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Supreme Court Hears Oral Arguments in *Hein v. Freedom From Religion Foundation*

By Dominique Ludvigson

On Wednesday, February 28th, the Supreme Court heard oral arguments in *Hein v. Freedom From Religion Foundation* (FFRF). Paul Clement, the Solicitor General of the United States, argued on behalf of the Administration. Andrew Pincus of the Washington law firm of Mayer, Brown, Rowe & Maw appeared for FFRF.

The case marked the first opportunity for the newly-constituted Roberts Court to take up a complicated issue of church-state separation. The question in *Hein* focused on a narrow, jurisdictional matter—whether or not taxpayers have the appropriate legal standing to challenge the activities of the White House Office and agency Centers for Faith-Based and Community Initiatives where they have suffered no direct legal injury. The Court was not asked to rule on the constitutionality of the Faith-Based and Community Initiative.

The Supreme Court announced a general rule against taxpayer standing to challenge federal expenditures for policies and programs with which taxpayers disagree in the 1923 case, *Frothingham v. Mellon*. Normally, a plaintiff would have to show some special injury to himself before he would be able to make a claim in federal court. But in 1968, the Warren Court created an exception to that general rule where religion cases are concerned. That case, *Flast v. Cohen*, gave citizen taxpayers the right to challenge government programs and spending they claim violate the Establishment Clause of the First Amendment simply by virtue of being taxpayers.

In *Hein*, the Administration argued that separation of powers principles require a narrow interpretation of the *Flast* exception. A broad interpretation of *Flast* would “create a roving license for any one of the

more than 180 million taxpayers in the United States to challenge any action of the executive branch that offends that individual's own view” of church-state separation. Alternatively, the government urged the Court to abandon the *Flast* exception altogether if it could not reconcile the decision with its other standing case precedent. FFRF, on the other hand, asserted an extremely broad view of the *Flast* exception, arguing that taxpayers should have standing so long as the challenged expenditure is “fairly traceable to the alleged unconstitutional conduct.”

The lawsuit initially arose in 2004, when Madison, Wisconsin-based FFRF challenged the Faith-Based and Community Initiative in federal court, claiming that its White House conferences, along with speeches made by government officials at the conferences, created

a climate that impermissibly advanced religion. A lower court judge threw the case out, saying plaintiffs lacked the requisite legal standing to pursue their claims in court. However, a three-judge panel of the Seventh Circuit Court of Appeals, in a 2-1 opinion written by Judge Richard Posner, overturned the district court’s holding and reinstated the lawsuit. The White House asked that the case be heard before all eleven Court of Appeals judges. The Circuit Court refused, but several of its judges urged the Supreme Court to become involved in the case. The



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government then petitioned the Supreme Court to hear the case and certiorari was granted late last year.

If the Supreme Court narrows standing or eliminates the *Flast v. Cohen* exception altogether, the case will

be dismissed. If it permits standing, the parties will proceed to trial on the merits in federal district court to decide the constitutionality of the White House conferences. A decision in the case is expected in June, before the Court adjourns for summer recess.

Jay Hein Interviewed on Washington Watch Weekly

Tony Perkins, President of the Family Research Council, recently interviewed Director Jay Hein on the Washington Watch Weekly radio program. Mr. Perkins and Director Hein discussed the origin and future of the President’s Faith-Based and Community Initiative.

During the interview, Director Hein described the President’s vision of government and civil society and, specifically, the President’s desire for private and voluntary organizations to become better partners in the delivery of social services. He highlighted the work of 11 Federal agencies with Centers for Faith-Based and Community Initiatives as well as the efforts of many cities and states to implement the Initiative at the local level. He also drew attention to conferences hosted across the country by the White House and explained that, for future conferences, the White House will partner more closely with states to

provide technical assistance targeted at local issues. Additionally, Director Hein talked about the new “Compassion in Action” Roundtables, launched this past January at the White House. The monthly roundtable events feature organizations and policies that are addressing critical social needs and consider what the Federal government is doing to expand and support the work of the faith-based and community groups actively engaged in serving their neighbors and communities.

To listen to the interview, visit <http://www.frc.org/get.cfm?i=WR07B03>. It begins 9 minutes and 15 seconds into the broadcast and lasts approximately 7 minutes and 25 seconds.



Economic Development Administration Telecast

On February 21st, the Department of Commerce’s Economic Development Administration (EDA) sponsored a telecast for organizations interested in launching small businesses to aid in economic development. The telecast focused on the impact of faith-based and community organizations on economic development. Hosted by Sandy Baruah, Assistant Secretary of Commerce for Economic Development and featuring Director Jay Hein and Senator Kit Bond of Missouri, the telecast

highlighted William Factory Small Business Incubator, located in Tacoma, Washington, and the St. Patrick Center, located in St. Louis, Missouri. Both organizations have received awards for Excellence in Economic Development in Community and Faith-Based Social Entrepreneurship. To view the telecast, visit: www.narc.org/events/telecasts/faith-based-economic-development.html.

“Since 2001 EDA has invested over \$150 million in 192 projects, that support faith-based and community initiatives; \$45 million of that amount is invested in faith-based projects alone. They are creating over 60,000 jobs across America and are saving an additional 20,000 jobs that currently exist. And most importantly, these jobs help leverage over \$3.5 billion in private sector investment.”

Sandy Baruah
Assistant Secretary of Commerce

Capacity Building Grant Opportunity

The U.S. Department of Health and Human Services Administration for Children and Families (ACF) announced applications are being accepted for new grants under the Compassion Capital Fund (CCF) Demonstration Program. ACF will award \$16.5 million through CCF to experienced intermediaries to deliver capacity-building services to faith-based and community organizations in five critical areas: (1) leadership development; (2) organizational development; (3) program development; (4) revenue development strategies; and (5) community engagement. Capacity building activities are

designed to increase an organization's sustainability and effectiveness, enhance its ability to provide social services and create collaborations to better serve those most in need. Applications are due May 16, 2007.



To learn more about this grant opportunity, visit: www.acf.dhhs.gov/grants/open/HHS-2007-ACF-OCS-EJ-0035.html.

FAITH-BASED AND COMMUNITY INITIATIVE THE WEEK AHEAD Monday, March 5, 2007 | Saturday, March 10, 2007

Wednesday, March 7

WHITE HOUSE: Jay Hein gives opening remarks at the Family Strengthening and National Service Conference entitled, "Empowering Youth, Family and Community."
Hampton, Virginia

DEPARTMENT OF LABOR: Jedd Medefind addresses the National Institute of Corrections' National Reentry Conference.
Charlotte, North Carolina

DEPARTMENT OF HEALTH AND HUMAN SERVICES: CFBCI hosts an At-Risk Youth workshop at the Department of Education's technical assistance workshop.
Dearborn, Michigan

Thursday, March 8

DEPARTMENT OF LABOR: Jedd Medefind honors "Turning the Tide" as Department of Labor CFBCI's March "Champion of Compassion."
Philadelphia, Pennsylvania