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.,
Respondents.

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

BRIEF FOR AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, PEOPLE FOR THE AMERICAN WAY FOUNDATION, AND ANTI-DEFAMATION LEAGUE SUPPORTING RESPONDENTS

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INTERESTS OF AMICI CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 550,000 members dedicated to the preservation and defense of constitutional rights and civil liberties. Since its founding in 1920, the ACLU has frequently advocated in

[1] No counsel for either party authored this brief in whole or in part and no persons or entities, other than amici, their members or their counsel, made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

support of the religious freedoms guaranteed by the First Amendment, both as direct counsel and as amicus curiae. Because this case involves fundamental issues of religious liberty, and the ability to vindicate those rights in federal court, its proper resolution is a matter of significant concern to the ACLU and its members throughout the country.

Americans United for Separation of Church and State is a 75,000-member national, nonsectarian public interest organization committed to defending religious liberty and the separation of church and state. Since its founding in 1947, Americans United has been involved as a party, as counsel, or as an amicus curiae in many of the leading church-state cases that have come before the state and federal courts, including this Court. Americans United is currently serving as counsel in four cases in which the plaintiffs have asserted taxpayer standing to raise Establishment Clause claims. As an organization frequently involved in such litigation, Americans United can offer the Court special insight into the constitutional issues raised by this case.

The Baptist Joint Committee for Religious Liberty ("BJC") is a 70 year-old education and advocacy organization that serves fourteen cooperating Baptist conventions and conferences in the United States, with supporting congregations throughout the nation. BJC deals exclusively with religious liberty and church-state separation issues and believes that vigorous enforcement of both the Establishment and Free Exercise clauses is essential to religious liberty for all Americans. BJC has participated as amicus curiae in many of the major religious liberty cases before the Supreme Court.

People For the American Way Foundation ("PFAWF") is a nonpartisan citizens organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has more than 750,000 members and activists nationwide. PFAWF has frequently represented parties and filed amicus curiae briefs in litigation seeking to

defend First Amendment rights, including cases concerning religious liberty and violations of the Establishment Clause. PFAWF has joined in filing this amicus brief in order to help defend the important principles of standing and access to justice at stake in this case.

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races to combat racial, ethnic, and religious prejudice in the United States, the Anti-Defamation League ("ADL") is today one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. The League brings to this case a unique national perspective, acquired from day-to-day experience serving constituents across the United States, which sets it apart from the parties directly involved. Decades of work on issues related to the First Amendment's religion clauses have reinforced ADL's core belief in the importance of strict adherence to the separation of church and state as a means of reserving religious freedom and protecting our democracy. Because taxpayer standing is critically important to enforcing separation and seeking redress for its violation, ADL believes that taxpayer access to the courts is fundamental to preserving religious liberty and democracy.

SUMMARY OF ARGUMENT

Petitioners and their amici seek to erode, if not jettison, *Flast* v. *Cohen*, 392 U.S. 83 (1968). But *Flast* is a simple, straightforward application of longstanding principles that the lower courts have been able to apply with ease. The undersigned amici support affirmance of the Seventh Circuit's decision, and submit this brief to demonstrate that *Flast* is consistent with, and remains vital to, this Court's standing jurisprudence.

When taxes levied and appropriated by Congress are spent in violation of the Establishment Clause, a taxpayer may constitutionally challenge such expenditures because he suffers a direct and concrete injury that is caused by the illegal expenditure and that would be redressed by enjoining it. This principle—recognized in *Flast* v. *Cohen*, 392 U.S. 83

(1968), clarified in *Bowen* v. *Kendrick*, 487 U.S. 589 (1989), and confirmed last Term in *DaimlerChrysler Corp.* v. *Cuno*, 126 S. Ct. 1854 (2006)—is not a doctrinal anomaly but rather a straightforward application of the well-settled constitutional standing requirements of injury, causation, and redressability. Moreover, because this principle is entirely consistent with this Court's general standing jurisprudence, it has been easily administrable by lower courts.

ARGUMENT

I. CHALLENGES BY TAXPAYERS TO EXPENDITURES THAT VIOLATE THE ESTABLISHMENT CLAUSE COMPORT WITH CONSTITUTIONAL STANDING REQUIREMENTS

The standing recognized in *Flast* and *Kendrick* is fully consistent with this Court's broader standing jurisprudence. Taxpayers who invoke *Flast* to challenge Establishment Clause violations must make the same individualized showing of injury, causation, and redressability required of all plaintiffs seeking standing in Article III courts. *See Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

Although the term "taxpayer standing" typically refers to a type of standing sought by plaintiffs who rely solely on their status as taxpayers and who cannot meet the constitutional elements of standing, *see Frothingham* v. *Mellon*, 262 U.S. 447, 485-486 (1923); *see also Warth* v. *Seldin*, 422 U.S. 490, 508-511 (1975); *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State*, 454 U.S. 464, 476-482 (1982), the mere fact that a plaintiff objects as a taxpayer to a federal expenditure does not automatically preclude standing. *Frothingham*'s rejection of "taxpayer standing" is a proxy—a generalization about the application of constitutional principles to plaintiffs who suffer no concrete, distinct injury. "Taxpayer standing" is not an independent constitutional bar,[2] and it does not trump a court's obligation

[2] When the *Flast* Court undertook what it called a "fresh examination of the limitations upon standing to sue in a federal court and the application of those limitations to taxpayer suits," it expressly rejected the

to evaluate standing based on the nature of the particular claims asserted in a specific case. *See Warth*, 422 U.S. at 500 (explaining that standing "often turns on the nature and source of the claim asserted"); *see also McConnell* v. *FEC*, 540 U.S. 93, 227 (2003) (same). While *Flast* may represent a departure from the general prohibition against taxpayer standing, it is not an exception to Article III's requirements. Under *Flast* and its progeny, plaintiffs who are taxpayers and who challenge federal spending as violative of the Establishment Clause do not need—and do not receive—any special dispensation from Article III's standing requirements.

A. This Court's Cases Make Clear That *Flast* Is Consistent With The Limits On Judicial Power Embodied In Article III Standing Doctrine

Far from being "out of step with the rest of Article III standing doctrine," State Attorneys General Br. 15, *Flast* emphasized the constitutional constraints on the federal judiciary and linked those constraints to limits on standing. *Flast* expressly recognized the "dual limitation placed upon federal courts by the case-and-controversy doctrine," which includes both "limit[ing] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process," *and* "defin[ing] the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." 392 U.S. at 95. In so doing, *Flast*

Government's assertion that "the constitutional scheme of separation of powers . . . present[s] an absolute bar to taxpayer suits challenging the validity of federal spending programs." 392 U.S. at 94, 98. No subsequent case has disturbed this determination. *See Kendrick*, 487 U.S. at 619-620 (granting standing to taxpayers in Establishment Clause case); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) (explaining that, under *Flast*, taxpayer status can "supply the personal stake essential to standing"). Accordingly, the general rule against taxpayer standing has no force apart from the constitutionally required elements of standing.

rejected the roving "private attorneys-general" model of standing that Justice Douglas would have permitted, *id.* at 108 (Douglas, J., concurring), observing that the case-or-controversy requirement is not met "where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." *Id.* at 106.

Indeed, this Court's Article III analysis last Term in *DaimlerChrysler* confirms *Flast*'s continuing significance and its consistency with modern standing doctrine. First, *DaimlerChrysler* relies on language from *Flast* to explain the link between standing rules and preserving separation of powers. *See* 126 S. Ct. at 1861 ("This Court has recognized that the case-or-controversy limitation is crucial in maintaining the 'tripartite allocation of power' set forth in the Constitution.") (quoting *Valley Forge* quoting *Flast*). Second, *DaimlerChrysler* echoes *Flast*'s identification of the susceptibility of a dispute to judicial resolution as an essential element of a "case" or "controversy." *Flast* makes clear that Article III limits the federal judicial power not only "to those disputes which confine federal courts to a rule consistent with a system of separated power," but also to those "which are traditionally thought to be capable of resolution through the judicial process."[3] *Flast*, 392 U.S. at 97; *see also Valley Forge*, 454 U.S. at 472 (quoting this language from *Flast*). Likewise, *DaimlerChrysler* describes a dispute that

[3] This analysis makes clear that *Flast* acknowledges the separation of powers component in the Article III case-or-controversy requirement that forms the basis for the standing doctrine. Any indication to the contrary in *Lewis* v. *Casey*, 518 U.S. 343, 353 n.3 (1996), was dicta, and, in any event, was subsequently corrected in *DaimlerChrysler*, 126 S. Ct. at 1861. Furthermore, the principle elucidated in *Flast*—that the Establishment Clause is a specific limitation on the tax and spend power—provides assurance that "the federal courts will not intrude into areas committed to the other branches of government." *Flast*, 392 U.S. at 96; *see also DaimlerChrysler*, 126 S. Ct. at 1861. The judicial branch is permitted to decide a taxpayer's claim only when the taxpayer asserts that an identifiable and articulated limit on the tax and spend power has been exceeded. *See Kendrick*, 487 U.S. at 619; *Flast*, 392 U.S. at 102-103.

satisfies constitutional standing principles as "a controversy between parties which ha[s] taken a shape for judicial decision" and is "of a Judiciary Nature." 126 S. Ct. at 1861. Thus, notwithstanding Petitioners' amici's description of *Flast* as a "withered husk," State Attorneys General Br. 23, that is "manifest[ly] inconsisten[t] with the rest of Article III caselaw," American Center for Law and Justice Br. 13, this Court's reliance on *Flast* in *DaimlerChrysler* confirms *Flast*'s continuing relevance and conclusively refutes the charge that it is disconnected from Article III jurisprudence.

B. The Nature Of A Taxpayer's Establishment Clause Challenge To Federal Spending Provides The Requisite Harm To Satisfy The Three Constitutional Standing Requirements

Contrary to the assertions of several of Petitioners' amici, *see, e.g.*, American Center for Law and Justice Br. 9; State Attorneys General Br. 14-15; Foundation for Moral Law, Inc. Br. 9-10, plaintiffs who rely on *Flast* allege standing based on a concrete and direct harm. The Establishment Clause itself provides protection against a specific injury: the improper expenditure of taxpayer funds. *See Flast*, 392 U.S. at 104 (Establishment Clause was designed "as a specific bulwark" against potential abuses of governmental power and "operates as a specific constitutional limitation" on the tax and spend power"); *id.* at 114 (Stewart, J. concurring) (stating that because the Establishment Clause "plainly prohibits taxing and spending in aid of religion, every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution"); *see also DaimlerChrysler*, 126 S. Ct. at 1865.

In *Flast*, the taxpayers had standing to bring suit under the Establishment Clause, claiming that Executive Branch officials had used funds that were appropriated by Congress to finance instruction in religious schools. *See* 392 U.S. at 85-87. The *Flast* Court observed:

> Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was

> that the taxing and spending power would be used to favor one religion over another or to support religion in general.

Id. at 103. Consequently, a taxpayer challenging government action under the Establishment Clause has "a clear stake" in the outcome of the action, because a "logical nexus" exists between the plaintiff's taxpayer status and his claim of Establishment Clause violation. *Id.* at 102-106. The taxpayer's stake assured the *Flast* Court of the presence of "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult questions," and which fulfills Article III's requirement that there be a case or controversy "in a form historically viewed as capable of resolution through the judicial process." *Id.* at 95, 99 (internal quotations and citations omitted).

As in *Flast*, the taxpayers in *Kendrick* were permitted to challenge Executive Branch officials' use of funds that Congress had appropriated for disbursement under a federal program for social services. 487 U.S. at 618. There, the Government argued that the taxpayers' suit was in actuality a challenge to executive action, and not to an exercise of congressional authority under Article I, § 8—the same argument the Government makes here. *Id.* at 619. The Court rejected this argument. It explained that the taxpayers' claim that federal funds were being used improperly by individual grantees was no less a challenge to congressional tax and spend power "simply because the funding authorized by Congress has flowed through and been administered by the Secretary." *Id.* As the *Kendrick* Court recognized, the appropriate inquiry is not whether the challenged expenditures required action by the Executive Branch, but whether there is "a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power." *Id.* at 619-620. The participation of Executive Branch officials in disbursing those monies has no bearing on the standing analysis. Where plaintiffs "call into question how the funds authorized by Congress are being

disbursed pursuant to the . . . statutory mandate," they are challenging the tax and spend power. *See id.* at 619-620. *Cf. Valley Forge*, 454 U.S. at 489-490 (no taxpayer standing where Article I, § 8 powers not challenged, such that there was no congressional action but only an Executive Branch decision); *Kendrick*, 487 U.S. at 619 (distinguishing *Valley Forge* as a case "where the challenge was to an exercise of executive authority pursuant to the Property Clause" and not Article I, § 8).

The "constitutional minimum" of standing contains three elements: the plaintiff must have suffered an injury in fact; there must be a causal connection between the injury and the conduct complained of; and it must be likely that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-561. The type of standing recognized in *Flast* and *Kendrick* is entirely consistent with this "constitutional minimum."

1. *Flast* and its progeny require plaintiffs to demonstrate the requisite injury in fact, "a requirement that helps assure that courts will not pass upon abstract, intellectual problems, but adjudicate concrete, living contests between adversaries." *FEC* v. *Akins*, 524 U.S. 11, 20 (1998) (internal citations and quotations omitted); *see Lujan*, 504 U.S. at 560 (injury must be "an invasion of a legally protected interest" that is concrete and particularized and actual or imminent); *see also DaimlerChrysler*, 126 S. Ct. at 1862 (same); *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) (same). Each taxpayer plaintiff is directly injured by the improper expenditure of tax dollars, which is the precise harm that the Establishment Clause was designed to prevent. *Walz* v. *Tax Comm'n of City of New York*, 397 U.S. 664, 668 (1970) ("For the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.").[4] As this

[4] The *Flast* Court observed:

Court recognized last Term, the injury suffered by the taxpayer in Establishment Clause challenges to federal spending is "the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion alleged by a plaintiff." *DaimlerChrysler*, 126 S. Ct. at 1865. Moreover, the injury is the fact that the taxpayer's "money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power." *Flast*, 392 U.S. at 106.

Furthermore, the taxpayer's injury, as a "concrete and particularized" harm, *Lujan*, 504 U.S. at 560, fits squarely within the realm of cognizable injuries sufficient for Article III standing. Indeed, outside the Establishment Clause context, this Court has granted standing for plaintiffs with far more attenuated injuries. *See, e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 181-182 (2000) (standing established where environmental plaintiffs averred that defendant's activities directly affected plaintiffs' recreational and aesthetic interests in affected area); *Akins*, 524 U.S. at 21 (injury in fact consisted of voters' inability to obtain relevant financial information regarding organization alleged to be a political committee); *Lujan*, 504 U.S. at 566-567 (a person who observes or works with a particular animal threatened by a federal decision "is facing perceptible harm" for standing purposes); *Smith* v. *Organization of Foster Families For Equality & Reform*, 431 U.S. 816, 841 (1977) (foster parents had standing to raise the

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> James Madison, who is generally recognized as the leading architect of the religion clauses of the First Amendment, observed in his famous Memorial and Remonstrance Against Religious Assessments that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general.

Flast, 392 U.S. at 103-104 (internal citations omitted).

rights of children); *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-689 (1973) (alleged harm from inability to use natural resources was "specific and perceptible harm" for standing purposes).

The concrete and particularized harm recognized in *Flast* and *Kendrick* contrasts sharply with the harms alleged in cases in which this Court has denied standing to taxpayers. In *Frothingham*, for example, a taxpayer complained that an appropriation violated the Tenth Amendment. 262 U.S. at 479. This improper expenditure, she argued, caused her direct harm because the appropriations might increase "the burden of future taxation." *Id.* at 486. But, as this Court recognized, any possible injury from an increased tax burden "is shared with millions of others, is comparatively minute and indeterminable, and . . . so remote, fluctuating and uncertain" that it cannot serve as the concrete injury necessary for standing in federal courts. *Id.* at 487. In contrast, taxpayers who claim that expenditures were made in violation of the Establishment Clause suffer an immediate and direct harm from the expenditure itself, without regard for the speculative effect on their overall tax burden. *See DaimlerChrysler*, 126 S. Ct. at 1865.[5]

2. The standing recognized in *Flast* also satisfies the causation element of Article III standing. Where taxpayers are challenging government misuse of funds appropriated under Congress's tax and spend power, there is a direct link between the conduct and the harm suffered—"the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion." *DaimlerChrysler*, 126 S. Ct. at 1865; *see Akins*, 524 U.S. at 25 (voters' inability to obtain financial information regarding organization was a harm that was "fairly traceable" to the

[5] Although they brought Establishment Clause claims, the plaintiffs in *Doremus* v. *Board of Education*, 342 U.S. 429, 433 (1952), and *Valley Forge*, 454 U.S. at 480—unlike Respondents in this case—were unable to identify any appropriated funds that they alleged had been misused, and therefore were also unable to demonstrate an injury in fact.

FEC's decision that such organization was not a political committee).[6] Accordingly, the taxpayer's injury is "not the result of the independent action of some third party not before the court" but is instead "fairly traceable" to the government's alleged illegal expenditure. *Lujan*, 504 U.S. at 560 (internal quotation marks omitted).

Flast makes clear that the requisite causal link is established when taxpayers challenging appropriated expenditures on Establishment Clause grounds satisfy the "logical nexus" test, which requires a link between taxpayer status and the type of program challenged, as well as a nexus between that status and the precise nature of the constitutional infringement alleged. *Flast*, 392 U.S. at 102-103. Because Establishment Clause challenges to disbursements of congressional appropriations are directed at "identifiable Government violations of law," *Allen* v. *Wright*, 468 U.S. 737, 759-760 (1984), the constitutional requirement is satisfied. *See Flast*, 392 U.S. at 102 ("[I]t is both appropriate and necessary to look to the substantive issues . . . to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated."); *see also United States* v. *Richardson*, 418 U.S. 166, 174 (1974) (quoting *Flast*).

In contrast, Establishment Clause plaintiffs who fail to show a direct link between the government action and their taxpayer status consistently have been denied standing. In *Doremus* v. *Board of Education*, 342 U.S. 429 (1952), this Court refused to grant standing to taxpayers complaining about Bible reading in public schools because they made no claims that the Bible reading was supported by any "measurable appropriation or disbursement of school-district funds

[6] This link between the alleged misconduct and the harm suffered is no less direct when the funds pass through the hands of Executive Branch officials. For purposes of Article III standing analysis, the touchstone event is when the appropriation is used, by any branch of the government, to fund religious activity. *See Flast*, 392 U.S. at 87-88 (upholding taxpayer challenge to executive officials' expenditure of federal funds); *Kendrick*, 487 U.S. at 589 (same).

occasioned solely by the activities complained of." *Id.* at 434. With no allegation that the complained of conduct used appropriated funds, the plaintiffs were unable to show the requisite causal relationship. *Id.* at 434-435 ("It is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct."). Similarly, the plaintiffs in *Valley Forge* challenged government action pursuant to the Property Clause, rather than the Tax and Spend Clause, eliminating any nexus between the complained of conduct and the plaintiffs' standing as taxpayers. *Valley Forge*, 454 U.S. at 480; *see also Kendrick*, 487 U.S. at 619.

3. The standing permitted in *Flast* and its progeny also satisfies the redressability prong of this Court's general standing analysis. The possibility of redress for the injury "must be likely, as opposed to merely speculative." *Lujan*, 504 U.S. at 561 (internal quotations and citations omitted); *see Steel Co.*, 523 U.S. at 106-110 (holding that the relief sought by the plaintiff must serve to remedy the plaintiff's alleged injury caused by the actions of the defendant). As this Court expressly observed last Term, ordering the cessation of the improper government expenditure provides the proper redress for taxpayers claiming harm to their interest under the Establishment Clause: "an injunction against the spending would of course redress that injury, regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally." *DaimlerChrysler*, 126 S. Ct. at 1865 (citing *Valley Forge*, 454 U.S. at 514 (Stevens, J., dissenting)).

Accordingly, this Court has made clear that the elements of Article III standing are satisfied by an Establishment Clause challenge to government expenditures of appropriated funds.

C. Respondents Meet The Article III Standing Requirements

Respondents claim that the government's expenditures of tax dollars for activities such as the sponsorship of conferences that give preference to faith-based organizations vio-

late the Establishment Clause. *See* Pet. App. 73a, 76a, 80a. Because this alleged misuse of funds directly causes a concrete injury to Respondents as taxpayers and can be remedied by the injunction that they are seeking, they have standing to bring this claim. Respondents' allegations describe the government's use of federal tax funds to support the establishment of religion. This "'extract[ion] and spen[ding] of 'tax money' in aid of religion," *DaimlerChrysler*, 126 S. Ct. at 1865, is a cognizable, direct injury to Respondents.

Similarly, Respondents allege that the funds come from dollars appropriated under the tax and spend power, Pet. App. 73a, 76a, 80a, so the alleged misconduct has a "logical nexus" to the plaintiffs' status as taxpayers. *See Flast*, 392 U.S. at 102-103. Thus, the harm is "fairly traceable" to the challenged conduct. *See Lujan*, 504 U.S. at 560.

Finally, Respondents seek, among other remedies, an injunction to prevent expenditures of tax funds that violate the Establishment Clause. Pet. App. 80a. As this Court recognized in *DaimlerChrysler*, 126 S. Ct. at 1865, the imposition of such an injunction would serve as a complete remedy to the harm suffered by Respondents as taxpayers.

II. *FLAST* PROVIDES AN ADMINISTRABLE RULE TO THE LOWER COURTS

Taxpayer standing in Establishment Clause cases is rare. We have been able to identify fewer than two dozen cases in the nearly four decades since *Flast* was decided in which federal courts of appeals have granted plaintiffs standing to bring Establishment Clause claims based solely on their status as federal taxpayers. Taxpayer standing is rare both because plaintiffs may allege other bases for standing, *see, e.g.*, *Doe* v. *Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 499 n.83 (5th Cir. 2001) (en banc) (Wiener, J., concurring in part and dissenting in part) (explaining that the majority did not need to reach the issue of taxpayer standing because it found another basis for standing); *Grove* v. *Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1532 (9th Cir. 1985) (not reaching taxpayer standing because other plaintiffs had a

separate basis for standing), and because, as explained below, courts have carefully stayed within *Flast*'s—and thus, Article III's—bounds.

A. *Flast* Has Not Opened The Floodgates Of Taxpayer Litigation Because It Has Been Effectively Limited To Establishment Clause Cases

For nearly forty years, this Court has recognized that taxpayers have standing to challenge government expenditures they claim violate the Establishment Clause. Recognition of that principle has not resulted in a flood of litigation or an erosion of traditional standing doctrine. Indeed, *Flast* provides a clear barrier to any expansion of standing to those bringing suit based on hypothetical or conjectural harms, because it requires federal taxpayers to show that the challenged expenditures "exceed[] specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power." *Flast*, 392 U.S. at 102-103. As discussed above, the Establishment Clause acts as just such a limit. *Id.* at 104.

We are unaware, however, of any other constitutional provision that the courts of appeals have found to be a similar limit on the tax and spend power. This Court recognized as much in *DaimlerChrysler*, noting that "'only the Establishment Clause' has supported federal taxpayer suits since *Flast*." 126 S. Ct. at 1864 (internal citations omitted). This limitation provides a clear, bright-line rule for the lower courts that allows for quick dismissals of cases involving plaintiffs who do not allege direct injury of the sort suffered in Establishment Clause cases. *See Storino* v. *Borough of Point Pleasant Beach*, 322 F.3d 293, 298 n.2 (3d Cir. 2003) ("At present, the only acknowledged exception to this rule [prohibiting taxpayer standing] arises when a plaintiff challenges a government expenditure as violating the Establishment Clause."); *Troutman* v. *Shriver*, 417 F.2d 171, 173 (5th Cir. 1969) (listing an Establishment Clause claim as one of *Flast*'s requirements).

B. Courts Have Also Limited Standing In Establishment Clause Cases To Those Federal Taxpayer Plaintiffs Challenging Expenditures Appropriated Pursuant To Congress's Tax And Spend Power

1. Circuit courts have denied standing where potential plaintiffs challenged conduct unrelated to Congress's power to tax and spend

Flast provides another safeguard against widespread reliance on taxpayer standing by requiring plaintiffs to challenge expenditures of funds appropriated pursuant to Congress's tax and spend power. *Flast*, 392 U.S. at 102. In *Kurtz* v. *Baker*, 829 F.2d 1133 (D.C. Cir. 1987), for example, the plaintiff sought to challenge the constitutionality of a congressional guest chaplaincy program. The D.C. Circuit determined that he lacked taxpayer standing because the program operated under the rules of the individual houses of Congress, rather than through the tax and spend power. *Id.* at 1140. Similarly, in *Langendorf* v. *Administrators of Tulane Educational Fund*, 528 F.2d 1076 (5th Cir. 1976), the Fifth Circuit refused to grant taxpayer standing to plaintiffs because the expenditures at issue—although made by a public institution—were funded entirely by private donations and therefore had no connection to the tax and spend power. *Id.* at 1077.

Indeed, the lower courts have so rigorously applied this requirement that in some Establishment Clause cases they have erroneously rejected taxpayer standing even where the challenged appropriations were authorized by Article I, § 8, simply because the expenditures were supported by other congressional powers as well. *Americans United for Separation of Church & State* v. *Reagan*, 786 F.2d 194, 199-200 (3d Cir. 1986) (denying taxpayer standing to challenge government funding of diplomatic relations with the Vatican because the authorization for the expenditures were not "found *only* in article I, section 8, clause 1") (emphasis added); *see also Phelps* v. *Reagan*, 812 F.2d 1293, 1294 (10th Cir. 1987) (rejecting similar claim because the expenditures were "not solely dependent upon the taxing and spending clause"). *But see Katcoff* v. *Marsh*, 755 F.2d 223, 231 (2d Cir.

1985) (adopting the reasoning of the lower court, which allowed taxpayers to challenge the constitutionality of the Army's chaplaincy program because the funds were authorized at least in part by the tax and spend power). These overly restrictive cases, improperly denying standing to plaintiffs who meet *Flast*'s requirements, clearly demonstrate that the lower courts are not prone to lax, expansive applications of *Flast*.

2. Standing to challenge Executive Branch expenditures of funds appropriated pursuant to the tax and spend power does not exceed *Flast*'s limits

Flast's requirement that plaintiffs challenge the use of funds appropriated pursuant to Congress's Article I, § 8 power does not, as this Court has recognized, preclude challenges to the Executive Branch's expenditure of those funds. *See Kendrick*, 487 U.S. at 619 (explaining that plaintiffs have standing to challenge the Executive's use of appropriated funds); *Flast*, 392 U.S. at 86-87 (explaining that plaintiffs were challenging specific expenditures made pursuant to a broad appropriations statute). The lower courts have followed this guidance. *See American Jewish Congress* v. *Corporation for Nat'l & Cmty. Servs.*, 399 F.3d 351, 355-56 (D.C. Cir. 2005); *Lamont* v. *Woods*, 948 F.2d 825, 829-31 (2d Cir. 1991); *Pulido* v. *Bennett*, 860 F.2d 296, 297-298 (8th Cir. 1988) (stating that *Kendrick* "makes clear that federal taxpayers do have standing to raise Establishment Clause challenges to executive administration of congressional spending programs" and allowing a taxpayer to challenge expenditures of appropriated funds by the Secretary of Health and Human Services).

Although Petitioners assert that the Seventh Circuit introduced conflict on this issue in the lower courts, *see* Pet. 23, we have been unable to identify a single circuit in which a federal taxpayer is currently prohibited from bringing a claim that the Executive's authorized use of funds appropri-

ated pursuant to Article I, § 8 violated the Establishment Clause.[7] Petitioners point in particular to conflicts with the D.C. and Second Circuits. Pet. 23-25. No such conflict exists.

Although the D.C. Circuit decided in *American Jewish Congress* v. *Vance*, 575 F.2d 939 (D.C. Cir. 1978), that federal taxpayers could not bring Establishment Clause challenges to Executive action, that case was decided prior to this Court's decision in *Kendrick*. In *American Jewish Congress* v. *Corporation for National & Community Service*, 399 F.3d 351 (D.C. Cir. 2005), the D.C. Circuit explicitly concluded, in light of *Kendrick*, that the *Flast* rule encompassed taxpayer Establishment Clause claims based on "the manner in which the Executive Branch is administering" a tax-and-spend statute. *Id.* at 355. Such a challenge satisfies *Flast*'s "nexus" requirement because "[a] 'claim that funds appropriated by Congress are being used improperly by individual grantees' is no less 'a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by' an executive official." *Id.* (quoting *Kendrick*, 487 U.S. at 619).

Similarly, the Second Circuit, in *Lamont* v. *Woods*, concluded that federal taxpayers had standing to bring an Establishment Clause claim against specific grants made by the Executive Branch from appropriated funds. 948 F.2d at 830.

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[7] The Third Circuit, in a case decided before *Kendrick*, noted that this Court stated in *Valley Forge* that "*Flast* did not even reach Executive Branch actions." *Americans United for Separation of Church & State*, 786 F.2d at 200; *see also Kirby* v. *HUD*, 675 F.2d 60, 65 n.9 (3d Cir. 1982) (noting in dicta that plaintiffs would not have taxpayer standing to bring a non-Establishment Clause claim in part because "*Flast* limits taxpayer standing to challenges of exercises of congressional power and is not applicable to the action of administrative agencies such as HUD which are extensions of the Executive Branch"). Not only does *Kendrick* clearly foreclose the Third Circuit's reasoning, but that statement is merely dicta in any event; the court concluded that the plaintiffs lacked standing because the funding was appropriated pursuant to the Necessary and Proper Clause, rather than the tax and spend power. *Americans United for Separation of Church & State*, 786 F.2d at 199.

In doing so, the court distinguished *In re United States Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989), a case that Petitioners argue is in conflict with the Seventh Circuit's decision below. Pet. 24. Unlike the *Lamont* plaintiffs, the federal taxpayers in *Catholic Conference* "claimed the agency was acting *ultra vires* in its statutory authority." *Lamont*, 948 F.2d at 831; *see also Catholic Conference*, 885 F.2d at 1028 ("The complaint centers on an alleged decision made solely by the Executive Branch that in plaintiffs' view directly contravenes Congress' aim."). Therefore, because the *Catholic Conference* plaintiffs "did not impugn Congress's exercise of its taxing and spending powers, their status as federal taxpayers was insufficiently linked to their claim," and the court concluded they lacked standing. *Id.* The federal taxpayers in *Lamont*, by contrast, challenged allegedly unconstitutional expenditures by the Executive Branch that were "permitted, but . . . not mandate[d]" by the appropriations statute. *Lamont*, 948 F.2d at 830 n.2. Thus those plaintiffs "fit[] the traditional *Flast* model of taxpayer standing." Pet. Reply 9 n.4.

Although *Catholic Conference* appears to depart from *Flast*, *see Flast*, 392 U.S. at 90, 109 (finding standing without distinguishing between plaintiffs' claims that the funds were used improperly under the act and, in the alternative, that the act was unconstitutional to the extent it permitted such use), it turns on an issue not presented by the case before the Court because the plaintiffs here have made no allegation that the Executive's use of appropriated funds contravened congressional funding statutes. Where, as here, plaintiffs challenge Executive Branch expenditures that are consistent with the appropriations statute, they have demonstrated a nexus with the tax and spend power and thus have standing to bring an Establishment Clause claim. *Kendrick*, 487 U.S. at 619-620; *see also Lamont*, 948 F.2d at 843.

III. Settled Principles of Stare Decisis Bar Overruling *Flast*

Those seeking to overturn *Flast* bear a "heavy burden." *Vasquez* v. *Hillery*, 474 U.S. 254, 266 (1986). Stare decisis

"contributes to the integrity of our constitutional system of government." *Id.* at 265. It "carries such persuasive force" that this Court has "always required a departure from precedent to be supported by some special justification." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000) (internal quotation marks omitted). No such justification exists here.

This Court has looked to four factors to help guide its decision about whether an earlier case should be overturned: (1) whether the development of the law has left the original decision "no more than a remnant of abandoned doctrine"; (2) whether the understanding of the factual premise for the earlier decision has so changed "as to have robbed the old rule of significant application or justification"; (3) whether the rule is unworkable; and (4) whether reversal would cause harm to or inflict inequity on those who have relied on it. *Planned Parenthood of S.E. Penn.* v. *Casey*, 505 U.S. 833, 854-855 (1992). This assessment strongly supports upholding *Flast*.

"Intervening development of the law" is the "primary reason" for this Court's reversals. *See Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989). As explained above, *Flast* was—and is—consistent with traditional principles of standing, and it was reaffirmed by this Court as recently as last Term. *See DaimlerChrysler*, 126 S. Ct. at 1861. Recent standing cases cannot be said to have "removed or weakened the conceptual underpinnings" from *Flast* or to have "rendered [*Flast*] irreconcilable with competing legal doctrines or policies." *Patterson*, 491 U.S. at 173; *see also Mitchell* v. *United States*, 526 U.S. 314, 331-332 (1999) (Scalia, J., dissenting, noting that "wide acceptance in the legal culture" would be an "adequate reason" not to overrule precedent). *See supra* Parts I.A and I.B.

This Court has also overturned precedent when the factual premise underlying the older case has been found to be invalid. *See Casey*, 505 U.S. at 864 (explaining that *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937), and *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954), were valid departures from principles of stare decisis because "each rested on facts,

or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions"). But the factual basis for *Flast* remains valid today. Indeed, when this Court reaffirmed *Flast*'s legal conclusion, it also reaffirmed the factual premise on which that conclusion was based: the understanding that the Establishment Clause was designed to address the specific concern "'that the taxing and spending power would be used to favor one religion over another or to support religion in general.'" *DaimlerChrysler*, 126 S. Ct. at 1865 (quoting *Flast*, 392 U.S. at 103). Thus, *Flast*'s holding is not "somehow irrelevant or unjustifiable in dealing with the issue it addressed." *Casey*, 505 U.S. at 855.

Nor has *Flast* "proven to be intolerable simply by defying practical workability." *See Casey*, 505 U.S. at 854. As discussed above, the lower courts have faced no particular difficulty in assessing taxpayer standing questions in Establishment Clause cases, and "the required determinations fall within judicial competence." *Id.* at 855. *See supra* Part II.B.1. *Flast* provides a clear, administrable, and narrow rule that recognizes the Establishment Clause's unique yet important role while guarding against widespread reliance on taxpayer standing. It has presented no problems that would support its overruling. *Compare Swift & Co.* v. *Wickham*, 382 U.S. 111, 115-116 (1965) (finding an earlier decision unworkable where this Court found its application "as elusive as did the District Court").

This Court has recognized that the reliance interests that support stare decisis are not limited to cases involving economic reliance. *See Casey*, 505 U.S. at 855-856. Indeed, stare decisis is "even more critical in adjudication involving constitutional liberties than in adjudication involving commercial entitlements." *Payne* v. *Tennessee*, 501 U.S. 808 852-853 (1991) (Marshall, J., dissenting). Individuals seeking to challenge the will of the majority on constitutional grounds—including those claiming that elected representatives have used taxpayer funds to support the establishment of religion—have a strong interest in ensuring that this

Court's decisions do not shift with changes in popular sentiment. *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve."); *see also Casey*, 505 U.S. at 868 ("The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete.").

Where, as here, Petitioners and supporting amici have "offered no reason to believe that any . . . metamorphosis has rendered the Court's long commitment to [*Flast*] outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration," *Vasquez*, 474 U.S. at 266, there is no ground for overturning a precedent that has withstood the test of almost forty years of consistent and workable application.

CONCLUSION

For the foregoing reasons, amici respectfully request that the decision of the United State Court of Appeals for the Seventh Circuit be affirmed.

Respectfully submitted.

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