permits taxpayer standing under *Flast v. Cohen*, 392 U.S. 83 (1968), and its most recent explication by the U.S. Supreme Court in *Winn*—the "'extract[ion] and spen[ding]' of 'tax money' in aid of religion." 563 U.S. at 140.

### A. SB2 Violates the Establishment Clause of the First Amendment and Article VI of the U.S. Constitution.

The General Assembly's view, enshrined into state law with SB2, that a magistrate's religious beliefs can supersede his or her judicial obligation to uphold the laws of the United States, directly conflicts with the purpose of the Supremacy and Oath Clauses of Article VI of the U.S. Constitution. As the Governor of North Carolina correctly explained when he vetoed SB2, judges sworn to uphold the federal constitution should not be granted the right to claim their "professed

doctrines of religious belief superior to the law of the land." That statement—and Plaintiffs-Appellants' arguments here—echoes the views of the Supreme Court. There are three clear Establishment Cause problems with SB2. First, though the funds involved in implementing SB2 are a small portion of the state budget,

> No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

*Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 15-16 (1947).

Second, the state legislature exceeded its constitutional powers in codifying support for a religious view of marriage contrary to the constitution, let alone authorizing religious rejection of the judicial oath of office.

> [W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.

*School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963). And, third, there are constitutional limits to the primacy of religious belief in public life.

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

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

SB2 violates the First Amendment for these reasons, and as explained further below, because it requires the spending of tax dollars to ensure its implementation, Plaintiffs-Appellants have taxpayer standing to challenge it.

### B. SB2 Mandates the Spending of Tax Funds for an Expressly Religious Purpose.

The authors of SB2 attempted to craft an unassailable state-endorsement of religion; in particular, their religious objection to the fundamental right of gay and lesbian Americans to marry under the Fourteenth Amendment. The bill sought to avoid a due process "undue burden" claim on that right to marry by requiring that every county provide a willing magistrate at least 10 hours a week over three days, so no one can claim they cannot get married during the course of a five-day work week. The authors also sought to avoid an equal protection challenge, and make the recusal mechanism facially neutral, by requiring that any magistrate who refused to marry gay or lesbian couples could not marry *any* other couples during the period of recusal. They also did not assign a specific budget amount to the bill in an attempt to avoid a taxpayer challenge.

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

Yet SB2 requires the AOC, through Defendant-Appellee, to spend tax dollars to make each magistrate's "religious beliefs superior to the law of the land." *Smith*, 494 U.S. at 879. That type of pro-religious spending mandate, commanded in Sections 1(c) and 5 of SB2, is the kind of spending pursuant to a legislative enactment that gives the Plaintiffs-Appellants taxpayer standing to challenge SB2 under the First Amendment.

### C. Sections 1(c) and 5 of SB2 Mandate Spending to Promote Religion.

Section 1(c) of SB2 authorizes and necessarily requires the expenditure of tax money to accomplish its religious goal. It directs Defendant-Appellee to bring a willing magistrate across jurisdictional lines to solemnize marriages when all magistrates appointed in that jurisdiction have recused themselves based on a religious objection. That act requires the spending of tax dollars to cover transportation costs. As a matter of law, state employees must be reimbursed for official travel. N.C. Gen. Stat. § 138-6. Magistrates specifically can only be reimbursed for official travel *outside* of their jurisdiction and *not* within it. N.C. Gen. Stat. § 171.1(b). Thus, the spending of tax funds alleged in this Complaint to transport a magistrate from Rutherford County to McDowell County three separate days each week to conduct marriages is not discretionary; it is a necessary requirement of Section 1(c). Defendant-Appellee would not have incurred, or paid,

those transportation costs but for the mandatory provisions of this Section. This challenged spending occurred solely because of the legislative enactment.

And Section 5 expressly orders the AOC to use Plaintiffs-Appellants' tax dollars to buy service credit in the retirement system for magistrates who resigned on religious grounds on or after October 6, 2014, the date *certiorari* was denied in *Bostic*, and were then reappointed after Senate Bill 2 became law.[10] Again, this spending to bridge the service gap of judicial officials with religious objections to *Bostic* was *ordered* by the General Assembly; Defendant-Appellee lacked any authority or discretion to use public funds in that manner but for the mandate of SB2.

Thus, Defendant-Appellee is compelled by these two sections of SB2 to use tax dollars to aid, promote, and endorse its religious purpose—to create and execute a religious exemption from the judicial oath of office and the duty to marry all citizens. There is nothing discretionary about Defendant-Appellee spending these funds.

Plaintiffs-Appellants' consciences are offended as taxpayers that the General Assembly has directed the use of their tax money to ensure that religious objections to the Fourteenth Amendment right of all persons to marry supersede every

[10] The specific reference to the date *Bostic* became the law of this Circuit should remove any doubt that the "sincerely held religious objection" to "marriage" championed by SB2 refers solely to religious objections to that Fourteenth Amendment ruling.

magistrates' Article VI oath to uphold the federal constitution. That type of legislatively-mandated spending to promote religion against their conscience gives Plaintiff-Appellants taxpayer standing.

### D. The Supreme Court's Road to *Flast* Supports Plaintiffs-Appellants' Taxpayer Standing Arguments.

To understand why Plaintiffs-Appellants have standing under *Flast* and *Winn*, and why *Valley Forge* is wholly inapposite to this case, a brief history of the evolution of taxpayer standing is necessary.

In the 1920s, the Supreme Court declared in the consolidated cases of *Massachusetts v. Mellon* and *Frothingham v. Mellon*, 262 U.S. 447 (1923), that federal taxpayers lacked standing to challenge the constitutionality of the Maternity Act, a federal law that distributed money to the states for programs to lower maternal and infant mortality. The Supreme Court held:

> If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned.

262 U.S. at 487. For many years, *Frothingham* stood as an absolute bar to federal taxpayer lawsuits.

But as time passed, confusion grew around the taxpayer standing issue, as municipal taxpayers had standing, as did some state taxpayers. For instance, in *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1 (1947), the Court addressed the

merits of a *local* taxpayer's First Amendment challenge to a New Jersey school district's practice of providing transportation for all students in the district, including those who attended Catholic schools. The Court ultimately upheld the challenged practice as being neutral as to religion, but addressed at length the importance of the First Amendment in our social contract and the right to bring such challenges:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government ... can pass laws which aid one religion, aid all religions, or prefer one religion over another … No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion … In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

*Id.* at 15-16.

The high court then addressed a *state* taxpayer challenge to a New Jersey statute that required the reading of Old Testament scripture each day in the public schools. *See Doremus v. Board of Ed. of Hawthorne*, 342 U.S. 429 (1952). The Court rejected any claim to taxpayer standing because the record was devoid of evidence that *any* money was spent or marked for this purpose,

> It is true that this Court found a justiciable controversy in *Everson v. Board of Education*. But *Everson* showed a measurable appropriation **or** *disbursement* of school-district funds occasioned solely by the activities complained of. This complaint does not.

*Doremus*, 342 U.S. 433-34 (internal citation omitted, emphasis added).

*Everson* and *Doremus*, with their assessments of municipal and state taxpayer standing, eventually led the Supreme Court to reconsider and find federal taxpayer standing for First Amendment challenges to legislative spending in *Flast v. Cohen*, 392 U.S. 83 (1968). In *Flast*, New York taxpayers filed a First Amendment challenge to federal legislation that distributed funds to state education agencies and then to local schools, including religious ones. A three-judge district court panel ruled 2-1 that *Frothingham* barred this First Amendment challenge to that federal program.

The Supreme Court reversed. It reviewed the then-tangled law on local, state, and federal taxpayer standing and analyzed at length of the meaning of Article III "justiciability." 392 U.S. at 91-101. The Court held that the "question of standing is related only to whether the party invoking federal court jurisdiction has 'a personal stake in the outcome of the controversy.'" *Id.* at 101. Such a "personal stake" could exist in certain taxpayer cases, and *Frothingham* was not an "absolute bar" to such suits. *Id.*

To articulate a standard for taxpayer standing, the Court explained two closely-related conditions necessary for a federal taxpayer claim: (1) that the taxpayer needs to challenge spending directly authorized by taxing and spending power, "a logical link between that status and the type of legislative enactment attacked;" and (2) a "nexus" that that "challenged enactment exceeds specific

constitutional limitations imposed upon the exercise of the congressional taxing and spending power." The plaintiffs in *Flast* satisfied both prongs. The lawsuit challenged spending by Congress, and that spending power was limited by the Establishment Clause of the First Amendment. *Id*. at 102-03.

The *Flast* Court relied on *Everson*'s holding on the importance of the First Amendment as a bulwark of religious freedom. Specifically, the Court cited to James Madison's "Memorial and Remonstrance Against Religious Assessments," included in the record in *Everson*, that was written and presented during debates about taxes for seminaries in the Virginia House of Delegates, which explained the deep distrust that

> 'the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.' The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general. The Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power.

*Id.* at 104 (internal citation omitted). Given that First Amendment limitation on spending to aid religion, the *Flast* plaintiffs had standing to challenge public spending to support religious schools.

Cases post-*Flast* applied that same principle to First Amendment challenges to *state* legislative spending.[11] *Lemon v. Kurtzman*, 403 U.S. 602 (1971), involved taxpayers' challenges to funding for religious schools by state legislatures in Rhode Island and Pennsylvania. 403 U.S. at 607, 609. In *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985), *overruled on other grounds by Agostini v. Felton*, 521 U.S. 203 (1997), the Court found *Flast* standing in a challenge to two state-funded education programs that allegedly aided religion, noting "the numerous cases in which we have adjudicated Establishment Clause challenges by state taxpayers to programs for aiding nonpublic schools." *Id.* at 380 n.5.[12] Thus, spending pursuant to state legislative enactments to expressly support one religious belief, like

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[11] The district court noted that Defendant-Appellee had argued, and it disagreed, that *Flast* did not apply to challenges to state spending, just federal. [JA 187] Plaintiffs-Appellants note these state spending cases in anticipation of that same argument.

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

SB2 does here, can be challenged by taxpayers like Plaintiffs-Appellants under the First Amendment.

### E. The District Court Misapplied Post-*Flast* Cases to Plaintiffs-Appellants' Taxpayer Standing Arguments.

While *Flast* involved a substantial amount of federal funding, the Supreme Court's latest taxpayer standing decision, *Winn*, made clear that the Madisonian "three pence" concern in *Flast* means that taxpayer standing exists to challenge even small amounts of legislative spending that support a religious purpose. *Winn*, 563 at 142. But rather than focus on *Flast* and *Winn*'s "three pence" language, the district court misapprehended the winnowing of taxpayer standing by decisions issued between *Flast* and *Winn* to bar Plaintiffs-Appellants' ability to challenge SB2. The district court missed the linkage in these cases that it is the *legislative mandate* to spend taxpayer dollars in furtherance of a religious purpose that confers taxpayer standing.

For instance, the district court cited *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974), to erroneously conclude that Plaintiffs-Appellants lacked standing because "[SB2] implicitly authorizes uses of funds by the North Carolina judicial branch, not the legislature." [JA 186] The court below missed the point of *Schlesinger*, and misapprehends the fact that nearly all legislated spending is "used" by administrative agencies.

In *Schlesinger*, the Supreme Court denied standing to an anti-war group's suit to enjoin a presidential order allowing members of Congress to serve in the military reserves. The case did not involve any spending, and the plaintiffs lacked standing because they "did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch." *Id.* at 228. Plaintiffs-Appellants here "challenge an enactment by the legislature"—SB2—and the spending it compelled.

The district court also relied upon *United States v. Richardson*, 418 U.S. 166 (1974) [JA 190], where the Court denied standing in a mandamus action to require the CIA to provide a public accounting of its budget. That suit was brought under Art. I, § 9, cl. 7, not the spending clause, and did not challenge congressional spending authority; rather, it sought to enforce the obligation to hold the CIA to account. *Id.* at 173-74.

Most importantly, the district court erroneously relied upon the next case in the *Flast* progeny—*Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982). [JA 182] There, the Supreme Court denied a claim to "citizen" standing to challenge a federal agency's decision to donate surplus property to a religious college under a 1942 law which authorized federal agencies to dispose of their property. *Id.* at 489-90. The case did not involve

*any* spending or *any* congressional involvement in the decision to donate the land to that school. *Flast* simply did not apply. *Id.* at 479-80.[13]

The same goes for the district court's reference to *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006), a case involving a taxpayer Commerce Clause challenge to state and city tax incentives to induce that car manufacturer to remain in Toledo, Ohio. The case did not involve any legislative spending and turned instead on asserting a *Flast*-analogous claim to Commerce Clause standing. The Supreme Court rejected any comparison of the Commerce Clause to the First Amendment and the "specific evils feared" in *Flast* from the "extraction and spending" of taxes, even if only "three pence," in favor of a religion. *Id.* at 347-48.

And finally, the district court also misapplied *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007), to Plaintiffs-Appellants' case. In *Hein*, the Court denied taxpayer standing to challenge President George W. Bush's "Faith Based Initiatives" program. Like *Schlesinger* and *Valley Forge*, but unlike this case, the *Hein* plaintiffs did not challenge a specific legislative enactment that spent funds in support of religion. Instead it challenged wholly discretionary executive spending that was independent of any legislative process. *Id.* at 608. Again, *Flast* did not apply.

[13] The district court's error in finding that *Valley Forge* was indistinguishable on the standing issue in this case is discussed in more detail below.

### F. Plaintiffs-Appellants Have *Flast* Taxpayer Standing under *Winn*.

*Schlesinger*, *Richardson*, *Valley Forge*, *Cuno*, and *Hein* all held that *Flast* standing only applies to challenges to legislative enactments that direct spending in favor of religion. Those cases led to *Winn.* The plaintiffs there filed a First Amendment challenge to an Arizona statute that authorized the creation of "student tuition organizations" or "STOs" and provided state income tax credits for donations to them. 563 U.S. at 129. The STOs then used the donations to provide scholarships to students to attend private and religious schools. 563 U.S. at 136. The program had generated hundreds of millions of dollars for religious schools, and had a significant impact on the state's education budget. *Id*. at 147, 158 (Kagan, J., dissenting).

The *Winn* majority, led by Justice Kennedy, found that plaintiffs lacked taxpayer standing under *Flast* because the challenged STO program involved a tax *credit*. It did not involve any legislative spending but spending by individual taxpayers instead. *Id.* at 141-43. That was the case even though the STO program was created by the legislature and generated substantial funding for religious schools. The dissent, authored by Justice Kagan, found this distinction contrived, given the regular use of tax credits in so many aspects of government budgeting, numerous prior decisions allowing challenges to tax credits, and the significant scope of the program. *Id.* at 148 (Kagan, J., dissenting). But the majority held

steadfast that the STOs did not involve legislative spending, so *Flast* did not apply to provide standing.

In retort to the dissent's arguments about the scope and budgetary impact of the STO program, the majority held that *Flast* standing did *not* turn on the amount of money involved, but on the act of spending taxed money, even if "three pence." It cited to Madison's concerns:

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

563 U.S. at 140 (internal citations and quotations omitted).

> Madison objected to the proposed assessment on the ground that it would coerce a form of religious devotion in violation of conscience. In Madison's view, government should not force a citizen to contribute three pence only of his property for the support of any one establishment. This Madisonian prohibition does not depend on the amount of property conscripted for sectarian ends. Any such taking, even one amounting to "three pence only," violates conscience.

*Id.* at 141 (internal citations and quotations omitted). This reliance on Madison's warnings about the dangers of government support of religion, even in small amounts, is consistent with the Court's earlier declaration in *Everson*:

> No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

330 U.S. at 15-16.

Plaintiffs-Appellants' challenge to SB2 falls squarely within the *Everson/Flast/Winn* doctrine that prohibits legislative spending, even in small amounts, that supports religion. They have standing under *Flast* and *Winn* to challenge SB2's edict to Defendant-Appellee to spend public funds to ensure that magistrates may subjugate their judicial oath by raising a "sincerely held religious objection." Plaintiffs-Appellants have taxpayer standing to challenge SB2 and the trial court erred in dismissing this case for lack of it.

### 1. There Is A "Logical Link" Between Plaintiffs-Appellants' Taxpayer Status and SB2.

Under *Winn* and *Flast*, Plaintiffs-Appellants' Complaint alleges facts showing a "logical link" between their taxpayer status and SB2. Plaintiffs-Appellants are taxpayers who challenge a legislative enactment that orders the spending of their tax dollars to support religion in violation of the Establishment Clause of the First Amendment. Section 1(c) necessarily requires the expenditure of tax dollars to pay for the transportation costs of traveling magistrates across jurisdictions. Section 5 explicitly requires the expenditure of tax dollars to pay for the retirement benefits of reinstated magistrates who resigned in light of *Bostic*.

### 2. There Is A "Nexus" Between Plaintiffs-Appellants' Taxpayer Status and the Alleged Establishment Clause Violation.

Plaintiffs-Appellants have also properly alleged that there is a nexus between their taxpayer status and their Establishment Clause claim. The *Flast* plaintiffs met

this second condition because they alleged that "Government funds had been spent on an outlay for religion in contravention of the Establishment Clause." *Id.* at 139. Plaintiffs-Appellants make the same allegation: that the spending the legislature has required under Sections 1(c) and 5 are for an expressly religious purpose—to ensure that magistrates can avoid their civil marriage duties based upon a religious objection to the Fourteenth Amendment's fundamental protection of marriage equality. Unlike Arizona's tax credit program in *Winn*, which did not involve any government spending, Sections 1(c) and 5 of SB2 direct Defendant-Appellee to spend Plaintiffs-Appellants' tax dollars to elevate religion over the judicial oath to uphold the constitution.

## II. This Case is Not Controlled by *Valley Forge*.

The district court erred fundamentally in holding that Plaintiffs-Appellants' taxpayer standing arguments were indistinguishable from those dismissed in *Valley Forge*. That case did not involve any legislative spending, like the legislative order here to spend public monies for a religious purpose. Indeed, the Third Circuit in *Valley Forge* had not even found *Flast* standing. The issue argued before the Supreme Court was whether the plaintiffs had "citizen" standing to raise First Amendment concerns about the discretionary gifting of public land to a religious institution. *Id.* at 466-70.

The district court made two fundamental errors: comparing the action of donating the land to the college under a 1942 statute to the challenge to SB2 here; and finding the challenged spending "incidental."

The court compared this action to *Valley Forge* by quoting from a footnote in that case that those plaintiffs "[did] not challenge the constitutionality of the [Act] itself, but rather a particular Executive Branch action arguably authorized by the Act." [JA 186] *Plaintiff-Appellants here do the exact opposite*. They challenge the constitutionality of "the [Act] itself" and the spending it commands.

The Complaint here alleges that (1) SB2's creation of a religious objection for magistrates violates Article VI of the federal constitution and the Establishment Clause of the First Amendment, and (2) the General Assembly, through SB2, has ordered Defendant-Appellee to use public funds to aid that religious purpose. In contrast, the *Valley Forge* plaintiffs challenged the Department of Health, Education, and Welfare's ("H.E.W") decision to *donate* federal land to a college run by the Assemblies of God church, based on the agency's discretionary determination that the college would put the land to "public use." *Id.* at 469. The H.E.W.'s "public use" decision did not involve any spending—it was a gift of land—let alone any legislative edict to spend funds in support of religion. The federal agency's authority to donate the surplus land arose under the Federal Property and Administrative

Services Act of 1949 an exercise of Congress' power under the Property Clause, Art. IV, § 3. *Id.* at 480.

The district court, though it acknowledged the "three pence" analysis in *Winn*, nonetheless concluded erroneously that the challenged spending in SB2 was merely incidental to a regulatory scheme, and thus not subject to *Flast* standing. The spending challenged here is small, but it is *essential* to effectuating SB2, not incidental to it. The movement of magistrates across jurisdictional lines is the key to SB2, a bulwark against due process and equal protection challenges to its elevation of religious belief above judicial duty. That the amount is small, even "three pence," does not make the spending "incidental." That is the central point of *Winn* that the district court missed.

The term "incidental" in *Flast* is attributed to *Doremus*. But a search of *Doremus* shows it did not actually use the phrase. Instead, the Court noted that the plaintiffs in *Doremus* failed to make any showing of spending. As quoted above:

> *Everson* showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of. This complaint does not.

*Doremus*, 342 U.S. 433-34. Here, Plaintiffs-Appellants have alleged specific, "measurable" spending under SB2 to bring a magistrate into McDowell County under Section 1(c) and to cover retirement benefits under Section 5. The district

court misapprehended *Winn* and misapplied *Valley Forge*, in calling such spending incidental to a regulatory scheme.

Plaintiffs-Appellants have standing challenge to SB2 squarely under *Flast v. Cohen*. As in *Flast*, Plaintiffs-Appellants challenge a legislative enactment that spends taxpayer funds in furtherance of a single religious view—the religious objection to the recognition and exercise of the constitutionally protected right to marry.

## CONCLUSION

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

## REQUEST FOR ORAL ARGUMENT

Plaintiffs-Appellants respectfully request that the Court hear oral argument in this case. This appeal raises serious constitutional issues regarding taxpayer standing, the Establishment Clause of the First Amendment, the Due Process Clause of the Fourteenth Amendment, and Article VI of the U.S. Constitution.

Date: November 21, 2016

Respectfully submitted,

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I hereby certify that on November 21, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all the registered CM/ECF users.

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