

No. 09-16404

United States Court of Appeals

For the Ninth Circuit

PATRICK M. McCOLLUM; et al.,

Plaintiffs-Appellants,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS
AND REHABILITATION; et al.,

Defendants-Appellees.

**Appeal from the District Court of the Northern District of California
D.C. Number 3:04-cv-03339-CRB**

**BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND
STATE, THE ANTI-DEFAMATION LEAGUE, THE AMERICAN JEWISH
COMMITTEE, THE INTERFAITH ALLIANCE, AND THE HINDU
AMERICAN FOUNDATION AS *AMICI CURIAE* ON BEHALF OF
PLAINTIFFS/APPELLANTS, IN SUPPORT OF REVERSAL**

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Amicus curiae Americans United for Separation of Church and State is a 501(c)(3) non-profit organization. Americans United has no parent corporation, and no publicly-held corporation owns ten percent or more of Americans United.

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Amicus curiae The Interfaith Alliance Foundation, which joins this *amicus* brief, is a 501(c)(3) non-profit organization. Its parent organization is The Interfaith Alliance, Inc., which is a 501(c)(4) organization. No publicly-held corporation owns ten percent or more of The Interfaith Alliance Foundation or The Interfaith Alliance, Inc.

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INTEREST OF THE *AMICI CURIAE*

Amici, who have filed a motion for leave to file this brief, are Americans United for Separation of Church and State, the Anti-Defamation League, the American Jewish Committee, the Interfaith Alliance, and the Hindu American Foundation. Descriptions of the *amici* appear in the appendix to this brief.

Although *amici* represent diverse religious and secular perspectives, they are united in the view that denying Patrick McCollum an opportunity to challenge the California Department of Corrections and Rehabilitation's Five Faiths Policy could undermine religious liberty by allowing the government to classify individuals on religious grounds without risking judicial scrutiny.

INTRODUCTION

Patrick McCollum's claimed injury is just the sort for which the Establishment Clause was enacted: An official state policy, paid for with tax dollars, treats members of some religions more favorably than adherents to other religions. Likewise, his challenge to a hiring policy that treats him disparately on account of his religion falls within the mainstay of Equal Protection Clause and Title VII litigation. Yet the district court erroneously denied McCollum even the chance to have his claims heard. Without taking a position on the ultimate merits of those claims, we write to advocate that McCollum be given an opportunity to air his grievance in court.

FACTUAL BACKGROUND

Plaintiff Patrick McCollum is a Wiccan clergy member. For the past five years, he has been seeking judicial review of the California Department of Corrections and Rehabilitation's Five Faiths Policy, which limits paid chaplain positions to persons who are Protestant, Catholic, Jewish, Muslim or Native American. McCollum is qualified for a CDCR chaplain position in all respects except for his religion. McCollum seeks, in this lawsuit, to challenge his exclusion

from the eligibility pool.¹ Whether the challenged policy emanates from religious favoritism, or instead from the application of religiously neutral criteria, is the question that this case presents.

The district court avoided this question altogether, concluding that McCollum lacked standing to sue. It held that McCollum lacks direct standing to bring his Establishment Clause, equal-protection, and Title VII claims because: (1) the provision of chaplains is a matter of inmates' rights, and (2) McCollum could not show that he would be hired even if a position were created for a Wiccan chaplain. *McCollum v. California*, No. C 04-03339 CRB, 2009 WL 393774, at *3-*4 (N.D. Cal. Feb. 13, 2009) (Establishment Clause); *McCollum v. California*, No. C 04-03339 CRB, 2006 WL 2263912, at *3-*4 (N.D. Cal. Aug. 8, 2006) (Equal Protection Clause); *McCollum*, 2006 WL 2263912, at *6-*7 (Title VII). The latter conclusion overlooks the settled principle of employment-discrimination law that an applicant need not show that he would have been hired but for the challenged discrimination. The former conclusion is equally misguided, for it disregards potential employees' interest in being free from employment discrimination — an interest inmates cannot assert. More than simply being legally erroneous, the

¹ Early on, McCollum was joined in his challenge by a number of Wiccan inmates in the CDCR system seeking greater accommodation of their rights under the Free Exercise Clause. *See McCollum v. California*, No. C 04-03339 CRB, 2009 WL 393774, at *1 (N.D. Cal. Feb. 13, 2009). The district court dealt separately with the inmates' claims. *See McCollum v. California*, No. C 04-03339 CRB, 2007 WL 4390616 (N.D. Cal. Dec. 13, 2007). This brief does not address those claims.

court's reasoning would inflict serious damage on the viability of all employment-discrimination claims.

The district court also denied McCollum taxpayer standing under the Establishment Clause, reasoning that he did not demonstrate that a victory would reduce the tax burden to the treasury. *McCollum*, 2009 WL 393774, at *4-*6. Requiring a plaintiff to show that the remedy he seeks would decrease the government's expenditures is inconsistent with the principles underlying taxpayer standing, conflicts with Supreme Court and Ninth Circuit precedent, and could potentially erode the taxpayer-standing doctrine altogether.

Whether the State needs to hire a Wiccan chaplain and, if so, whether McCollum is the right person for the job, may be unclear. What is clear, however, is that the district court erred in denying McCollum the chance to have his claims heard.

ARGUMENT

I. McCollum Has Direct Standing to Challenge the Five Faiths Policy under the Establishment Clause, the Equal Protection Clause, and Title VII.

McCollum's central claim strikes at the heart of the rights and freedoms that the Establishment Clause, the Equal Protection Clause, and Title VII were designed to guarantee. A state policy that classifies on the basis of religion (or any other protected ground) epitomizes disparate treatment that is properly subject to challenge by a member of the excluded group.

A. A challenge to a policy that classifies on its face is the archetypal employment-discrimination lawsuit.

The Supreme Court has recently reaffirmed that disparate-treatment cases “present ‘the most easily understood type of discrimination.’” *Ricci v. DeStefano*, 129 S. Ct. 2658, 2672 (2009) (quoting *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)). Thus, it is axiomatic that an otherwise-qualified member of a protected class who is treated less favorably by a hiring policy has standing to challenge that policy. In such cases, “[t]he question is not whether th[e] conduct was discriminatory but whether the [government] had a lawful justification.” *Id.* at 2674. The district court’s refusal to proceed to that question

was erroneous with respect to all three of the causes of action that McCollum lodges against the Five Faiths Policy.

Title VII. Title VII states quite simply that it is unlawful for an employer to “refuse to hire . . . any individual . . . because of such individual’s race, color, *religion*, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (emphasis added). The statute contemplates that enforcement actions would be brought by “employees or applicants for employment.” *See id.* at § 2000e-2(a)(2); *see also id.* at § 2000e-5(f)(3) (authorizing filing in any judicial district “in which the aggrieved person would have worked”). The CDCR plainly does not hire, and in fact prohibits its prisons from hiring, chaplains of any faith other than the five listed in its policy. On its face, then, the policy squarely implicates Title VII, and McCollum falls within the group of individuals qualified to file suit.

“A facially discriminatory policy is one which on its face applies less favorably to a protected group.” *Cnty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1048 (9th Cir. 2007); *accord Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 197-97 (1991) (policy that applied on its face only to women was facially discriminatory); *Ricci*, 129 S. Ct. at 2673-74 (decision not to certify test scores because of impact on racial minorities was itself a facially discriminatory policy under Title VII). More than just entitling the challenger to standing, a demonstration of a facial

classification is generally adequate to establish a *prima facie* case of intentional discrimination. *See Lowe v. City of Monrovia*, 775 F.2d 998, 1006-07 (9th Cir. 1985) (applicant for position with the police force established a *prima facie* case by showing that she was told not to apply because she was black). In such instances, no showing of a malevolent motive is required. *See Johnson Controls*, 499 U.S. at 199.

The Five Faiths Policy plainly makes a facial classification. Persons who adhere to any of the five listed religions are eligible for a position, while those who adhere to other religions are not. The Policy's application to McCollum thus bears all the hallmarks of a Title VII disparate-treatment claim: "an individual was singled out and treated less favorably than others similarly situated on account of race or any other criterion impermissible under the statute." *Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531, 537 (9th Cir. 1982).

To be sure, the CDCR may still present a lawful justification for its classification. *Ricci*, 129 S. Ct. at 2674. It may, for example, be able to demonstrate that membership in one of the five faiths is a "bona fide occupational qualification." *Cnty. House*, 490 F.3d at 1049 (citing *Johnson Controls*, 499 U.S. at 200). But it would be folly to suggest that a plaintiff who was "singled out and treated less favorably" (*Gay*, 694 F.2d at 537) based on his religion cannot put the CDCR to that task.

Equal Protection Clause. The same dynamic is at play in McCollum’s equal-protection claim. “At the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.” *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O’Connor, J., dissenting)) (internal quotation marks omitted). When government departs from that principle, a member of the excluded group has standing to challenge the classification. *See, e.g., Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (scrutinizing preference given to racial minorities during layoffs in challenge brought by non-minority plaintiffs, because government decisions “based on race or ethnic origin are reviewable under the Fourteenth Amendment”); *Bernal v. Fainter*, 467 U.S. 216, 219 (1984) (ruling on resident alien’s challenge to “a state law that discriminate[d] on the basis of alienage” by imposing a citizenship requirement for notary-public positions).

That is true when the classification is religious no less than when it is racial. In *Truth v. Kent School District*, 542 F.3d 634, 650-51 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2889 (2009), where a religious student group’s equal-protection claim arising from denial of its charter was dismissed on summary judgment, this Court reversed and remanded because the group would have a valid equal-protection claim by “demonstrat[ing] that it was singled out for unequal treatment

on the basis of religion.” And in *Rosenbaum v. City & County of San Francisco*, 484 F.3d 1142, 1152-57 (9th Cir. 2007), this Court adjudicated, under the Equal Protection Clause, Christian evangelists’ claim that noise permits were selectively issued and enforced based on religion. *See also United States v. Armstrong*, 517 U.S. 456, 464-65 (1996) (noting that a criminal defendant can bring an equal-protection challenge for selective prosecution when prosecutor’s decision was based on religion).² Having been “singled out for unequal treatment on the basis of religion” (*Truth*, 542 F.3d at 650-51), McCollum is entitled to his day in court.

Establishment Clause. The same principles apply under the Establishment Clause. “The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244 (1982); *see also Bd. of Educ. v. Grumet*, 512 U.S. 687, 703 (1994) (the “principle at the heart of the Establishment Clause [is] that government should not prefer one religion to another”). Accordingly, “[n]either [a State nor the federal government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a

² When a classification disadvantages a “suspect class,” courts “trea[t] [the classification] as presumptively invidious” and subject the classification to strict scrutiny. *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). Religion is one such “suspect” classification triggering strict scrutiny. *See, e.g., Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001) (“If the statute employs a suspect class (such as race, religion, or national origin) . . . then courts must apply strict scrutiny”); *Christian Sci. Reading Room Jointly Mandated v. City & County of S.F.*, 784 F.2d 1010, 1012 (9th Cir. 1986).

belief in the existence of God as against those religions founded on different beliefs.” *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).³

At issue in *Larson* were registration and reporting requirements imposed on religious organizations that received more than 50% of their funds from nonmembers. 456 U.S. at 231-32. Religious organizations that received less than 50% of their funds from nonmembers were exempt from the requirements. *Id.* The Supreme Court did not hesitate to reach the merits of an Establishment Clause claim brought by an organization that was disparately treated under the policy. *Id.* at 238-44. The Court held that the denominational distinction was subject to strict scrutiny — scrutiny that the distinction failed to withstand. *Id.* at 246-47, 251.

Likewise, in *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1250 (10th Cir. 2008), the Tenth Circuit entertained an Establishment Clause challenge to a scholarship program that distinguished among colleges along religious lines, allowing payments to students at some religious colleges but not others. The court

³ The historical roots and importance of this principle are clear: The Founders repeatedly emphasized the need to maintain strict governmental neutrality both among sects and in all matters touching on religion. *E.g.*, Letter from John Adams to Dr. Price (Apr. 8, 1785) (quoted in JOHN WITTE JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 49 (2d ed. 2005)) (“all men of all religions consistent with morals and property [must] enjoy equal liberty, . . . security of property . . . and an equal chance for honors and power”) (emphasis added).

did not question the ability of the plaintiff college, whose students were ineligible for the funds, to challenge the unfavorable treatment. *Id.* at 1258.

McCollum has standing to challenge the Five Faiths Policy under the Establishment Clause to the same extent that the plaintiff organizations had standing in *Larson* and *Colorado Christian*. Here, as in those cases, the State has chosen to treat members of some religions more favorably than members of other religions; and as a member of the group less favorably treated, McCollum has standing to challenge that choice.

* * *

In sum, the Equal Protection Clause, Title VII, and the Establishment Clause speak with one voice against the government’s drawing of lines along denominational lines. *See Colorado Christian*, 534 F.3d at 1257-58 (recognizing that Equal Protection, Free Exercise, and Establishment Clauses “draw on . . . common [anti-discrimination] principles”). And the courts routinely allow those placed outside the perimeter to challenge the exclusion.

B. None of the rationales advanced by the district court has merit.

The district court gave two reasons for denying McCollum direct standing to bring his discrimination claims. First, the court concluded that McCollum was merely litigating the rights of Wiccan inmates. *McCollum*, 2006 WL 2263912, at *4, *6. Second, it reasoned that McCollum was unable to demonstrate that he

would be hired even if a position were made available for Wiccan clergy.

McCollum, 2009 WL 393774, at *3-*4. Neither rationale holds up to scrutiny.

1. McCollum is pursuing his own right to be free from discrimination, not the inmates' right to religious exercise.

The fact that inmates may have standing to challenge the Five Faiths Policy does not mean that McCollum is barred from bringing his own claim. The Supreme Court “has not adopted a best litigant rule, nor has it created a hierarchy of injuries.” Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 474 (2007). In any event, McCollum’s rights and interests are different from those of Wiccan inmates.

In order to establish standing, a litigant need only demonstrate that he has been injured by a policy. He need not show that he is the individual *most* injured by that policy. Thus, in *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973), the Supreme Court recognized an environmental group’s standing to challenge a railroad surcharge, even though shippers who had to pay the surcharge were more directly affected by it. Here, McCollum easily satisfies the injury requirement by virtue of being ineligible for a publicly funded chaplain position on account of his religion.

But even if McCollum were required to show that he is the best plaintiff to bring his claims, he would be able to do so. Although the inmates could seek

additional accommodation for their religious practices, including greater access to clergy and materials, they are not in a position to seek equal access to employment. The inmates simply could not bring McCollum's Title VII claim, for they are not "employees or applicants for employment" covered by the statute. *See* 42 U.S.C. § 2000e-2(a)(2). The inmates would also likely be unable to raise McCollum's Equal Protection and Establishment Clause employment-discrimination claims for the same reason. A potential employee, excluded from consideration by a challenged policy, is the best (and perhaps the only) type of individual in a position to mount an employment-discrimination challenge.

2. Requiring McCollum to prove that he would have been hired but for the discriminatory policy is inconsistent with both well-settled law and logic.

The district court was equally misguided in denying McCollum standing on the ground that he could not prove that, were a chaplain position created, he would be selected to fill it. *McCollum*, 2009 WL 393774, at *3-*4. It is well-settled that, "for standing purposes, [a plaintiff] need not show that, had the hiring decision been untainted . . . , he would have obtained the position." *Tarpley v. Jeffers*, 96 F.3d 921, 923 (7th Cir. 1996). The injury in Title VII failure-to-hire cases is "the closing of the job opening to [the plaintiff] and the loss of opportunity even to compete for the position." *Ruggles v. Cal. Polytechnic State Univ.*, 797 F.2d 782, 786 (9th Cir. 1986). Likewise, "an equal protection plaintiff need not establish

standing by demonstrating that, but for the condition challenged as unconstitutional, she would have obtained a particular benefit.” *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 657 (9th Cir. 2002). Indeed, requiring plaintiffs to show that they would have been hired but for the discrimination would impose a “nearly insurmountable [burden] at the *prima facie* stage,” for that showing “involves factors better marshalled and presented by the defendants.” *Ruggles*, 797 F.2d at 786.⁴

* * *

In sum, the district court erred in failing to recognize McCollum’s standing to bring his Title VII, Equal Protection, and Establishment Clause challenges to the CDCR’s Five Faiths Policy. McCollum has no less standing to bring his claim than the women plaintiffs challenging their exclusion from certain jobs under Title VII in *Johnson Controls*, 499 U.S. at 198, the employees targeted for layoffs on account of their race in *Wygant*, 476 U.S. at 270-73, and the religious-organization

⁴In some cases a plaintiff does not need to show that he or she even *applied* for a position. *Teamsters*, 431 U.S. at 367. As the Supreme Court has explained:

The denial of Title VII relief on the ground that the claimant had not formally applied for the job could exclude from the Act’s coverage the victims of the most entrenched forms of discrimination. Victims of gross and pervasive discrimination could be denied relief precisely because the unlawful practices had been so successful as totally to deter job applications from members of minority groups.

Id.

plaintiffs in *Larson*, 456 U.S. at 246-47 — all of whom were subject to disparate treatment along suspect lines.

II. McCollum Has Standing as a Taxpayer to Challenge the Five Faiths Policy.

McCollum has taxpayer standing to challenge the religiously discriminatory manner in which the CDCR is using its funds. If he were to prevail, the funds that are restricted for payment to members of the five faiths would be redirected to religiously neutral uses. Requiring him to demonstrate that the government's outlays would be reduced or discontinued altogether would upend Supreme Court precedent and undermine Establishment Clause protections.

A. Taxpayer standing plays a unique and fundamental role in Establishment Clause jurisprudence.

Although taxpayers generally do not have standing to challenge governmental disbursements (*DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 343-45 (2000)), the courts have long drawn an exception for Establishment Clause cases in order to give effect to the Founders' vision in enacting that essential protection (*see id.* at 347-48; *Flast v. Cohen*, 392 U.S. 83, 103 (1968)).

“Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to

support religion in general.” *Flast*, 392 U.S. at 103. In arguing against a proposed Virginia tax to be sent directly to churches, James Madison, chief architect of the Religion Clauses of the First Amendment, famously observed, “[T]he 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.” *Id.* (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 WRITINGS OF JAMES MADISON 183, 186 (Hunt ed. 1901)). As the Supreme Court has stated:

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, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power.

Id. at 103-04.

In recognition of that history, the Supreme Court has long granted federal, state, and municipal taxpayers the right to challenge governmental expenditures alleged to violate the Establishment Clause. *See Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1010-11 (9th Cir. 2009), *reh’g en banc denied*, ___ F.3d ___, 2009 WL 3365936 (9th Cir. Oct. 21, 2009) (“[T]he Supreme Court has repeatedly decided Establishment Clause challenges brought by state taxpayers . . . without ever suggesting that such taxpayers lacked Article III standing.”); *Minn.*

Fed'n of Teachers v. Randall, 891 F.2d 1354, 1358 (8th Cir. 1989) (noting that “taxpayer standing was created to specifically permit the airing of establishment claims”); Note, *Taxpayer Suits*, 82 HARV. L. REV. 224, 229 (1968) (the *Flast* Court concluded that “coerced financial support [to religion] presents a specially severe injury to conscience” so that “taxpayers can be designated as properly adverse parties to seek judicial review”). Indeed, many of the Supreme Court’s seminal Establishment Clause cases have been heard on the grounds of taxpayer standing. See Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771, 815 (2003).

The High Court first recognized state and municipal taxpayer standing in *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952),⁵ holding that a taxpayer could demonstrate the “requisite special injury necessary” for standing by showing the expenditure of a measurable sum of public funds. The Court extended the doctrine to federal taxpayers in *Flast*. 392 U.S. at 104, 106. Since then, the Court has “consistently adhered to *Flast*.” See, e.g., *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988); *Cuno*, 547 U.S. at 348 (explaining taxpayer standing as emanating from the Founders’ fear that the taxing power “‘would be used to favor

⁵ An earlier case, *Everson v. Board of Education*, 330 U.S. 1 (1947), had involved municipal-taxpayer standing, but the Court there did not specifically address the propriety of such standing. See *id.* at 3 (mentioning without analysis that plaintiff sued “in his capacity as a district taxpayer”).

one religion over another or to support religion in general”) (quoting *Flast*, 392 U.S. at 103).⁶

In recognizing the ability of taxpayers to challenge governmental expenditures that advance some faiths over others, or that advance religion in general, the Supreme Court has remained faithful to the concerns of James Madison and his fellow Founders.

⁶ The Supreme Court has applied different standards to federal, state, and municipal taxpayers. Federal taxpayers can challenge only those expenditures that are specifically appropriated by Congress under the congressional taxing and spending power. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S 587, 608-09 (2007). A municipal taxpayer, on the other hand, need only “identif[y] a measurable sum of public funds being used to further a challenged activity.” *PLANS, Inc. v. Sacramento City Unified Sch. Dist.*, 319 F.3d 504, 506 (9th Cir. 2003) (citing *Doremus*, 342 U.S at 434-35 (1952)); *see also Cammack v. Waihee*, 932 F.2d 765, 770 (9th Cir. 1991).

Whether the federal or the municipal standard applies to state taxpayers remains unsettled. *Compare Pedreira v. Ky. Baptist Homes for Children, Inc.*, 579 F.3d 722, 732 (6th Cir. 2009) (municipal standard), *with Americans United for Separation of Church and State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 420 (8th Cir. 2007) (federal standard). The district court here assumed without analysis that state taxpayers must meet the federal-taxpayer standard. *McCollum*, 2009 WL 393774, at *5 (citing *Americans United*). This Court need not reach the question, since there is no dispute that *McCollum* meets even the more demanding federal standard. *See id.* (“the paid chaplain positions are specifically funded each year through the state budget process with a separate line item that must be approved by the California legislature”); *see id.* at *4 (the “chaplain positions are funded by state legislative enactments”).

B. Redirection of tax dollars is a remedy regularly sought by taxpayer-plaintiffs.

The district court rightly recognized the viability of taxpayer standing but held that the claims here fail because McCollum could not demonstrate that the burden on the treasury would be reduced if he were to prevail. *McCollum*, 2009 WL 393774, at *4-*6. Requiring such a demonstration by a taxpayer plaintiff not only violates the governing law, but threatens to swallow the doctrine of taxpayer standing wholesale.

Taxpayer plaintiffs have never been required to show that a victory would reduce the burden on the treasury. In *Bowen*, 487 U.S. at 593-94, the taxpayer plaintiffs challenged a statute that called for the disbursement of grants to nonprofit organizations for services and research regarding premarital adolescent sexual relations and pregnancy. The executive agency charged with selecting grantees chose to provide some of the funds to religiously affiliated organizations. *Id.* at 593-94, 597. The Supreme Court held that the plaintiffs had taxpayer standing to challenge the statute both on its face and as applied. *Id.* at 619-20. The Court further held that although the statute was facially constitutional, some grants — namely those to recipients that were pervasively sectarian or that used the funds for religious activities — were impermissible. *Id.* at 617-21. But because Congress had appropriated a set amount annually for the grants, the actual amount spent by the government would not decrease even if particular grants were disallowed. Rather,

the money would simply be redirected to other grantees for secular use. *See id.* at 622 (remedy would be “to insure that grants awarded . . . comply with the Constitution”).

Similarly, in *Tilton v. Richardson*, 403 U.S. 672, 675-76 (1971), the Court addressed a taxpayer challenge to federal grants issued to several religiously affiliated educational institutions as part of a construction-grant program. The Court upheld the grants to the religious colleges but struck down a 20-year sunset provision on a prohibition against religious use of facilities constructed with the grants. *See id.* at 682-83. The remedy produced no savings to the government: The institutions would still keep the grants, but their use of the money for religious purposes would forever be prohibited. *See id.* at 683.

This Circuit has likewise permitted taxpayer challenges that do not yield savings for the government. In *Cammack*, 932 F.2d at 769-72, this Court allowed taxpayers to challenge the State’s recognition of Good Friday as an official holiday for state employees. Eliminating the paid holiday would not have saved the State tax dollars: Salaries would have been paid whether employees had the day off or came to work.

Indeed, even an increase in taxpayer spending can be a proper result in a taxpayer challenge. In *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), the Supreme Court considered a secular magazine’s challenge to a sales-tax exemption

for religious periodicals. The State contended that the plaintiff-magazine lacked standing because the plaintiff would not receive a refund of its back taxes should the State choose to eliminate rather than extend the exemption. *Id.* at 7-8. The Court concluded that this argument would “effectively insulate underinclusive statutes from constitutional challenge.” *Id.* at 8 (citation omitted). The Court went on to say: “It is not for us to decide whether the correct response . . . to a finding that a state tax exemption is unconstitutional is to eliminate the exemption, to curtail it, to broaden it, or to invalidate the tax altogether.” *Id.* In other words, the injury that gave rise to standing was the disparate taxation — and that injury could be remedied either by withdrawing the exemption from religious periodicals (which would have benefited the treasury) or by extending the exemption to nonreligious periodicals (which would have resulted in a net loss to the treasury).

The federal courts’ refusal to look to the fiscal bottom line in taxpayer suits makes eminent sense given that a taxpayer plaintiff’s “grievance is not that [his] tax bills are too high, but that [his] tax dollars are being spent . . . in violation of the United States Constitution.” *Wilder v. Bernstein*, 645 F. Supp. 1292, 1311 (S.D.N.Y. 1986), *aff’d*, 848 F.2d 1338 (2d Cir. 1988). As the Supreme Court reaffirmed in *Cuno*, because the injury in an Establishment Clause case is the “very ‘extract[ion] and spend[ing]’ of ‘tax money’ in aid of religion, . . . an injunction against the spending would of course redress *that* injury, regardless of whether

lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally.” 547 U.S. at 348-49 (emphasis and alteration in original) (quoting *Flast*, 392 U.S. at 106); *see also Winn*, 562 F.3d at 1008 (noting that taxpayer plaintiff need not show reduction in tax bill). “In fact, obtaining an injunction to halt the government spending may never reduce taxes because the government could easily spend the public funds on a different project that does not violate federal law.” Staudt, *Taxpayers in Court*, *supra*, 52 EMORY L.J. at 776-77.

McCollum’s request that the State fund its chaplain positions in a religiously neutral fashion is properly made as a taxpayer. If McCollum were to prevail, the CDCR could elect either to allocate the same funds on a religiously neutral basis or to add clergy positions. For purposes of McCollum’s standing, it does not matter that the same amount of money would be expended in the end, or even that additional funds might be expended (*contra McCollum*, 2009 WL 393774, at *5), for either course would redress the taxpayer injury — the religiously discriminatory use of public funds.

CONCLUSION

McCollum has direct standing to bring his Title VII, equal-protection, and Establishment Clause challenges to the CDCR's facial classification. His status as a taxpayer gives him an additional basis to raise his Establishment Clause claim. He may ultimately not prevail on any of those claims, for the State may adequately defend the challenged classification. But he deserves his day in court. Barring him at the threshold is inconsistent with governing law and antidiscrimination principles.

Respectfully submitted,

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APPENDIX: DESCRIPTIONS OF THE AMICI

Americans United for Separation of Church and State is a national, nonsectarian, nonpartisan public-interest organization dedicated to defending the constitutional principles of religious liberty and separation of church and state. Americans United represents more than 120,000 members and supporters across the country, including thousands who reside in this circuit. Americans United's membership includes people who belong to a wide array of both majority and minority faiths, as well as people with no religious affiliation and nonbelievers. Since its founding in 1947, Americans United has served as a party, as counsel, or as an *amicus curiae* in scores of church-state cases before the United States Supreme Court, this Court, and other federal and state courts nationwide.

Organized in 1913 to combat racial, ethnic, and religious prejudice in the United States, the **Anti-Defamation League** (ADL) is today one of the world's leading organizations fighting anti-Semitism, hatred, and bigotry of all kinds. Decades of work on issues related to the religion clauses of the First Amendment, the Equal Protection Clause, and federal and state anti-discrimination laws have reinforced ADL's core belief in the importance of these values as a means of preserving religious freedom and protecting our democracy. Because standing is critically important to enforcing our fundamental rights under the constitution, ADL believes that taxpayer access to the courts is essential to preserving religious

liberty and democracy and that those seeking to fight discrimination deserve their day in court.

The American Jewish Committee (“AJC”), a national organization of approximately 175,000 members and supporters and 26 regional offices, including three in the State of California, was founded in 1906 to protect the civil and religious rights of Jews and is dedicated to the defense of religious rights and freedoms of all Americans. A staunch supporter of church-state separation as the surest guarantor of religious liberty, AJC believes it critically important that government not be permitted to favor some religions to the detriment of others and that public funds be used in a religiously neutral manner.

Interfaith Alliance celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance has 185,000 members across the country who come from 75 different religious traditions as well as from no religion. Interfaith Alliance supports people who believe their religious freedoms have been violated as a vital part of its work promoting and protecting a pluralistic democracy.

The **Hindu American Foundation** (HAF) is an advocacy group providing a progressive voice for over two million Hindu Americans. The Foundation interacts with and educates leaders in public policy, academia and the media about

Hinduism and issues concerning Hindus both domestically and internationally, including religious liberty; the portrayal of Hinduism; hate speech; hate crimes and human rights. HAF has both litigated and participated as *amicus curiae* in numerous cases involving issues of separation of church and state as well as the right to free exercise and subscribes to the view that all religions and adherents thereof should be treated equally and with dignity by the state.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. Proc. 32(a)(7)(C), the undersigned certifies as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. Proc. 32(a)(7)(B) because it contains 5,674 words, excluding the parts of the brief exempted by Fed. R. App. Proc. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. Proc. 32(a)(5) and the type style requirements of Fed. R. App. Proc. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word 2003.

Date: November 30, 2009

s/ Devin M. Cain
Devin M. Cain

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2009, I filed this **Brief of Amici Curiae** with the Clerk of the United States Court of Appeals for the Ninth Circuit using the online CM/ECF filing system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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