No. 16-2082

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

BRIEF FOR APPELLEE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 16-2082 Caption: Kay Ansley v. Marion Warren

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Marion Warren in his Official Capacity as Director of the North Carolina Administrative Office
(name of party/amicus)

of the Court

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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(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: Olga E. Vysotskaya de Brito Date: 09/29/2016

Counsel for: Appellee

CERTIFICATE OF SERVICE

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I certify that on Sept. 29, 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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STATEMENT OF THE ISSUES

I. Whether the district court correctly dismissed Plaintiffs' claims for their failure to meet the requirements of the taxpayer standing exception as articulated in *Flast v. Cohen*, 392 U.S. 83 (1968).

II. Whether the limited exception to unavailability of federal taxpayer standing announced in *Flast* extends to state taxpayers.

III. Whether federal courts lack personal jurisdiction over the Director of the North Carolina Administrative Office of Courts pursuant to 42 U.S.C. § 1983.

IV. Whether Plaintiffs failed to state a claim that Senate Bill 2 violates the First Amendment of the United States Constitution.

STATEMENT OF THE CASE

A. Introduction.

Following involved public debate, bans on same-sex marriage in North Carolina were declared to be unconstitutional in October 2014. *General Synod of the United Church of Christ v. Resinger*, 12 F. Supp. 3d 790 (W.D.N.C. 2014); *Fisher-Borne v. Smith*, 14 F. Supp. 3d 695 (M.D.N.C. 2014). Shortly thereafter, the United States Supreme Court ruled in *Obergefell v. Hodges* that same-sex couples must be allowed to join in civil marriage "on the same terms and conditions as opposite-sex couples," 576 U.S. __, __ , 135 S. Ct. 2584, 2605

(2015), and heralded that same-sex marriages were both valid personal and legal bonds between loving couples. At the same time, the opinion created a concern for some public officials who believed that their deeply held religious convictions prevented them from participating in same-sex marriage ceremonies.[1] When forced to choose between facing possible criminal sanctions, meeting the obligations of their State employment, and the obligations of their faith, some North Carolina officials resigned their positions. [See JA 25]

Cognizant of its constitutional duty to protect its citizens' freedom from religious discrimination, and the parallel duty to ensure that same-sex couples enjoy an unencumbered right to marry, the North Carolina General Assembly enacted Senate Bill 2, ("SB 2") ("Act To Allow Magistrates And Registers Of Deeds To Recuse Themselves From Performing Duties Related To Marriage Ceremonies Due To Sincerely Held Religious Objection"), 2015 N.C. ALS 75, 2015 N.C. Sess. Laws 75, 2015 N.C. Ch. 75, 2015 N.C. SB 2. [Add 1] That legislation was designed to ensure a level balance between reasonable accommodations for the sincerely held religious objections of public officials, and the right of same sex couples to marry. SB 2 neither facially nor substantively

[1] *See, e.g.*, Letter from Phil Berger et al. to Hon. John W. Smith (Oct. 24, 2014), http://christianactionleague.org/wp-content/Republican-Senators-Letter-to-AOC-Smith.pdf (last visited Jan. 11, 2017); Lyle Denniston, Contempt Hearing for Kentucky County Clerk, SCOTUSblog (Sep. 1, 2015), http://www.scotusblog.com/2015/09/contempt-hearing-for-kentucky-county-clerk (last visited Jan. 5, 2017).

targets same-sex couples, neither benefits nor endorses any particular set of religious beliefs, and does not serve to establish any religion. Instead, the legislation serves to protect the rights mandated by *Obergefell*, and the rights of civil servants to continue their state employment without regard to their religious beliefs.

B. Plaintiffs' Complaint.

Plaintiffs filed their Complaint on March 9, 2016, challenging the constitutionality of SB 2. [JA 15-38] Plaintiffs Ansley and McGaughey are residents of McDowell County, North Carolina. Plaintiffs Ansley and McGaughey are a same-sex couple who were married on October 14, 2014. [JA 15] Plaintiffs Carol and Thomas Person are residents of Moore County, North Carolina. Plaintiffs allege that Mr. and Mrs. Person are an interracial couple, who were married during the 1970s. [JA 16] Plaintiffs Penn and Goodman are a same-sex couple who, according to the Complaint, "live and work together and are engaged to be married." [JA 16]

Plaintiffs' Complaint does not allege that any couple in North Carolina has been denied marriage due to the passage of SB 2. [JA 15-38] Likewise, Plaintiffs do not allege that their own ability to marry or their religious convictions were impacted by SB 2. Nevertheless, Plaintiffs challenge the legislation as an unconstitutional establishment of religion, and simultaneously violation of equal-

protection and due-process guarantees. Yet, instead of adhering to the requirements of Article III of the U.S. Constitution to demonstrate an actual or imminent injury caused by SB 2, Plaintiffs seek to employ a criticized exception articulated in *Flast v. Cohen*, 392 U.S. 83 (1968)[2] in their endeavor to nullify the compromise struck by SB 2. [JA 17, 73-82; Pls Br] While Plaintiffs now criticize North Carolina laws that make State employees' records confidential, [Pls Br 8], their Complaint is silent as to the constitutionality of N.C. Gen. Stat. §126-22 et seq. which secures the privacy of State employee personnel records, including the confidentiality of a magistrate's personnel file. [JA 15-38]

In response to Plaintiffs' Complaint, Defendant filed a motion to dismiss on May 5, 2016. [JA 39] The district court granted Defendant's motion on September 20, 2016 (1) holding that "Plaintiffs have failed to make the required showing that they fall within the *Flast* exception to taxpayer standing[]" for Establishment Clause challenges, and (2) rejecting Plaintiffs' attempt to expand the *Flast* exception to their Fourteenth Amendment claims.[3] [JA 185, 190-191] Plaintiffs appealed from the judgment on September 21, 2016. [JA 194-196]

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[2] The exception announced in *Flast* has been the subject of significant controversy and criticism. *See, e.g., United States v. Richardson*, 418 U.S. 166, 173 (1974); *Spencer v. Kemna*, 523 U.S. 1, 11-12 (1998); *Lewis v. Casey*, 518 U.S. 343, 353, n. 3 (1996); *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 636 (2007).

[3] The district court appropriately concluded that "taxpayer standing is simply not an appropriate means for Plaintiffs to bring their Due Process and Equal Protection claims before the court." [JA 190-191]

On appeal, Plaintiffs abandon their Fourteenth Amendment claims by failing to articulate in their opening brief any standing grounds or any merits' argument for Count II and III of the Complaint. [JA 34-37, Pls Br] *See Yousefi v. INS*, 260 F.3d 318, 326 (4th Cir. 2001) (argument on appeal raised for the first time in reply brief is deemed abandoned by failing to raise it in opening brief); *Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n.6 (4th Cir. 1999) (claim not properly raised in appellant's opening brief is deemed abandoned). [4] Plaintiffs' appeal is focused solely on their First Amendment challenge to SB 2, and is grounded entirely in the asserted *Flast* taxpayer standing.

C. Legislative History And Substance Of SB 2.

SB 2 was filed in the North Carolina Senate on January 28, 2015, [JA 26], and ratified by the North Carolina General Assembly and presented to Governor Patrick McCrory for signature on May 28, 2015. [JA 28] Governor McCrory

[4] To the extent the Court considers the merits of Plaintiffs' argument for *Flast*-like standing for their Fourteenth Amendment claims, the Supreme Court in DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006) Hein, and Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125 (2011) narrowed the application of *Flast*, and has repeatedly refused to expand *Flast* beyond its limited Establishment Clause utility. [*see infra* 25-29] Most pointedly, the plaintiffs in *Cuno* sought to extend *Flast* to taxpayer challenges under the Commerce Clause. The Supreme Court unanimously rejected standing, holding that "a broad application of *Flast*'s exception to the general prohibition on taxpayer standing would be quite at odds with its narrow application in our precedent[.]" *Cuno*, 547 U.S. at 348 (citing *Flast*). Any assertion that *Flast* is so expansive that it accommodates taxpayer standing under Fourteenth Amendment is without precedent, contradicted by *Flast* itself, contrary to the Supreme Court precedent, cuts against doctrinal rationale behind standing requirements, and should be rejected by this Court.

vetoed SB 2 on May 28, 2015. [Id.] The General Assembly subsequently overrode the veto on June 11, 2015. [JA 29] SB 2 became effective on the same day.

SB 2 consists of six sections. Section 1 creates a new statute, N.C. Gen. Stat. § 51-5.5, which outlines the parameters of recusals available to magistrates, assistant registers of deeds, and deputy registers of deeds. As it relates to magistrate right to recusal, Section 1 of SB 2 delineates:

> Every magistrate has the right to *recuse from performing all lawful marriages* under this Chapter *based upon any sincerely held religious objection*. Such *recusal shall be upon notice to the chief district court judge* and is in effect for at least six months from the time delivered to the chief district court judge. The recusing magistrate may not perform any marriage under this Chapter until the recusal is rescinded in writing. *The chief district court judge shall ensure that all individuals issued a marriage license seeking to be married before a magistrate may marry*.

SB 2, sect 1; N.C. Gen. Stat. § 51-5.5(a) (emphasis added). The recusal prohibits the magistrate to perform any marriage; must be based upon sincerely held religious objections; and, may only take effect upon notice to the chief district court judge. Meanwhile, the legislation requires that the chief district court judge ensure that all individuals with valid marriage licenses are able to be married by a magistrate. N.C. Gen. Stat. § 51-5.5(d) further provides that no magistrate, assistant, or deputy register of deeds should be criminally charged or convicted due to his or her decision to exercise their right to recusal. In turn, Sections 2 and 3 of

SB 2 amended the Criminal Code by removing from the list of criminal offenses those charges that could otherwise be brought against magistrates and registers of deeds on the basis of their marriage recusals. N.C. Gen. Stat. §§ 14-230(b), 161-27(b).

Section 4 of SB 2 rewrote N.C. Gen. Stat. § 7A-292, which outlines the scope of powers assigned by the General Assembly to North Carolina magistrates. Significantly, that section assigned the authority to perform marriage ceremonies to magistrates *collectively*, instead of making it the duty of any individual magistrate:

> The authority granted to magistrates under G.S. 51‑1 [to solemnize marriage] and subdivision (a)(9) [to perform the marriage ceremony] *is a responsibility given collectively to the magistrates in a county and is not a duty imposed upon each individual magistrate.* The chief district court judge shall ensure that marriages before a magistrate are available to be performed at least a total of 10 hours per week, over at least three business days per week.

N.C. Gen. Stat. § 7A-292(b) (emphasis added). Section 5 of SB 2 further provided that any magistrate who resigned or was terminated from the office between October 6, 2014 and June 11, 2015, (the effective date of SB 2), may apply to fill "any vacant position of magistrate." Those individuals who were reappointed as magistrates within 90 days after June 11, 2015 were authorized to receive a service gap coverage pursuant to SB 2: (1) "the magistrate shall be considered to have been serving as a magistrate during that period for purposes of determining

continuous service, length of aggregate service, anniversary date, longevity pay rate, and the accrual of vacation and sick leave[,]" and (2) "the magistrate shall be considered to have been an employee … during the break in service" for retirement benefit purposes. SB 2, sect. 5. "The Judicial Department shall pay and submit both the employee and employer contributions to the Retirement Systems Division on behalf of the magistrate… ." SB 2, sect. 5(3). Section 6 simply specified that SB 2 "is effective when it becomes law."

SUMMARY OF ARGUMENT

The district court properly dismissed Plaintiffs' First and Fourteenth Amendment claims for a lack of standing when they failed to meet the prerequisites associated with the narrow exception to taxpayer standing unavailability as articulated in *Flast v. Cohen*, 392 U.S. 83 (1968), and as they otherwise "failed to allege that they have suffered any actual or concrete injury beyond a generalized grievance common to all taxpayers." *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 469 (1982). Plaintiffs' discontent with the regulatory scheme enacted through SB 2, which allows magistrates and registers of deeds to recuse themselves from participating in marriage proceedings, is insufficient to supplant Article III constitutional standing requirements. Even if Plaintiffs were able to satisfy the two-prong *Flast* standing test, the Supreme Court has never held that the *Flast*

exception to federal taxpayer standing unavailability extends to state taxpayers. Consistent with the Supreme Court's precedential trend toward narrowing the holding of *Flast*, this Circuit should reject Plaintiffs' urgings of such a doctrinal expansion.

In addition to Plaintiffs' standing shortcomings, the Director of AOC does not enforce SB 2 in a manner sufficient to confer personal jurisdiction pursuant to 42 U.S.C. § 1983. Finally, Plaintiffs simply failed to show in their Complaint that SB 2 amounts to more than a constitutionally permissible accommodation of North Carolina's magistrates' religious beliefs. This Court should further affirm the dismissal of Plaintiffs' Complaint on those alternate grounds.

STANDARD OF REVIEW

Defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), (2), (3) and (6) was premised upon lack of standing, want of personal jurisdiction, Plaintiffs' failure to state a claim, improper venue, and deficiencies in prudential standing. [JA 39] The district court found that Director Warren was a correct Defendant in this action and that the venue was proper in the Western District, but then dismissed Plaintiffs' Complaint for lack of standing. [JA 191] Additionally, because the district court concluded that constitutional standing was lacking, it did not reach the merits of Defendant's prudential standing argument. [JA 191 n.7] A prevailing party may ask an appellate court "to affirm a judgment on any ground

appearing in the record" without filing a cross-appeal. *Rosenruist-Gestao E Servicos LDA v. Virgin Enters.*, 511 F.3d 437, 447 (4th Cir. 2007). This court is then "entitled to affirm the court's judgment on any alternate grounds[.]" *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 536 (4th Cir. 2002); *Cook v. James*, 100 Fed. Appx. 178, 179 (4th Cir. 2004).

The Court reviews a district court's dismissal for lack of subject matter jurisdiction, personal jurisdiction, failure to state a claim, and for a lack of standing *de novo*. *See, e.g., Jordahl v. Democratic Party of Virginia*, 122 F.3d 192, 197 (4th Cir. 1997) (with regard to 12(b)(2)); *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006) (with regard to standing); *Young v. F.D.I.C.*, 103 F.3d 1180, 1190 (4th Cir. 1997) (with regard to 12(b)(1)); *Duckworth v. State Admin. Bd. of Election Laws*, 332 F.3d 769, 772 (4th Cir. 2003) (with regard to 12(b)(6)). The *de novo* standard applies to each of the arguments presented on appeal.

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO ESTABLISH STANDING UNDER *FLAST V. COHEN*, 392 U.S. 83 (1968), WHICH PERMITS ONLY LIMITED TAXPAYER CHALLENGES UNDER THE ESTABLISHMENT CLAUSE.

Pursuant to Article III of the U.S. Constitution, federal courts possess restricted powers to adjudicate certain categories of cases and controversies, and a party's standing to sue is "an integral component of the case or controversy requirement." *Miller*, 462 F.3d at 316. The existence of a plaintiff's standing to

commence a federal action is an essential facet of the case or controversy requirement, and "[t]hose who do not possess Art. III standing may not litigate as suitors in the courts of the United States." *Valley Forge*, 454 U.S. at 475-476.

Ordinarily, Article III standing exists only when a plaintiff "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors v. Village of Bellwoo*d, 441 U.S. 91, 99 (1979). If a plaintiff has not suffered an injury, there is no standing, the court is without jurisdiction to consider the action, *see Allen v. Wright*, 468 U.S. 737, 750-66 (1984), and the matter should then be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). *See, e.g., White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 459 (4th Cir. 2005). Plaintiffs bear the burden of establishing the requisite elements of standing, and must support each element of standing with sufficient factual allegations. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

A. Taxpayer Standing Is Generally Unavailable.

In 1923, the United States Supreme Court announced a rule that federal taxpayers had no standing to challenge the constitutionality of a federal statute. *Frothingham v. Mellon*, 262 U.S. 447 (1923) (decided with *Massachusetts v. Mellon*). Similarly, a state taxpayer's standing to sue was rejected as inconsistent with requirements of Article III of the U.S. Constitution. *Doremus v. Board of*

Education, 342 U.S. 429 (1952). In *Doremus*, state taxpayers challenged a New Jersey statute which provided "for the reading, without comment, of five verses of the Old Testament at the opening of each public-school day[,]" claiming a violation of the Establishment Clause. 342 U.S. at 430. The Supreme Court reiterated that "'[t]he party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement.'" *Id.* at 434 (citing *Frothingham*). The Supreme Court then dismissed the case for a lack of state taxpayer standing, opining that the matter raised religious differences as "a feigned issue of taxation," which failed to articulate a necessary direct and measurable fiscal injury to those plaintiffs-taxpayers. *Id.* at 435.

Neither *Frothingham*, nor *Doremus* have been reversed, and they continue to generally outline the boundaries of federal and state taxpayer standing. [*See infra* 25-28]. Indeed, this taxpayer standing unavailability comprehensively barred all taxpayer challenges to legislative enactments until 1968 when the Supreme Court was asked to "decide whether the *Frothingham* barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment." *Flast*, 392 U.S. at 85.

B. *Flast* Carved A Narrow Exception To Unavailability Of Taxpayer Standing.

In *Flast*, plaintiffs-federal taxpayers challenged the Elementary and Secondary Education Act of 1965 ("Act"), 20 U. S. C. §§ 241a et seq., 821 et seq. (1964 ed., Supp. II), alleging that federal funds had been and were being disbursed pursuant to the Act to finance "instruction in reading, arithmetic and other subjects and for guidance in religious and sectarian schools" and "the purchase of textbooks and instructional and library materials for use in religious and sectarian schools." *Flast*, 392 U.S. at 87. The Act mandated substantial and specific tax fund outlays by Congress under Art. I, § 8, as "[a]lmost $1,000,000,000 was appropriated to implement the Elementary and Secondary Education Act in 1965." *Flast*, at 103 n. 23.

The Supreme Court developed a two-part test to evaluate whether federal taxpayers have standing to sue in limited circumstances. Initially, because claimants are injured only by tax liability, such claimants may "be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution." *Flast*, 392 U.S. at 102. Additionally, a taxpayer is also required to "show that the challenged enactment exceeds specific constitutional limitations upon the exercise of the taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." *Id.* at 102-103. The court dubbed these aspects of taxpayer spending as "a logical link between the taxpayer status

and the type of the legislative enactment attacked," and "a nexus between that status and the precise nature of the constitutional infringement alleged." *Id.* at 103. The plaintiffs in *Flast* satisfied this test as "[their] constitutional challenge [was] made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare," *id*., at 103, and because the Establishment Clause, on which their complaint rested, was "a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8," *id.*, at 104. The Court cautioned that federal action remains improper "where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government[.]" *Id.* at 106.

Ultimately, while the "impenetrable barrier" to taxpayer lawsuits was slightly lowered through the narrow exception announced in *Flast*, "the Court made clear it was reaffirming the principle of *Frothingham* precluding a taxpayer's use of 'a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.'" *United States v. Richardson*, 418 U.S. 166, 173 (1974) (citing *Flast*). Principally and predominately, "the mere fact that a plaintiff is a taxpayer is not generally deemed sufficient to establish standing in federal court." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 130 (2011).

Flast provided a narrow path toward establishing taxpayer standing under particularly exacting and rigorous requirements. *See Bowen v. Kendrick*, 487 U.S. 589, 618 (1988); *Richardson*; and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974). In the instant matter, Plaintiffs now ground their claims of standing exclusively upon *Flast*. [JA 17 ¶ 6, 114-115] To do so, Plaintiffs must establish a "logical link" between their taxpayer status and SB 2, and "a nexus" between their taxpayer status and "the precise nature of the constitutional infringement alleged." *Flast*, at 102. Plaintiffs here have failed to meet either prong of this stringent test.

C. A Link Between Plaintiffs' Taxpayer Status And SB 2 Is Lacking.

Plaintiffs argue that their Complaint alleges "a 'logical link' between their taxpayer status and SB 2." [Pls Br 29] In doing so, Plaintiffs rely on sections 1(c) and 5 of the SB 2, which both arguably result in the incurrence of some cost – travel expenses for a magistrate to drive to a jurisdiction where every magistrate has recused himself, and a single, isolated service gap coverage payment for magistrates who were separated from employment, only to be later rehired. [JA 29-33] Plaintiffs assert that these costs establish the first test for taxpayer standing. [Pls Br 29] Plaintiffs are mistaken.

Flast carefully emphasized that to fit within parameters of the first prong, contested enactments may not be "essentially regulatory" programs, and that the

expenditure in that case "involve[d] a substantial expenditure of federal tax funds." *Flast*, at 102, 103, 122 n. 9 (Harlan, J., dissenting). *Flast* admonished that "[i]t will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." *Id*. Therefore, the standing doctrine established in *Flast* excludes the attack on any legislation which may cause expenditures that are "insubstantial," or cannot otherwise be characterized as a "spending" program.

SB 2 is neither a *bona fide* legislative spending program arising from the Legislature's taxing and spending powers, nor does it implicate any substantial expenditure of tax funds. In fact, instead of serving as a spending bill, SB 2's fiscal consequences are merely incidental to the central stated goal of the legislation attempting to accommodate a magistrate's "sincerely held religious objection," while ensuring compliance with applicable marriage laws. SB 2 is an evident exercise of the General Assembly's regulatory authority over the statutory scope of magistrate marriage duties in North Carolina, rather than an application of its taxing and spending powers. SB 2 contains no clause levying any new tax or authorizing any separate appropriation for the benefit of the Judicial Department. The Supreme Court confirmed in *Valley Forge* that short of specific extraction and spending pursuant to the Taxing and Spending Clause of Art. I, § 8, any other legislation does not meet the first prong of the *Flast* test. 454 U.S. at 480 (holding

that "the property transfer about which respondents complain was not an exercise of authority conferred by the Taxing and Spending Clause of Art. I, § 8. The authorizing legislation, the Federal Property and Administrative Services Act of 1949, was an evident exercise of Congress' power under the Property Clause, Art. IV, § 3, cl. 2."); *see also Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 592 (2007) (concluding that only "expenditures made pursuant to an express congressional mandate and a specific congressional appropriation" meet the *Flast* nexus requirement, and rejecting plaintiffs' claim that any "expenditure of government funds in violation of the Establishment Clause" is adequate.)

Although Plaintiffs alleged that some minimal amount of funds were expended pursuant to SB 2 to cover the gap in service credits and to ensure availability of a magistrate to perform a marriage in any given county, according to *Flast*, such spending is merely incidental and cannot serve as a basis for taxpayer standing. *Flast*, at 102. Plaintiffs have not pointed to the establishment of any specific appropriation of funds by the legislature designed to aid a particular religion or set of religious beliefs. Furthermore, even if funds were expended in the manner alleged by Plaintiffs, they were expended to ensure that magistrates were available to perform marriages, heterosexual and same-sex marriages alike, therby ensuring abidance with *Obergefell*. Plaintiffs cannot fairly allege an unconstitutional purpose behind that objective. Under these circumstances,

Plaintiffs have failed to logically tie their status as state taxpayers to SB 2.

D. The Claimed Nexus Between Plaintiffs' Taxpayer Status And The Alleged Establishment Clause Violation Does Not Meet The Second Prong Of The *Flast* Test.

Plaintiffs' argument that there is a nexus between their taxpayer status and the Establishment Clause challenge is equally unconvincing. [Pls Br 29-30] Plaintiffs Ansley and McGaughey were married on October 14, 2014, while Plaintiffs Carol Person and Thomas Person were married in the 1970's. Given the facts as alleged by Plaintiffs, SB 2 allowance of magistrate recusals from performing marriages has caused these couples no legally cognizable harm. Plaintiffs Penn and Goodman are not yet married, but have not alleged that they have applied for or been denied a marriage as a consequence of magistrate recusals. No Plaintiff claims that SB 2 has harmed any aspect of their respective religious convictions. As the Supreme Court noted, such generalized grievances do not establish standing:

> Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.

Valley Forge, 454 U.S. at 485-486. This Court similarly announced its disfavor of

standing arguments, which "convert the federal judiciary into a 'forum' for the vindication of … 'generalized grievances about the conduct of government.'" *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 271 (4th Cir. 2011) (citing *Flast*).

The mere fact that Plaintiffs' Complaint is couched in terms of violations of the Establishment Clause does not, by itself, establish the requisite nexus. To conclude otherwise requires looking past the facts actually alleged, and elevating the form over substance. Indeed, the Supreme Court specifically noted that, "a claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Valley Forge*, 454 U.S. at 485-486. In actuality, the nexus Plaintiffs strain to create between the alleged expenditure of funds and the governmental establishment of religion utterly fails when SB 2 and the Complaint are scrutinized in their totality. [JA 31-34]

Initially, it should be noted that Plaintiffs' dispute with the one-time retirement service gap measure codified in SB 2, sect. 5 cannot import standing as any such payment occurred in the past, is incapable of being characterized as a search for prospective relief, and therefore cannot properly serve as the basis for their 42 U.S.C. § 1983 claims against Defendant. *See, e.g., Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635, 645 (2002) (to comply with

Ex Parte Young, 209 U.S. 123 (1908) exception, a complaint must allege "an ongoing violation of federal law and seek[] relief properly characterized as prospective.") Moreover, SB 2 does not contain any spending and tax appropriations to inspire religious recusals, or to encourage any religious belief. On its face, the money allegedly expended under section 1(c) of SB 2 is disbursed not to establish or aid any religion, but to "ensure that a magistrate is available in that jurisdiction [where all magistrates have recused] for performance of marriages for the times required under G.S. 7A-292(b)." N.C. Gen. Stat. § 51-5.5. Even if this section could be characterized as a spending provision, naturally, Plaintiffs do not oppose the constitutionally-unassailable costs incurred by North Carolina in order to comply with *Obergefell's* mandate to extend civil marriage rights to same-sex couples. Their true, substantive disagreement is not with the SB 2, sect. 1(c), which arguably serves as a basis for the State's *de minimis* reimbursement of travel expenses for magistrates to travel to neighboring jurisdictions to ensure that all marriages continue to rightfully take place. However denominated, the essence of Plaintiffs' disagreement is with the regulatory provisions of SB 2, which alter the scope of magistrates' duties and permit magistrates to recuse themselves from performing marriages. Yet, *Flast* was not engineered to cure that type of taxpayer discontent, and *Flast* and its progeny do not permit a veiled attack upon the States' regulatory enactments under the guise of an Establishment Clause challenge.

Plaintiffs' struggles with forming the requisite nexus between their purported taxpayer liabilities and SB 2's alleged Establishment Clause infirmities were revealed during the district court hearing. Specifically, when questioned as to whether expansion of SB 2 to allow recusals based on any and all sincerely held objections, beyond religious objections, would alleviate Plaintiffs' concerns, Plaintiffs' counsel earnestly responded that it would not. [JA 120-123] As Plaintiffs' counsel went on to explain, their true concern was that SB 2 targets gay and lesbian couples. [Id.] That concern could present a classic Fourteenth Amendment challenge, where the *Flast* standing exception is unavailable.[5] *Hein*, 551 U.S. at 609.

The nonexistence of the requisite nexus is manifest when one compares the remedy sought by Plaintiffs, and the available remedy this Court may provide under *Flast*. *Flast* serves "as a specific bulwark" against government's unconstitutional "taxing and spending powers" for religious purposes pursuant to

[5] To make a traditional Fourteenth Amendment claim for due process and equal protection, Plaintiffs would be required to show that: "(1) [they have] suffered an "injury in fact" that is (a) concrete and particularized and, (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and, (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)).

James Madison's "three pence" concern,[6] cited by Plaintiffs in support of their standing argument. *Flast*, at 104. [Pls Br 22, 28] If this Court were to agree with Plaintiffs' argument that SB 2 unconstitutionally extracted and spent public funds in aid of religion, the proper remedy would be to enjoin the unconstitutional expenditure. In other words, the Court will prevent North Carolina from spending public funds to allow non-recusing magistrate to travel outside their respective jurisdictions to ensure that all marriages continue to occur in an orderly manner.[7] Of course, this is not the outcome Plaintiffs seek here. The logical incongruity between the remedies sought and the available remedies provided under *Flast* serves to further undermine Plaintiffs' asserted nexus between their taxpayer status and the alleged Establishment Clause violation. This Court should therefore affirm the district court dismissal of Plaintiffs' Complaint for lack of standing.

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[6] James Madison's concern, expressed in his Memorial and Remonstrance (*Memorial and Remonstrance against Religious Assessments*, 2 Writings of James Madison 186), serves to undercut rather than to support Plaintiffs' argument for extending *Flast* to this case. Unlike the instant case where the General Assembly does not establish any taxing program and does not support any church with its alleged spending, James Madison's concern about religious taxation arose "in 1785-86 when the Virginia legislative body was about to renew Virginia's *tax levy for the support of the established church*." *Everson v. Bd. of Educ.*, 330 U.S. 1, 11 (1947) (emphasis added). In his writing, Madison denounced governmental support of churches through taxes. *Flast*, at 108. Such a concern simply does not exist with SB 2.

[7] Plaintiffs misunderstand the legal significance of N.C. Gen. Stat. § 7A-171.1 (b).[Pls Br 17] On its face, the statute simply states "Notwithstanding G.S. § 138-6, a magistrate may not be reimbursed by the State for travel expenses incurred on official business within the county in which the magistrate resides."

II. *FLAST* DOES NOT LOWER THE STANDING THRESHOLD FOR STATE TAXPAYER CHALLENGES TO STATUTORY ENACTMENTS OF STATE LEGISLATURES.

In addition to failing *Flast* test itself, Plaintiffs provided no rationale for this Court to expand *Flast* standing exception to state taxpayers.

A. *Flast* Itself Offers No Support To The Contention That It Creates A State Taxpayer Exception.

As discussed *supra*, *Flast* addresses only federal legislation enacted under the Taxing and Spending Clause of Article I: there exists "no absolute bar in Article III to suits by *federal taxpayers challenging allegedly unconstitutional federal taxing and spending*." 392 U.S. at 101 (emphasis added). Federal taxpayers had sufficient standing to maintain their litigation in federal court since they contested "an exercise by Congress of its power under Article I, Section 8, to spend for the general welfare," "the challenged program involve[d] a substantial expenditure of federal tax funds," and the taxpayers alleged that the challenged expenditures violated the Establishment Clause. *Id.* at 103.

B. The Supreme Court Has Not Concluded That The *Flast* Exception To Taxpayer Standing Unavailability Should Apply To State Taxpayers.

Plaintiffs overemphasize the significance of several decisions that merely assume state taxpayer standing in Establishment Clause cases. [Pls Br 23, 23 n 12] Most of these cases were decided in 1970's during the confusing infancy of post-*Flast* inquiries into taxpayer standing. Since then, and especially in recent years,

the trend has been to narrow, rather than to expand the *Flast* exception. [*See infra* 25-29]

Notably, none of the cases cited by Plaintiffs considered and held that the *Flast* exception grants Article III standing to state taxpayers. In fact, while rejecting state taxpayer standing in *Winn*, the Supreme Court more recently concluded that the very same line of cases Plaintiffs rely upon here, (*i.e.*, *Mueller v. Allen*, 463 U.S. 388 (1983)*; Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Hunt v. McNair*, 413 U.S. 734 (1973)*; Walz v. Tax Comm'n of City of New York*, 397 U.S. 664 (1970) and others), [Pls Br 23, 23 n 11-12], amount to "nonbinding *sub silentio* holdings," which simply fail to address the precise jurisdictional defect the Defendant now asks the Court to review:

> The conclusion that the *Flast* exception is inapplicable at first may seem in tension with several earlier cases, all addressing Establishment Clause issues and all decided after *Flast*. … [T]hose cases do not mention standing and so are not contrary to the conclusion reached here. When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed. … The Court would risk error if it relied on assumptions that have gone unstated and unexamined.

Winn, 563 U.S. at 144-145 (citations omitted).

The line of cases relied upon by Plaintiffs do not create a general rule to open the gates to all Establishment Clause challenges by all taxpayers. *See*

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006); *see also Winn* at 149 (Kagan, J., dissenting). In none of these cases did the Court squarely reconcile state taxpayer standing under the "good-faith pocketbook" injury requirement announced in *Doremus*, 342 U.S. at 434,[8] with the two-prong test articulated in *Flast* and its progeny.

C. The Supreme Court's Recent Trend To Narrow, Rather Than To Expand, *Flast* Exception Weighs In Favor Of Rejecting State Taxpayer Standing.

In addition to relying on older cases that do not resolve the precise standing issue implicated here, Plaintiffs also misapprehend the import of *Cuno*, *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007), and *Winn*, regarding the issue of whether a state taxpayer possesses the necessary standing to bring an Establishment Clause challenge. [Pls Br 24-26] In *Cuno*, the Supreme Court closed a broader attempt to apply *Flast* to state taxpayers' standing, under Constitutional provisions that were asserted to be similar to Establishment Clause challenges. To establish standing in federal court, the *Cuno* taxpayer plaintiffs argued that their dormant Commerce Clause challenge to Ohio's investment tax credit was analogous to the Establishment Clause claim asserted by the plaintiffs in

[8] *Doremus* emphasized the importance of the presence of direct and particularized pocketbook injury to plaintiffs' standing by distinguishing *Everson v. Bd. Of Educ*. since "*Everson* showed a measurable appropriation or disbursement of school-district funds occasioned solely" by New Jersey statutory enactment authorizing disbursement of funds for student transportation to and from religious schools. 342 U.S. at 434.

Flast. The Court labeled that argument as "misguided" and refused "to transform federal courts into forums for taxpayers' generalized grievances." *Cuno*, 547 U.S. at 337. Concurring, Justice Ginsburg described the denial of federal taxpayer standing in *Cuno* as "solidly grounded" in *Frothingham* and *Doremus*. *Cuno*, 547 U.S. at 354-355. Justice Ginsburg also plainly opined that she "accept[s] . . . the nonjusticiability of *Frothingham*-type federal and state taxpayer suits in federal court . . ." *Cuno*, 547 U.S. at 355. Therefore, while not strictly an Establishment Clause case, the analysis employed in *Cuno* served to considerably contract the exception announced in *Flast*. *Cuno* narrowly described the alleged Establishment Clause injury in *Flast* as "the very 'extraction and spending' of 'tax money' in aid of religion[,]" and served to restrict the second prong of the *Flast* test to Establishment Clause violations only, holding that no other restriction on Article I, Section 8 implicated the same type of taxpayer interests. 547 U.S. at 348.

In *Hein*, the Supreme Court continued the narrowing of *Flast* by limiting taxpayer standing to challenges of express legislative spending. The Court again reiterated that "the payment of taxes is generally not enough to establish standing to challenge an action taken by the Federal Government." 551 U.S. at 593. The plurality in *Hein* then found that the *Flast* exception applied only to challenges directed at specific appropriations of money by Congress that were undertaken under the U.S. Const. art. I, § 8. The Court refused to find *Flast* standing in the

use of funds that have been appropriated for the general discretionary use by the Executive Branch, and rejected plaintiffs' claim "that, having paid lawfully collected taxes into the Federal Treasury at some point, they have a continuing, legally cognizable interest in ensuring that those funds are not used by the Government in a way that violates the Constitution." *Hein*, 551 U.S. at 599. The Court dismissed the taxpayer Establishment Clause challenge for lack of standing, reflecting a further quarantining of the holding in *Flast* to its particular facts.

Finally, Plaintiffs appear to misapprehend the significance of *Winn*. [Pls Br 27-29]. *Winn* involved a state taxpayer Establishment Clause challenge to Arizona's income tax credits to citizens contributing to school tuition organizations (STOs), including donations made to religious entities. *Winn* differs in several significant respects from the case at hand. For instance, *Winn* actually involved substantial and measurable tax savings for individuals who contributed money to religiously affiliated STOs. Additionally, tax credits for donations to STOs in *Winn* financially subsidized religious entities, rather than providing work accommodations to state employees. Notwithstanding the factual differences between *Winn* and the instant case, the majority in *Winn* again merely assumed a state taxpayer's assertion that the *Flast* test applied, but rejected that test as inapplicable on its own terms without considering whether *Flast* extended standing to state taxpayers. The majority found no state taxpayer standing in that case

because the taxpayers failed to establish that they fell within the exception to the rule for claims of extraction and spending of tax money in violation of the Establishment Clause.

Even though the taxpayers in *Winn* suggested that tax credits for donations to religious organizations have similar economic consequences as specific governmental appropriations in aid of religion, the Supreme Court refused to expand *Flast*, holding that "[t]he fact that respondents are state taxpayers does not give them standing to challenge the subsidies that [Ariz. Gen. Stat.] § 43-1089 allegedly provides to religious STOs." 563 U.S. at 145-146. In her dissent, Justice Kagan acknowledged that the majority and dissent "all agree" that there was a "general prohibition on taxpayer standing." *Winn* at 149. The significance of the plurality holding, and the acknowledgement of the dissent, is that the overarching rule that mere taxpayers do not possess standing, announced with *Frothingham* and *Doremus*, controlled the outcome in *Winn*. Finally, contrary to Plaintiffs' belief that *Winn* controls the issue of state taxpayer standing, the Court expressly warned against the sort of inference on which Plaintiffs' arguments are based. 563 U.S. at 145. ("The Court would risk error if it relied on [standing] assumptions that have gone unstated and unexamined.")

In general, the logic of the Supreme Court's recent taxpayer standing decisions of "leav[ing] *Flast* as [the Court] found it," *Hein*, 551 U.S. at 448,

prohibits *Flast* from being expanded to state taxpayers. Just as *Cuno* rejected an expansion of *Flast* to Commerce Clause cases, *Hein* rejected an expansion of *Flast* to anything other than specific legislative appropriations, and *Winn* rejected an expansion of *Flast* based on tax credits this Court should avoid an expansion of *Flast* to state taxpayers. State legislatures, much less leaders of State agencies, (such as Director of the North Carolina Administrative Office of the Courts), simply do not rely on "congressional power" under the Spending Clause – the express requirement of *Flast*. The narrowing and strict reasoning of *Flast*, *Cuno*, *Hein*, and *Winn* contrasts with the proposition to grant expansive Article III standing to hundreds of millions of state taxpayers. Limiting the exception of *Flast* to federal taxpayers would be consistent with the narrowing seen in the most recent Supreme Court cases, and would protect principles of federalism by encouraging state taxpayer to seek remedies for state legislative appropriations in state court.

D. The Doctrinal Reasoning Behind *Flast* Does Not Support State Taxpayer Standing.

Arguably, the *Flast* exception stands as a recognition by the Supreme Court that Establishment Clause challenges are unique from a standing perspective, as they are rarely based upon the particularized injury to a federal taxpayer required by *Lujan*. "*Flast v. Cohen* may also have been a reaction to what appeared at the time as an immutable political logjam that included unsuccessful efforts to confer

specific statutory grants of standing." *Richardson*, 418 U.S. at 195. In that respect, state taxpayer challenges to state legislative outlays are on a different footing than federal taxpayer attempts to challenge federal taxing and spending programs. Whereas without *Flast*, federal taxpayers would arguably be barred from Establishment Clause lawsuits by a strict interpretation of Article III of the U.S. Constitution, state taxpayers can and do resort to the aid of state courts featuring no Article III limitation upon federal judicial powers. Moreover, state courts can utilize a more relaxed approach to standing, and further incorporate additional protections afforded beyond those found in the U.S. Constitution. "The state courts, in the main, have remained faithful to the language of their own constitutional provisions designed to protect religious freedom and to separate religions and governments." *Everson*, 330 U.S. at 14.

Considerations of federalism should guard against granting standing to state taxpayers challenging a state's largely regulatory scheme. Plaintiffs demand of a federal ruling to disrupt the General Assembly's attempt of allocating duties among State's magistrates also potentially impacts the State's own, albeit *de minimus*, expenditures to effectuate these statutory duties which presents a separation of powers' concern. *See generally National League of Cities v. Usery*, 426 U.S. 833 (1976); 28 U.S.C. § 1341 (recognizing a state's power of taxation as a basic attribute of sovereignty); *First National Bank v. Board of County*

Commissioners, 264 U.S. 450 (1924) (calling for judicial restraint in matters involving state's fiscal affairs). Neither *Flast* nor *Everson*[9] undertook an analysis into this federal-state separation of powers' concern, and Plaintiffs articulated no reason why the *Flast* narrow federal taxpayer standing exception should apply to state taxpayers under the scenario presented here. Expanding the holding of *Flast* in the way suggested by Plaintiffs in the instant matter will push the federal courts beyond their "modest role" as envisioned under Article III, and will permit them to interfere with myriad issues entrusted to the states. *Cuno*, 547 U.S. at 346.

III. PLAINTIFFS FAILED TO ESTABLISH THAT DEFENDANT'S ADMINISTRATIVE DUTIES CONSTITUTE SUFFICIENT ENFORCEMENT OF SB 2, AS REQUIRED UNDER 42 U.S.C. § 1983.

Plaintiffs invoked 28 U.S.C. § 2201 and 42 U.S.C. § 1983 to establish this Court's jurisdiction over the claim, but have failed to allege facts sufficient to draw the necessary connection between the Defendant's general authority over AOC in his capacity as the agency's Director and the enforcement of SB 2.

Generally, the Eleventh Amendment of the United States Constitution bars suit against non-consenting States by private individuals in federal court. *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001). The doctrine of

[9] While *Everson* recognized incorporation of the Establishment Clause to the States, its analysis does not lend itself to any taxpayer standing question. Taxpayer standing simply did not exist at the time *Everson* was decided, (before *Flast*), and *Everson* simply does not speak to the issues implicated by this case.

Ex Parte Young, 209 U.S. 123, 159-60 (1908), provides an exception to Eleventh Amendment immunity where suit is brought against state officials and "(1) the violation for which relief is sought is an ongoing one, and (2) the relief sought is only prospective." *Republic of Paraguay v. Allen*, 134 F.3d 622, 627 (4th Cir.1998). "[A] court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective'" to determine if *Ex Parte Young* applies. *Verizon Md. Inc. v. PSC*, 535 U.S. 635, 645 (2002) (citation omitted).

In order for Defendant to be properly sued in his official capacity, Plaintiffs must allege facts demonstrating a "special relation" between Defendant and SB 2, meaning that Defendant's service as the Director of the AOC must feature proximity to SB 2, and Defendant must possess responsibility for that challenged State legislation. The "special relation" requirement serves to ensure that the proper party is before federal court, without interference with "the lawful discretion of state officials." *Ex parte Young*, 209 U.S. at 158-59.

This Court has made it abundantly clear that the "[g]eneral authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law." *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001) (quotation omitted). Absent a showing that Defendant enforces SB 2 to impermissibly aid magistrates' religious beliefs,

Plaintiffs have not demonstrated that Defendant has engaged in any ongoing violation of the U.S. Constitution. Consequently, Defendant would not qualify as a "person" for the purposes of this § 1983 action.

Plaintiffs did not allege any facts to show that Defendant personally refuses to abide by *Obergefell*'s mandate. Instead, Plaintiffs pled that SB 2 directs Defendant "as Director of the NCAOC … to use public funds for a religious purpose[,]" [JA 16-17], and that "Defendant Warren oversees and manages the administration of the judicial system and is well aware that the magistrates are judicial officials subject to these provisions of law as well as the judicial oath of office." [JA 21] Although delivered as factual allegations, these assertions are simply legal conclusions that fail to buttress Plaintiffs' contentions that Defendant enforces the provisions of SB 2, especially given the limited references in that provision to Defendant. The four-corners of Plaintiffs' Complaint reveal no actual factual allegation to support these conclusions. Moreover, Plaintiffs have offered no statute, code, rule, or regulation that validates their beliefs regarding the enforcement role played by Defendant. Indeed, by virtue of North Carolina's General Statutes and the State's Constitution, Defendant is not empowered to enforce the contested legislation. *See* N.C. Gen .Stat. §§ 7A-340, 7A-341, 7A-146. None of the referenced statutory duties provide the Director with the responsibility or authority to enforce SB 2. Instead, these statutes authorize the Director to

engage in general administrative activities designed to facilitate the administration of justice.

In contrast, a recent decision by the North Carolina Court of Appeals makes clear that Defendant possesses no statutory enforcement authorities over administration of magistrates' duties or SB 2 in the context of same-sex marriages. *Breedlove v. Warren*, __ N.C. App. __, 790 S.E.2d 893 (2016). With *Breedlove*, the North Carolina Court of Appeals concluded that plaintiffs-magistrates lacked standing to sue this Defendant over his role in the supervision of magistrates in the context of same-sex marriage enforcement:

> [North Carolina's] statutes, taken together, make it explicit that the appointment of magistrates is within the authority of the Senior Resident Superior Court Judge; that the suspension of magistrates is within the authority of the Chief District Court Judge; that the removal of magistrates is within the authority the Senior Resident Superior Court Judge, or any superior court judge holding court in the relevant county; and that administrative and supervisory authority over magistrates is vested in the Chief District Court Judge, pursuant to the general supervision of the Chief Justice of the Supreme Court. Nowhere in any of these statutes is AOC listed as a party with any authority to appoint, sanction, suspend, remove, or generally supervise magistrates.

790 S.E. 2d at 896-897. As *Breedlove* emphasizes, Defendant does not administer the conduct of recusing magistrates in any manner. His alleged role as chief supervisor and general administrator of AOC, (which by extension includes general AOC budget responsibilities), does not rise to a "special relationship" with

enforcement of SB 2. *See Lytle v. Griffith*, 240 F.3d 404 (4th Cir. 2001) (holding that Virginia Governor's general authority to enforce the laws of the Commonwealth was not sufficient to satisfy *Ex parte Young*); *Hutto v. S.C. Ret. Sys*., 773 F.3d 536 (4th Cir. 2014) (State treasury officials possessed only "general administration and responsibility for the proper operation" of the Retirement System, and therefore did not possess enforcement authority over the challenged State statute.)

Defendant's limited role vis-à-vis SB 2 stands in stark contrast to this Court's cases where a requisite connection for § 1983 challenge has been found. In *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324 (4th Cir. 2008), the personal involvement of the Director of the South Carolina Department of Transportation in the implementation of challenged transportation project warranted the conclusion that he possessed a sufficient connection to the alleged violation to be properly named as a defendant. *Id*. at 333. The instant action features no such deep involvement by Defendant, and Plaintiffs have made no such factual allegations in their complaint. Likewise, in *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), Virginia's State Registrar of Vital Records was sufficiently connected to the enforcement of Virginia's laws against same-sex marriage as to fall within the *Ex Parte Young* exception. In addition to the Registrar's statutory responsibilities over "the specific provisions at issue[,]" she actually conceded that she enforced

the specific state provisions at issue in that case. *Id*. at 371. Neither Defendant's concession nor specific statutory responsibilities over enforcement of SB 2 exist within the parameters of the present case.

Plaintiffs' Complaint fails to establish that Defendant has a connection with the enforcement of SB 2. The paucity of factual allegations to support Plaintiffs' legal contentions is fatal to their claim that Defendant has engaged in an ongoing violation of the federal Constitution sufficient to qualify as a "person" under 42 U.S.C. § 1983. These failures warranted dismissal of Plaintiffs' Complaint on alternate grounds, pursuant to Rules 12(b)(2) and (6) of the Federal Rules of Civil Procedure.

IV. PLAINTIFFS FAILED TO STATE A CLAIM FOR ALLEGED VIOLATIONS OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of the complaint. *Edwards v. City of Goldsboro*, 178 F.3d at 243 (4th Cir. 1999). A complaint that does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" must be dismissed. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The "court accepts all well-pled facts as true and construes these facts in the light most favorable to the plaintiff in weighing the legal sufficiency of the complaint," but does not consider "legal conclusions, elements of a cause of

action, . . . bare assertions devoid of factual enhancement[,] . . . unwarranted inferences, unreasonable conclusions, or arguments." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (citations omitted). The 12(b)(6) standard for dismissal requires the articulation of facts that, if true, demonstrate a claim that the plaintiff may plausibly be entitled to relief. *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (citations omitted).

On appeal, Plaintiffs briefly note that in addition to running afoul of the First Amendment, SB 2 also violates the Supremacy Clause, Article VI of the U.S. Constitution. [Pls Br 14-16] In doing so, however, Plaintiffs offer no argument for extending *Flast* styled standing to Supremacy Clause challenges by state taxpayers, no argument that they otherwise qualify under *Lujan* standing standards, and no argument, standards, or authorities to support Article VI claim. Further, review of the Plaintiffs' Complaint reflects that while they reference Article VI in that pleading, [JA 18, 27, 37], they premise their three claims for relief exclusively on the alleged violations of the First and Fourteenth Amendments. [JA 31-37] (Claim I (First Amendment – Establishment Clause Violation); Claim II (Fourteenth Amendment – Equal Protection Violation); Claim III (Fourteenth Amendment – Due Process Violation)). This Court should not consider the merits of Plaintiffs' deficient Article VI contention.

As to the claim based on the alleged violation of the Establishment Clause,

the relevant portions of the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Establishment Clause enshrines a principle of separation of church and state, while the Free Exercise Clause "requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). If either of the Clauses were taken to their logical, absolute extremes, they would necessarily clash with each other, without easily discernible compromise. *See Walz v. Tax Com. of New York*, 397 U.S. 664, 668-669 (1970). Plaintiffs' Complaint erroneously encourages this Court to embark on the path of extending the Establishment Clause such that any accommodation of religious beliefs in civil service pursuant to Free Exercise Clause, no matter how carefully considered, would violate the Establishment Clause's "wall of separation" between the church and state.

With their Brief to this Court, Plaintiffs make clear that they do not believe that any statutory accommodation of a magistrate's religious beliefs related to marriage is appropriate under any circumstance. [Pls Br 14-16] Plaintiffs' urgings are contrary to Supreme Court precedent, and this Court should therefore affirm the dismissal of Plaintiffs' Complaint for a failure to state a claim. Contrary to Plaintiffs' arguments, the Supreme Court has reiterated that "we have not, and do not, adhere to the principle that the Establishment Clause bars any and all

governmental preference for religion over irreligion." *Van Orden v. Perry*, 545 U.S. 677, 684 n. 3 (2005) (citations omitted).

It is a well-established principle that "the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987). Indeed, Title VII of the Civil Rights Act of 1964 accommodates the religious convictions of public employees. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75 (1977) (an employer has a "statutory obligation to make reasonable accommodation for the religious observances of its employees"); 42 U.S.C. § 2000(e)- 16a – 16(c); 42 U.S.C.A. § 2000e(a)-(b) (defining a covered "employer" to include "a person . . . who has fifteen or more employees," and defining "person" to include "governments"). "A public sector employer does not unconstitutionally 'support' an employee's religious beliefs by granting an accommodation." *Slater v. Douglas County*, 743 F. Supp. 2d 1188 (D. Or. 2010).

Supreme Court decisions recognize that "there is room for play in the joints" between the Clauses, *Walz*, at 669, and legitimate space for legislation touching upon religious subjects neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause. *See, e.g.*, *Burwell v. Hobby Lobby Stores*,

Inc., 134 S. Ct. 2751 (2014); *Cutter*, 544 U.S. at 719-720; *Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990); *Amos*, 483 U.S. at 329-330; *Sherbert v. Verner*, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting).[10] SB 2, on its face, falls within this permissible "room for play." Although the statute ensures that magistrates will not lose their jobs because of sincerely held religious convictions, it does not encourage magistrates to develop new religious convictions. Any implication that SB 2 encourages magistrates to adopt a particular religious belief or engage in religious exercise that they had not already embraced before SB 2's enactment does not square with the *Iqbal-Twombly* "facial plausibility" paradigm of Fed. R. Civ. P. 12(b)(6).

At the same time, the statute also considers the interests of all marrying couples by requiring "[t]he chief district court judge," upon effectuating a magistrate's recusal, to "ensure that all individuals . . . seeking to be married before a magistrate may marry." N.C. Gen. Stat. § 51-5.5(a). The U.S. Constitution does not prohibit the North Carolina General Assembly from shifting statutory duties over marriage proceedings from magistrates, in their individual

[10] The Supreme Court further reasoned that under circumstances, such as here, where a law facially amounts to a permissible legislative accommodation of religion which "fits within the corridor between the Religion Clauses," application of the *Lemon v. Kurtzman* test might not be necessary. *Cutter, at* 726-27 (referring to *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971)). *See also*, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001))

capacities, to magistrates collectively, and does not bar the State from accommodating the religious beliefs of government employees, as long as same-sex and different-sex couples continue to have equal access to marriage.

Although Plaintiffs failed to acknowledge that such permissible legislative space between the two Clauses of the First Amendment exists, they neglected to plead sufficient facts to show that SB 2's recusal provisions are anything other than a permissible governmental attempt to accommodate the religious beliefs of some North Carolina magistrates under binding Supreme Court's precedent. Indeed, Plaintiffs admit that SB 2 was carefully drafted to avoid an equal protection and due process problem. [Pls Br 16] Suppositions about the unwelcome nature and possible impact of SB 2 are legal inferences lacking the specific factual allegations necessary to survive a motion to dismiss premised upon 12(b)(6). [JA 31-33] Such inferences should be disregarded by the Court in its 12(b)(6) analysis. *Nemet Chevrolet*. "Threadbare recitals . . . , supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. What is left outside of such recitals may be contemplatively interesting, but are ultimately academic questions of law that federal courts have refrained from adjudicating as "'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Valley Forge*, 454 U.S. at 474-475. This Court should affirm the dismissal of Plaintiffs' claims

for failure to state a cognizable claim.

CONCLUSION

For all the foregoing reasons, Defendant respectfully asks this Court to affirm the district court's dismissal of Plaintiffs' Complaint.

Respectfully submitted, this the 17th day of January, 2017.

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Dated: January 17, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this the 17th day of January 2017 I electronically filed the foregoing **BRIEF FOR APPELLEE** 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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ADDENDUM INDEX

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2015

SESSION LAW 2015-75
SENATE BILL 2

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.

The General Assembly of North Carolina enacts:

SECTION 1. Article 1 of Chapter 51 of the General Statutes is amended by adding a new section to read:

"**§ 51-5.5. Recusal of certain public officials.**

(a) Every magistrate has the right to recuse from performing all lawful marriages under this Chapter based upon any sincerely held religious objection. Such recusal shall be upon notice to the chief district court judge and is in effect for at least six months from the time delivered to the chief district court judge. The recusing magistrate may not perform any marriage under this Chapter until the recusal is rescinded in writing. The chief district court judge shall ensure that all individuals issued a marriage license seeking to be married before a magistrate may marry.

(b) Every assistant register of deeds and deputy register of deeds has the right to recuse from issuing all lawful marriage licenses under this Chapter based upon any sincerely held religious objection. Such recusal shall be upon notice to the register of deeds and is in effect for at least six months from the time delivered to the register of deeds. The recusing assistant or deputy register may not issue any marriage license until the recusal is rescinded in writing. The register of deeds shall ensure for all applicants for marriage licenses to be issued a license upon satisfaction of the requirements as set forth in Article 2 of this Chapter.

(c) If, and only if, all magistrates in a jurisdiction have recused under subsection (a) of this section, the chief district court judge shall notify the Administrative Office of the Courts. The Administrative Office of the Courts shall ensure that a magistrate is available in that jurisdiction for performance of marriages for the times required under G.S. 7A-292(b). Only for the duration of the time the Administrative Office of the Courts has not designated a magistrate to perform marriages in that jurisdiction, the chief district court judge or such other district court judge as may be designated by the chief district court judge shall be deemed a magistrate for the purposes of performing marriages under this Chapter.

(d) No magistrate, assistant register of deeds, or deputy register of deeds may be charged or convicted under G.S. 14-230 or G.S. 161-27, or subjected to a disciplinary action, due to a good-faith recusal under this section."

SECTION 2. G.S. 14-230 reads as rewritten:

"**§ 14-230. Willfully failing to discharge duties.**

(a) If any clerk of any court of record, sheriff, magistrate, school board member, county commissioner, county surveyor, coroner, treasurer, or official of any of the State institutions, or of any county, city or town, shall willfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a Class 1 misdemeanor. If it shall be proved that such officer, after his qualification, willfully and corruptly omitted, neglected or refused to discharge any of the duties of his office, or willfully and corruptly violated his oath of office according to the true intent and meaning thereof, such officer shall be guilty of misbehavior in office, and shall be punished by removal therefrom under the sentence of the court as a part of the punishment for the offense.

(b) No magistrate recusing in accordance with G.S. 51-5.5 may be charged under this section for recusal to perform marriages in accordance with Chapter 51 of the General Statutes."

SECTION 3. G.S. 161-27 reads as rewritten:

"**§ 161-27. Register of deeds failing to discharge duties; penalty.**

(a) If any register of deeds fails to perform any of the duties imposed or authorized by law, he shall be guilty of a Class 1 misdemeanor, and he shall be removed from office.

(b) No assistant register of deeds or deputy register of deeds recusing in accordance with G.S. 51-5.5 may be charged under this section for recusal to issue marriage licenses in accordance with Chapter 51 of the General Statutes."

SECTION 4. G.S. 7A-292 reads as rewritten:

"**§ 7A-292. Additional powers of magistrates.**

(a) In addition to the jurisdiction and powers assigned in this Chapter to the magistrate in civil and criminal actions, each magistrate has the following additional powers:

(1) To administer oaths.
(2) To punish for direct criminal contempt subject to the limitations contained in Chapter 5A of the General Statutes of North Carolina.
(3) When authorized by the chief district judge, to take depositions and examinations before trial.
(4) To issue subpoenas and capiases valid throughout the county.
(5) To take affidavits for the verification of pleadings.
(6) To issue writs of habeas corpus ad testificandum, as provided in G.S. 17-41.
(7) To assign a year's allowance to the surviving spouse and a child's allowance to the children as provided in Chapter 30, Article 4, of the General Statutes.
(8) To take acknowledgments of instruments, as provided in G.S. 47-1.
(9) To perform the marriage ceremony, as provided in G.S. 51-1.
(10) To take acknowledgment of a written contract or separation agreement between husband and wife.
(11) Repealed by Session Laws 1973, c. 503, s. 9.
(12) To assess contribution for damages or for work done on a dam, canal, or ditch, as provided in G.S. 156-15.
(13) Repealed by Session Laws 1973, c. 503, s. 9.
(14) To accept the filing of complaints and to issue summons pursuant to Article 4 of Chapter 42A of the General Statutes in expedited eviction proceedings when the office of the clerk of superior court is closed.
(15) When authorized by the chief district judge, as permitted in G.S. 7A-146(11), to provide for appointment of counsel pursuant to Article 36 of this Chapter.
(16) To appoint an umpire to determine motor vehicle liability policy diminution in value, as provided in G.S. 20-279.21(d1).

(b) The authority granted to magistrates under G.S. 51-1 and subdivision (a)(9) of this section is a responsibility given collectively to the magistrates in a county and is not a duty imposed upon each individual magistrate. The chief district court judge shall ensure that marriages before a magistrate are available to be performed at least a total of 10 hours per week, over at least three business days per week."

SECTION 5. Any magistrate who resigned, or was terminated from, his or her office between October 6, 2014, and the effective date of this act may apply to fill any vacant position of magistrate. Notwithstanding any other provision of law, with respect to any magistrate who resigned his or her office between October 6, 2014, and the effective date of this act, and who is subsequently reappointed as a magistrate within 90 days after the effective date of this act:

(1) For the period of time between that magistrate's resignation and his or her resumption of service upon reappointment, the magistrate shall not receive salary or other compensation and shall not earn leave. However, the magistrate shall be considered to have been serving as a magistrate during that period for purposes of determining continuous service, length of aggregate service, anniversary date, longevity pay rate, and the accrual of vacation and sick leave.

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(2) For purposes of the Teachers' and State Employees' Retirement System and the calculation of benefits under that System, (i) the magistrate shall be considered to have been an employee under G.S. 135-1(10) during the break in service, (ii) the period of the break in service shall be counted as membership service under G.S. 135-1(14), and (iii) the magistrate shall be deemed to have earned compensation under G.S. 135-1(7a) during the break in service at the rate of compensation that would have applied had there been no break in service.

(3) The Judicial Department shall pay and submit both the employee and employer contributions to the Retirement Systems Division on behalf of the magistrate as though that magistrate had been in active service during the period in question. Those contributions shall be submitted within 90 days of the magistrate's resumption of service and shall not be subject to penalties or interest if submitted within that 90-day period.

SECTION 6. This act is effective when it becomes law.

In the General Assembly read three times and ratified this the 28th day of May, 2015.

s/ Daniel J. Forest
President of the Senate

s/ Tim Moore
Speaker of the House of Representatives

VETO Pat McCrory
Governor

Became law notwithstanding the objections of the Governor at 10:10 a.m. this 11th day of June, 2015.

s/ Denise Weeks
House Principal Clerk

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