No. 06-157

In the Supreme Court of the United States

JAY F. HEIN, DIRECTOR, WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, ET AL., PETITIONERS

v.

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether taxpayers have standing under Article III of the Constitution to challenge, on Establishment Clause grounds, the actions of Executive Branch officials pursuant to an Executive Order, where the conduct at issue is financed only indirectly through general appropriations legislation and no funds are disbursed to any institutions or individuals outside the government.

PARTIES TO THE PROCEEDINGS

The petitioners, who were sued in their official capacity as defendants-appellees below, are Jay F. Hein, Director of the White House Office of Faith-Based and Community Initiatives; Steven McFarland, Director of the Department of Justice Task Force for Faith-Based and Community Initiatives; Jedd Medefind, Director of the Department of Labor Center for Faith-Based and Community Initiatives; C. Gregory Morris, Director of the Department of Health and Human Services Center for Faith-Based and Community Initiatives; Robert Bogart, Director of the Department of Housing and Urban Development Center for Faith-Based and Community Initiatives; Shayam K. Menon, Director of the Department of Education Center for Faith-Based and Community Initiatives; Therese Lyons, Director of the Department of Agriculture Center for Faith-Based and Community Initiatives; and Terri Hasdorff, Director of the Agency for International Development Center for Faith-Based and Community Initiatives.[*]

Rod Paige, the former Secretary of the United States Department of Education, was a defendant-appellee below, but is not a petitioner in this Court. Elaine L. Chao, Secretary of the United States Department of Labor, Tommy G. Thompson, the former Secretary of the United States Department of Health and Human Services, Alberto R. Gonzales, Attorney General of the United States, Dr. Julie Gerberding, Director of the Centers for Disease Control and Prevention, and David Caprara, the former Director of Faith-Based and

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[*] Pursuant to Supreme Court Rule 35(3), each of the petitioners has been substituted for their predecessors in office, who were the originally named defendants.

Community Initiatives at the Corporation for National and Community Service, were originally named as defendants, but were dismissed from the case in district court and were not parties to the appeal. Neither they nor their successors are parties before this Court.

The respondents, who were plaintiffs-appellants below, are Anne Nicol Gaylor, Annie Laurie Gaylor, Dan Barker, and the Freedom from Religion Foundation, Inc., a non-stock corporation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 433 F.3d 989. The order of the court of appeals denying the government's petition for rehearing and rehearing en banc (Pet. App. 58a-66a), with the accompanying opinions concurring in and dissenting from the denial of rehearing en banc, is reported at 447 F.3d 988. The opinion of the district court denying in part the government's motion to dismiss the complaint (Pet. App. 27a-35a), and the final judgment of the district court (Pet. App. 36a-57a), are unreported.

JURISDICTION

The court of appeals entered its judgment on January 13, 2006. A petition for rehearing was denied on May 3, 2006 (Pet. App. 59a). The petition for a writ of certiorari was filed on August 1, 2006, and the petition was granted on December 1, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2, of the United States Constitution provides, in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; * * * [and] to Controversies to which the United States shall be a Party.

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

STATEMENT

1. Pursuant to Executive Order 13,199, the President created the White House Office of Faith-Based and Community Initiatives (White House Office) within the Executive Office of the President. Exec. Order No. 13,199, 3 C.F.R. § 2, at 752 (2002). The President recognized that "[f]aith-based and other community organizations are indispensable in meeting the needs of poor Americans and distressed neighborhoods." *Id.* § 1, at 752. The President created the White House Office to ensure that "private and charitable community groups,

including religious ones, should have the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve valid public purposes" and adhere to "the bedrock principles of pluralism, nondiscrimination, evenhandedness, and neutrality." *Ibid.* In particular, the President charged the White House Office "to eliminate unnecessary legislative, regulatory, and other bureaucratic barriers that impede effective faith-based and other community efforts to solve social problems." *Id.* § 3(j), at 753.

In addition to the White House Office, the President created Executive Department Centers for Faith-Based and Community Initiatives (agency Centers) in a number of federal agencies.[1] The purpose of those Centers is "to coordinate department efforts to eliminate regulatory, contracting, and other programmatic obstacles to the participation of faith-based and other community organizations in the provision of social services." Exec. Order No. 13,198, 3 C.F.R. § 2, at 750 (2002).

The President undertook that initiative to ensure that faith-based organizations "[w]ould be eligible to compete for Federal financial assistance used to support social service programs and to participate fully in the social service programs supported with Federal financial assistance without impairing their independence, autonomy, expression, or religious character," as long as they "do[] not use direct Federal financial assistance to support any inherently religious activities, such as worship, religious instruction, or proselytization." Exec. Order No. 13,279, 3 C.F.R. § 2(f), at 260 (2003). At the

[1] See, *e.g.*, Exec. Order No. 13,198, 3 C.F.R. at 750 (2002); Exec. Order No. 13,280, 3 C.F.R. at 262 (2003); Exec. Order No. 13,342, 3 C.F.R. at 180 (2005); Exec. Order No. 13,397, 71 Fed. Reg. 12,275 (2006).

same time, the President directed that "[n]o organization should be discriminated against on the basis of religion or religious belief in the administration of Federal financial assistance under social service programs," *id.* § 2(c), at 260, and that "[a]ll organizations that receive Federal financial assistance under social services programs should be prohibited from discrimination against beneficiaries or potential beneficiaries of the social services programs on the basis of religion or religious belief," *id.* § 2(d), at 260.

2. Respondents, the Freedom from Religion Foundation and three of its members, filed this action against the Director of the White House Office and the Directors of agency Centers at the Departments of Justice, Labor, Health and Human Services, Housing and Urban Development, Education, and Agriculture, as well as the Director of the Center at the Agency for International Development. Pet. App. 67a-80a.[2] Respondents contended that petitioners violated the Establishment Clause by organizing national and regional conferences at which, according to the allegations of the complaint, faith-based organizations "are singled out as being particularly worthy of federal funding" and "the belief in God is extolled as distinguishing the claimed effectiveness of faith-based social services." *Id.* at 73a para. 32. Respondents further alleged that petitioners "engage in myriad activities, such as making public appearances and giving speeches, throughout the United States, intended to promote and advocate for funding for faith-

[2] Initially, respondents also sued David Caprara, the former Director of Faith-Based and Community Initiatives at the Corporation for National and Community Service, as well as the Director of the Center for Disease Control and Prevention, but they subsequently voluntarily dismissed the claims against those defendants. Pet. App. 37a.

based organizations," *id.* at 77a para. 41, and that "Congressional appropriations [are] used to support the activities of the defendants," *id.* at 79a para. 45.

Respondents' complaint sought a declaratory judgment that petitioners' activities violate the Establishment Clause, an injunction prohibiting further "use [of] appropriations in violation of the Establishment Clause," and "an order requiring the defendants to establish rules, regulations, prohibitions, standards and oversight to ensure that future appropriations" comport with the Establishment Clause. Pet. App. 80a. Respondents asserted standing based solely on their status as federal taxpayers. *Id.* at 68a-69a paras. 4-10.[3]

The district court dismissed the claims against petitioners for lack of standing. Pet. App. 27a-35a. The district court held that federal taxpayer standing is limited to Establishment Clause challenges to the constitutionality of "exercises of congressional power under the taxing and spending clause of Art. I, § 8," *id.* at 31a (quoting *Flast* v. *Cohen*, 392 U.S. 83, 102 (1968)), and that the challenged activities of the petitioners—organizing conferences and making speeches—"are not 'exercises of congressional power,'" *id.* at 34a. More specifically, the court found that the Director of the White House Office acts "at the President's request and on the President's behalf," and that none of the petitioners is "charged with the administration of a congressional program." *Id.* at 33a-34a. "The view that federal taxpayers as such should be permitted to bring Establishment Clause chal-

[3] The Freedom from Religion Foundation itself is a non-profit entity that is exempt from paying federal income taxes under 26 U.S.C. 501(c)(3), but it may assert standing on behalf of its taxpaying members. See *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976).

lenges to all Executive Branch actions on the grounds that those actions are funded by congressional appropriations," the district court concluded, "has never been accepted by a majority of the Supreme Court." *Id.* at 33a.[4]

3. A divided court of appeals vacated the district court's order of dismissal and remanded. Pet. App. 1a-26a.

a. The majority held that "[t]axpayers have standing to challenge an executive-branch program, alleged to promote religion, * * * even if the program was created entirely within the executive branch, as by Presidential executive order," as long as the actions of Executive Branch officials are "financed by a congressional appropriation." Pet. App. 16a. In the majority's view, taxpayer standing extends beyond legislative programs that allocate federal funding to third parties, and includes challenges to any Executive Branch activity funded "from appropriations for the general administrative expenses, over which the President and other executive branch officials have a degree of discretionary

[4] The district court dismissed respondents' claim against former Secretary of Education Rod Paige, and the court of appeals affirmed that dismissal. Pet. App. 14a-15a, 35a. Respondents' amended complaint also asserted claims that the heads of certain federal agencies had violated the Establishment Clause by "directly and preferentially fund[ing]" particular programs that allegedly "integrate religion as a substantive and integral component" of their activities. *Id.* at 77a-79a paras. 42, 43. Respondents voluntarily dismissed all of those claims with the exception of two programs administered by the Secretary of Health and Human Services. The district court subsequently granted summary judgment for the Secretary with respect to one of those claims, and for respondents with respect to the other. *Id.* at 56a-57a. Neither of those decisions was appealed, and they are not at issue before this Court. *Id.* at 14a-15a.

power," as opposed to funding "from, say, voluntary donations by private citizens." *Id.* at 11a.

The court accordingly held that taxpayers have standing even if "there is no statutory program" enacted by Congress under its taxing and spending power, Pet. App. 11a, and even if the taxpayer is "unable to identify the appropriations that fund the [challenged activity]," *id.* at 10a. In the majority's view, taxpayer standing requires only that the plaintiff's "objection [be] to a program for which money undoubtedly is 'appropriated,' albeit by executive officials from discretionary funds handed them by Congress, rather than by Congress directly." *Id.* at 12a. Extending taxpayer standing in that manner was appropriate, the court reasoned, because "there is so much that executive officials could do to promote religion in ways forbidden by the establishment clause." *Id.* at 13a.

b. Judge Ripple dissented. Pet. App. 16a-26a. In his view, allowing a taxpayer to challenge the conduct of Executive Branch officials "so long as that conduct was financed in some manner by a congressional appropriation" reflects a "dramatic expansion of current standing doctrine," *id.* at 16a, and "cuts the concept of taxpayer standing loose from its moorings," *id.* at 19a. Judge Ripple criticized the majority for abandoning the "narrow terms" on which this Court had recognized taxpayer standing, *id.* at 19a, which had required that a "plaintiff must bring an attack against a disbursement of public funds made in the exercise of *Congress*' taxing and spending power," *id.* at 22a. The majority's approach, Judge Ripple observed, now "makes virtually any executive action subject to taxpayer suit" because "[t]he executive can do nothing without general budget appropriations from Congress." *Id.* at 24a.

4. By a vote of 7-4, the court of appeals denied the government's petition for rehearing en banc. The four judges who dissented from the denial of rehearing en banc noted that the panel's decision to extend taxpayer standing to suits that "challenge[] *executive* action," Pet. App. 64a, "has serious implications for judicial governance," and "departs significantly from established Supreme Court precedent." *Id.* at 63a (Ripple, J., joined by Manion, Kanne, and Sykes, JJ.). In the dissent's view, "the Supreme Court, in making an exception to usual standing rules for taxpayers has drawn a very clean line in order to avoid making the federal courts a forum for all sorts of complaints about the conduct of governmental affairs on no basis other than citizen standing." *Id.* at 65a. The majority's decision contravened that "very clear line," the dissent concluded, because "[s]ome expenditure of governmental funds is necessary for every executive action." *Ibid.*

Chief Judge Flaum concurred in the denial of rehearing en banc. Pet. App. 59a. He explained that his vote "is not premised upon a conclusion that the taxpayer standing issue * * * is free from doubt," but from his conviction that "the obvious tension which has evolved in this area of jurisprudence * * * can only be resolved by the Supreme Court." *Ibid.*

Judge Easterbrook also concurred in the denial of rehearing en banc. Pet. App. 59a-62a. While he acknowledged "considerable force in Judge Ripple's dissent," *id.* at 59a, Judge Easterbrook shared Chief Judge Flaum's view that only this Court can resolve the existing "tension" in the law governing taxpayer standing, *id.* at 62a.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that taxpayer standing extends to challenges to Executive Branch activities that are the product of the President's exercise of his Article II power, not Congress's exercise of its taxing and spending power, and that do not themselves entail the disbursement of any federal funds outside the government. That decision—which equates the mere presence of appropriated federal funds with taxpayer standing—defies this Court's precedent, fundamentally alters the constitutional allocation of powers, and, if allowed to stand, would unravel this Court's taxpayer-standing doctrine.

In *Frothingham* v. *Mellon*, 262 U.S. 447 (1923), this Court held that Article III and the separation of powers generally prohibit taxpayer standing. In the forty years since the Court recognized a narrow exception to that prohibition in *Flast* v. *Cohen*, 392 U.S. 83 (1968), this Court's cases have consistently cabined taxpayer standing, permitting only Establishment Clause challenges to *Congress's* exercise of its legislative taxing and spending power through direct appropriations to fund the activities of churches and other sectarian institutions. Three times, taxpayers have asked this Court to expand their standing to include challenges to executive officials' conduct of the Executive Branch's business. Three times, this Court has refused. See *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *United States* v. *Richardson*, 418 U.S. 166 (1974).

This Court should reverse the court of appeals' decision for the same reason that it rebuffed those efforts.

Article III requires plaintiffs to have suffered an individualized and concrete injury-in-fact. A taxpayer's interest in the disposition of funds in the Treasury generally does not satisfy that test. In *Flast*, this Court carved out a narrow and rigidly defined exception under the Establishment Clause to that general prohibition on taxpayer standing. But the Court did so not because the Establishment Clause writ large demanded peculiar enforcement mechanisms. The Court did so because it discerned in the history of the Establishment Clause a distinct and individualized Article III injury to religious liberty when Congress uses its taxing and spending power to move money from the pockets of taxpayers into the pockets of sectarian entities for their religious use. Thus, even in the Establishment Clause context, the Court has made clear that taxpayers have standing only to challenge congressional action that inflicts "a direct dollars-and-cents injury," and not simply to assert "a religious difference" with governmental policies. *Doremus* v. *Board of Educ.*, 342 U.S. 429, 434 (1952)

Flast represents the high-water mark of this Court's modern taxpayer-standing jurisprudence, and this Court has repeatedly refused to extend *Flast* beyond its four corners. The court of appeals' decision, if allowed to stand, would fundamentally distend *Flast* by unmooring the doctrine from its historic roots and constitutional justification. Rather than reflect a particularized and historically sensitive application of Article III, the court of appeals would transform the doctrine of taxpayer standing into 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 the Establishment Clause's proscription.

Fundamental separation of powers principles preclude that dramatic expansion of the judicial power to sit in judgment on the constitutionality of the actions of a coordinate Branch of government based on a single taxpayer's undifferentiated interest, shared in common with the public at large, in having the Executive Branch comport its Article II activities with the Establishment Clause. Such a retooling of *Flast* could not be squared with the precedents of this Court both before and after *Flast*. Further, by eliminating the boundaries set on *Flast*, the Court would call into question the validity, workability, and, thus, sustainability of any exception to the general constitutional prohibition on taxpayer standing. The Court, however, need not revisit *Flast* in this case if it hews to the original and carefully demarcated boundaries of the taxpayer-standing doctrine and overturns the court of appeals' impermissible enlargement of the narrow *Flast* exception.

ARGUMENT

UNDER ARTICLE III OF THE CONSTITUTION AND SEPARATION OF POWERS PRINCIPLES, TAXPAYER STANDING IS NARROWLY LIMITED TO CHALLENGES TO CONGRESS'S EXERCISE OF ITS TAXING AND SPENDING POWER TO DISBURSE FUNDS OUTSIDE OF THE GOVERNMENT

As this Court underscored just last Term, "[n]o principle is more fundamental to the judiciary's proper role in our federal system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp.* v. *Cuno*, 126 S. Ct. 1854, 1861 (2006) (brackets in original) (quoting *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997)). Article III's standing requirement enforces that case-or-

controversy requirement, *ibid.*, and thus is key to maintaining the proper constitutional balance of powers. In adherence to the Constitution's standing requirement, this Court has held for more than 80 years, and it reiterated as recently as last Term in *DaimlerChrysler*, that an individual's status as a taxpayer alone generally provides an insufficient basis to confer Article III standing. *Ibid.*; see *Frothingham* v. *Mellon*, 262 U.S. 447 (1923).

In *Flast* v. *Cohen*, 392 U.S. 83 (1968), this Court concluded that the Establishment Clause's unique history supported carving out a narrow exception to the general rule against taxpayer standing for plaintiffs who challenge Congress's use of its taxing and spending power to subsidize with taxpayer funds the religious practices of private parties, in alleged violation of the Establishment Clause. *Id.* at 102-106. In the nearly four decades since *Flast*, this Court repeatedly has confirmed the narrow scope of that exception and has declined invitations to enlarge it. The court of appeals' decision in this case, however, significantly expands the *Flast* exception by opening Article III standing to any taxpayer's Establishment Clause objection to any governmental activity that entails the expenditure of budget funds—which is virtually everything the government does. That decision cannot be reconciled with this Court's precedent and is foreclosed by the constitutional limitations on standing embodied in Article III and separation of powers principles.

A. Article III's Case-Or-Controversy Requirement Generally Prohibits Taxpayer Standing To Challenge How Federal Funds Are Expended

The Constitution does not vest the federal judiciary with "an unconditioned authority to determine the con-

stitutionality of legislative or executive acts." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). Rather, Article III of the Constitution confines the judicial power to the resolution of actual "Cases" and "Controversies." U.S. Const. Art. III, § 2. That limitation is an indispensable "ingredient of [the] separation and equilibration of powers, restraining the courts from acting at certain times," *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 101 (1998), and "confin[ing] federal courts to a role consistent with a system of separated powers," *Valley Forge*, 454 U.S. at 472. See *DaimlerChrysler*, 126 S. Ct. at 1861 ("[T]he case-or-controversy limitation is crucial in maintaining the tripartite allocation of power set forth in the Constitution.") (internal quotation marks and citation omitted).

An "essential and unchanging" component of the case-or-controversy requirement is the rule that a plaintiff invoking the jurisdiction of the federal courts must have standing. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). That doctrine confines the judiciary's role to the resolution of disputes "of the sort traditionally amenable to, and resolved by, the judicial process," *Steel Co.*, 523 U.S. at 102, and thereby "ensur[es] that the Federal Judiciary respects the proper—and properly limited—role of the courts in a democratic society," *DaimlerChrysler*, 126 S. Ct. at 1860 (quoting *Allen* v. *Wright*, 468 U.S. 737, 750 (1984)). See also *United States* v. *Richardson*, 418 U.S. 166, 192-194 (1974) (Powell, J., concurring). If a party lacks standing—and thus if the case "is not a proper case or controversy" —the federal "courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler*, 126 S. Ct. at 1860-1861. The burden is on the

party asserting federal jurisdiction to establish standing. *Id.* at 1861 n.3; see *Warth* v. *Seldin*, 422 U.S. 490, 518 (1975).

When standing rests on nothing more than the plaintiff's status as a taxpayer, that burden is usually insurmountable. That is because the "irreducible constitutional minimum of standing" requires that the plaintiff "have suffered an 'injury in fact'" in the form of the "invasion of a legally protected interest," that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990)).[5] Taxpayers, for example, have standing to challenge the individualized assessment of taxes against them because *collection* of the tax has a direct, immediate, and concrete impact on their personal finances. See, *e.g.*, *Commissioner* v. *Banks*, 543 U.S. 426 (2005) (dispute over definition of taxable income); *Follett* v. *Town of McCormick*, 321 U.S. 573, 575-577 (1944) (invalidating tax on the activity of preaching); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 109-112 (1943) (invalidating tax on soliciting as applied to religious adherents).

By contrast, it is well established that taxpayers generally lack standing to challenge how tax dollars that were lawfully collected from them are *used* by the gov-

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[5] To establish standing, a plaintiff also must identify a "causal connection between the injury and the conduct" of which he complains, such that the alleged injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court," and must demonstrate that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-561 (brackets in original) (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41-42, 43 (1976)).

ernment. This Court has repeatedly held that "the 'alleged deprivation of the fair and constitutional use of [a federal taxpayer's] tax dollar'" does not constitute an injury-in-fact that would support Article III standing. *DaimlerChrysler*, 126 S. Ct. at 1862 (brackets in original) (quoting *Valley Forge*, 454 U.S. at 476). That is because a taxpayer's interest in the money that he has contributed to the federal Treasury

> is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

Frothingham, 262 U.S. at 487. The alleged injury of misused tax dollars "is not 'concrete and particularized,' but instead a grievance the taxpayer 'suffers in some indefinite way in common with people generally.'" *DaimlerChrysler*, 126 S. Ct. at 1862 (quoting *Lujan*, 504 U.S. at 560, and *Frothingham*, 262 U.S. at 488); see *Valley Forge*, 454 U.S. at 477 ("[T]he expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing, even though the plaintiff contributes to the public coffers as a taxpayer.").

The injury associated with misspent tax dollars, moreover, "is not 'actual or imminent,' but instead 'conjectural or hypothetical,'" *DaimlerChrysler*, 126 S. Ct. at 1862, since "it is pure speculation whether the lawsuit would result in any actual tax relief" for the plaintiff, *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 614 (1989) (opinion of Kennedy, J.). Indeed, because any additional taxation caused by the operation of a law would be visited

"upon a vast number of taxpayers," that consequence or "injury" "is essentially a matter of public and not of individual concern." *Frothingham*, 262 U.S. at 487; see *ASARCO*, 490 U.S. at 613. Article III standing requires that the plaintiff be "immediately in danger of sustaining some direct injury" as a result of the law's enforcement, and "not merely that he suffers in some indefinite way in common with people generally." *Frothingham*, 262 U.S. at 488. For courts to intervene in disputes based on such intangible and generalized—indeed, virtually universal—allegations of harm "would be not to decide a judicial controversy," as required by Article III's case-or-controversy requirement, but "to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly [courts] do not possess." *Id.* at 489.

B. By Its Terms, *Flast* Represents A Narrow Exception To The General Rule Against Taxpayer Standing

1. Taxpayer standing under Flast *rests upon a unique and narrow historical concern about legislatively compelled subsidization of private religious exercise*

In *Flast* v. *Cohen*, *supra*, this Court recognized a narrow exception to that general prohibition on taxpayer standing to challenge the government's expenditure of tax revenues. *Flast* held that a taxpayer could bring an Establishment Clause challenge to Congress's exercise of its taxing and spending power to provide federal funding to private religious schools. 392 U.S. at 102-104. The Court underscored, however, that taxpayer standing would extend "*only* [to] exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution." *Id.* at 102 (emphasis added). Challenges aimed not at congressional action

but at the "incidental expenditure of tax funds in the administration of an essentially regulatory statute" by the Executive Branch, the Court emphasized, will not support taxpayer standing. *Ibid.*

Flast held not only that the taxpayer's challenge must target congressional taxing and spending, but also that there must be "a nexus between that [taxpayer] status and the precise nature of the constitutional infringement alleged." 392 U.S. at 102. In particular, the taxpayer must allege that Congress's exercise of its spending power under Article I, Section 8 of the Constitution "exceed[ed] specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power," rather than simply asserting "that the enactment is generally beyond the powers delegated to Congress." *Flast*, 392 U.S. at 102-103. Surveying the history of the Establishment Clause and the Framers' particular concern "that the taxing and spending power would be used to favor one religion over another or to support religion in general," the Court reasoned that the Establishment Clause "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power." *Id.* at 103-104. The Court has never held that any other constitutional constraint on Congress's taxing and spending power supports taxpayer standing. See *DaimlerChrysler*, 126 S. Ct. at 1864.

Flast was not conceived as an exception to Article III's requirement of an individualized and concrete injury-in-fact. Courts have no authority to craft exceptions to the Constitution's limitations on judicial power. For a court to attempt to adjudicate cases that fall beyond the jurisdiction vested by Article III would "offend[] fundamental principles of separation of powers,"

Steel Co., 523 U.S. at 94, and would be the "very definition" of a court "act[ing] ultra vires," *id.* at 102.

Rather, in explaining the exception carved out by *Flast*, the Court discerned in the history of the Establishment Clause a unique and particularized injury directly tied to Congress's extraction and spending of taxpayers' dollars to subsidize churches, ministers, and similar forms of religious exercise by other individuals and entities outside the government. The *Flast* Court emphasized 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.

The Court cited, in particular, James Madison's *Memorial and Remonstrance Against Religious Assessments*, which Madison published in response to a proposed tax in Virginia "for the support of Christian teachers." *Everson* v. *Board of Educ.*, 330 U.S. 1, 72-74 (1947) (reproducing the proposed tax bill); see James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *in* 5 *The Founders' Constitution* 82 (Philip B. Kurland & Ralph Lerner eds., 1987). Madison argued and ultimately persuaded his fellow Virginians that no citizen should be "force[d] * * * to contribute three pence only of his property for the support of any one establishment," and that to permit such an incursion on religious liberty would allow government to "force [a citizen] to conform to any other establishment in all cases whatsoever." 5 *The Founders' Constitution* para. 3, at 82; see *Flast*, 392 U.S. at 103; see also *Mitchell* v. *Helms*, 530 U.S. 793, 856 (2000) (O'Connor, J., concurring) ("[T]he most important reason for according special treatment to direct money

grants is that this form of aid falls precariously close to the original object of the Establishment Clause's prohibition.").

The *Flast* Court thus sought to carve out a narrow exception to the general rule against taxpayer standing to permit taxpayer challenges to congressional appropriations that took the form of legislatively directed grants in aid of religion. See 392 U.S. at 114 (Stewart, J., concurring) (citing historical Establishment Clause concerns and stating that "[t]oday's decision no more than recognizes that the appellants have a clear status as taxpayers in assuring that they not be compelled to contribute 'three pence . . . of [their] property for the support of any one establishment'"). While the Establishment Clause was the product of many historical forces,[6] *Flast* determined that one—and only one—of those forces was uniquely and inextricably tied to an individual's status as a taxpayer—the individual's right not to have Congress take money out of his pocket and put it into the coffers of a church or other private sectarian entity for their religious use. *Flast* concluded that the injury caused by the extracting and spending of a taxpayer's money to subsidize or fund the religious exercise of others was sufficiently direct and particularized to satisfy Article III's standing requirements. See 392 U.S. at 94.

In so holding, the Court stressed that it would not suffice "to allege an insubstantial expenditure of tax funds in the administration of an essentially regulatory statute," and cited as an example the complaint in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952), that publicly funded school teachers violated the Estab-

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[6] See generally Sanford H. Cobb, *The Rise of Religious Liberty in America* (1902).

lishment Clause by reading the Bible in public school classrooms. *Flast*, 392 U.S. at 102. *Doremus* rejected the taxpayers' assertion of standing because "[i]t is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference." 342 U.S. at 434. *Flast* likewise permits taxpayer standing only where the complaint states "a direct dollars-and-cents injury" based on Congress's exercise of its taxing and spending power in a manner that implicates the unique historical concerns that animated the *Flast* decision.

***2. This Court's precedents confirm the narrow ambit of taxpayer standing under* Flast**

The court of appeals' decision adopts an "unusually broad and novel view of [taxpayer] standing to litigate" the constitutionality of any Executive Branch action, *Valley Forge*, 454 U.S. at 470, as long as the officials' salaries or activities are funded by the federal Treasury. That holding has no foothold in this Court's precedent. Quite the opposite, in the four decades since *Flast* was decided, this Court has consistently reaffirmed that taxpayer standing is narrowly restricted to cases that fit *Flast*'s historic rationale, and that the doctrine "does not provide a special license" for taxpayers "to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Id.* at 487.

In *Flast* itself, the Court stressed that taxpayer standing would apply "*only* [to] exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution." 392 U.S. at 102 (emphasis added). Underscoring that taxpayer standing would be limited to challenges to congressional power, the Court stressed in the very next sentence that taxpayer stand-

ing would not extend to challenges to the Executive Branch's "incidental expenditure of tax funds in the administration of an essentially regulatory statute." *Ibid.* Indeed, the Court explained at the beginning of the opinion that the jurisdiction of the three-judge Court —and thus of the Supreme Court itself, *id.* at 88 n.2— was premised on the plaintiffs' challenge to the constitutionality of federal law, rather than the Executive Branch's "administration" of the law, *id.* at 90. The Court then reiterated at the end of the *Flast* decision that the particular form of taxpayer standing it had recognized was designed to protect against "abuses of *legislative power,*" and in particular the *spending* power. *Id.* at 106 (emphasis added).

Six years later, the Court underscored the narrow scope of taxpayer standing in *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974). In that case, the Court rejected taxpayer standing because the plaintiffs "did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status," in alleged violation of the Ineligibility and Incompatibility Clauses of the Constitution, Art. I, § 6, Cl. 2. The Court held that taxpayer standing under *Flast* was limited to "challeng[ing] an enactment under Art. I, § 8," rather than contesting the alleged "invalidity of Executive action in paying" out taxpayer funds. *Schlesinger*, 418 U.S. at 228 & n.17.[7] See also *Richardson*, 418 U.S. at 175 (holding that a taxpayer

[7] Because the absence of any challenge to an exercise of Congress's taxing and spending power failed the first prong of the *Flast* test, the Court did not address whether the Incompatibility and Ineligibility Clauses impose specific constitutional constraints on Congress's taxing and spending power for purposes of the second *Flast* requirement.

lacks standing to compel the Secretary of the Treasury to publish an accounting of the receipts and expenditures of the CIA, because that challenge was "not addressed to the taxing or spending power, but to the statutes regulating the CIA"); *id.* at 173 (*Flast* only "slightly lowered" the general bar to taxpayer standing and did so only for "suits against Acts of Congress.") (quoting *Flast*, 392 U.S. at 85).

Likewise, in *Valley Forge*, the Court emphasized that the *Flast* exception must be applied with "rigor," 454 U.S. at 481, and rejected taxpayer standing where the plaintiffs challenged "not a congressional action, but a decision by [a federal agency] to transfer a parcel of federal property" to a religious college. *Id.* at 479. The Court explained that, while the agency's actions in transferring the property necessarily entailed the use of tax money from general appropriations, the Executive Branch's "expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing." *Id.* at 477. Rather, the Court reaffirmed, taxpayer standing is confined to "challenges directed *only* [at] exercises of congressional power." *Id.* at 479 (emphasis added). A constitutional objection to "a particular Executive Branch action arguably authorized by [an] Act [of Congress]" will not suffice. *Id.* at 479 n.15 (quoting *Flast*, 392 U.S. at 102).

That pattern continued unbroken in *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), where the Court repeated that *Flast* is a "narrow exception * * * to the general rule against taxpayer standing established in Frothingham." *Id.* at 618. The Court held that the *Flast* exception permitted the plaintiffs to challenge on its face a statute permitting the distribution of federal grant money to private entities, including religious organiza-

tions. See *ibid.* The Court also held that the taxpayers had standing to challenge the constitutionality of the statute as applied to particular grants made by the Secretary of Health and Human Services pursuant to the law, explaining that the authorizing statute "is at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers, and appellees' claims call into question how the funds authorized by Congress are being disbursed pursuant to the [Act]'s statutory mandate." *Id.* at 619-620. In so holding, however, the Court distinguished a challenge aimed not at the constitutionality of a federal spending statute, but at the Executive Branch's expenditure of funds in the course of administering or executing "an essentially regulatory statute." *Id.* at 619 (quoting *Flast*, 392 U.S. at 102).

Finally, just last Term, the Court reiterated that *Flast* has a "narrow application in our precedent," and must not be applied so broadly as to "transform federal courts into forums for taxpayers' generalized grievances." *DaimlerChrysler*, 126 S. Ct. at 1865. Rather, taxpayer standing is strictly limited to a claim that "*congressional action* under the taxing and spending clause is in derogation of the Establishment Clause," *id.* at 1864 (emphasis added) (quoting *Flast*, 392 U.S. at 105-106). The Court stressed that taxpayer standing has been recognized in that particular context—and no other—because Congress's "extract[ion] and spen[ding] of tax money in aid of religion," is "fundamentally unlike" an alleged violation of "almost any [other] constitutional constraint on government power," given the historical constitutional imperative of protecting citizens against "contribut[ing] three pence . . . for the support of any one [religious] establishment." *Id.* at 1864-1865. Thus, "the 'injury' alleged in Establishment Clause challenges

to federal spending" that may give rise to standing is "the very 'extract[ion] and spend[ing]' of 'tax money' in aid of religion alleged by a plaintiff." *Id.* at 1865.

C. Respondents' Challenge To The Speeches, Meetings, And Other Operational Activities Of Executive Branch Officials That Do Not Entail The Disbursement Of Federal Funds Outside The Government Do Not Support Taxpayer Standing

The court of appeals' holding that taxpayer standing extends to respondents' challenge to the allegedly unconstitutional conduct of Executive Branch officials solely because their salaries and supplies are paid for through appropriations departs dramatically from *Flast* and "cuts the concept of taxpayer standing loose from its [constitutional] moorings," Pet. App. 19a (Ripple, J., dissenting), because the claim does not entail a challenge to Congress's exercise of its taxing and spending power to subsidize the religious activities of persons or entities outside the government.

1. Respondents' objection to the constitutionality of the Executive Branch's activities is not a challenge to Congress's taxing and spending power

The court of appeals held that "[t]axpayers have standing to challenge an executive-branch program, alleged to promote religion, * * * even if the program was created entirely within the executive branch, as by Presidential executive order," Pet. App. 16a, even if "there is no statutory program" enacted by Congress under its taxing and spending power, *id.* at 11a, and even if the taxpayer is "unable to identify the appropriations that fund the [challenged activity]," *id.* at 10a. This Court's cases, however, have been quite explicit that an essential prerequisite to taxpayer standing un-

der *Flast* is a "challenge[] directed only [at] exercises of congressional power" under the Taxing and Spending Clause. *Valley Forge*, 454 U.S. at 479 (quoting *Flast*, 392 U.S. at 105); see *DaimlerChrysler*, 126 S. Ct. at 1864 (taxpayer standing under *Flast* applies when the taxpayer challenges "congressional action under the taxing and spending clause"); *Schlesinger*, 418 U.S. at 225 n.15 ("[T]he *Flast* nexus test is not applicable where the taxing and spending power is not challenged."); *Flast*, 392 U.S. at 106 (challenge must be to "congressional action under the taxing and spending clause").

Respondents do not challenge any specific congressional action or appropriation, and respondents do not ask the Court to invalidate any Act of Congress, on its face or as applied. Respondents also do not question Congress's power to tax and spend to finance the salaries and day-to-day activities of Executive Branch officials, including paying them to give speeches or to conduct meetings. Nor do they challenge or seek to enforce any conditions imposed by Congress on federal spending. The funds at issue, in fact, were appropriated without attached conditions or programmatic directives for the President's discretionary use within the Executive Office of the President and federal agencies. And those funds would be spent on salaries, meetings, and other day-to-day activities whether or not those activities take a form to which respondents object. Respondents, in short, do not allege that *Congress* exceeded its taxing and spending authority in any respect and, thus, they do not allege the type of "direct dollars-and-cents injury," *Doremus*, 342 U.S. at 434, that could support taxpayer standing under *Flast*. See Pet. App. 64a (Ripple, J., dissenting from the denial of rehearing en banc) ("Here, as

in *Valley Forge*, the plaintiffs do not complain of any action taken by Congress.").

Instead, the heart of respondents' complaint is that *Executive Branch* officials have made improper decisions about the particular subject matter of certain day-to-day operations, such as the allegedly religious content of their speeches and meetings.[8] Respondents thus challenge Executive Branch activities, not a congressional program and not any financial disbursements to outside entities. But what Executive Branch officials say and what meetings they conduct in doing the President's business are quintessentially Executive actions. They are no more congressional exercises of the taxing and spending power than a Presidential decision to host a summit of foreign leaders or the President's delivery of a State of the Union address.

2. The mere presence of federal funding is insufficient to create taxpayer standing

The court of appeals reasoned that taxpayer standing requires nothing more than Congress's passage of a funding law that makes it possible for Executive Branch officials to run afoul of the Establishment Clause. Pet. App. 8a (statute must "ha[ve] been necessary for the violation to occur—it did not have to be sufficient"); see *id.* at 11a-12a. That is incorrect, for four reasons.

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[8] See Pet. App. 77a para. 40 (challenging the "actions and/or words" of Executive Branch officials); *id.* at 75a-76a paras. 34, 35 (challenging the content of presidential speeches); *id.* at 77a para. 41 (challenging Executive Branch officials' "myriad activities, such as making public appearances and giving speeches"); *id.* at 73a para. 32 (challenging Executive Branch officials' "support of national and regional conferences"); *id.* at 76a-77a paras. 36, 39 (challenging Executive Branch officials' organization and conduct of conferences).

First, this Court has never adopted such a sweeping "funding ergo standing" test for taxpayer standing. Indeed, that rationale is fundamentally at odds with the general rule that taxpayer status does not confer standing to challenge how federally financed "officials of the executive department of the government are executing" their duties. *Frothingham*, 262 U.S. at 488.

Moreover, even with *Flast*'s narrow exception to that rule, this Court has never suggested that the mere presence of federal funding is sufficient. To the contrary, the Court has repeatedly required plaintiffs to articulate a specific challenge to "congressional action under the taxing and spending clause," *DaimlerChrysler*, 126 S. Ct. at 1864; *Flast*, 392 U.S. at 106. Under *Flast*, it is only when the congressional spending decision itself causes the alleged injury that the unique historic concern about Congress's abuse of its taxing and spending power to compel religious subsidization is implicated.

Indeed, this Court's decisions in *Valley Forge* and *Doremus* foreclose the court of appeals' funding-equals-standing rule. In *Valley Forge*, as here, federal funds paid the salaries of federal officials while they processed applications for property. Compare 454 U.S. at 466-467, with Pet. App. 69a-73a. In addition, federal funds financed the determination by Executive Branch officials in *Valley Forge* that a religious group had a unique "program of utilization which provides * * * the greatest public benefit" for the use of surplus government property. 454 U.S. at 467 & n.4.

That is no different from respondents' allegation here that federal funds financed Executive Branch officials' determination that faith-based groups have a "unique capacity * * * to provide effective social services." Pet. App. 75a para. 34. The use of taxpayer

funds thus was as "necessary for the violation to occur" (Pet. App. 8a) in *Valley Forge* as in this case, and accordingly the *Valley Forge* complaint would have satisfied the court of appeals' test for standing. But it did not satisfy this Court's test. The Court held that those allegations were insufficient and that the plaintiffs in *Valley Forge* lacked standing because the object or "source of their complaint is not a congressional action, but a decision by [a federal agency]." 454 U.S. at 479. While federal funds were unquestionably employed and expended, that was not enough. "[T]he expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing." *Id.* at 477. And even though in *Valley Forge*, unlike here, the challenged Executive Branch activity resulted in the distribution of property to an outside religious entity, the Court still found standing lacking.

In fact, the Court expressly rejected the contention that the taxpayers' right "extends to the Government as a whole, *regardless of which branch is at work in a particular instance*, and regardless of whether the challenged action was an exercise of the spending power." *Valley Forge*, 454 U.S. at 484 n.20 (emphasis added; citation omitted). That argument, the Court explained, was "premised on a revisionist reading of our precedents" and lacked any "[l]ogical[]" limitation. *Ibid.* Given that evaluating and publicly certifying the comparative "public benefit" offered by a religious group and then transferring 77 acres of land to it, *Valley Forge*, 454 U.S. at 468, does not support standing, then it necessarily follows that discussing religious groups in speeches and inviting them to conferences does not confer Article III standing either.

Likewise, in *Doremus*, taxpayers alleged standing to challenge public schoolteachers' reading of passages from the Bible in the classroom each day. Although taxpayer funds paid those teachers' salaries while they read from the Bible, just as here taxpayer funds paid federal officials' salaries as they allegedly spoke about religious groups in speeches and at conferences, this Court held that the plaintiffs lacked standing. 342 U.S. at 434. The Court explained that the plaintiffs could not identify any particular statutory provision—a "separate tax" or a "particular appropriation," *id.* at 433—that funded the Bible reading. The fact that taxpayer funds made it possible for the teachers to be in the classroom reading the Bible to students was not enough. *Id.* at 434 (noting the absence of "a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of"). The problem for the taxpayers in *Doremus* was that their real complaint was not the expenditure for teachers' salaries, but the essentially "regulatory" decision to read the Bible. Likewise here, respondents' real complaint is not the dollar-and-cents injury from expenditures on Executive Branch salaries and supplies, but the essentially "regulatory" decision of Executive Branch officials (allegedly) to emphasize the benefits of religion and religiously affiliated organizations in their speeches and meetings. See also *Schlesinger*, 418 U.S. at 211, 228 (taxpayer standing denied where taxpayers "did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch," even where that action involved the use of taxpayer funds to pay Members of Congress their Reserve salaries).

In short, when the statutory direction is for the Executive to do something other than disburse funds, nei-

ther that direction nor the Executive Branch's subsequent actions or expenditures in carrying it out gives rise to taxpayer standing. And that remains true even if the legislature's non-spending direction, see, *e.g.*, *Doremus*, or the executive action, see, *e.g.*, *Valley Forge*, arguably violates the Establishment Clause.

Second, the court of appeals' approach provides no principled basis for determining when the disposition of federal funds stops being an exercise of congressional power and becomes Executive action. In the court's view, any activity funded by a congressional appropriation—which means virtually everything the Executive and Judicial Branches do—is a sufficient exercise of the taxing and spending power to trigger the *Flast* exception.[9]

But Congress's taxing and spending power is not self-perpetuating after an appropriation is made. Basic separation of powers principles recognize limits to Congress's role and reach. Once an appropriations law, whether general or targeted, is passed by both Houses of Congress and signed into law by the President, implementation and execution of that law is Executive Branch action. More specifically, when Congress provides funds to the Executive Branch to be used in the Executive's discretion and outside of a congressional spending program, Congress's taxing and spending role ends when the funds are appropriated—that is, when the funds are delivered into the control of the Executive Branch. A taxpayer does not have a "continuing stake * * * in the disposition of the Treasury to which he has contributed

[9] While the court of appeals would apparently treat differently official activity that is funded by "voluntary donations by private citizens," Pet. App. 11a, that would appear to be a null set. See Anti-Deficiency Act, 31 U.S.C. 1341, 1342.

his taxes, and [a] right to have those funds put to lawful uses." *Valley Forge*, 454 U.S. at 484 n.20. The disbursement of funds for Congress's purpose—which in this case was to fund the operations of the Executive Branch itself, without further condition and outside of a congressional spending program—is the circuit breaker. The use of non-earmarked funds after this point becomes a matter of Executive discretion, not the exercise of Congress's taxing and spending power.[10] And while there may be any number of plaintiffs who have standing to challenge the more particularized Executive Branch implementation of a congressional appropriation, their standing must rest on something other (and more particularized) than taxpayer standing under *Flast*.

The court of appeals reasoned that *Kendrick* supported taxpayer standing here because it permitted a challenge to a congressional spending program as applied or administered by the Department of Health and Human Services. Pet. App. 8a. But this Court found standing in *Kendrick* because the agency disbursed funds at *Congress's* behest pursuant to a *congressional* taxing and spending program. The object of the plaintiffs' complaint was "a program of disbursement of funds pursuant to Congress' taxing and spending powers, and [their] claims call[ed] into question how the funds authorized by Congress are being disbursed pursuant to the

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[10] See *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993) ("The allocation of funds from a lump-sum appropriation is an[] administrative decision traditionally regarded as committed to agency discretion."); see also *Clinton* v. *City of New York*, 524 U.S. 417, 446 (1998); *id.* at 466-469 (Scalia, J., concurring in part and dissenting in part); *id.* at 480 (Breyer, J., dissenting); *INS* v. *Chadha*, 462 U.S. 919, 952-959 & n.16 (1983) (defining constitutional limits on the scope of the legislative role).

[Act]'s statutory mandate," not the Executive's discretionary judgment. 487 U.S. at 619-620 (emphasis added). The explicit decision to permit funds to be disbursed to religious groups was Congress's, not the Executive's. See *id.* at 595-596 (quoting statute's numerous references to "religious * * * organizations"). This Court's decision simply recognized that the fact that the funding authorized by Congress "ha[d] flowed through and been administered by the Secretary [of Health and Human Services]" did not absolve Congress of responsibility for that judgment and adoption of that spending program. *Id.* at 619.

Here, there is no congressional taxing and spending program under challenge. Respondents have pointed to no law that directs that funds be used for any allegedly unconstitutional purpose, and respondents are not suing any Executive Branch official who disburses or distributes federal funds. To the contrary, the court of appeals' acknowledged that "[t]his is a program that the President," not Congress, "has created by a series of executive orders," not exercises of the legislative taxing and spending power. Pet. App. 8a.

Third, because the Executive Branch depends upon general appropriations to function, the court of appeals reasoned that the difference between congressionally directed spending programs and federally financed executive action "cannot be controlling." Pet. App. 11a. But the distinction between the Legislature's taxing and spending power and Executive action makes all the difference under this Court's cases for purposes of Article III's standing requirement. That is what *Valley Forge*, *Richardson*, *Schlesinger*, and *Doremus* held. Indeed, *Valley Forge* rejected in terms the argument that taxpayer standing applies "regardless of which branch is at

work in a particular instance." 454 U.S. at 484 n.20. Yet, under the Seventh Circuit's decision, the result in *Valley Forge* was a product of pleading error, not constitutional limitation. Had the plaintiffs simply asserted a taxpayer injury based on the use of "appropriations for the general administrative expenses" (Pet. App. 11a) involved in evaluating the public benefit of the religious group's proposed use of the property and transferring the property to the group, the plaintiffs would have had standing.

This Court repudiated that approach in *Valley Forge*, *Richardson*, *Schlesinger*, and *Doremus* for good reason. The Court in *Flast* explained that its exception to the general rule against taxpayer standing rested on distinct historical forces directly tied to concerns about *Congress*'s abuse of its "unlimited power of taxation," *An Old Whig, No. 5* (1787), *in* 5 *The Founders' Constitution* 86 (emphasis omitted), to fund the religious exercise of a church or other religious entity. Under *Flast*, the Article III injury that supports standing is the individual taxpayer's loss of religious liberty when the legislature extracts money from his pocket and puts it into a church's or someone else's coffers to fund religious exercise. See, *e.g.*, *DaimlerChrysler*, 126 S. Ct. 1865. Those are harms that the Executive Branch, which lacks the power to levy taxes and to spend "for the * * * general Welfare," see U.S. Const. Art. 1, § 8, Cl. 1, cannot inflict. See also *id*. Art. I, § 9, Cl. 7 ("No Money shall be drawn from the Treasury, but in consequence of Appropriations made by Law.").

The court of appeals reasoned that taxpayer standing was nonetheless appropriate because "there is so much that executive officials could do to promote religion in ways forbidden by the establishment clause." Pet. App.

13a. That rationale is seriously flawed. Courts have no license to expand their own authority beyond the limits set by Article III based on nothing more than unsubstantiated speculation that a coordinate branch of government will flout the Constitution's commands. Indeed, the presumption is that Executive officials will faithfully discharge their constitutional obligations, see *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996), and, in fact, there is no history of the kind of general abuse hypothesized by the court of appeals.

More to the point, what is relevant to the question of *taxpayer* standing is that there is *not* so much that Executive officials could do to promote religion (were they so inclined) that inflicts the specific type of *taxpayer injury* that was of unique concern to the Framers and that provided the foundation for the particular Article III injury recognized in *Flast*. Only Congress can "extract[] and spen[d]" "tax money" in aid of religion, *Flast*, 392 U.S. at 106, and "only" challenges to such "exercises of congressional power" will support taxpayer standing, *id*. at 102. See *DaimlerChrysler*, 126 S. Ct. at 1865.

In any event, the court of appeals' concern is unfounded. This Court's cases demonstrate that violations of the Establishment Clause by executive officials need not go unchecked. While *Doremus* denied taxpayer standing to challenge Bible reading in public school classrooms, later cases in which plaintiffs had standing in a more particularized capacity than as mere taxpayers provided the opportunity for plaintiffs to demonstrate that such conduct "promote[s] religion in ways forbidden by the establishment clause" (Pet. App. 13a). See *School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203, 224 n.9 (1963) (standing to challenge Bible reading in class as parents of school children).

Fourth, if the first criterion for taxpayer standing under *Flast* were to require nothing more than proof that governmental action was financed through taxpayer funds, it would be an empty test. As the court of appeals recognized, "almost all executive branch activity is funded by appropriations." Pet. App. 12a. Requiring nothing more than the presence of federal funding would, for all intents and purposes, reduce the test for taxpayer standing into a pleading question that turns solely on whether the plaintiffs raise an Establishment Clause challenge.

And even that line might not hold since the rationale for limiting taxpayer standing to Establishment Clause challenges has been that Clause's unique historical nexus to "the exercise of the congressional taxing and spending power." *Flast*, 392 U.S. at 103; see *Richardson*, 418 U.S. at 173. The second prong of *Flast* requires taxpayer-plaintiffs to invoke a "specific constitutional limitation[] imposed" not upon the Executive Branch or the federal government generally, but upon "*congressional*" power. 392 U.S. at 103 (emphasis added). The taxpayer must allege that the "congressional action" under challenge "is in derogation of those constitutional provisions *which operate to restrict the exercise of the taxing and spending power*." *Richardson*, 418 U.S. at 173. Identifying a constitutional constraint on the exercise of Executive power—whether the Ineligibility and Incompatibility Clauses of the Constitution, Art. I, § 6, cl. 2, or the Establishment Clause as it applies to the Executive Branch—does not suffice to support taxpayer standing under *Flast*. See *Valley Forge*, *supra*; *Schlesinger*, *supra*. But jettisoning the requirement that the plaintiffs challenge a congressional action in the first place might well lead to a parallel dilution of the

constitutional nexus requirement of the second prong of *Flast*, as it would be difficult to justify requiring the plaintiff's constitutional objection to specifically constrain congressional power if no exercise of congressional power needs to be challenged in the first place.

Furthermore, once the focus on congressional taxing and spending is breached, there is no historic rationale for limiting taxpayer standing to Establishment Clause challenges. While *Flast* explained that the Framers had a distinct taxpayer-based concern about *Congress*'s abuse of its legislative taxing and spending power to establish a religion, there is no evidence that the Framers were any more concerned that the government would adopt measures "respecting an establishment of religion," writ large, than measures "abridging the freedom of speech, or of the press," or measures respecting the separation of powers or principles of federalism, or would engage in "unreasonable searches and seizures," would compel defendants to be witnesses against themselves, or would deny criminal defendants a trial by jury. U.S. Const. Arts. I, II, III; *id.* Amends. I, IV, V, VI, IX, X.

Noting this Court's statement that the "incidental expenditure of tax funds in the administration of an essentially regulatory statute" by the Executive Branch will not support taxpayer standing, *Kendrick*, 487 U.S. at 619; *Flast*, 392 U.S. at 102, the court of appeals attempted to rewrite the first prong of *Flast* into a test of whether "the marginal or incremental cost to the taxpaying public of the alleged violation of the establishment clause would be zero." Pet. App. 12a. That approach misunderstands the Establishment Clause, misreads this Court's precedent, and is unworkable.

To begin with, the Establishment Clause is no place for a jurisprudence of incremental cost. The Framers' objection to legislative taxing and spending to subsidize private churches and the religious exercise of others was one of principle, not degree. The concern was not that such a tax could be too big, but that as small amount as even three pence was too much. *Memorial and Remonstrance Against Religious Assessments*, *in* 5 *The Founders' Constitution* 82; see also *DaimlerChrysler*, 126 S. Ct. at 1857; Thomas Jefferson, *Act for Establishing Religious Freedom*, *in* 5 *The Founders' Constitution* 84-85. "Their objection was not to small tithes. It was to any tithes whatsoever. * * * Not the amount but 'the principle of assessment was wrong.'" *Everson*, 330 U.S. at 41 (Rutledge, J., dissenting).[11]

Furthermore, the court of appeals misunderstands what an "incidental expenditure of tax funds in the administration of an essentially regulatory statute" means. *Kendrick*, 487 U.S. at 619; *Flast*, 392 U.S. at 102. "Incidental" does not mean incremental. See *Webster's Third New Int'l Dictionary* 1142 (1993). It means an expenditure that is an adjunct or byproduct of a legislative program aimed at some end other than taxing and spending, such that the injury—whether large or small—is not a dollars-and-cents injury. Thus, this Court has repeatedly held that the Executive Branch's routine use of federal funds for such things as salaries and resources

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[11] At the time of Madison's Remonstrance, such references to "pence" were understood to refer to a very small amount of money. See 2 Samuel Johnson, A Dictionary of the English Language (1755) (defining "pence" as the "plural of *penny*," and "penny"" as " [a] small coin, of which twelve make a shilling * * * a subordinate species of coin," and "[p]roverbially[] A small sum").

in the course of conducting the government's business—outside the context of a congressional taxing and spending program—do not support taxpayer standing. See *Valley Forge*, *supra*; *Schlesinger*, *supra*; *Richardson*, *supra*; *Doremus*, *supra*.

Finally, as Judge Easterbrook explained, the court's "incremental cost" test is inadministrable. "If money from the Treasury is to supply the identifiable trifle for standing, then the only tenable line is between $0 (no cost to taxpayers as a whole) and $1 (some cost, however dilute)." Pet. App. 61a-62a. There is no sound basis for deciding, as the court of appeals did, that the cost to taxpayers of petitioners' references to religious groups in speeches and conferences is sufficient to support taxpayer standing, but that the cost of the President's or the Secretary of Education's delivery and reproduction of a speech discussing religion is not. See *id.* at 14a-15a; see also *id.* at 62a (Easterbrook, J., concurring in the denial of rehearing en banc) ("[T]he panel draws a line between $500,000 and $50,000 or $5,000 (even if there are lots of speeches or proclamations at $5,000 or $50,000 apiece). Where is the coherence in such a doctrine?"). Indeed, the whole doctrine of taxpayer standing is built on the premise that is it *not* enough to allege injury based simply on the theory that taxpayers have incurred "some cost" (*ibid.*) due to the government action at issue. See *DaimlerChrysler*, 126 S. Ct. at 1862.

3. Under* Flast*, taxpayer standing extends only to objections to Congress's disbursement of federal funds outside the government

The court of appeals erred in finding taxpayer standing not only because of the absence of a challenge to Congress's taxing and spending power, but also because the

Court in *Flast* limited its exception to a particular manifestation of the taxing and spending power—the disbursement of funds outside of the government to subsidize the religious activities of churches and other private entities. The distinct taxing concern that *Flast* found had influenced the adoption of the Establishment Clause was not simply that Congress would exercise its power to support religion, but that it would do so in a particular way—through the provision of funds to churches or other institutions outside the government to subsidize their own religious exercise.

The problem against which Madison remonstrated and Thomas Jefferson inveighed was not that Executive Branch officials, with their taxpayer-funded salaries, would speak favorably about religion or that they would meet with representatives of religious groups. Quite the opposite, religious themes appear frequently in the Nation's founding documents and the speeches and letters of the Framers.[12] The Continental Congress itself announced in 1778 that the Nation's success in the Revolutionary War had been "so peculiarly marked, almost by the direct interposition of Providence, that not to feel and acknowledge his protection would be the height of impious ingratitude." 11 *Journals of the Continental Congress* 477 (Worthington Chauncy Ford ed., 1908). Likewise, President Washington—on the taxpayers' dime—issued the first Thanksgiving Day proclamation to "recommend to the people of the United States a day

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[12] See, *e.g.*, *Van Orden* v. *Perry*, 125 S. Ct. 2854, 2859 (2005) (plurality opinion) ("The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself.") (quoting *Schempp*, 374 U.S. at 213); *id.* at 2861-2862 (citing additional examples).

of public thanksgiving and prayer" for "the many and signal favors of Almighty God." *Van Orden* v. *Perry*, 125 S. Ct. 2854, 2861 (2005) (plurality opinion) (citation omitted). The taxpayers also paid the salary of President Lincoln when he delivered the Gettysburg Address, with its "extensive acknowledgments of God." *Id.* at 2863 n.9.[13] There is no evidence that the Framers considered the *taxpayers*' religious liberty to be distinctly

[13] See also Alexander Hamilton, *The Farmer Refuted* (1775) ("[T]he Supreme Being gave existence to man, together with the means of preserving and beautifying that existence. He endowed him with rational faculties, by the help of which to discern and pursue such things as were consistent with his duty and interest; and invested him with an inviolable right to personal liberty and personal safety."), *in The Republic of Reason: The Personal Philosophies of the Founding Fathers* 333 (Norman Cousins ed., 1988) (internal quotation marks omitted); Richard Vetterli & Gary C. Bryner, *In Search of the Republic: Public Virtue and the Roots of American Government* 59 (rev. ed. 1996) ("The Founders, as a whole, were deeply religious men. * * * The foundation of their modern republican philosophy was based on a belief in God."); Chester James Antieau, *The Higher Laws: Origins of Modern Constitutional Law* 124 (1994); Samuel Adams, *The Rights of the Colonists* (1772), *in* 5 *The Founders' Constitution* 60 ("'Just and true liberty, equal and impartial liberty' in matters spiritual and temporal, is a thing that all Men are clearly entitled to, by the eternal and immutable laws Of God and nature."); Samuel Adams, *Oration on the Steps of the Continental State House* (Phila., Pa., Aug. 1, 1776) ("[T]he hand of heaven appears to have led us on to be, perhaps, humble instruments and means in the great providential dispensation which is completing.") (quoted in Derek H. Davis, *Religion and the Continental Congress, 1774-1789: Contributions to Original Intent* 60 & n.15 (2000)). For the similar sentiments of many other Founders, see *id.* at 60-69 (quoting Oliver Wolcott, Samuel Chase, John Adams, Elbridge Gerry, John Witherspoon, and William Williams); *In Search of the Republic*, *supra*, at 66-68 (quoting James Madison, John Adams, Thomas Jefferson, John Jay, Alexander Hamilton, and Benjamin Franklin); see generally Edmund Fuller & David Eliot Green, *God in the White House: The Faiths of American Presidents* (1968).

infringed by funding such references or religious contacts.

Rather, the particular taxing concern that troubled the Framers was, as explained in *Flast* and other decisions of this Court, focused narrowly on the fear that Congress would use its power forcibly to transfer funds from taxpayers into the coffers of churches or other institutions—institutions that were external to the government and staffed by religious, not governmental, officials—which would then use the funds for inherently religious activities.[14] The tax against which Madison protested aimed to provide funds not for the government's internal operations, but to churches for the training of Christian ministers.[15] That was also a common

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[14] See *Locke* v. *Davey*, 540 U.S. 712, 722 (2004) ("Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion."); *id.* at 722-723 (discussing other historical examples); *Flast*, 392 U.S. at 103-104; *Everson*, 330 U.S. at 11 ("The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused [the Framers'] indignation. It was these feelings which found expression in the First Amendment."); see *id.* at 10-11 & nn.8-10.

[15] See *Memorial and Remonstrance Against Religious Assessments*, *in* 5 *The Founders' Constitution* 82-84; see also *id.* at 84-85 (reproducing Jefferson's Act for Establishing Religious Freedom); *id.* at 58-59 (letter from Benjamin Franklin protesting forced taxation for "maintaining the Presbyterian or independent worship"); *id.* at 65 (reproducing Isaac Backus, *A History of New England 1774-75*) (asserting "an entire freedom from being taxed by civil rulers to religious worship"); *id.* at 71 (quoting N.C. Const. of 1776, art. XXXIV) (no person shall "be obliged to pay, for the purchase of any glebe, or the building of any house of worship, or for the maintenance of any minister or ministry"); *ibid.* (quoting similar provision from the Pennsylvania Constitution of 1776); *id.* at 85 (quoting similar provision from the Vermont Constitution of 1786).

aspect of established religion in the States around the time the Constitution and the First Amendment were adopted.[16]

Accordingly, the unique and historic injury to religious liberty upon which this Court focused in *Flast* was not that tax funds would be used within the government to reference or even to promote religion. Instead, the animating concern was that private funds would be ex-

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[16] See, *e.g.*, Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First-Amendment Theory*, 36 Wm. & Mary L. Rev. 837, 874 (1995) (discussing taxation to support the Dutch Reformed Church in New York); Md. Const. of 1776, Decl. of Rights, para. XXXIII, *in* 3 Francis N. Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies, Now or Heretofore Forming the United States of America* 1689 (1909) (discussing Maryland tax "for the support of the Christian religion"); John K. Wilson, *Religion Under the State Constitutions 1776-1880*, 32 J. Church & St. 753, 755 (1990) (noting that, before the American Revolution, nine of the thirteen colonies provided direct tax aid to churches, but five of those nine states "disestablished immediately, and with little discussion" after the Revolution); *id.* at 756 (discussing a Georgia constitutional provision that provided for the imposition of a general assessment upon each person to support his own church); *id.* at 758 (discussing Massachusetts' constitutional provision directing that "[t]he legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies-politic or religious societies to make suitable provision, at their expense, for the institution of the public worship of God and for the support and maintenance [of] public Protestant teachers of piety, religion, and morality in all cases where such provision shall not be made voluntary"); *id.* at 759 ("Some Baptist churches even sued their own members in court, and had property seized when 'dissenters' refused to pay."); *ibid.* (quoting Article 6 of the New Hampshire Constitution (amended 1968), which allowed towns to impose a tax to support Protestant teachers, as long as no person "shall ever be compelled to pay towards the support of the teacher or teachers of another persuasion, sect or denomination").

tracted from individual taxpayers and handed over to churches and other religious institutions external to the Branches of government in order to subsidize their religious exercise. That was "the right not to contribute three pence . . . for the support of any one [religious] establishment" that Madison sought to vindicate. *DaimlerChrysler*, 126 S. Ct. at 1864 (quoting *Flast*, 392 U.S. at 103); see *Flast*, 392 U.S. at 114 (Stewart, J., concurring) ("[E]very taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution.").

The history of the Establishment Clause, however, does not support recognition of a distinct injury-in-fact —uniquely traceable to a taxpayer's status as such—in not supporting the speeches and day-to-day activities of Executive Branch officials. Cf. *Bowen* v. *Roy*, 476 U.S. 693, 700 (1986) (individuals have no First Amendment right "to dictate the content of the Government's internal procedures"). Under the Constitution, such "religious difference[s]," *Doremus*, 342 U.S. at 434, or policy disagreements are to be addressed not through the courts, but through "political safeguards" and "democratic accountability." *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 563 (2005); see *Giles* v. *Harris*, 189 U.S. 475, 488 (1903) ("[R]elief from a great political wrong * * * must be given by * * * the legislative and political department of the government of the United States."). They are not Article III "cases" or "controversies."

Confining taxpayer standing to challenges to the congressionally authorized disbursement of funds outside the government hews not only to that history, but also to this Court's precedent. In both *Flast* and *Kendrick*— the only two cases in which this Court has upheld tax-

payer standing—the taxpayers challenged congressional programs that, by their terms, authorized the disbursement of federal funds to outside entities, including religious organizations. In *Flast*, the Court observed that "[t]he gravamen of the appellants' complaint was that federal funds appropriated under the Act were being used to finance instruction in * * * religious schools." 392 U.S. at 85.

Likewise, in *Kendrick*, the Court stressed that the plaintiffs' constitutional objections were to the "disbursement of funds" and "how the funds authorized by Congress are being disbursed" to sectarian grantees. 487 U.S. at 619-620. Reinforcing that point, the Court noted that the challenged funds "flowed *through*" a federal agency en route to an alleged religious use. *Id.* at 619 (emphasis added). *Kendrick* did not hold that taxpayer standing exists whenever federal funds have flowed *to* a federal agency and stopped there.

To establish the requisite taxpayer injury to support standing under *Flast*, a plaintiff therefore must challenge congressional action directly authorizing the disbursement of funds to entities outside the government in alleged derogation of the Establishment Clause. Asserting nothing more than a link between the challenged government activity and funding stemming from appropriations legislation has no historic or precedential antecedent from which to discern that individualized injury-in-fact required by Article III. Cf. *Valley Forge*, 454 U.S. at 480 n.17 ("[A]ny connection between the challenged property transfer and respondents' tax burden is at best speculative and at worst nonexistent.").

To be sure, continuing to adhere to the historic and precedential limitations on taxpayer standing in this manner would leave areas of governmental activity that

are not susceptible to suit by taxpayers, as such. But this Court has never suggested that taxpayer standing should be a universal panacea for every taxpayers' Establishment Clause qualms. Quite the opposite, the Court has consistently underscored the narrow and historically measured scope of the *Flast* doctrine, see, *e.g.*, *DaimlerChrysler*, 126 S. Ct. at 1865, and has made clear that taxpayer standing does not exist to challenge "religious difference[s]," *Doremus*, 342 U.S. at 434, or every alleged Establishment Clause transgression, see *Valley Forge*. Moreover, the absence of standing as a taxpayer to challenge an Executive Branch action on Establishment Clause grounds does not mean that no one will be able to challenge the action. Compare *Doremus* (no taxpayer standing to challenge Bible reading in public school classrooms), with *Schempp*, 374 U.S. at 224 n.9 (parents of students have standing to challenge teacher-led Bible reading in public school classrooms) .

In any event, "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Valley Forge*, 454 U.S. at 489 (citation omitted). That approach "would convert standing into a requirement that must be observed only when satisfied." *Ibid.*

4. Separation of powers principles require that the Flast *exception for taxpayer standing remain narrowly cabined*

Fundamental separation of powers concerns preclude enlarging the *Flast* exception beyond the particular exercise of Congress's taxing and spending power at issue in *Flast*—that is, the extraction and spending of taxpayer dollars to subsidize or fund the religious activities of others.

First, Article III requires an injury in fact. To the extent that requirement can be satisfied under *Flast* based solely on taxpayer status, the alleged injury must hew to the one historical paradigm that, at the time of the Establishment Clause's adoption, pertained directly to an individual's taxpayer status and that, under *Flast*, amounted to a distinct and personalized injury to individual religious liberty.

Second, because taxpayer standing cases involve, by definition, challenges to the constitutionality of the actions of a coordinate branch of government, see *Flast*, 392 U.S. at 103, the standing inquiry must be "especially rigorous," *Raines*, 521 U.S. at 819, and "observe[d] fastidiously," *Coleman* v. *Miller*, 307 U.S. 433, 464 (1939) (opinion of Frankfurter, J.) . Declaring unconstitutional "an act of the Legislative or Executive Branch * * * is a formidable means of vindicating individual rights," and "when employed unwisely or unnecessarily it is also the ultimate threat to the continued effectiveness of the federal courts in performing" the "ultimate and supreme function" of interpreting the Constitution. *Valley Forge*, 454 U.S. at 473. Indeed, "[r]elaxation of standing requirements is directly related to the expansion of judicial power," such that loosening the constraints on taxpayer standing "would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government." *Richardson*, 418 U.S. at 188 (Powell, J., concurring). The requirement of concrete injury, in particular, "insur[es] that such adjudication does not take place unnecessarily." *Schlesinger*, 418 U.S. at 221.

Proper respect for the separation of powers thus requires that the Judicial Branch not "hospitably accept for adjudication claims of constitutional violation by

other branches of government where the claimant has not suffered cognizable injury." *Valley Forge*, 454 U.S. at 474. Because constitutional challenges to the acts of the Executive Branch "affect[] relationships between the coequal arms of the National Government," *id.* at 473, claims like respondents' should only be entertained as a "last resort," *id.* at 474, and upon the firmest conviction that the constitutional requirements for judicial intervention under Article III have been satisfied.

> To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing "government by injunction."

Schlesinger, 418 U.S. at 222. That principle applies with particular force when, as here, taxpayers seek judicial superintendence of the speeches and daily activities not just of agency officials, but also of presidential staff within the Executive Office of the President acting pursuant to a presidential directive.

To require, as the court of appeals did, only the presence of federal funding within the government paired with an Establishment Clause objection not only would loose taxpayer standing from its constitutional, historic, and precedential moorings, but also would disregard those constitutional constraints and would go far towards establishing the courts, at the behest of any one of the more than 180 million taxpayers in the United States, as a standing Council of Revision for every governmental encounter with religion. See *Richardson*, 418

U.S. at 189 (Powell, J., concurring). "[S]uch a broad application of *Flast*'s exception to the general prohibition on taxpayer standing would be quite at odds with its narrow application in [this Court's] precedent and *Flast*'s own promise that it would not transform federal courts into forums for taxpayers' 'generalized grievances.'" *DaimlerChrysler*, 126 S. Ct. at 1865 (quoting *Flast*, 392 U.S. at 106). Indeed, if interpreted in that open-ended fashion, *Flast* could not stand with the precedents of this Court—both before and after *Flast*—that hew to Article III's limits on taxpayer standing.

In addition, such a dramatic expansion of taxpayer standing would likely sow additional confusion in courts that already struggle with the scope and application of this Court's taxpayer standing jurisprudence. As Judge Easterbrook explained, the court of appeals' decision in this case creates line-drawing problems that not only suggest that the court's conception of taxpayer standing lacks "coherence," but also—if deemed to be a proper reading of *Flast*—"suggest[] problems in *Flast*'s underpinning and application." Pet. App. 62a (Easterbrook, J., concurring in the denial of rehearing en banc). Indeed, within three months of the court of appeals' decision in this case, the Seventh Circuit loosened the reins on taxpayer standing even further, holding that taxpayer standing supports suits for equitable restitution against private entities. See *Laskowski* v. *Spellings*, 443 F.3d 930 (7th Cir.), as amended on reh'g, 456 F.3d 702 (2006), petition for cert. pending, No. 06-582 (filed Oct. 24, 2006). Accordingly, adopting the court of appeals' reading of *Flast* could require the Court to revisit *Flast* and the doctrine of taxpayer standing altogether. If something has to give way to make the law in this area administrable, it should be the narrow anomaly of *Flast*,

not Article III and its bedrock requirement of particularized injury.[17]

While itself the subject of judicial and scholarly criticism, *Flast* has survived as a "stringently limited" exception to the general prohibition against taxpayer standing. *Richardson*, 418 U.S. at 194 (Powell, J., concurring). Eliminating the concrete boundaries established by *Flast*—in particular, the unique historical concern about imposing taxes to subsidize the religious exercise of churches and similar entities—would call into question the legitimacy of *Flast* itself. The Court need not undertake that examination in this case, however, if it retains its view of *Flast* as a narrow exception and reverses the court of appeals' holding that taxpayer standing extends to challenges to Executive Branch activities that are financed only indirectly through general appropriations and that do not entail the congressionally directed disbursement of federal funds to institutions or individuals outside the government.

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[17] Many jurists and scholars—beginning with Justice Harlan in his dissent in *Flast*—have questioned whether the *Flast* exception can be squared with the fundamental separation of powers principles that compel the general rule against taxpayer standing. See, *e.g.*, *Richardson*, 418 U.S. at 180-197 (Powell, J., concurring); *id.* at 183 n.2 ("Mr. Justice Harlan's criticisms of the Court's analysis in *Flast* have been echoed by several commentators.") (citing articles); *Flast*, 392 U.S. at 116-133 (Harlan, J., dissenting); see generally Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suff. U. L. Rev. 881 (1983); Kenneth E. Scott, *Standing in the Supreme Court–A Functional Analysis*, 86 Harv. L. Rev. 645 (1973); Boris I. Bittker, *The Case of the Fictitious Taxpayer: The Federal Taxpayer's Suit Twenty Years After* Flast *v.* Cohen, 36 U. Chi. L. Rev. 364 (1969).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 2007