Appeal No. 05-1130

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, INCORPORATED; ANNE GAYLOR; ANNIE LAURIE GAYLOR, et al.,

Plaintiffs-Appellants,

v.

ELAINE L. CHAO, TOMMY G. THOMPSON, and ALBERTO GONZALES, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ANSWER OPPOSING PETITION FOR REHEARING OR REHEARING EN BANC

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I. INTRODUCTION.

The plaintiffs-appellants oppose the petition of defendants-appellees for rehearing or rehearing en banc. The panel's majority opinion correctly holds that Congressional tax appropriations to executive branches of the Federal Government may not be used to endorse religion. This is not a rogue decision by an overreaching majority.

The defendants complain that the majority decision by Judge Posner allows taxpayers to challenge the use of federal tax appropriations by the Executive Branch when such appropriations are allegedly used in violation of the Establishment Clause. The defendants do not deny that the funds allegedly misused are derived from Congressional tax appropriations. The defendants, however, would distinguish between general budget appropriations made by Congress and tax appropriations made to specific "spending programs."

The distinction urged by the defendants is not based upon any principle of differential responsibility or culpability by Congress in making appropriations that are allegedly misused. The distinction urged by the defendants, instead, is based upon a belief that the Executive Branch should be able to use Congressional tax appropriations without accountability under the Establishment Clause.

The United States Supreme Court has already determined in *Bowen v. Kendrick*, 487 U.S. 589 (1988), that taxpayer standing is not based upon Congressional culpability for making a decision to use tax appropriations in violation of the Establishment Clause. In *Bowen*, the Court recognized taxpayer standing even though a challenged expenditure was based upon a facially constitutional scheme, i.e., Congress appropriated money for

purposes that in no way violated the Establishment Clause. Congress did nothing wrong. The Supreme Court, nonetheless, recognized taxpayer standing based upon the Executive Branch's misuse of the tax appropriations in violation of the Establishment Clause.

The majority in this case similarly concluded that taxpayers may challenge executive decisions relating to the use of appropriations made by Congress. The majority's decision was correct. The majority also correctly recognized that to hold otherwise would countenance a distinction without a meaning -- and insulate a substantial part of federal spending of taxpayer appropriations from any obligation to comply with the Establishment Clause. To hold otherwise than the majority, in fact, would support the remarkable proposition that entire blocks of executive spending, such as for corrections, would not be subject to the Establishment Clause, i.e., as an executive function that is merely funded by taxpayer appropriations. The defendants' argument in this case would support the incongruous proposition that such spending programs pursued by the Executive Branch with Congressional appropriations cannot be challenged by taxpayers objecting to the use of tax appropriations to endorse religion.

The majority correctly concluded that the defendants' argument does not represent the current state of the law and it is not based upon a logical distinction relating to Congressional tax appropriations. In the end, all of the Executive Branch's money comes from Congressional appropriations, which is important, and the misuse of such appropriations by the Executive Branch, without any Congressional culpability, properly provides a basis for taxpayer standing.

Finally, the defendants argue ominously, but incorrectly, that the majority has opened a floodgate. The majority, in fact, only allows taxpayer standing to challenge misuse of Congressional appropriations that are used to endorse religion. Such suits have been allowed since *Flast v. Cohen*, 382 U.S. 83 (1968), without any flood. Limiting taxpayer standing to Establishment Clause transgressions has been an effective gate-keeper. The Executive Branch will find this to remain true, albeit adherence to the Establishment Clause is apparently the pinch point that concerns the defendants.

II. EXECUTIVE OFFICIALS DO NOT HAVE THE RIGHT TO SPEND CONGRESSIONAL BUDGET APPROPRIATIONS IN VIOLATION OF THE ESTABLISHMENT CLAUSE.

A. Taxpayers Have Standing To Challenge The Use Of Congressional Budget Appropriations to Promote Religion.

The Establishment Clause prohibits the use of Congressional tax appropriations to support religion. As the United States Supreme Court stated in *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947), "no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." At a minimum, "although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith." *School District of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985). "Any use of public funds to promote religious doctrines violates the Establishment Clause." *Bowen v. Kendrick*, 487 U.S. 589, 623 (1988) (O'Connor, J., concurring). The principle against using public money for the promotion of religion, in

short, lies at the heart of the prohibition on establishment consistently recognized by the United States Supreme Court.

The Supreme Court has explicitly recognized that taxpayers have standing to challenge the use of Congressional tax appropriations in violation of the Establishment Clause. In *Flast* at 103, the Court specifically approved taxpayer standing in the context of the alleged misuse of tax appropriations in violation of the Establishment Clause.

The Supreme Court recognized in *Flast* that the fundamental aspect of standing focuses on the party seeking to get his complaint before a federal court: "The gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult Constitutional questions." *Id.* at 99.

The Supreme Court in *Flast* emphasized that the nexus for taxpayer standing relates to the litigant's status as taxpayer and the expenditure of tax revenue in violation of the Establishment Clause. The relationship between taxpayer and the misuse of tax money, the Court concluded, gives rise to standing because of the taxpayer's interest in assuring that taxes are not used in violation of the Establishment Clause. *Id.* at 105-106.

The Supreme Court's decision in *Flast* emphasizes not just the Congressional source of the funds at issue, but also the expenditure of such taxes for a constitutionally proscribed activity. As Justice Stewart stated in concurrence, the Court's judgment and opinion "holds only that a federal taxpayer has standing to assert that a specific expenditure of federal funds violates the Establishment Clause of the First Amendment."

Id. at 113. Similarly, Judge Fortas stated in his Concurrence that he understood the Court's ruling "to be limited to the proposition that a taxpayer may maintain a suit to challenge the validity of a federal expenditure on the ground that the expenditure violates the Establishment Clause." *Id.* at 115. Finally, Justice Harlan, in dissent, recognized the issue in *Flast* to "present the question whether federal taxpayers *qua* taxpayers may, in suits in which they do not contest the validity of their previous or existing tax obligations, challenge the Constitutionality of the uses for which Congress has authorized the expenditure of public funds." *Id.* at 117.

B. Use of General Budget Appropriations by Executive Officials to Promote Religion May Be Challenged by Taxpayers.

The defendants incorrectly interpret *Flast* to require Congressional responsibility or culpability for expenditures made by executive officials in violation of the Establishment Clause. This is not a correct reading of *Flast*, and its progeny, and the defendants ignore *Flast's* premise that standing "is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." In practice, the Supreme Court has applied this test to focus on the Congressional source of financial support for activities used to promote religion. This requires in the federal context that funds be derived from tax revenue appropriated by Congress pursuant to Article I, § 8, of the Constitution, but it does not require that Congress direct the inappropriate use of such funds.

The Supreme Court has expressly held that the use of federal tax appropriations by executive branch officials, in violation of the Establishment Clause, gives rise to

taxpayer standing, even when the Congressional appropriation is facially Constitutional. A taxpayer has such a personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult Constitutional questions. *Bowen*, 487 U.S. at 618-20. A taxpayer, therefore, is a proper party to request an adjudication of the constitutionality of executive expenditure of appropriations made pursuant to Congress' Taxing and Spending authority under Article I, § 8.

The Supreme Court's decision in *Bowen* makes clear that standing does not depend upon the culpability of Congress in making an appropriation that is used or expended by executive officials in violation of the Establishment Clause. Congressional culpability is not a predicate for taxpayer standing.

The facial constitutionality of the Congressional appropriation in *Bowen* was upheld by the Supreme Court. "We have concluded that the statute has a valid secular purpose, does not have the primary effect of advancing religion, and does not create an excessive entanglement of church and state." 487 U.S. at 617. On that basis, the Court concluded that the Congressional spending statute did not itself violate the establishment Clause. *Id.*.

Despite the blamelessness of Congress in *Bowen*, the Supreme Court further considered whether the expenditure of tax appropriations was unconstitutional "as applied." The defendants in *Bowen* argued that a challenge to expenditures "as applied" was really a challenge to executive action, not to an exercise of Congressional authority under the Taxing and Spending Clause. *Id.* The Court rejected this argument. *Id.* at 619.

The *Bowen* and *Flast* decisions together make clear the conceptual and legal basis for taxpayer standing, which the majority correctly construed. First, a taxpayer must make a claim that tax dollars are being misused. This requirement provides a logical nexus between the taxpayer and his complaint, i.e., taxes are being misused. The corollary is also true. A taxpayer lacks standing based upon her status as a taxpayer unless she complains about the use of tax appropriations. The challenged use of funds, therefore, must involve the use of funds appropriated by Congress pursuant to Article I, § 8, of the Constitution.

The source of the misused funds is the critical factor, rather than any decisional culpability by Congress for the actual misuse. The *Bowen* decision makes clear that a Congressional appropriation that is constitutional on its face may still be challenged by a taxpayer if the funds are misused through the discretion of administrative and executive officers. The relationship between taxes and taxpayer is the critical factor, rather than whether Congress passed an appropriation bill that was facially unconstitutional. Congress can be blameless, as in *Flast* and *Bowen*, without defeating the standing of a taxpayer to challenge the misuse of a Congressional appropriation by executive officers.

Taxpayer standing is limited by the types of misuse to which a taxpayer can object, i.e., expenditures in violation of the Establishment Clause. That is what has limited the scope of taxpayer standing. "*Flast* has limited federal taxpayer challenges by means of the second nexus." *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 7, 14 (D.C. Cir. 1988). The defendants in this case, therefore, incorrectly claim that recognition of standing would open the courthouse doors to all

generalized grievances that citizens may have with policies pursued by the government. Courts, in fact, have only recognized the alleged misuse of funds in violation of the Establishment Clause to confer taxpayer standing.

Finally, in *Minnesota Federation of Teachers v. Randall*, 891 F. 2d 1354, 1358 (8th Cir. 1989), the Eighth Circuit Court of Appeals rejected any notion that taxpayers have standing only where a special tax assessment was levied to pay for an expenditure that promoted religion. According to the Court, under such a rule, "when expenditures are made from general funds, no one would be able to challenge Establishment Clause violations. We believe taxpayer standing was created to specifically permit the airing of establishment claims." (The Court of Appeals construed state taxpayer standing requirements to be interchangeable with the federal taxpayer standing requirements, announced in *Flast*. *Id.* at 1357.) *See also, Booth v. Hvass*, 302 F. 3d 849, 852 (8th Cir. 2002) ("*Randall* stands for the proposition that state taxpayers, just like federal taxpayers, must only show that there has been a disbursement in potential violation of constitutional guarantees when bringing Establishment Clause challenges.").

C. Purported Contrary Authority Does Not Support the Lack of Taxpayer Standing.

The authorities cited by the defendants are not inconsistent with the majority's opinion. The cases either do not involve claimed expenditures under Article I, § 8 of the Constitution or they precede the Supreme Court's decision in *Bowen*. In *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), for example, the challenged action did not involve a Congressional appropriation

pursuant to Article I, § 8, but rather involved an agency decision to transfer a parcel of federal property pursuant to an unrelated Constitutional provision. Similarly, *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), involved an action against the federal government based on the Incompatibility Clause, Article I, § 6, of the Constitution. *United States v. Richardson*, 418 U.S. 166 (1974), also did not involve a challenge to the use of Congressional appropriations, but instead related to regulatory statutes affecting the CIA. Finally, *Public Citizen, Inc. v. Simon*, 539 F. 2d 211 (D.C. Cir. 1976), also preceded *Bowen* and did not involve a specific Constitutional limitation on the Taxing and Spending authority of Congress, i.e., the case did not involve any claim involving the Establishment Clause.

In re United States Catholic Conference, 885 F. 2d 1020 (2d Cir. 1989), comes closest to supporting the defendants' position, but that decision no longer reflects the position of even the Second Circuit Court of Appeals. The *Catholic Conference* decision did not involve the alleged misuse of Congressional appropriations by the executive branch, and the Second Circuit in any event has limited the *Catholic Conference* decision. In *Lamont v. Woods*, 948 F. 2d 825 (2d. Cir. 1991), the Court limited the applicability of *Catholic Conference* to cases in which executive action is alleged to be *ultra vires*. *Id.* at 831. Here, the plaintiffs do not claim the defendants acted *ultra vives* -- and the majority's opinion is not in conflict with the Second Circuit.

The *Lamont* decision subsequently has been applied by district courts in the Second Circuit as reflecting the prevailing view of taxpayer standing in that Circuit. *Mehdi and Chankan v. United States Postal Service*, 988 F. Supp. 721 (S.D. NY 1997), is

particularly instructive because it involved a claim that the United States Postal Service violated the Establishment Clause by maintaining sectarian holiday displays with federal tax appropriations. The court concluded that the plaintiffs had standing as taxpayers to challenge the government expenditures, made pursuant to Congress' Taxing and Spending power, as violative of the Establishment Clause. *Id.* at 727. Under the defendants' argument, however, such postal expenditures would not be actionable by taxpayers because they are not part of a detailed Congressional spending program.

Here, the majority's decision to recognize standing is clearly supported by the law and the logic of the above decisions, including *Bowen*, which recognize taxpayer standing to challenge the use of Congressional budget appropriations by executive officials in ways that allegedly violate the Establishment Clause.

III. CONGRESSIONAL BUDGET BILLS CONSTITUTE APPROPRIATIONS AUTHORIZED BY LAW.

The defendants urge that a distinction be recognized between appropriations for "Congressional programs" and "general budget appropriations" made to fund executive operations. The distinction proposed by the defendants, however, is not a distinction that is recognized conceptually or legally. The defendants cite no decision that recognizes such a distinction between Congressional appropriation bills, nor is the distinction provided with any conceptual plausibility.

Congressional appropriations for "programs" and/or budget appropriations, in all instances, constitute appropriations made pursuant to Congress' Taxing and Spending authority under Article I, § 8 of the Constitution, and pursuant to the Appropriations

Clause of Article I, § 7. There is no distinction between administrative spending bills and executive budget appropriations, all of which must be passed by Congress as properly enacted laws pursuant to Article I, § 8. Congressional budget appropriations constitute authorizations to spend, just as in *Bowen*.

The Constitution, simply stated, does not distinguish between Congressional appropriations made to administrative "spending programs" and Congressional budget appropriations made to the executive branch. All appropriations require Congressional legislative action. The Congressional "power of the purse" refers to this exclusive power of Congress to appropriate funds, which power derives from specific provisions of the Constitution, including Article I, § 8, which empowers Congress to "pay the Debts and provide for the common Defense and general Welfare of the United States." The Appropriations Clause, Article I, § 7, Cl. 9, further provides "no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

The provisions of the Constitution governing appropriations have been described as "the most important single curb in the Constitution on presidential power." *Corwin, The Constitution and What it Means Today*, 134 (14th ed. 1978). "No money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937). Regardless of the nature of the payment -- salaries, payments promised under a contract, etc., no payment may be made from the United States Treasury unless Congress has made the funds available. As the Supreme Court stated more than a century ago: "However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of anything not

previously sanctioned by a Congressional appropriation." *Reeside v. Walker*, 52 U.S. 272, 291 (1850).

The Constitutional requirements for appropriations remain as valid today as when adopted as part of the Constitution. *Citing* both *Cincinnati Soap* and *Reeside*, the Supreme Court recently reiterated that any exercise of power by a government agency "is limited by a valid reservation of Congressional control over funds in the Treasury." *Office of Personnel Management v. Richmond*, 496 U.S. 414, 425 (1990). "Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute." *Id.* at 424. As a consequence, budget appropriation bills are enacted by Congress just as all other legislation. The Supreme Court described this process in *Clinton v. New York*, 524 U.S. 417, 448 (1998).

The reality of the Congressional appropriation process does not support the defendants' attempt to distinguish between Congressional appropriations made to fund administrative "programs" and budget appropriation bills adopted to fund executive operations. The purported distinction advanced by the defendants is not based on any procedural difference, nor based upon any principled difference in the degree of discretion provided to the executive branch in determining the ultimate use of Congressional appropriations. As in *Bowen* and *Flast*, even administrative programs enacted and funded by Congress provide significant discretion to the executive branch to make decisions about the actual use of tax appropriations. That discretion, nonetheless, is clearly subject to judicial review in actions brought by taxpayers, and it is not any

different than the discretion exercised by the executive branch in using budget appropriations made by Congress to fund executive operations.

IV. CONCLUSION.

The majority has not reached a novel conclusion by holding that taxpayers have standing to challenge the use of Congressional budget appropriations in violation of the Establishment Clause. To hold otherwise would be an overreaching limitation on the Constitutional significance of the Establishment Clause. The majority decided correctly and consistently with Supreme Court precedent and the decisions of the other Circuits. The defendants' Petition for Rehearing or Rehearing en Banc should be denied.

Dated this 6th day of April, 2006

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1.

I hereby certify that the text of the foregoing Answer to Petition for Rehearing or Rehearing En Banc complies with the typeface requirements of Fed. R. App. 32(a)(5), and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 10 in 12 point Times New Roman.

This 6th day of April, 2006.

Richard L. Bolton

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Answer Opposing Petition for Rehearing or Rehearing En Banc upon opposing counsel via U.S. Mail and addressed to the following:

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I hereby certify that I have on this day e-mailed a PDF version of the foregoing Reply Brief of Appellants to Lowell V. Sturgill, Jr. at lowell.sturgill@usdoj.gov.

This 6th day of April, 2006.

Frederick Caraccio