

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
Case No. 04 C 0381 S
The Honorable John C. Shabaz Presiding

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

(formerly known as Certificate of Interest)

Appellate Court No: 05-1130

Short Caption: Freedom From Religion Foundation, Inc., et al. v. Jim Towey, et al.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):

Anne Nicol Gaylor, Annie Laurie Gaylor, Dan Barker

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Boardman, Suhr, Curry & Field LLP

(3) If the party or amicus is a corporation:

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APPELLANTS' JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331. The appellants alleged that the appellees violated the Establishment Clause of the First Amendment to the United States Constitution.

The United States Court of Appeals for the Seventh Circuit has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. The appellants' Notice of Appeal was filed in the district court on January 14, 2005. The appellants appealed that part of the Judgment, entered by the district court on January 12, 2005, in favor of appellees affirming the Department of Health and Human Services' Compassion Capital Fund grant to the Emory University -- Interfaith Health Program. The appellants also appealed the Order entered November 16, 2004, dismissing appellees Jim Towey, Patrick Purtill, Brent Orrell, Bobby Polito, Ryan Streeter, John Porter, Juliete McCarthy, Linda Shovlain, David Caprara and Rod Paige. (The appellants voluntarily dismissed claims against David Caprara and Dr. Julie Gerberding, based upon representations that they were not involved in the alleged activities complained of by appellants. Mr. Caprara and Dr. Gerberding, therefore, are not parties to this appeal.)

Each of the appellees is a federal official sued in the individual's official capacity.

STATEMENT OF THE ISSUES

Do federal taxpayers have standing to object to the use of general budget appropriations, made by Congress to executive branch officials, when such appropriations allegedly are used to promote and endorse religion?

District Court Answer: The district court distinguished between appropriations for Congressional “spending programs” and Congressional budget appropriations for support of executive branch operations. Based on this distinction, the district court denied appellants standing to challenge the use of Congressional budget appropriations by executive officials to promote religion.

STATEMENT OF THE CASE

This appeal raises an important issue relating to federal taxpayer standing. The appellants allege that executive branch officials are engaging in activities, funded with Congressional budget appropriations, that endorse religion. The appellees do not deny that their activities are funded by general budget appropriations disbursed to them by Congress. The appellees, however, claim that taxpayers cannot complain about the use of federal tax appropriations used to pay for executive branch activities. They claim that appropriations authorizing executive branch expenditures are not Congressional “spending programs.”

The executive branch under President Bush is admittedly pursuing a “Faith-Based Initiative. The contention that this Initiative may be implemented using Congressional budget appropriations, disbursed to the executive branch, without judicial review, raises important issues about the relationship of Congress’ exclusive appropriation authority and the specific limitations of the Establishment Clause.

The appellants commenced this action on June 17, 2004. (R.2) They subsequently filed an Amended Complaint on September 9, 2004. (R.10) The appellees, Jim Towey, Patrick Purtell, Brent Orrell, Bobby Polito, Ryan Streeter, John Porter, Juliete McCarthy, Linda Shovlain and Rod Paige, then filed a motion

on September 30, 2004, to partially dismiss the Amended Complaint for lack of taxpayer standing. (R.13)

The district court granted the appellees' motion on November 16, 2004, thereby dismissing all claims against the appellees Towey, Purtill, Orrell, Polito, Streeter, Porter, McCarthy, Shovlain, Caprara and Paige. (R. 10) The district court stated that "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 has never been accepted by a majority of the Supreme Court." (R. 10 at 8) The court concluded that only executive branch actions undertaken to administer a "Congressional spending program" may be challenged by taxpayers. The court accordingly granted appellees' motion to dismiss because "their actions do not represent Congressional power as required by the *Flast* test." (R. 10 at 9)

The appellants proceeded with remaining claims against the Secretary of the Department of Health and Human Services, Tommy Thompson. The parties filed cross motions for summary judgment as to remaining claims on November 23, 2004. (R. 23 and R. 28) The district court granted summary judgment on January 12, 2005, in favor of appellants, finding that the funding of MentorKids USA violated the Establishment Clause. (R. 53) The court, however, also granted summary judgment in favor of Secretary Thompson as to funding of the Emory

University - Interfaith Health Program. (R. 53) The district court entered final judgment on January 12, 2005. (R. 54)

The appellants filed a Notice of Appeal on January 14, 2005. (R. 55) They appealed the district court's decision of November 16, 2004, and the adverse portion of the court's summary judgment decision on January 12, 2005. (R. 55) The appellants subsequently have decided not to pursue their appeal of the district court's summary judgment decision regarding funding for Emory's Interfaith Health Program, as funding for that grant is believed to now be complete, rendering the pertinent issues to be moot. Secretary Thompson, for his part, did not appeal the adverse holding of the district court prohibiting funding for the MentorKids USA program. This appeal, therefore, only presents issues relating to the district court's decision of November 16, 2004 denying appellants standing to proceed.

STATEMENT OF FACTS¹

The appellant, Freedom From Religion Foundation, Inc., (“FFRF”) is a Wisconsin non-stock corporation whose principal office is in Madison, Wisconsin. (A-2) FFRF has more than 5,000 members, including federal taxpayers, who are opposed to government endorsement of religion in violation of the Establishment Clause of the First Amendment to the United States Constitution. (A-2) FFRF’s purpose is to protect the fundamental constitutional principle of separation of church and state by representing and advocating on behalf of its members. (A-2)

The appellant, Anne Nicol Gaylor, is a federal taxpayer residing in Madison, Wisconsin. She is a member and former President of FFRF, and she is a nonbeliever who is opposed to governmental establishment of religion. (A-2)

The appellant, Annie Laurie Gaylor, also is a federal taxpayer residing in Madison, Wisconsin, and she too is a member and an employee of FFRF and the Editor of FFRF’s periodical “FreeThought Today.” She is a nonbeliever who is opposed to governmental establishment of religion. (A-2) Finally, the appellant, Dan Barker, likewise is a federal taxpayer residing in Madison, Wisconsin. He is a member of and an employee of FFRF, and he is a nonbeliever who is opposed to

¹ The facts presented are taken from the appellants’ Amended Complaint and the district court’s Memorandum Decision, included in the Appendix herewith. In ruling on a motion to dismiss for lack of standing, the well-pleaded allegations of the complaint are accepted as true. *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

governmental establishment of religion. (A-3) All of the appellants are opposed to the use of Congressional taxpayer appropriations to advance and promote religion, as alleged in this case. (A-3)

By way of background, President George W. Bush launched a Faith-Based and Community Initiative, through a series of Executive Orders, shortly after taking Office. (A-15) To assist the President in implementing this Initiative, he created an office within the White House called the Office of Faith-Based and Community Initiatives. (A-15)

The appellee, Jim Towey, is the Director of the White House Office of Faith-Based and Community Initiatives, whose activities are funded by Congressional budget appropriations, pursuant to the Taxing and Spending authority of Article I, section 8, of the United States Constitution. (A-3) The activities of Towey and his office are funded by Congressional budget appropriations, pursuant to Article I, section 8, of the Constitution, which Congressional appropriations are subject to the limitations of the Establishment Clause of the United States Constitution. (A-3)

Congressional budget appropriations, including appropriations made for executive and administrative purposes, constitute legislation pursuant to Article I, section 8, of the Constitution, which only Congress can make. (A-3) The President of the United States does not have authority to appropriate funds for the

activities of appellee Towey and his office, without Congressional budget appropriations, and Towey's activities in his position and his office are subject to availability of Congressional budget appropriations, as recognized by Executive Order. (A-3)

President Bush also issued a series of Executive Orders directing several executive branch agencies to establish Centers for Faith-Based and Community Initiatives, to coordinate the President's Initiative within those agencies. (A-16)

The appellee, Patrick Purtill, is the Director of the Department of Justice Center for Faith-Based and Community Initiatives. His activities are funded by Congressional budget appropriations, pursuant to the Taxing and Spending provision of the Constitution. (A-3/4)

The appellee, Bobby Polito, is the Director of the Department of Health and Human Services Center for Faith-Based and Community Initiatives. His activities also are funded by Congressional budget appropriations, pursuant to the Taxing and Spending provision of the Constitution. (A-4)

The appellee, Ryan Streeter, is the Director of the Department of Housing and Urban Development Center for Faith-Based and Community Initiatives, whose activities are funded by Congressional budget appropriations, pursuant to the Taxing and Spending provisions of the Constitution. (A-4)

The appellee, John Porter, is the Director of the Department of Education Center for Faith-Based and Community Initiatives. His activities are funded annually by Congressional budget appropriations, pursuant to the Taxing and Spending provision of the Constitution. (A-4)

The appellee, Juliete McCarthy, is the Director of the Department of Agriculture Center for Faith-Based and Community Initiatives. Her activities too are funded by Congressional tax appropriations, pursuant to the Taxing and Spending provision of the Constitution. (A-4)

The appellee, Brent Orrell, is the Director of the Department of Labor Center for Faith-Based and Community Initiations, the activities of which likewise are funded by Congressional budget appropriations, pursuant to the Taxing and Spending provision of the Constitution. (A-5)

Finally, the appellee, Michael Magan, is the Director of the Agency for International Development Center for Faith-Based and Community Initiatives. His activities too are funded by Congressional budge appropriations, pursuant to the Taxing and Spending provision of the Constitution. (A-5)

The activities of the appellees, Purtill, Orrell, Polito, Streeter, Porter, McCarthy, and Magan, are funded by Congressional budget appropriations made respectively to the Departments of Justice, Labor, Health and Human Services, Housing and Urban Development, Education, Agriculture, and the Agency for

International Development, pursuant to Article I, § 8, of the Constitution. These Congressional appropriations are subject to the limitations of the Establishment Clause of the United States Constitution. (A-5) The Congressional budget appropriations for the activities of Purtill, Orrell, Polito, Streeter, Porter, McCarthy, and Magan derive from the authority of Congress to appropriate tax money under the Taxing and Spending provision of the Constitution, and these appellees' activities are expressly made subject to the availability of adequate budget appropriations, as recognized by Executive Order. (A-5/6)

The appellees allegedly have engaged in and are engaged in activities that violate the Establishment Clause of the First Amendment to the United States Constitution. (A-6) Their actions have violated the fundamental principle of the separation of church and state by using Congressional taxpayer appropriations, made pursuant to the Taxing and Spending provision of the Constitution, to support activities that endorse religion and give faith-based organizations preferred positions as political insiders. (A-6)

Appellees' actions, including by Towey, Purtill, Orrell, Polito, Streeter, Porter, McCarthy, and Magan, include the support of national and regional conferences, which are funded with Congressional budget appropriations, made pursuant to Article I, section 8, of the Constitution, and at which conferences faith-based organizations 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. (A-7)

Keynote speeches have been made at the referenced national and regional conventions, such as by appellee Rod Paige at a White House Conference on Faith-Based and Community Initiatives in October of 2002, at which he made the following statements that give the appearance of endorsing religion:

“With the stoke of a pen, the President signaled that this Administration will knock down any barrier, will do whatever it takes to get people of faith and goodwill involved in helping solve some of the problems in our society.

Now, President Bush does this because he knows first-hand the power of faith to change lives - from the inside out. And the reason he knows this is because faith changed his life ...

He grew up in church, but like most of us, he didn't always walk the walk. Many years ago, at a particularly low point in his life, he realized that something was missing. Fortunately for him, he bumped into the Reverend Billy Graham. And they had a long, long, long conversation. And he made a decision coming out of that conversation that changed his life. And he believes that if it can change his life, it can change the lives of others as well. And that is why he is so committed to this.

So the reason we're all here today is not because some politician needs to knock off one more thing on his 'to do' list. We are here because we have a President, who is true, is a true man of God. A man who prays every day. And I think together, we can really make a difference for mankind, for Americans, we can make America a better place. We can, and I enjoyed the prayer, as we began, served, getting food. He said, if the Jews could be better Jews, and if Christians could be better Christians, if all of us could just be a little better ourselves, what a difference that would make in this world, what a difference that would make.

So, he has made it his mission to level the playing field so good people who used to get left out of the process can now act on their spiritual imperative and can help others make a difference and can be partners with the federal government.

He's created this new initiative, because he knows you have tremendous powers to change lives. You have tremendous powers to make lives better. In many communities, you are the last line of defense. And when it comes to our nations' children, we need your help, big time ...

The President has called upon my help to achieve this end. As United States Secretary of Education, he's asked me to lead this initiative. He said to me, I need your help. Well, guess what, I'm here today to say to you, I need your help. I need your help. I need Americas' help, but most especially, the good people of faith. We need your help ...

The federal government can provide funds, we can make laws, but we cannot provide love and faith and compassion. That's where you come in. You can do that. No one can do that better.”
(A-7/8)

President Bush also has spoken at such national and regional conferences, including at the first White House National Conference on Faith-Based and Community Initiatives, held in June of 2004, at which the President touted the allegedly unique capacity of faith-based organizations to provide effective social services, including by singling out alleged exemplary stories and anecdotes, all of which focused on faith-based organizations, to the exclusion of other organizations. (A-8)

President Bush also made similar statements at a Regional Conference on Faith-Based and Community Initiatives in March of 2004 in Los Angeles,

California, at which event the President extolled the virtues of funding for faith-based organizations, in language that invoked religious imagery, such as references to “miracles,” as well as telling many anecdotal stories about alleged exemplary faith-based programs and outcomes, to the exclusion of any mention of non-faith-based community programs. (A-8/9)

The conferences and public events organized, set up and run by the appellees, including by Towey and the Directors of the Centers for Faith-Based and Community Initiatives, are intended to preferentially promote and advocate to funding of faith-based organizations, without similar advocacy for secular community-based organizations; the advocacy and promotion of funding for faith-based organizations, moreover, is based upon their status as faith-based organizations per se, rather than on the basis of their status as community-based organizations. (A-9)

The appellees, including at such national and regional conferences, send messages to non-adherents of religious belief that non-believers are outsiders, not full members of the political community, and the appellees send an accompanying message to adherents of religious belief that they are insiders and favored members of the political community. (A-9)

A reasonable observer of the appellees’ actions and a listener to their words would perceive the appellees to be endorsing religious belief over non-belief at

such governmentally sponsored events; these events give the appearance of stating the government's official support for and advocacy of funding for faith-based organizations precisely because such organizations are faith-based. (A-9)

The appellees, including Towey, Purtill, Orrell, Polito, Streeter, Porter, McCarthy, and Magan, organize, set up and conduct such public events to advance funding for faith-based organizations, using Congressionally enacted budget appropriations to conduct such advocacy, and using appropriations made pursuant to Congress' Taxing and Spending authority. (A-9/10) The appellees' actions and/or words give support to and the appearance of endorsing a preference for the funding of faith-based organizations. (A-10)

Appellees Towey and the Directors of the Centers for Faith-Based and Community Initiatives oversee the expenditure of Congressional budget appropriations, made pursuant to Article I, section 8, of the Constitution, to advocate and promote federal funding for faith-based organizations precisely because such organizations are faith-based; the appellees' actions include the promotion of capacity building of faith-based organizations and they 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; all of these funded activities give support to and the appearance of religious endorsement to reasonable observers and/or listeners,

including because no comparable advocacy is made for secular community organizations. (A-10)

The appellees filed a partial motion to dismiss appellants' Amended Complaint, without factually controverting their claimed support for religion.

(R.13) The appellees instead argued that appellants failed to demonstrate standing to pursue claims against the appellees, based on appellants' status as federal taxpayers. (R. 14)

The district court held that appellants' allegations were insufficient to establish standing, including as to the appellee Towey. (A-21) The court rejected appellants' contention that federal taxpayers may bring Establishment Clause challenges to executive branch actions which are funded by general budget appropriations from Congress. (A-21) Although the court found that Towey's actions were funded with general budget appropriations, the court concluded that he did not administer a "Congressional program." (A-21) The district court reasoned, therefore, that Towey's actions were not "exercises of Congressional power," despite Congressional funding. (A-21)

The district court also concluded that the appellees Purtill, Orrell, Polito, Streeter, Porter, McCarthy, and Shovlain, similarly were not charged with the administration of Congressional spending programs. (A-22) The court rejected the standing of appellants on the basis that the actions of these appellees allegedly "do

not represent Congressional power.” (A-22) According to the court, only executive officials administering “Congressional programs” may be charged with violating the Establishment Clause, even when funded with “general budget appropriations.” (A-21/22)

SUMMARY OF ARGUMENT

The use of general budget appropriations to pay for executive officials to promote religion cannot be challenged by taxpayers, according to the appellees. The source of the appellees' general budget appropriations from Congress is allegedly insufficient to confer standing on taxpayers who object to the use of their taxes in ways contrary to the Establishment Clause; only if objectionable spending is pursuant to a "Congressional spending program" do taxpayers allegedly have standing. The Establishment Clause allegedly is irrelevant as a constraint on the use of general budget appropriations to fund executive branch activities.

The prohibitions of the Establishment Clause are eviscerated by a purported rule that allows executive officials to spend general budget appropriations independent of the requirements of the Establishment Clause. Although injury from the use of tax dollars to promote religion is uniquely inflicted on taxpayers, they are denied any opportunity to complain about executive uses of Congressional tax appropriations, under the reasoning of the appellees.

The executive branch has no authority to appropriate funds to itself. Only Congress can appropriate tax revenue, including for executive operations. All spending by the executive branch must be authorized by Congressional appropriations. To say that the Constitution does not control what the executive

branch does with Congressional appropriations, therefore, is contrary to the established law and the underlying logic of federal taxpayer standing.

The district court incorrectly held that executive officials can use Congressional budget appropriations to promote religion without objection by taxpayers. The alleged distinction between appropriations for Congressional spending programs and Congressional support for executive operations is not based on any legal difference related to Congress' exclusive appropriation authority. All uses of tax revenue by the federal government are authorized by Congress, which must pass appropriation bills authorizing spending, including for executive operations. Congressional authorization is mandated by the Appropriations Clause of the United States Constitution, which does not implicate separation of powers considerations, including as to appropriations used to fund activities of the executive branch.

Standing to challenge executive use of Congressional appropriations to promote religion will not open the courthouse door to lawsuits based on generalized taxpayer grievances. A nexus must exist between the use of Congressional appropriations and a specific Constitutional limitation on the use of such appropriations. This nexus has been found to exist only in cases of alleged use of appropriations to promote religion in violation of the Establishment Clause.

Denying taxpayer standing to complain of executive misuse of appropriations to endorse religion relies on an irrational distinction. The Supreme Court previously has held that taxpayers have standing to challenge the executive use of appropriated funds, even where Congress enacted and funded a facially irreproachable program. Executive action alone can create standing to challenge the use of such Congressional appropriations. No rationale or logic, therefore, justifies denying standing to challenge executive officials' use of budget appropriations to promote religion. Budget appropriations constitute spending programs authorized by Congress under the Constitution.

The decision made by the district court in this case to deny taxpayer standing to appellants was based on a misapprehension of Supreme Court precedent. The alleged misuse of general budget appropriations by the executive branch was pursuant to an "exercise of Congressional power," as required by *Flast*. The use of federal funds by executive officials is, "at its heart, a program of disbursement of funds pursuant to Congress' Taxing and Spending powers and the taxpayers' claims call into question how the funds authorized by Congress are being disbursed pursuant to Congress' authority." Executive officials are not above the Constitution.

ARGUMENT

A. STANDARD OF REVIEW

The appellants assert that the district court erred as a matter of law in concluding that they lack standing to challenge the use of general budget appropriations by executive officials in violation of the Establishment Clause. The Court of Appeals reviews *de novo* the legal question of standing. *Wisconsin Right To Life, Inc. v. Schober*, 366 F. 3d 485, 489 (7th Cir. 2004). The Court reviews factual determinations necessary to the question of standing for clear error. *Id.*

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

1. 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 v. Cohen*, 392 U.S. 103 (1968), the Court specifically approved taxpayer standing in the context of the alleged misuse of tax appropriations in violation of the Establishment Clause.

Prior to the *Flast* decision, the Supreme Court’s decision in *Frothingham v. Mellon*, 262 U.S. 447 (1923), had stood for 45 years “as an impenetrable barrier to suits against Acts of Congress brought by individuals who assert only the interest of federal taxpayers.” *Flast*, 392 U.S. at 85. In *Flast*, however, the Court considered whether the *Frothingham* barrier should be lowered when a taxpayer attacks federal spending on the ground that it violates the Establishment Clause of the First Amendment. In that context, the Court considered the standing question presented, while noting that “the Government views such [taxpayer] suits as involving no more than the mere disagreement by the taxpayer with the uses to

which tax money is put.” *Id.* at 98. The Court then rejected the government’s position after analyzing the function served by standing limitations.

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. In other words, when standing is placed at issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue. *Id.* at 100. A proper party is demanded so that federal courts will not be asked to decide ill-defined controversies or cases of a hypothetical or abstract character.

Whether a particular person is a proper party to maintain an action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the federal government. “In terms of Article III limitations on federal court jurisdiction, the question of 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 resolution.” *Id.* at 101.

Consideration of the substantive issues raised by a taxpayer are only considered to determine whether there is a “logical nexus between the status asserted and the claim sought to be adjudicated.” *Id.* at 102. The Supreme Court in *Flast* concluded that the taxpayers satisfied both nexuses to support their claim of standing based on their constitutional challenge to an exercise by Congress of its power under Article I, § 8, to spend for the general welfare and their allegation that the challenged expenditures violated the Establishment Clause of the First Amendment. “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.

The test for taxpayer standing articulated in *Flast* focuses upon the relationship of the taxpayer to the alleged constitutional violation, i.e., whether the taxpayer is complaining that taxes raised pursuant to Congress’ Taxing and Spending authority are being used in violation of a specific prohibition on the use of funds for such a purpose:

The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status [taxpayer] and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of Congressional power under the taxing and spending clause of Article I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the

administration of an essentially regulatory statute. This requirement is consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus v. Board of Education*, 342 U.S. 429 (1952). Secondly, the taxpayer must establish a nexus between that status [taxpayer] and the precise nature of the Constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific Constitutional limitations imposed upon the exercise of the Congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Article I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction. *Id.* at 102-103.

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:

We have noted that the Establishment Clause of the First Amendment does specifically limit the Taxing and Spending power conferred by Article I, § 8. Whether the Constitution contains other specific limitations can be determined only in the context of future cases. However, whenever such specific limitations are found, we believe a taxpayer will have a clear stake as a taxpayer in assuring that they are not breached by Congress. Consequently, we hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that Congressional action under the taxing and spending clause is in derogation of those Constitutional provisions which operate

to restrict the exercise of the taxing and spending power. The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific Constitutional protections against such abuses of legislative power. Such an injury is appropriate for judicial redress, and the taxpayer has established the necessary nexus between his status and the nature of the allegedly unconstitutional action to support his claim of standing to secure judicial review. Under such circumstances, we feel confident that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the Constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution. *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.

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

The district court misapprehended the Supreme Court’s *Flast* decision to be limited to Congressional “program” appropriations. The court distinguished the use of general budget appropriations from “Congressional spending programs” on the purported basis that executive spending was not an exercise of Congress’ power. (A-21/22) The court’s distinction incorrectly interprets *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 court’s reading ignores *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 v. Kendrick*, 487 U.S. 589, 618-20 (1988). 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 Court, instead, relied upon the fact that the source of misused funds originated with a Congressional appropriation made pursuant to Article I, § 8, regardless of the fact that executive officers made the decision as to the disbursement of the funds at issue.

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:

We do not think that appellees' claim that AFLA funds are being used improperly by individual grantees is any 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]. Indeed, *Flast* itself was a suit against the Secretary of HEW, who had been given the authority under the challenged statute to administer the spending program that Congress had created. In subsequent cases, most notably *Tilton*, we have not questioned the standing of taxpayer plaintiffs to raise Establishment Clause challenges, even when their claims raised questions about the administratively made grants. *See Tilton*, 403 U.S. at 676, 91 S. Ct. at 2094; *see also Hunt*, 413 U.S. at 735-736, 93 S. Ct. at 2870-2871 (not questioning standing of a state taxpayer to file suit against a state executive in an “as applied” challenge); *Roemer*, 426 U.S. at 744, 96 S. Ct. at 2343 (same). This is not a case like *Valley Forge*, where the challenge was to an exercise of executive authority pursuant to the Property Clause of Article IV, section 3, *see* 454 U.S. at 480, 102 S. Ct. at 762, *or Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 228, 94 S. Ct. 2925 (1974), where the plaintiffs challenged the executive decision to allow Members of Congress to maintain their status as officers of the Armed

Forces Reserve. *See also U.S. v. Richardson*, 418 U.S. 166, 175, 94 S. Ct. 2940 (1974) (rejecting standing and challenge to statutes regulating the Central Intelligence Agencies' accounting and reporting requirements). *Id.* at 619.

The distinction between an “as applied” and a “facial” legislative challenge highlights the irrelevance of Congressional culpability as a necessary requirement for taxpayer standing. A facial challenge alleges that a law cannot constitutionally be applied to anyone, no matter what the facts of the particular case may be; in fact, the facts concerning how a law was applied are irrelevant to a facial challenge. *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 133, n. 10 (1992). An “as applied” challenge, on the other hand, alleges that a law is unconstitutional only insofar as it has been applied to the specific facts of the case under review.

Unlike a facial challenge, an “as applied” challenge does not result in the invalidation of the law in question. As a result of this distinction, the Supreme Court concluded in *Bowen*, 487 U.S. at 622, that “should the district court [on remand] conclude that the Secretary has wrongfully approved certain AFLA grants, an appropriate remedy would require the Secretary to withdraw such approval.” The Court further stated that if “the Secretary’s current practice does allow such grants, it [the court] should devise a remedy to ensure that grants awarded by the Secretary comply with the Constitution and the statute.” *Id.* Such relief, then, focuses upon the actions of the executive official who decided to make

expenditures, rather than upon the actions of Congress in appropriating the funds at issue.

The *Bowen* and *Flast* decisions together make clear the conceptual and legal basis for taxpayer standing, which the appellees in this case misconstrue. First, a taxpayer must include 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.

Second, the source of the misused funds, appropriations made to executive officials pursuant to Congress' Taxing and Spending authority, is the important 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.

Finally, taxpayer standing is limited by the types of misuse to which a taxpayer can object, i.e., expenditures in violation of the Establishment Clause. The appellees in this case incorrectly claim that the recognition of standing would open the courthouse doors to any generalized grievance 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.

The Supreme Court in *Flast* recognized that the Establishment Clause of the First Amendment specifically limits the Taxing and Spending power conferred by Article I, § 8. 392 U.S. at 105. The Supreme Court went on to question "whether the Constitution contains other specific limitations," which the Court said could only be determined in the context of future cases. In the event, only the Establishment Clause has been found to constitute such a specific limitation on the Taxing and Spending power conferred by Article I, § 8. The Court has made clear that taxpayer standing is not a growth industry, although "it has, in one significant respect, expanded the narrow rule announced in *Flast* by recognizing that an Establishment Clause challenge to Congressional appropriations may be brought

against executive officers based upon their decision regarding the use of taxpayer funds.” *Lamont v. Woods*, 948 F.2d 825, 830 (2nd Cir. 1991).

Other Supreme Court decisions support the view that *Flast* only requires a measurable expenditure of tax money where Establishment Clause violations are alleged. In *Marsh v. Chambers*, 463 U.S. 783, 786, n. 4 (1983), for example, the Court stated that plaintiff, “as a member of the Legislature and as a taxpayer whose taxes are used to fund the Chaplaincy, has standing to assert this [Establishment Clause] claim.” *Marsh* involved a claim that a prayer offered by a Chaplain, who was paid from public funds, violated the Establishment Clause of the First Amendment. *Id.* at 784-85.

In *Minnesota Federation of Teachers v. Randall*, 891 F. 2d 1354, 1358 (8th Cir. 1989), the Court of Appeals also 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 the 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.”).

Here, a logical nexus exists between the status of the appellants and their claim that Congressional budget appropriations are being used by executive officials to promote religion: General budget appropriations have been made pursuant to the exercise by Congress of its power under Article I, § 8, of the Constitution, and the use of the challenged appropriation exceeds a specific constitutional limitation, i.e., the Establishment Clause of the First Amendment to the Constitution.

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

The authorities relied on by appellees do not support the conclusion that appellants lack standing. 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 statutes regulating the CIA. In *Americans United for Separation of Church and State v. Reagan*, 786 F.2d 194 (3d. Cir. 1986), the Court rejected taxpayer standing under the Necessary and Proper Clause, rather than the Taxing and Spending Clause; this decision also preceded the *Bowen* decision. Likewise, *Velvel v. Nixon*, 415 F. 2d 236 (10th. Cir. 1969), challenged Viet Nam War expenditures authorized by the power to raise and support armies and to provide and maintain a navy, rather than under the Taxing and Spending authority; this decision also preceded *Bowen*. In *Mahorner v. Bush*, 224 F. Supp. 2d 48 (D.C. Dist. Col. 2002), the plaintiff did not assert that he had sustained an injury in fact as a result of financial assistance that the United States Government provides to Israel, and the court's discussion of standing did not even acknowledge *Bowen*. *Pietsch v. Bush*, 755 F. Supp. 62 (E.D. NY 1991), involved a claim of emotional distress based on being "an accessory to murder," but the complaint was not based on the misuse of appropriations under the Taxing and Spending power or the Establishment Clause. 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 appellees' position, but that decision no longer reflects the position of even the Second Circuit Court of Appeals. The *Catholic Conference* decision, it should be noted, did not involve the alleged misuse of Congressional appropriations by the executive branch, and the Second Circuit in any event disavowed *Catholic Conference* in *Lamont v. Woods*, 948 F. 2d 825 (2d Cir. 1991). In *Lamont*, the Court marginalized *Catholic Conference* by limiting its applicability to cases in which executive action is claimed to be *ultra vires*. *Id.* at 831. Here, the appellants do not claim the appellees acted *ultra vires*.

The *Lamont* decision subsequently has been read by district courts in the Second Circuit to reflect 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:

The Second Circuit in *re In re U.S. Catholic Conference*, 885 F. 2d 1020, 1027-28 (2d. Cir. 1989), held that taxpayers did not have standing to challenge the IRS administration of a Congressional tax exemption program because there was no assertion that the Congressional enactment, itself was an Establishment Clause violation, a holding which would arguably apply in this case because plaintiffs do not contend that the Congressional authorization of U.S.P.S. spending is itself unconstitutional. However, the Circuit subsequently held in *Lamont v. Woods*, 948 F. 2d 825, 829-31 (2d. Cir. 1991), that taxpayers did have standing to challenge how an agency spent funds authorized to it be Congress, even though Congress did not mandate that the agency spend in the manner alleged to violate the Establishment Clause. *Catholic Conference* was distinguished on the grounds that there the IRS was alleged to be acting ultra vires of a Congressional grant of authority. *Id.* at 831. Because there is no allegation here that the USPS is acting beyond its statutory authority, the court believes that *Lamont* controls and that the plaintiffs have standing as taxpayers. 998 F. Supp. at 727.

The district court's decision to deny standing in the present case is confounded 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 by promoting and endorsing religion.

C. CONGRESSIONAL BUDGET BILLS CONSTITUTE
APPROPRIATIONS AUTHORIZED BY LAW

The district court in the present case recognized a purported distinction between appropriations for "Congressional programs" and "general budget appropriations" made to fund executive operations. (A-21) In reaching its

decision, the court rationalized that actions by executive officials funded by Congressional appropriations are not “exercises of Congressional power.” (A-21) The court concluded that the appellees “have no Congressional mandate” to spend general budget appropriations from Congress. (A-21)

The appellees similarly argued to the district court that budget appropriations made by Congress should be treated differently for purposes of taxpayer standing than Congressional spending bills that create specific administrative programs. The appellees did not dispute that their activities were funded by Congressional budget appropriations, but they urged the district court to recognize a distinction between Congressional appropriations made to “programs” and Congressional budget appropriations made to the executive branch. The appellees specifically framed their position as follows:

Taxpayer standing applies solely where Congress has exercised its authority under Article I, § 8 to enact a Congressional expenditure program and solely as to executive agency actions that carry out a statutory mandate to disburse funds pursuant to such a program. The mere fact that the executive branch utilizes appropriations to carry out an executive activity is not sufficient to establish taxpayer standing. (R. 14 at 13.)

The distinction proposed by the appellees, and adopted by the district court, is not a distinction that is recognized conceptually or legally. The appellees cite no decision that recognizes this distinction between Congressional appropriation bills, nor is the distinction provided with any conceptual plausibility.

Congressional appropriations for "programs" and/or budget appropriations, in both 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*.

Congressional culpability, as noted, certainly is not the conceptual basis for any alleged distinction between different types of Congressional appropriations. The appellees attempt to distinguish *Bowen* on the ground that Congress allegedly mandated the expenditures challenged in that case, whereas Congress only authorized the budget appropriations at issue here. The Supreme Court held standing to exist in *Bowen*, however, despite finding the underlying legislation to be facially constitutional. In addition, the appellees' ground for distinguishing *Bowen* does not account for *Flast*, which involved a statute that permitted, but did not mandate, the allegedly unconstitutional expenditure of federal funds for religious education. *See Flast*, 392 U.S. at 86-87 (describing challenged portions of the appropriation act at issue). Congressional culpability for deciding to spend money in violation of the Establishment Clause, therefore, is not a basis for distinguishing

general budget appropriations from Congressional spending “programs.” On the contrary, the Constitution does not even permit Congress to execute the laws that it passes, which power is reserved exclusively to the executive branch. *See Bowsher v. Synar*, 478 U.S. 714, 726 (1986).

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 power of Congress to appropriate funds and to prescribe the conditions governing the use of those funds. Congress’ exclusive 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.

The rationale underlying the Congressional constitutional requirements for appropriations was long ago described by Justice Story as follows:

The object is apparent from the slightest examination. It is to secure regulatory, punctuality, and fidelity, in the disbursements of the public money. As all the taxes raised from the people, as well as revenues arising from other sources, are to be applied to the discharge of the expenses, and debts, and other engagements of the government, it is highly proper that Congress should possess the power to decide how and when any money should be applied for these

purposes. If it were otherwise, the executive would possess an unbounded power over the public purse of the Nation; and might apply all its moneyed resources as its pleasure. The power to control and direct the appropriations, constitutes the most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public peculation. 2 J. Story, Commentaries on the Constitution of the United States, § 1348 (3d Ed. 1858), quoted in *Richmond*, 496 U.S. at 427.

See also, AINS, Inc. v. United States, 56 Fed. Cl. 522, 540 (2003) (the Appropriations Clause is not a restriction on Congress, but on the executive branch, justified by the historical rationale that “because tax revenue belongs to the people, the Framers of the Constitution believed that it should be Congress that decides to what purpose these revenues ought to be used.”); *American Federation of Government Employees v. Federal Labor Relations Authority*, 388 F.3d 405, 408-09 (3rd. Cir. 2004) (the purpose of the Appropriations Clause is to place authority to dispose of public funds firmly in the hands of Congress, rather than the Executive; this not only allows Congress to guard against extravagance, “but hands Legislative Branch a powerful tool to curb the behavior of the Executive”); *Illinois Central Railroad Co. v. United States*, 18 Ct. Cl. 118, 132 (1883) (“no one will probably contend that if Congress fails to confer upon the Executive power to expend the public money for a given purpose that it is within the constitutional power of the Executive to bind the United States”).

The Congressional “power of the purse” reflects the fundamental proposition that the executive branch is dependent on Congress for its funding. In exercising its appropriations power, however, Congress is not limited to these elementary functions. It is also well-established that Congress can determine the terms and conditions under which an appropriation may be made, as well as provide the executive branch considerable discretion in determining specific expenditures. “That Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates must, of course, be plain. Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies.” *Cincinnati Soap Company*, 301 U.S. at 321-22.

No tenable constitutional distinction exists between appropriation and tax laws, on the one hand, and all other laws on the other. *Byrd v. Raines*, 956 F. Supp. 25, 37 (D.D.C. 1997). Similarly, no distinction exists between “program” and “budget” appropriations, as urged by the appellees. Thus, in *Ameron, Inc. v. United States Senate*, 809 F. 2d 979 (3d Cir. 1986), the Court of Appeals discussed the federal procurement process whereby “Congress appropriates funds for a wide variety of purposes and delegates to executive branch officials the authority to make certain decisions regarding how those funds are to be spent.” The Court also described how “Congress may use the power of the purse to restrict executive

action of many kinds under existing legislative delegations of authority.” *Id.* at 992, n. 8. Once an allocation is made, however, “the executive must be allowed to operate freely within the spirit of discretion created for him by that legislation, subject only to challenge for illegality before the courts and the general oversight of Congress.” *Id.* at 993. By contrast, “nothing in the Constitution gives the President any power over appropriations except the power to veto appropriation legislation.” *Id.*

Budget appropriation bills are enacted by Congress just as other legislation. The Supreme Court described this process in *Clinton v. New York*, 524 U.S. 417, 448, 118 S. Ct. 2091 (1998):

Our decision rests on the narrow ground that the procedures authorized by the Line Item Veto Act are not authorized by the Constitution. The Balanced Budget Act of 1997 is a 500-page document that became "Public Law 105-33" after three procedural steps were taken: (1) a bill containing its exact text was approved by a majority of the members of the House of Representatives; (2) the Senate approved precisely the same text; and (3) that text was signed into law by the President. The Constitution explicitly requires that each of those three steps be taken before a bill may "become a law." Article I, § 7. If one paragraph of that text had been omitted at any one of those stages, Public Law 105-33 would not have been validly enacted. If the Line Item Veto Act were valid, it would authorize the president to create a different law - one whose text was not voted on by either the House of Congress or presented to the president for signature. Something that might be known as "Public Law 105-33, as modified by the president" may or may not be desirable, but it is surely not a document that may "become a law" pursuant to

the procedures designed by the Framers of Article I, section 7 of the Constitution.

The magnitude of the Congressional budget appropriation process is further described in the dissent by Justice Breyer in *Clinton*, 524 U.S. at 471:

Today, our population is about 250 million, *See U.S. Department of Commerce, Census Bureau, 1990 Census*, the Federal Government employs more than 4 million people, *See Office of Management and Budget, Budget of the United States, Fiscal Year 1998: Analytical Perspectives 207 (1997) (hereinafter, Analytical Perspectives)*, the annual federal budget is \$1.5 trillion, *See Office of Management and Budget, Budget of the United States Government, Fiscal Year 1998: Budget 303 (1997) (Hereinafter, Budget)*, and a typical budget appropriation bill may have a dozen titles, hundreds of sections, and spread across more than 500 pages of the statutes at large. *See e.g., Balanced Budget Act of 1997, Pub. L. 105-33, 111 Stat. 251*. Congress cannot divide such a bill into thousands, or tens of thousands of separate appropriation's bills, each of which the President would have to sign, or to veto separately.

The reality of the Congressional appropriation process does not support the appellees' attempt to distinguish between Congressional appropriations made to fund administrative "programs" and budget appropriation bills adopted to fund the executive branch. The purported distinction advanced by the appellees 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*, comprehensive 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.

According to the appellees, however, only discretionary decisions made by the executive branch as part of Congressional “programs” are subject to the limitation of the Establishment Clause, while the millions of dollars spent by the executive branch as part of its budget appropriations from Congress are completely unconstrained by the Establishment Clause. In both instances, the funds originate from a Congressional appropriation bill and the decision how to utilize the funds is made by the executive branch. The appellees, nevertheless, would protect the appropriations made to the executive branch from any Constitutional constraint imposed by the Establishment Clause.

This is not a principled distinction that is urged by the appellees, and that was accepted by the district court, and it is not even a conceptually workable distinction. What is the difference between funds appropriated for spending pursuant to a Congressional “program” and a Congressional budget bill authorizing the appropriation of funds to be used by the executive branch? The proposed distinction is not founded in law or practicality, and the district court

erred in making the purported distinction the basis for its decision to deny appellants standing.

D. SEPARATION OF POWERS CONCERNS ARE NOT IMPLICATED BY TAXPAYER STANDING.

The Separation of Powers Doctrine also does not provide any conceptual framework for making the distinction urged by the appellees. The Separation of Powers Doctrine plainly does not prohibit judicial review of either Congressional or executive branch actions using tax appropriations to promote religion.

In *Flast*, the government argued that the constitutional scheme of separation of powers, and the deference owed by the federal judiciary to the other two branches of government within that scheme, presented an absolute bar to taxpayer suits challenging the validity of federal spending programs. The government argued that such suits involved no more than the mere disagreement by the taxpayer with the uses to which tax money was put. According to the government, the resolution of such disagreements was committed to other branches of the Federal Government, and not to the judiciary. Consequently, the government contended that, under no circumstances, should standing be conferred on federal taxpayers to challenge a federal taxing or spending program. *Flast*, 392 U.S. at 98. After analyzing the function served by standing limitations, however, the Court in *Flast*, rejected the government's position. "The question whether a particular person is a proper party to maintain the action does not, by its own force, raise

separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government.” *Id.* at 100-101.

Nor is there any support for the appellees’ argument that executive branch officials, including presidential advisors, are immune from all law suits that may question the constitutionality of their conduct. To state the proposition is to recognize its implausibility. The appellees’ position would mean that the executive branch is immune from actions brought under the Equal Protection Clause of the Constitution. The position advanced by the defendants would mean that the executive branch can take any and all actions without judicial scrutiny, regardless of whether they advance, endorse or give unambiguous support to religion. This is simply not the law. Certainly executive actions are subject to Constitutional scrutiny by courts, such as due process and equal protection claims. Similarly, actions against executive appointees for alleged violations of the Establishment Clause are already recognized in cases decided by the Supreme Court, such as *Flast* and *Bowen*.

The question raised by Appellant’s Amended Complaint against the appellees in this case is not whether they are members of the executive branch or advisors to the President, or appointees by the President. Nor is the issue whether the exercise of jurisdiction would violate the separation of powers. Likewise, the issue is not whether Congress acted with culpability. Instead, the issue raised

against these appellees is simply whether or not they engaged in activities that endorse, support, or advance religion in violation of the Establishment Clause, with funds appropriated by Congress pursuant to its taxing and spending authority. That is the relationship that is necessary to sustain taxpayer standing, i.e., whether the taxpayer is complaining that taxes appropriated by Congress are being used in violation of a specific limitation of the Constitution, namely, the Establishment Clause. That is the legal and conceptual relationship necessary to determine whether these appellants have the requisite interest to prosecute this action. The objections by the appellees lack a legal or conceptually compelling basis, and the district court erred by adopting their purported distinction in denying appellants standing to proceed.

E. THE ESTABLISHMENT CLAUSE PROHIBITS GOVERNMENT SPEECH ENDORSING RELIGION.

Although the appellees' motion to dismiss for want of standing did not depend upon the merits of appellants' claims, the appellees nonetheless incorrectly suggested that the Establishment Clause does not even apply to government speech endorsing religion. The appellees claimed, without authority, that speech by government officials at government-sponsored conferences cannot be regulated by the Establishment Clause. The appellees are wrong.

The relationship between government speech and the Establishment Clause is well-established. As Justice O'Connor, writing for the Supreme Court has

noted, “there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 110 S. Ct. 2356, 2372 (1990).

Based on the prohibition of government speech endorsing religion, many of the fundamental tenets of Establishment Clause jurisprudence relate to direct or inferred speech, *i.e.*, actions that convey a message. For example, prayer at government-sponsored activities is generally prohibited. Public displays of the Ten Commandments, or displays of holiday creches, are prohibited if they convey a message of religious endorsement. It is the message of endorsement that is the impropriety.

For the appellees to suggest, therefore, that the Establishment Clause does not prohibit actual government speech endorsing religion is misguided. In fact, the Supreme Court expressed doubt that even “practices like proclaiming a National Day of Prayer are constitutional.” *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 603, 109 S. Ct. 3086 (1989). *See also Doe v. Small*, 964 F.2d 611, 617 (7th Cir. 1992) (government speech endorsing religion is prohibited).

The focus of the Supreme Court’s “endorsement test” is on the message that is conveyed. Public support of religion, therefore, violates the Establishment Clause if the actions under review convey a message of endorsement or disapproval. *Books v. City of Elkhart, Indiana*, 235 F.3d 292, 302 (7th Cir. 2000). Under this analysis, courts must ensure that a government-sponsored activity does not have the purpose or the effect of endorsing religion, irrespective of the government’s actual purpose. *Id.* at 304. Under this analytical approach to the Establishment Clause, a court must assess the totality of the circumstances to determine whether a reasonable person would believe that government actions amount to an endorsement. *Id.* In assessing the situation, the court must consider whether an objective observer familiar with the history of the government’s action would perceive it as endorsement. *Id.* at 306. Finally, as the Supreme Court has recognized, “the Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person’s standing in the political community.” *County of Allegheny*, 492 U.S. at 593-94. That is very much questioned in this case.

Here, the appellants allege that the appellees are conducting and funding government-sponsored conferences at which explicit messages of religious endorsement are made, including by the appellee Rod Paige. (A-7/8). The

appellees only naively suggest that such allegations cannot be redressed under the Establishment Clause. The appellees certainly could not hand out literature or post placards embodying religious endorsement at such conferences. To suggest that government officials, however, can verbally make such endorsements at government-sponsored events is inconsistent with the premise of the Establishment Clause. In essence, the appellees suggest that only a “hard copy” of speech can constitute government endorsement, but in this day and age, that is wishful thinking. At government-sponsored events, officials do not have the right to convey the unmistakable message that religion matters to political standing.

CONCLUSION

For all the above reasons, the decision of the district court denying appellants standing to proceed should be reversed by the Court of Appeals.

Dated this 9th day of March, 2005.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE
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1.

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,484 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(I).

2.

This brief 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 13 point Times New Roman.

This 9th day of March, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Brief of Appellant and Appendix 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 Brief of Plaintiff-Appellants to Lowell V. Sturgill, Jr. at lowell.sturgill@usdoj.gov.

This 9th day of March, 2005.

Frederick Caraccio

CERTIFICATE OF COMPLIANCE WITH
CIRCUIT RULE 31(e)

The undersigned hereby certifies that I have electronically filed, pursuant to Circuit Rule 31(e), this brief and all of the appendix items that are available in non-scanned pdf format.

This 9th day of March, 2005.

Richard L. Bolton
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CERTIFICATE OF COMPLIANCE WITH
RULE 30(d)

Pursuant to Rule 30(d), I hereby certify that all of the materials required by Part (a) and (b) of this Rule are included in the Appendix bound with appellants' main brief.

This 9th day of March, 2005.

Richard L. Bolton
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APPENDIX

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