No.

In the Supreme Court of the United States

DENNIS GRACE, ACTING DIRECTOR OF THE WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, ET AL., PETITIONERS

v.

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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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 plaintiffs challenge no Act of Congress, the Executive Branch actions at issue are financed only indirectly through general appropriations, and no funds are disbursed to any entities or individuals outside the government.

PARTIES TO THE PROCEEDINGS

The petitioners, who were sued in their official capacity as defendants-appellees below, are Dennis Grace, Acting Director of the White House Office of Faith-Based and Community Initiatives, Steven McFarland, Director of the Department of Justice Center for Faith-Based and Community Initiatives, Jedd Medefind, Director of the Department of Labor Center for Faith-Based and Community Initiatives, Greg 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 Andrew Rajec, Acting 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, Dr. Julie Gerberding, Director of the Centers for Disease Control and Prevention, and David Caprara, the former Director of Faith-Based and Community Initiatives at the Corporation for National and Community Service, were originally defendants in the district court, but

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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.

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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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Dennis Grace, the Acting Director of the White House Office of Faith-Based and Community Initiatives, and the other federal petitioners, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 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, and the accompanying opinions concurring in and dissenting from the denial of rehearing en banc (App., *infra*, 58a-66a), are reported at 447 F.3d 988. The opinion of the district court denying in part the defendants' motion to dis-

miss the complaint for lack of Article III standing (App., *infra*, 27a-35a), and the final judgment of the district court (App., *infra*, 36a-57a), are unreported.

JURISDICTION

The court of appeals entered its judgment on January 13, 2006. The government's petition for rehearing was denied on May 3, 2006 (App., *infra*, 59a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In January 2001, the President created by Executive Order the White House Office of Faith-Based and Community Initiatives (White House Office) within the Executive Office of the President. See Exec. Order No. 13,199, 3 C.F.R. 752 (2002). The White House Office has "lead responsibility" within the Executive Branch for establishing policies, priorities, and objectives designed to "expand the work of faith-based and other community organizations to the extent permitted by law." *Id.* § 2. The President's "paramount goal" is to ensure that "private and charitable community groups, including religious ones, * * * have the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve valid public purposes." *Id.* § 1. To that end, the White House Office aims "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).

The President created Executive Department Centers for Faith-Based and Community Initiatives (agency Centers) in a number of federal agencies. See Exec. Order No. 13,198, 3 C.F.R. 750 (2002); Exec. Order No. 13,280, 3 C.F.R. 262 (2003); Exec. Order No. 13,342, 3 C.F.R. 180 (2005); Exec. Order No. 13,397, 71 Fed. Reg. 12,275 (2006). The purpose of those Centers is "to coordinate department efforts to elimi-

nate regulatory, contracting, and other programmatic obstacles to the participation of faith-based and other community organizations in the provision of social services." 3 C.F.R. 750, § 2 (2002).

The President undertook this 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. 258, § 2(f) (2003). At the 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), and that "[a]ll organizations that receive Federal financial assistance under social services programs should be prohibited from discriminating against beneficiaries or potential beneficiaries of the social services programs on the basis of religion or religious belief," *id.* § 2(d).

2. The Freedom From Religion Foundation and three of its members, who are alleged to be federal taxpayers, App., *infra*, 68a-69a paras. 7-9 (collectively, "Foundation"), filed this action against the Director of the White House Office and the Directors of 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. See *id.* at 67a-80a.[1]

The Foundation contended that the defendant officials violated the Establishment Clause by organizing national and regional conferences at which faith-based organizations allegedly "are singled out as being particularly worthy of federal funding because of their religious orientation, and the belief in God is extolled as distinguishing the claimed effectiveness of faith-based social services." App., *infra*, 73a para. 32. The Foundation further alleged that the defendant officials "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-based organizations." *Id.* at 77a para. 41. The Foundation also alleged that "Congressional appropriations [are] used to support the activities of the defendants." *Id.* at 79a para. 45.

The Foundation's complaint seeks a declaratory judgment that the officials' 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. App., *infra*, 80a. The Foundation and its three members asserted standing based solely on their federal taxpayer status. *Id.* at 68a-69a paras. 4-10.[2]

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[1] Initially, the Foundation also sued David Caprara, the former Director of Faith-Based and Community Initiatives at the Corporation for National and Community Service, and the Director of the Centers for Disease Control and Prevention, but it subsequently voluntarily dismissed the claims against those defendants. App., *infra*, 37a.

[2] Because the Foundation itself is a non-profit entity that is exempt from paying federal income taxes under 26 U.S.C. 501(c)(3), the Foundation lacks taxpayer status in its own right, and can assert it, if

3. Petitioners, the Directors of the White House Office and the agency Centers, moved to dismiss the complaint against them for lack of standing. The district court granted the motion to dismiss. App., *infra*, 27a-35a.

The district court reasoned 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." App., *infra*, 31a (quoting *Flast* v. *Cohen*, 392 U.S. 83, 102 (1968)). The court held that the challenged activities of the White House Director and the Directors of the agency Centers—organizing conferences and making speeches—"are not 'exercises of congressional power' as required by the *Flast* test." *Id.* at 34a. The court noted that the Director of the White House Office acts "on the President's behalf," and that none of the petitioners is "charged with the administration of congressional programs." *Id.* at 33a, 34a. "The view that federal taxpayers as such should be permitted to bring Establishment Clause challenges 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.[3]

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at all, only on behalf of its taxpaying members. See *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976).

[3] The district court dismissed the Foundation's claim against former Secretary of Education Rod Paige, and the court of appeals affirmed that dismissal. App., *infra*, 14a-15a, 35a. The Foundation's 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. The Foundation 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

4. A divided court of appeals vacated the district court's order of dismissal and remanded. App., *infra*, 1a-16a.

a. The majority held that "[t]axpayers have standing to challenge an executive-branch program, alleged to promote religion, that is financed by a congressional appropriation, 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 general appropriations. App., *infra*, 16a. In the majority's view, taxpayer standing extends beyond 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 power," *id.* at 11a, as opposed to funding "from, say, voluntary donations by private citizens," *ibid.* Standing accordingly exists even if "there is no statutory program" enacted by Congress under its Taxing and Spending power, *ibid.*, and even if the taxpayer is "unable to identify the appropriations that fund the [challenged activity]," *id.* at 10a.

The majority noted, however, that standing would not exist to challenge "incidental" expenditures, which it defined as "such cases as that of the government's expenditure on an armored limousine to transport the President to the Capitol to deliver the State of the Union address in which he speaks favorably of religion." App., *infra*, 14a. Because the Foundation challenged a series of Executive Branch activities, however, the court held that the use of general appropriations to finance the officials' actions sufficed to support taxpayer standing under Article III of the Constitution. *Id.* at 16a.

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claims, and for the Foundation 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. Accordingly, only petitioners remain as potential defendants in any further district court litigation.

b. Judge Ripple dissented. App., *infra*, 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. Judge Ripple reasoned that, by predicating taxpayer standing on the nearly universal use of general appropriations funds to finance the activities of government officials, rather than Congress's specific appropriation of funds to finance the activities of private entities, the majority had "cut[] the concept of taxpayer standing loose from its moorings." *Id.* at 19a. Judge Ripple explained that this Court had first recognized taxpayer standing in Establishment Clause cases to ensure that Congress could not "support[] a sectarian cause through the transfer of public funds," because that was "one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption." *Id.* at 22a (quoting *Flast*, 392 U.S. at 103).

Judge Ripple criticized the majority for abandoning *Flast*'s "narrow terms," App., *infra*, 19a, which have 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. In Judge Ripple's view, the majority's decision "expand[s] the narrow concept of taxpayer standing to the point where it cannot be distinguished from the citizen standing that the Supreme Court has regarded * * * as destructive of the case and controversy limitation on the power of the federal courts." *Ibid.*

In so doing, Judge Ripple concluded, the majority "sets this circuit on a course different from that of the other courts

to have applied the *Flast* exception." App., *infra*, 24a (citing *District of Columbia Common Cause* v. *District of Columbia*, 858 F.2d 1 (D.C. Cir. 1988); *In re United States Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989), cert. denied, 495 U.S. 918 (1990)).

5. By a vote of 7-4, the court of appeals denied the government's petition for rehearing en banc. However, two of the judges that voted against rehearing en banc filed separate opinions explaining that further review by the Seventh Circuit was not warranted because "the obvious tension which has evolved in this area of jurisprudence * * * can only be resolved by the Supreme Court," and "the needed consideration of this important issue by that tribunal would be unnecessarily delayed by our further deliberation." App., *infra*, 59a (Flaum, C.J., concurring in the denial of rehearing en banc); see *id.* at 60a (Easterbrook, J., concurring in the denial of rehearing en banc) (explaining that the court's decision on a matter that "put[s] the judicial and the political branches of the federal government at odds impl[ies] the wisdom of further review," and "[m]y vote to deny rehearing rests on a conclusion that this is not the right forum for that further deliberation").

Four judges (Ripple, J., joined by Manion, Kanne, and Sykes, JJ.) dissented from the denial of rehearing en banc, App., *infra*, 63a-66a, stating that the panel's decision "has serious implications for judicial governance," and "departs significantly from established Supreme Court precedent and creates an inter-circuit conflict," *id.* at 63a. As the dissent explained, "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. In the dissenters' view, the majority's decision contravened that

"very clear line," and "[a]bolishing or even diluting a standard so explicitly set by the Supreme Court simply is not an appropriate decision for us to make." *Ibid.*

REASONS FOR GRANTING THE PETITION

The divided court of appeals' decision in this case transforms taxpayer standing in the Establishment Clause context from a narrow exception, designed to prevent the specific historic evil of direct legislative subsidization of religious entities, into a roving license for any "individual citizen to challenge any action of the executive with which he disagrees, as violative of the Establishment Clause." App., *infra*, 24a (Ripple, J., dissenting). The court's decision not only cuts taxpayer standing from its constitutional and historical moorings, but also contravenes this Court's precedents and the decisions of other circuits. Indeed, the far-reaching implications of the court's ruling—and its sharp departure from this Court's teachings—prompted more than half of the Seventh Circuit's judges to take the extraordinary step of calling for this Court's review of the decision. See *id.* at 59a (Flaum, C.J., concurring in the denial of rehearing en banc), 59a-62a (Easterbrook, J., concurring in the denial of rehearing en banc), 63a-66a (Ripple, J., joined by Manion, Kanne, & Sykes, JJ., dissenting from the denial of rehearing en banc). The Court should grant certiorari and reaffirm the fundamental limits on taxpayer standing in this context.

A. The Seventh Circuit's Decision Contradicts The Clear Teachings Of This Court's Taxpayer Standing Cases

The court of appeals' decision conflicts sharply with decisions of this Court strictly limiting the circumstances in which a plaintiff's taxpayer status alone confers Article III standing.

1. a. Article III of the Constitution confines the judicial power to the resolution of actual "Cases" and "Controversies." U.S. Const. Art. III, § 2. An "essential and unchanging" com-

ponent of that 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). The "irreducible constitutional minimum of standing" requires that the plaintiff, *inter alia*, "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." *Id.* at 560 (internal quotation marks and citations omitted).[4]

This Court has generally rejected taxpayer status as a proper basis on which to predicate Article III standing, because a federal taxpayer's interest in the moneys of the 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* v. *Mellon*, 262 U.S. 447, 487 (1923). "Standing has been rejected in such cases because the alleged injury is not 'concrete and particularized,' but instead a grievance the taxpayer 'suffers in some indefinite way in common with people generally,'" and because the injury "is not 'actual or imminent,' but instead 'conjectural or hypothetical.'" *DaimlerChrysler Corp.* v. *Cuno*, 126 S. Ct. 1854, 1862 (2006) (citations omitted). "Proper regard for the complex nature of our constitutional structure

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[4] To establish standing, a plaintiff also must demonstrate traceability and redressability. In other words, the plaintiff 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 the plaintiff must show 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 (internal quotation marks and citations omitted).

requires" that courts not "hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982).

b. In *Flast* v. *Cohen*, 392 U.S. 83 (1968), this Court recognized a narrow exception to the general prohibition on taxpayer standing. The Court 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. *Id.* 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" that are challenged on Establishment Clause grounds. *Id.* at 102. The Court made clear that it did not suffice "to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute," and pointed as an example to the complaint in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952), that publicly funded school teachers engaged in religious activities pursuant to a state law calling for the reading of the Bible in public school. The Court rejected that claim as a basis for taxpayer standing. [5]

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[5] *Flast* also held that the taxpayer must allege that Congress's exercise of its legislative power "exceed[ed] specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power," like the Establishment Clause's prohibition on the disbursement of tax dollars to religious entities, 392 U.S. at 102-103. The Court has never held that any other constitutional constraint on Congress's taxing and spending power would support taxpayer standing. See *DaimlerChrysler*, 126 S. Ct. at 1864 ("[O]nly the Establishment Clause has supported federal taxpayer suits since *Flast*.") (internal quotation marks and citation omitted).

That narrow departure in *Flast* from Article III's general prohibition on taxpayer standing was warranted, in the Court's view, because "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 thus grounded the type of personal injury needed to establish taxpayer standing in this context on the historic constitutional concern that a taxpayer not be "force[d] * * * to contribute three pence only of his property for the support of any one establishment." *Ibid.* (citation omitted). Given the unique constitutional and historical pedigree of the concern with the contribution of money raised by the government to outside religious entities—which the Court tied to Madison's "famous Memorial and Remonstrance Against Religious Assessments," *ibid.*—the Court held that an individual's claim that "his tax money is being extracted and spent in violation of [that] specific constitutional protection[] against such abuses of legislative power" could support Article III standing. *Id.* at 106.

c. In the ensuing four decades, this Court has consistently reaffirmed that *Flast* is a "narrow" and rarely invoked exception to the rule that taxpayer status is insufficient to establish Article III standing. *DaimlerChrysler*, 126 S. Ct. at 1865; see *Bowen* v. *Kendrick*, 487 U.S. 589, 618 (1988) ("[W]e have consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing established in *Frothingham*."); *Valley Forge*, 454 U.S. at 481 (discussing the "rigor with which the *Flast* exception to the *Frothingham* principle ought to be applied").

This past Term the Court reiterated that *Flast* has a "narrow application in our precedent," *DaimlerChrysler*, 126 S. Ct. at 1865, and is strictly limited to a challenge to "congressional action under the taxing and spending clause"

claimed to be "in derogation of the Establishment Clause," *id.* at 1864 (quoting *Flast*, 392 U.S. at 105-106). The Court stressed that taxpayer standing exists 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.

Likewise, in *Valley Forge*, the Court emphasized that the limits to the narrow *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." *Id.* at. 479. The Court explained that, while the agency's actions necessarily entailed the use of tax money, "the 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 (internal quotation marks omitted). A constitutional objection to "a particular Executive Branch action arguably authorized by [an] Act [of Congress]" will not suffice. *Id.* at 479 n.15.[6]

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[6] See also *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 227-228 (1974) (finding no taxpayer standing in a suit where 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"); *United States* v. *Richard-*

Finally, in *Bowen* v. *Kendrick*, the Court reaffirmed that taxpayer standing does not exist to challenge, on Establishment Clause grounds, "an incidental expenditure of tax funds in the administration of an essentially regulatory statute." 487 U.S. at 619 (quoting *Flast*, 392 U.S. at 102). At the same time, *Bowen* held that a statutory spending program enacted pursuant to Congress's power to tax and spend does not fall outside the *Flast* rule just because it is administered by Executive Branch officials. See *ibid.* The Court explained that a challenge to "administratively made grants" fits *Flast*'s mold because 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. The claim that "funds 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 the Secretary [of Health and Human Services]." *Id.* at 619. The key point was that the taxpayers' allegations "call[ed] into question how * * * funds authorized by Congress are being disbursed pursuant to * * * statutory mandate." *Id.* at 620.

2. The court of appeals' holding that the Foundation has taxpayer standing to challenge an Executive Branch's program, alleged to promote religion, without challenging either a specific congressional appropriation or a direct transfer of funds to a religious entity, just because the Executive Branch's activity "is financed by a congressional appropria-

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son, 418 U.S. 166, 175 (1974) (holding that a taxpayer 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").

tion," App., *infra*, 16a, flatly contradicts that precedent in three fundamental respects.

First, an essential prerequisite to taxpayer standing is a "challenge[] directed only [at] exercises of *congressional* power" under the Taxing and Spending Clause. *Valley Forge*, 454 U.S. at 479 (internal quotation marks omitted) (emphasis added); *Flast*, 392 U.S. at 106 (challenge must be to "congressional action under the taxing and spending clause" allegedly in derogation of the Establishment Clause); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 225 n.15 (1974) ("[T]he *Flast* nexus test is not applicable where the taxing and spending power is not challenged.").

The Foundation, however, challenges Executive—not congressional—action in this case. The Foundation's complaint does not ask the Court to invalidate any congressional action, on its face or as applied, or even any specific Executive Branch decision to transfer funds to an outside entity. See App., *infra*, 60a ("[P]laintiffs in this litigation do not say that they have paid one extra penny because of the [conduct at issue].") (Easterbrook, J., concurring in the denial of rehearing en banc); *id.* at 64a ("Here, as in *Valley Forge*, the plaintiffs do not complain of any action taken by Congress.") (Ripple, J., dissenting from the denial of rehearing en banc).

The Foundation challenges only the fact that Executive Branch officials have decided to dedicate their time and attention to certain issues and events, such as the organization and conduct of various conferences.[7] The fact that those executive

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[7] See App., *infra*, 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

activities are funded by general appropriations, however, does not transform the Foundation's complaint into a challenge to "*congressional action* under the taxing and spending clause" allegedly in derogation of the Establishment Clause. *Flast*, 392 U.S. at 106 (emphasis added). The gravamen of the complaint is not that Congress has appropriated funds to pay the salaries and expenses of Executive Branch officials, but that Executive Branch officials have made discretionary judgments about how to spend their time (and indirectly taxpayer money) in an impermissible manner. The challenge goes to the Executive's "use" of general appropriations. App., *infra*, 79a para. 44. But, unlike *Kendrick*, it challenges only the use of such general appropriations to fund internal Executive Branch activities, as opposed to specific spending decisions made pursuant to a challenged "statutory mandate." 487 U.S. at 620.[8]

Second, in the absence of a legislative program calling for the disbursement of federal funds to private entities, there is no "logical link," *Flast*, 392 U.S. at 102, between the Founda-

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officials' organization and conduct of conferences).

[8] As noted above, note 3, *supra*, the Foundation did challenge the administration of a specific statutory grant program—"Mentoring Children of Prisoners," which was established by Congress pursuant to the Promoting Safe and Stable Families Amendments of 2001, Pub. L. No. 107-133, § 121, 115 Stat. 2419 (42 U.S.C. 629i (Supp. III 2003))—that authorized funding faith- and community-based organizations. The Foundation argued that the disbursement of funds pursuant to that program to a religious organization violated the Establishment Clause. The district court recognized taxpayer standing to challenge that specific grant and granted summary judgment to the Foundation on that claim, but that aspect of the district court's decision was not appealed. See note 3, *supra*; App., *infra*, 20a-22a (Ripple, J., dissenting). That allegation, unlike the ones that are before the Court, was focused on the exercise of Congress's taxing and spending power and the disbursement of funds to religious entities.

tion's allegations and its members' taxpayer status, and thus no "injury" that could give rise to Article III standing. In both *Flast* and *Kendrick*—the only two cases in which this Court has upheld taxpayer standing—the taxpayers challenged congressionally authorized programs that distributed federal funds to private 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; see *id.* at 619 (taxpayer standing sustained because congressionally authorized funds "flowed through" the agency to private grantees).

The Foundation's challenge, by contrast, is analogous to the taxpayer challenge in *Doremus*, which *Flast* pointed to as an example of an insufficient taxpayer injury. In *Doremus*, tax funds would pay teacher salaries whether or not the teachers read from the Old Testament. Likewise, here, the only appropriations at issue are the general appropriations that pay for the federal officials' salaries and offices, which would be appropriated whether or not the officials engaged in the conduct respondents challenge.[9]

[9] In *Doremus*, the Court, in an opinion by Justice Jackson, emphasized that the alleged Establishment Clause violation—a state law authorizing the reading of Bible passages in public schools—was not "supported by any separate tax or paid for from any particular appropriation," and did not "add[] any sum whatever to the cost of conducting the school." 342 U.S. at 433. The Court contrasted the case with *Everson* v. *Board of Education*, 330 U.S. 1 (1947), in which the plaintiff "showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of." *Doremus*, 342 U.S. at 434. The Court accordingly concluded, in

A challenge to the disbursement of funds to religious entities is a critical prerequisite for taxpayer standing because such outlays trigger the unique historic concern upon which *Flast*'s narrow exception rests. *Flast* concluded that the Framers' particular concern with the use of federal tax funds to finance or subsidize churches or the clergy meant that each taxpayer has a singular interest in ensuring that his "three pence" not be extracted and spent to support a church. *Flast*, 392 U.S. at 103. As the Court explained—citing to Madison's *Memorial and Remonstrance Against Religious Assessments*—the Establishment Clause was specifically designed to prevent the use of the "taxing and spending power" to support religious entities. *Ibid.* That "specific evil," *ibid.*, arises directly and exclusively out of an exercise of the taxing and spending power. The funding of religious entities by the government thus uniquely triggers a historically recognized individualized injury rooted solely in the Taxing and Spending Clause, which no other Establishment Clause or constitutional violation causes. It is that special history, and that history alone, that explains why this particular usage of taxpayer funds gives rise to taxpayer standing, when all other taxpayer-standing claims are foreclosed by Article III.

While recognizing that every taxpayer has a concern with disbursements to churches might be understood as relaxing the general rule that the injury be particularized—or at least infusing the rule with a special historic meaning in this context—the requirement of a congressionally authorized disbursement to a third party has the added benefit of ensuring that the dispute is concrete and crystallized. Here, the court of appeals allowed a challenge to internal Executive Branch

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Doremus, that "[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." *Ibid.*; see *Valley Forge*, 454 U.S. at 477-478 (discussing *Doremus*).

prioritizations that may or may not ever result in concrete decisions to make disbursements to religiously-affiliated entities. To the extent such awards are made pursuant to a statutory mandate, they can be challenged either by taxpayers (as was true of challenges to specific grants in this very case) or by others, such as interested, non-religious grantees, who presumably would have standing under traditional Article III principles (without regard to whether a grant is made pursuant to a statutory mandate). But allowing a challenge to executive decisions that do not result in grants would open the courthouse door to abstract and generalized grievances that Executive Branch officials are too solicitous of religious entities. Indeed, that appears to be the essence of the Foundation's claims.

To establish the requisite taxpayer injury to support standing, a plaintiff therefore must challenge the disbursement of funds to private religious entities, either directly by an Act of Congress, as in *Flast*, or by an agency at Congress's specific direction, as in *Kendrick*. Alleging nothing more than a link between the challenged governmental activity and the funding of Executive Branch operations from general appropriations is too attenuated a claim to give rise to taxpayer standing. 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."). In other words, the Foundation has alleged at most a generalized grievance concerning executive action, not the kind of concrete congressional extraction and disbursement of funds that gives rise to Article III standing under *Flast*.

Third, by disregarding those fundamental principles, the court of appeals has loosed taxpayer standing from its constitutional and historical moorings. There was no Memorial and Remonstrance against the use of general legislative appropriations to finance the operations of a coordinate branch of gov-

ernment. Nor were executive meetings or communications with religious groups, religious references in public speeches, or any other operational activity of Executive Branch officials among the "*specific* evils feared by those who drafted the Establishment Clause." *Flast*, 392 U.S. at 103 (emphasis added).[10]

Quite unlike the specific historic evil that the *Flast* exception was designed to address, no federal funds in this case were disbursed to any religious entity, and the "plaintiffs in this litigation do not say that they have paid one extra penny because of the [executive actions at issue]." App., *infra*, 60a (Easterbrook, J., concurring in the denial of rehearing en banc). The Foundation's interest in ensuring that Executive Branch officials comport their speech and conduct their meetings in compliance with its view of the Establishment Clause has no distinct historical grounding or status. Taxpayers paid the President's salary when President Washington issued the first Thanksgiving Day Proclamation to "recommend to the people of the United States a day of public thanksgiving and prayer" for "the many and signal favors of Almighty God." *Van Orden* v. *Perry*, 125 S. Ct. 2854, 2861 (2005) (citation omitted). They also paid the salary of President Lincoln when he delivered the Gettysburg Address, with its "extensive acknowledgments of God." *Id.* at 2863 n.9. But concern about

[10] Quite the opposite, religious themes appear frequently in the Nation's founding documents and the speeches and letters of the Framers. See, *e.g.*, *Van Orden* v. *Perry*, 125 S. Ct. 2854, 2859 (2005) ("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 *School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203, 213 (1963)); *id.* at 2861-2862 (citing additional examples); cf. *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005) ("Citizens * * * have no First Amendment right not to fund government speech.").

a President's decision to spend time in such endeavors is nothing more than an abstract, generalized grievance. There is nothing individualized, concrete or particularized about that injury, beyond "the psychological consequence presumably produced by observation of conduct with which one disagrees," which is plainly insufficient to support standing. *Valley Forge*, 454 U.S. at 485; see App., *infra*, 60a (Easterbrook, J., concurring in the denial of rehearing en banc) ("Where's the concrete injury? The loss (if any) is mental distress that plaintiffs, who are bystanders to the challenged program, suffer by knowing about conduct that they deem wrongful.").

The court of appeals considered it necessary to expand the capacity of every taxpayer to police the Executive Branch's compliance with the Establishment Clause "because there is so much that executive officials could do to promote religion in ways forbidden by the establishment clause." App., *infra*, 13a. But the Republic has endured for more than 200 years without such an extravagant concept of taxpayer standing, and courts are not free to craft standing principles based on the presumption that the Executive Branch will flout the Establishment Clause or any other constitutional command. Cf. *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) ("[C]ourts presume that [public officers] have properly discharged their official duties.") (quoting *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 15 (1926)). Furthermore, "[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.*

In any event, this is *not* a context in which plaintiffs could not be found for any concrete action that might ultimately emerge from the executive's encouragement of religiously-

affiliated entities to participate in funding programs. *Flast* and *Kendrick* would allow taxpayer challenges to any actual disbursements pursuant to statute, as demonstrated by this very case, see note 3, *supra*. And, even apart from *Flast*, a disappointed non-religious grantee would have standing to sue. To the extent there would be no available plaintiff to challenge the preliminary deliberative process that led to the grant, that is only because deliberations, apart from the disbursement of funds, inflict, at most, an inchoate injury.

Beyond that, the court of appeals' rationale defies this Court's decision in *Valley Forge* that "the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing." 454 U.S. at 477. Indeed, the proposition that "the business of the federal courts is correcting constitutional errors, and that 'cases and controversies' are [just] * * * nuisances that may be dispensed with when they become obstacles to that transcendent endeavor * * * has no place in our constitutional scheme." *Id.* at 489.

Under the court of appeals' decision, however, only counsel's creativity in crafting the complaint stands as an obstacle to tens of millions of taxpayers obtaining standing to act as monitors of the government's Establishment Clause compliance. Indeed, 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" involved in selling federal property to a religious group, App., *infra*, 11a, the plaintiffs could have asserted taxpayer standing under the decision below. See *Valley Forge*, 454 U.S. at 467-468 (describing administrative measures involved in the property sales).

"[S]uch a broad application of *Flast*'s exception to the general prohibition on taxpayer standing [is] 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. Indeed, if interpreted in that open-ended fashion, *Flast* could not stand with the precedents of this Court—both before and after *Flast*—that faithfully apply the limits of Article III and the taxpayer standing doctrine. The court of appeals' sharp break with this Court's taxpayer standing precedents, and the fundamental separation-of-powers principles on which they are grounded, accordingly merits this Court's review.

B. The Seventh Circuit's Decision Conflicts With The Decisions Of Other Circuits That Have Faithfully Applied This Court's Taxpayer Standing Cases

As noted by the four Seventh Circuit judges who dissented from the denial of rehearing en banc, the court's decision not only contravenes this Court's precedents, but also conflicts with rulings of other circuits. App., *infra*, 24a-26a, 65a-66a.

In *American Jewish Congress* v. *Vance*, 575 F.2d 939 (D.C. Cir. 1978), the plaintiffs, like the Foundation here, filed suit on the ground that "executive officials" "expended governmental funds to effectuate cooperative programs" with third parties in a manner that violated, *inter alia*, the First Amendment. *Id.* at 944. The District of Columbia Circuit held, however, that the claim to federal taxpayer standing "falter[ed]" because the plaintiffs' allegations were "directed at executive action rather than at a congressional enactment under article I, section 8" (*i.e.*, Congress's taxing and spending authority). *Ibid.* As a result, "the general rule that a federal taxpayer's interest in Treasury moneys is too indeterminate, remote, and abstract to support standing" compelled the conclusion that the plaintiffs lacked standing. *Ibid.* See *Public Citizen, Inc.* v. *Simon*, 539 F.2d 211, 218-219 (D.C. Cir. 1976) (no taxpayer standing to challenge "mere executive

activity that entails some expenditures"—*viz.*, requiring the Secretary of the Treasury to recoup allegedly improper salary payments to White House staff members).

Thus, had the Foundation challenged in the District of Columbia Circuit the petitioners' "cooperation in programs" with religious entities, *American Jewish Congress*, 575 F.2d at 941, based on the fact that such "executive activity * * * entails some expenditures" of taxpayer funds, *Simon*, 539 F.2d at 218, the claim to taxpayer standing that the Seventh Circuit upheld here would have been rejected. The District of Columbia Circuit, unlike the Seventh Circuit, refuses "to recognize taxpayer standing to attack any executive action" simply because it "draws on an outstanding appropriation." *Id.* at 217.

The Second Circuit likewise has hewed to this Court's careful limitations on taxpayer standing. In *In re United States Catholic Conference*, 885 F.2d 1020 (1989), cert. denied, 495 U.S. 918 (1990), the Second Circuit held that taxpayers lacked standing to challenge the IRS's failure to revoke the tax-exempt status of the Catholic Church. The court reasoned that the plaintiffs' asserted injury "center[ed] on an alleged decision made solely by the executive branch," and thus lacked a "nexus * * * [to] Congress' exercise of its taxing and spending power." *Id.* at 1028. In the Second Circuit's view, taxpayer standing requires more than the application or expenditure of governmental resources. That court deems the disbursal of funds pursuant to congressional direction to be critical. "[T]axpayer standing exists to challenge the executive branch's administration of a taxing and spending statute" where "Congress [has] decided how the [Act's] funds were to be spent, and the executive branch, in administering the statute, was merely carrying out Congress' scheme." *Id.* at 1027. Accordingly, the claim of taxpayer standing in the case at hand—which involves no challenge to Congress's exercise of

its taxing and spending power, or to the Executive Branch's distribution of funds pursuant to congressional direction—would have been resolved differently had it arisen within the Second Circuit.

That conflict in the circuits creates a profound disparity in the government's susceptibility to suit at the behest of taxpayers alleging Establishment Clause violations and warrants prompt resolution by this Court.

C. The Question Presented Is Of Fundamental Importance And Warrants This Court's Immediate Review

This is the unusual case where a majority of the judges on the court of appeals have specifically emphasized the need for this Court's review of the question presented. App., *infra*, 59a, 60a, 66a. Proper application of this Court's taxpayer standing precedent is an issue that "is both recurring and difficult." *Id.* at 59a (Easterbrook, J., concurring in the denial of rehearing en banc); see *id.* at 66a (Ripple, J., joined by Manion, Kanne, & Sykes, JJ., dissenting from the denial of rehearing en banc) (explaining that this case raises "an important federal question"). Expansion of taxpayer standing in this fashion threatens a considerable amount of novel litigation. Indeed, within three months of the court's decision here, the Seventh Circuit loosened the reins on taxpayer standing in another respect, holding that it supports suits for equitable restitution against private entities. *Laskowski* v. *Spellings*, 443 F.3d 930 (2006) (as amended on reh'g (July 26, 2006)).[11]

[11] Unlike this case—which is focused on executive activities that do not involve the disbursement of funds to private entities—*Laskowski* involved a taxpayer complaint of "direct financial support by the government of religious activities," by means of a specific congressional appropriation of funds to the University of Notre Dame for distribution to other religious colleges. 443 F.3d at 933. The district court dismissed the action as moot because Notre Dame had already received and spent the federal funds at issue. The Seventh Circuit reversed,

As Judge Ripple explained, the rationale adopted by the decision below "makes virtually any executive action subject to taxpayer suit," since "[t]he executive can do nothing without general appropriations from Congress." App., *infra*, 24a. While the majority declined to recognize taxpayer standing to challenge comments in a speech by the Secretary of Education, *id.* at 14a-15a, there is, in Judge Easterbrook's words, no "coherence in * * * a doctrine" that permits taxpayers to challenge executive action that is funded only indirectly through general appropriations, but then attempts to draw lines between the costs of different types of executive action funded by such appropriations. *Id.* at 62a. Creating a coherent *de minimis* limitation on the court of appeals' novel expansion of *Flast* is particularly problematic in light of *Flast*'s grounding in the Remonstrance's prohibition of a mere three-pence of governmental support. See *id.* at 61a-62a ("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); yet the panel draws

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holding that the recipient of a federal grant may be ordered, at the behest of a private individual, to repay to the U.S. Treasury the grant funds under the doctrine of restitution. As Judge Sykes explained in dissent, "[i]mplicit" in the majority's decision was a determination "that taxpayers have standing to sue a private federal grant recipient for restitution where the government is alleged to have committed an Establishment Clause violation in making or monitoring the grant." *Id.* at 942. "Taxpayer standing under *Flast*," Judge Sykes explained, "has never been understood to encompass such a claim." *Ibid.* The theory of taxpayer standing adopted in this case is, if anything, even further removed from *Flast* than the one in *Laskowski*, because it does not involve any congressional appropriation or grant of federal funds to a private entity and, instead, is limited solely to the Executive's own activities. The Seventh Circuit's decision in *Laskowski* nonetheless underscores the need for this Court to provide further guidance on the jurisdictional limits recognized in *Flast*.

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.").

Furthermore, the court of appeals' expansion of taxpayer standing to pursue generalized grievances could render the Seventh Circuit a virtually universal forum for Establishment Clause challenges to Executive Branch action, thereby depriving the government of the protections of other circuits' adherence to this Court's precedent. Due to the national character of most federal governmental activity, anyone nursing a generalized grievance against the federal executive is likely to be able to locate a like-minded taxpayer residing within the Seventh Circuit. Indeed, while the taxpayers in this case reside within the Seventh Circuit, the activities of which they complained spanned the Country. See App., *infra*, 68a-69a paras. 4-9; *id.* at 76a para. 35 (objecting to the content of a presidential speech in Los Angeles); *id.* at 77a para. 42 (challenging activities in Tennessee, Georgia, and Colorado). Accordingly, all it will take to subject the federal government to a taxpayer suit is an objection by one of the more than 11 million federal taxpayers within the Seventh Circuit to executive action on Establishment Clause grounds, regardless of how many other federal taxpayers in other jurisdictions would have had their challenges dismissed out of court.[12]

Finally, review of this case is warranted because it involves an important question of constitutional law concerning the delicate balance of power between the Judicial and Executive Branches. Indeed, as the Court observed last Term, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation

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[12] United States Census Bureau, *State and Metropolitan Area Data Book: 2006*, at 109, Table A-79 (visited July 28, 2006) <http://www.census.gov/compendia/ smadb/TableA-79.pdf>.

of federal-court jurisdiction to actual cases or controversies," including the standing requirement. *DaimlerChrysler*, 126 S. Ct. at 1861 (internal quotation marks omitted). The Seventh Circuit's unprecedented expansion of taxpayer standing "has serious implications for judicial governance," App., *infra*, 63a (Ripple, J., joined by Manion, Kanne, & Sykes, JJ., dissenting from the denial of rehearing en banc), and threatens the very accretion of judicial power against which this Court's taxpayer standing cases have consistently guarded. The Executive Branch's constitutionally rooted concerns about that alteration in the balance of separated powers merit this Court's considered review. Furthermore, such broad lower court division, both within the Seventh Circuit and between the circuits, on a question that "put[s] the judicial and the political branches of the federal government at odds impl[ies] the wisdom of further review." *Id.* at 60a (Easterbrook, J., concurring in the denial of rehearing en banc).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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