No. 06-157

IN THE

Supreme Court of the United States

JAY HEIN, Director of the White House Office of Faith-Based and Community Initiatives, *et al.*,

Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, INC., *et al.*,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN JEWISH CONGRESS AND AMERICAN JEWISH COMMITTEE IN SUPPORT OF RESPONDENTS

JEFFREY SINENSKY
American Jewish Committee
165 East 56th Street
New York, NY 10022-2746
(212) 751-4000

MARC D. STERN
Counsel of Record
American Jewish Congress
825 Third Avenue, 18th Fl.
New York, NY 10022-7519
(212) 360-1545
mstern@ajcongress.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES, LEGISLATIVE MATERIALS

OTHER AUTHORITIES

BRIEF OF THE AMERICAN JEWISH CONGRESS and THE AMERICAN JEWISH COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI*

The American Jewish Congress ("AJCongress") is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of American Jews. Because those rights of Jews are dependent on a government that is scrupulously neutral about religion, AJCongress devoted much energy to litigation enforcing the Establishment Clause. Indeed, the case on which this one turns, *Flast v. Cohen*, 392 U.S. 83 (1968) was litigated by AJCongress' Special Counsel, Leo Pfeffer.

* * *

The American Jewish Committee ("AJC"), a national organization of over 175,000 members and supporters and 32 regional chapters, was founded in 1906 to protect the civil and religious rights of Jews and is dedicated to defending the religious rights and freedoms of all Americans. A staunch supporter of church-state separation as the surest guarantor of religious liberty, AJC filed an *amicus* brief in *Flast v. Cohen*, arguing that permitting taxpayers to initiate lawsuits is necessary to give effect to the Establishment Clause. AJC files again in this cased based on the belief that government funds, irrespective of whether they bear the stamp of congressional earmark, should not be used to promote religion and that, in order to vindicate the First Amendment, taxpaying Americans must be given the opportunity to challenge such unconstitutional expenditures in the courts.

The brief is filed with the consent of the parties. Letters of consent are on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

1. Petitioners' case for reversal rests on three principles they say are intrinsic to *Flast v.Cohen*, 392 U.S. 83 (1968): expenditures initiated by the Executive Branch are distinct from the congressional decision to allocate money to the Executive Branch, and are not traceable to Congress' spending power; only legislative expenditures in support of religion were of concern to the Founders; and, even as to legislative spending, standing under *Flast* exists only when government gives money to non-governmental actors, not when it itself engages in religious advocacy.

2. Nothing in *Flast* or its progeny lends support to these claims. Nor does logic support any of these distinctions. Whether by executive or legislative decision making, funds expended on religion cause exactly the same constitutional harm to the taxpayer.

3. Petitioners offer no explanation—and we can think of none—why taxpayers have standing to challenge grants to groups using religion to advocate abstinence (*Bowen v. Kendrick*, 4887 U.S. 489 (1988), but not to challenge identical programs operated directly by government, especially since as a matter of substantive constitutional law, the latter is more problematic than the former.

4. The claim that the Founders were concerned only with legislative appropriations for religion lacks historical basis. A review of the legal materials from the Founding era demonstrates a focus on prohibiting certain outcomes (using governmental power to advance religion, in particular

through funds extracted from taxpayers), not with allocating to one branch the power to spend money to advance religion. This is true both as to the influential Memorial and Remonstrance and as to early state constitutions in those states committed to a no-aid principle. Thus, for example, the Memorial speaks of the evils of the civil magistrate aiding religion. There 'magistrate' meant, as Samuel Johnson defined it, a person "publickly invested with authority; as a governour." (John Locke makes similar arguments using the word 'magistrate,' and he, too, included the executive within the proscription of government aid to religion.)

5. Various early state constitutions also did not limit the ban on financial aid to religion to legislatures, focusing instead on the right of citizens not to fund religion through government spending. New York, for example, warned of danger posed by both "wicked priests and princes" in seeking to financially aid religion.

7. Petitioners' recitation of numerous instances in which members of the Executive Branch have over the years made religious statements proves little. This test confuses the question of whether plaintiffs should prevail on the merits with the distant question of whether they have standing, *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83 (1998). In any event, those utterances, which may not be of the same quality with what is alleged here, did not pass unchallenged by the likes of Madison and Jefferson.

8. A restriction on taxpayer suits to either legislative expenditures or those made to groups outside government finds no support in the practice in state taxpayer suits generally, or those challenging government aid to religion specifically. They were created *ex nihilo* for this case. There

are other restrictions on such suits found in the state case law—the need to show special harm or to notify a specified official (the Attorney General) before filing suit; distinctions between negative and affirmative relief; or the exclusion of discretionary matters from the scope of the remedy. There is, however, no sign at all of any of the novel restrictions suggested by Petitioners.

9. The specter conjured up by Petitioners that if their proffered limits are not grafted unto *Flast* the Executive Branch will be barraged with taxpayer suits is not supported by the evidence from the states which permit taxpayer suits without Petitioners' limits, and are not buried in litigation. Parades of imagined horribles ought to be unpersuasive in the face of longstanding contrary experience.

10. Contemporary standing doctrine rests largely on preserving the separation of powers between branches. Separation of powers presumes three "co-equal branches" of government. Petitioners' arguments, particularly their argument that executive expenditures are not subject to taxpayer suits, suggest that the executive is substantially more equal than the legislature or the judiciary.

ARGUMENT[1]

Petitioners' core claim is not that Plaintiffs failed to allege the "pocketbook injury" required by *Doremus v. Bd. of Educ*., 342 U.S. 429 (1952) and *Flast v. Cohen*, 392 U.S. 83 (1968). Instead, they assert that "when Congress provides

[1] No person or entity, other than the *Amici Curiae*, their members and their counsel, made a monetary contribution to the preparation and submission of this brief. Counsel for the Respondents did not prepare this brief, either in whole or in part.

funds to the executive branch to be used in the Executive's discretion and outside of a specific congressionally ordained spending program, Congress' taxing and spending role ends when those funds are appropriated—that is, when the funds are delivered into the control of the Executive Branch." Petitioners' Brief ("Pet. Brief") at 30. *Flast*, they continue, applies only to congressional exercises of spending power, not executive expenditures. Pet. Brief at 24-26.[2]

To buttress their novel claim, Petitioners postulate that only legislative expenditures in support of religion concerned the Founders, Pet. Brief at 36. As a corollary, they add that even with regard to legislative spending, *Flast* standing exists only where funds are expended outside government. Pet. Brief at 38-44.

Petitioners' reading of *Flast* (to borrow terms from philosophy), confuses accidents with properties, and wrenches the First Amendment from its historical matrix. The restrictions Petitioners draw from in *Flast* and its direct descendant, *Bowen v. Kendrick*, 487 U.S. 489 (1988), are not in fact found in those cases. They were created *ex nihilo* for this one

A. The Distinction Between Legislative And Executive Spending Is Wholly Illogical

Petitioners' submission amounts to this: if the executive branch responds to a congressional command to address teenage pregnancy by making non-earmarked grants to third

---

[2] As the Center for Inquiry's *amicus* brief demonstrates, Petitioners' argument simultaneously misinterprets the way Congress appropriates money to the executive branch and creates an until now unheard of executive spending power.

parties,[3] taxpayers have standing to challenge particular grants as establishing religion, *Bowen v. Kendrick*, *supra*. If, on the other hand, the executive branch decides on its own to use funds committed by Congress to its unfettered discretion to set up an office to conduct identical programs as its own to combat teenage pregnancy, there would be no taxpayer standing.

Of the raw illogic of Petitioners' reading of *Flast* and *Bowen*, there is no need to say much. Whether by congressional or executive decision, the result is the same: funds (the proverbial "three pence") are pried from taxpayers to propagate religious views, a harm at the core of the Establishment Clause. That injury is the same no matter which branch of government spends money for that forbidden purpose.

If, as *Bowen* holds, standing exists to challenge a legislatively ordained abstinence program, even when the executive branch decides which groups are funded, what possible justification is there to allow the executive to conduct an identical program free of judicial challenge initiated by the same taxpayer complaining of the same harm to his pocketbook?

---

[3] Throughout, Petitioners' refer to grants to third parties. They do not specify whether these third parties encompass only non-governmental groups or include grants to other governmental units, and whether their theory would recognize taxpayer standing if the other governmental unit in turn made sub-grants to non-governmental groups. *Flast* itself involved grants to another governmental unit expended by that government itself allegedly in aid of religion. *Cf. Agostini v. Felton*, 521 U.S. 203 (1997) (upholding program at issue in *Flast* in part on the basis that funds remained under public control).

Petitioners pointedly do not claim that, despite its wording ("Congress shall make …"), the Establishment Clause applies only to the legislature. Cf. *Shrum v. City of Cowetta*, 449 F.3d 1132 (10th Cir. 2006) (rejecting argument that constraints of the First Amendment inapplicable to executive). They insist only that taxpayer standing is to be inexplicably bifurcated: it follows the constitutional harm in the case of legislative, but not executive, expenditures.

The judiciary's authority as a co-equal branch of government would be decidedly undermined if, in response *Bowen*, executive branch officials had, with impunity from taxpayer suit, taken a general appropriation for the operation of the Executive Office of the President (or took advantage of authority granted by Congress to shift funds from one departmental account to another[4]) to continue the very program the court had just held unconstitutional.

Petitioners offer no explanation and no authority for their further claim that the Establishment Clause harm to taxpayers of subsidizing nongovernmental groups is greater than the harm of the government undertaking such a program on its own. As a matter of substantive constitutional law, the harm is undoubtedly greater in the latter case than the former. Compare *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) with *Widmar v. Vincent*, 454 U.S. 263, 271, n. 9 (1981); *Mueller v. Allen* 463 U.S. 388, 399 (1983).

Flast, it is true, involved subsidizing a third party to provide a direct service to parochial school students. *Bowen* involved grant-making to third parties. But as Respondents

[4] See, *e.g.*, Consolidated Appropriations Act for FY 2005, P.L. 108-447, § 208.

and other of their *amici* argue, not a single word in the *Flast* or *Bowen* opinions suggests that anything turns on that happenstance, or that the result would have been different had the federal government itself undertaken to conduct remedial instruction in parochial schools or offer abstinence education. The happenstance that third parties were involved is no more significant for future cases than the fact that *Flast* arose in New York and *Bowen* involved sex.

B. The Founders Were Concerned With All Official Religion, Not Just Legislatively Established Religion

1. The Memorial and Remonstrance Opposed All Governmental, Not Just Legislative, Establishments

Petitioners' contend that the particular concern of the Framers was that the legislature (but not the executive) would transfer funds from taxpayers into the coffers of churches, Pet. Brief at 41. An attached footnote, *id.*, at n. 14, cites *Locke v. Davey*, 540 U.S. 712, 722 (2004); *Flast*, 392 U.S. at 103-04; and *Everson v. Bd. of Education*, 330 U.S. 1, 11 (1947), in support of this proposition. While each emphasizes the Founders' concern with legislative enactments funding religion, none even suggests that only congressional expenditures were proscribed (much less are sufficient to create taxpayer standing) and that religious subsidies were of concern only when channeled through private hands.

Of course, when discussing the spending power, the Founders spoke of legislative action, since they charged only that body with laying taxes and spending money. Article I, §

8. It does not follow that such spending was the Founders' exclusive concern.

Petitioners' reading of Madison's Memorial and Remonstrance Against Religious Assessment ("Memorial"),[5] as focusing exclusively on legislative activity to pay outsiders to teach religion is textually unsustainable. Pet. Brief at 41. Of course, the Memorial mentions the Virginia legislature. That body, not Virginia's governor or its judiciary, was considering the bill Madison was addressing. But a close reading demonstrates that he had broader concerns than legislative excess in mind.

The very first argument mustered by the Memorial is that "religion or the duty we owe our Creator … and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." Madison goes on to speak of "civil society['s]" incompetence in matters of religion, "which is wholly exempt from [civil society's] cognizance," because duties to God precede the formation of civil society. This argument is as applicable to executive appropriations in support of religion as to legislative ones. It is all of the civil authority that is debarred from interfering with the prior duty to God, not one or the other of its constituent parts. Duties owed God are not constrained by Montesquieu's theory of separate branches of government.

In the next paragraph (¶ 2), Madison refers to the legislative body as a "vice regent" of society as a whole. He goes on, however, to speak interchangeably of restrictions on "free government," including its "co-ordinate departments,"

---

[5] All textual references are to the Memorial as reprinted in an Appendix to *Everson v. Bd. of Educ.*, 330 U.S. 1, 63 (1947).

"more especially that neither of them be suffered to overlap the great Barrier which defends the rights of the people" (emphasis added).

Petitioners likewise demonstrate no basis upon which to limit the critical reference in the next paragraph (¶ 3) to "the same authority which can establish Christianity … may establish … any particular sect of Christianity" only to the legislature.

Paragraph 5 of the Memorial refers to the incompetence of the "Civil Magistrate" as a judge of religious truth. Later in the same paragraph, Madison rails against "Rulers in all ages" who have violated this principle. Both "magistrate" and "ruler" are terms at least as likely to refer to the executive as the legislature. Samuel Johnson's authoritative Dictionary of the English Language (1792) defined a magistrate as "a man publickly invested with authority; a governour"—in short a person invested with executive authority.

We note, parenthetically, that John Locke, in his influential A Letter Concerning Toleration, reprinted in P. Kurlander and R. Lerner (ed.), 5 Founders' Constitution 52 (Document 24) (1987) ("Founders' Constitution"), when setting limits on governmental interference with religion likewise uses the word 'magistrate' to apply to all branches of government. He goes on to say that "no man can so far abandon the case of his own salvation … to leave the choice of any other, whether prince or subject, to prescribe to him what faith or worship he shall embrace" (emphasis added).

Paragraphs 6 and 7 of the Memorial argue that Christianity "disavows a dependence on the powers of this World" and was dishonored by fourteen centuries of reliance

on civil authority. This reference to the "civil authority" cannot refer only to legislatures. For most of the referenced period, there were no legislatures, certainly not legislatures as powerful as executives (kings).

Given that the relevant background for the American religious settlement was the English religious conflicts of the prior century and a half, wars that were alternately (or sometimes jointly) the product of both executive and legislative branch overreaching, *cf. Engel v. Vitale*, 370 U.S. 421 (1962), it would be nothing short of astounding had Madison discounted concerns about the executive branch.

The salience of this history is not undermined by instances in the Founding era and later when members of the Executive Branch made overtly religious statements. Pet. Brief at 38-41. Those instances show at most that some of what Respondents have challenged may be within the bounds of substantive constitutional law. Petitioners do not show, as they must, that there is no set of circumstances in which Executive Branch officials could violate the Establishment Clause by endorsing religion, such that there is no conceivable injury for which Respondents could seek redress. A failure to prevail on the merits does not mean the absence of a case or controversy. *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89 (1998) (collecting cases).

A similar history of religious statements has been marshaled for the legislative branch, *Marsh v. Chambers*, 463 U.S. 783 (1983). That does not mean that no claim could be advanced against any legislative religious invocations. The contrary is authoritatively established, *County of Allegheny v. ACLU*, 492 U.S. 573, 603-05 (1992); *Wynne v.*

Town of Great Falls, 376 F.3d 292 (4th Cir. 2004). Petitioners again do not account for the preference they afford executive expression of religious sentiments.

Just as the Alien and Sedition laws are not an authoritative gloss on the First Amendment's Free Speech Clause, *NY Times v. Sullivan*, 376 U.S. 254 (1964), so, too, one should not accept without more detailed examination the constitutionality of any statement government officials have ever made in support of religion. Jefferson and Madison did not. See Letter of T. Jefferson to Rev. S. Miller, 5 Founders' Constitution 98 (Document 60) (1808); J. Madison, Detached Memoranda (1817); *id*., at 103-05 (Document 64); Letter to E. Livingston (182), *id*., at 105 (Document 66) (complaining of Executive Proclamations pronouncing public fasts and days of Thanksgiving).

2. Early State Constitutional Provisions Likewise Drew No Distinction Between Legislative And Executive Establishment

The struggle against religious assessments in Virginia has played a special role in interpreting the First Amendment. *Locke v. Davey*, 504 U.S. 712, 722 (2004). By the time of the founding other states, too, had banned compulsory support for religion, and their documents, too, are inconsistent with Petitioners' arguments. Like the Memorial, they express broader concerns than just legislative excess.

In New York, the colonials' struggle for non-establishment focused on a governor's efforts (supported by the legislature) to establish the Episcopal Church, J.W. Pratt, Religion, Politics and Diversity: The Church-State Theme in New York History (1967), 49-80. The Continental Congress,

in its Address to the Inhabitants of the Province of Quebec, 5 Founders' Constitution at 61-63, spoke of religious liberty being denied by the royal governor and his ministers.

Contemporaneous legal instruments are of a like tenor. These focus on the citizen's right not to be officially compelled to support religion, not on restricting only the legislature's ability to compel and allocate religious subsidies. The Delaware Declaration of Rights and Fundamental Rules (1776) provided that "no Man ought or of Right can be compelled to … maintain any Ministry contrary to his free Will and Reason and that no Authority can be vested in or assumed by any Power whatever [to]… control the Right of Conscience …" 5 Founders' Constitution at 70 (Document 26).

New Jersey (1776) provided that "no person … be compelled to attend any place of worship; nor shall any person ever be obliged to pay tithes, taxes, or any other rates for the purpose of building … any other church," *id*., at 71 (Document 28). Similar citizen-right focused language can be found in the 1776 North Carolina and Pennsylvania Constitutions, and the 1777 Vermont Constitution, *id*., at 71, Document 29 and *id*. at 71, Document 30; *id.*, at 75, Document 35.

New York (1777) prefaced its religious liberty provision by adverting to the "bigotry and ambition of weak and wicked priests and princes …," not legislators, *id*., at 75, Document 34.[6]

---

[6] North Carolina, New York and South Carolina barred clergymen from serving in both the legislative and executive branches. See *McDaniel v. Paty*, 435 U.S. 618 (1978). If there were only a fear of establishments by

II. NO STATE HAS ADOPTED ANY OF THE RESPONDENTS' LIMITS ON TAXPAYER SUITS

A. Ordinary State Taxpayer Suits Are Not Governed By Petitioners' Rules

If neither logic nor history sustains Petitioners' proffered limitations on *Flast* taxpayer suits, neither does the actual practice in state taxpayer suits. None of Petitioners' proffered proposals for circumscribing *Flast* can be found in numerous reported state taxpayer actions.

Almost all states have allowed taxpayer suits against municipalities at least since *Massachusetts v. Mellon*, 267 U.S. 447 (1923). A few states reject state taxpayer standing, but even those often leave the courthouse doors open to some such suits.[7] Most do allow them against state government, see *infra*, n. 9.

---

the legislative branch, these provisions designed to prevent a re-establishment of religion would have been limited to service in the legislature.

[7] Suits refusing to recognize taxpayer standing include *Scott v. Buhl J.S.D.*, 123 Id. 779, 852 P.2d 1376 (1993); *Citizens Committee v. County Comm'r*, 233 Md. 398, 197 A.2d 108 (1964) (no taxpayer standing, but standing where suit raises constitutional issue of great public interest); *State ex rel Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (1995) (no taxpayer standing; court nevertheless asserted jurisdiction because of "great public interest"); *Pittsburgh Palisades Park, LLC v. Commonwealth*, 585 Pa. 196, 888 A.2d 655 (2005) (no taxpayer standing absent special harm, unless (1) government action otherwise would go unchallenged, (2) those directly affected have no incentive to challenge expenditure, (3) judicial relief is appropriate; (4) no other redress exists and (5) no better situated plaintiff exists; *Goldman v. Landsidle*, 262 Va. 364, 552 S.E.2d 67 (2001) (no taxpayer standing absent special injury "pecuniary or otherwise"). Virginia does allow

In some cases, taxpayer standing is a matter of statutory right;[8] in most others, it is a creation of judicial decision.[9] A

---

municipal taxpayer suits without Petitioners' proposed limitations, *Goldman*, *supra*.

[8] See, *e.g.*, Cal. Code Civ. Pro. § 526a; Mich. Cons. Laws § 600.2041(3); Ill. Cons. Stat. 5/11-301; Kan. Stat. 60-907(b); Or. Stat. § 294.100(2). With regard to the constitutionality of the broadest reaches of Michigan's law, see *MEA v. Superintendent*, 272 Mich. App. 1, 724 N.W.2d 478 (2006). None of these statutes incorporate Petitioners' proposed limits on taxpayer standing.

[9] See, *e.g.*, *Jordan v. Siegelman*, ___ Ala. ___, ___ So.2d ___ (2006) ("taxpayer standing to challenge unconstitutional or illegal action"); *Trustees v. State*, 736 P.2d 324 (Alk. 1987) ("illegal government conduct on matter of significant public concern"); *Ethington v. Wright*, 66 Ariz. 382, 189 P.2d 209 (1948) (illegality or waste); *Nicholl v. E-470 Public Highway Authority*, 896 P.2d 859 (Colo. 1995) (unlawful expenditures or insuring compliance with state constitution); *Highgate Condominium Ass'n v. Watertown Fire Dist.*, 210 Ct. 6, 533 A.2d 1126 (1989) ("Some pecuniary or other great injury"); *City of Wilmington v. Land*, 378 A.2d 635 (Del. 1977) (unlawful expenditure or misuse of property; no need for special damages); *School Bd. of Volusia County v. Clayton*, 691 So.2d 1066 (Fla. 1997) (taxpayer standing only where special injury or constitutional challenge); *Iuli v. Fasi*, 62 Haw. 180, 613 P.2d 653 (1980) (loss of revenue resulting in increase in plaintiff's or all taxpayers' tax burden); *Embry v. O'Bannon*, 798 N.E.2d 157 (Ind. 2003); *Citizens v. City of Shenandoah*, 686 N.W.2d 470 (Ia. 2004) (no taxpayer standing where harm comes from project financed by legally issued bonds, not an illegal expenditure); *Blevins v. Bd. of Douglas County Comm'rs*, 251 Kan. 374, 834 P.2d 1344 (1992) (taxpayer's pocketbook affected); *Alliance Affordable Energy v. Council*, 677 So. 424 (La. 1996) (standing to prevent officials from "transcending their lawful powers or violating their legal duties; drawing distinction between affirmative and negative relief); *Common Cause v. State*, 455 A.2d 1 (Me. 1983) (direct interest in enforcing constitutional provision proscribing use of tax funds for private purposes); *E. Mo. Laborers v. St. Louis County*, 781 S.W.2d 43 (Mo. banc 1989) (illegal expenditure);

review of the relevant statutes and decisions discloses not even a hint of any of the restrictions the government asserts here to restricting taxpayer standing to legislative

---

Cunningham v. Exon, 202 Neb. 563, 276 N.W.2d 213 (1979) (illegality and matter of great public concern; no need for special damages); *Grinnell v. State*, 121 N.H. 823, 435 A.2d 523 (1981) (constitutional challenges); *Boryzewski v. Brynes*, 37 N.Y.2d 361, 334 N.E.2d 579, 372 N.Y.S.2d 623 (1975) (illegal or unconstitutional action); *Hard v. DePaoli*, 56 Nev. 19, 41 P.2d 1054 (1935); *Goldston and Harrington v. State*, ___ S.E.2d ___ (N.C. 2006) (unlawful or unconstitutional government expenditure); *Egbert v. Dunseith*, 74 N.D. 1, 24 N.W.2d 907 (1946) (violation of state constitution); *State ex rel v. Racing Comm'n*, 162 Ohio Stat. 366, 123 N.E.2d 1 (1954) (special damages), but see, *State ex rel Carter v. N. Olmstead*, 69 Ohio Stat.3d 315, 631 N.E.2d 1048 (1994) (allowing mandamus action when taxpayer standing wanting); *State ex rel Kane v. Goldschmidt*, 308 Or. 573, 783 P.2d 988 (1990); *Lipscomb v. State Bd. of Higher Educ.*, 305 Or. 472, 753 P.2d 939 (1987) ("tax burden will be augmented by unlawful expenditures of public funds"); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004) (public importance of issue, there compliance with state constitution); *Parker v. Youngquist*, 69 S.D. 423, 11 N.W.2d 84 (1943) (illegal act, when attorney general refuses to sue); *Parks v. Alexander*, 608 S.W.2d 881 (Tn. Ct. of Apps. 1980) (need for special harm, but "increased tax burden resulting from wrongful legislative action constitutes such harm" or constitutional violation); *Olson v. Salt Lake City School Dist.*, 724 P.2d 960 (1986) (standing if no more appropriate plaintiff and, if taxpayer suit is disallowed, issue will not be litigated); *Swart v. South Burlington*, 122 Vt. 177, 157 A.2d 514 (1961) (unconstitutional expenditures); *Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994) (no taxpayer standing to challenge tax cuts); *Tattersall v. Yelle*, 52 Wn.2d 856, 329 P.2d 841 (1958) (constitutionality of expenditure); *Winkler v. W. Va. School Bldg. Authority*, 189 W.Va. 748, 434 S.E.2d 420 (1993); *City of Appelton v. Town of Menasha*, 142 Wis. 2d 870, 419 N.W.2d 249 (1988) (must allege "direct and personal pecuniary loss, different from loss sustained by the general public," or "constitutional issue affecting … individual rights").

appropriations to be spent by third parties as appropriate restrictions on taxpayer actions.

Taxpayer lawsuits have been allowed to challenge purely executive practices (*i.e.*, a governor holding a simultaneous commission in the U.S. Air Force Reserve in violation of a state constitutional provision barring governor's holding a militia commission) which do not involve any legislative appropriation, *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004)). Other suits have involved legislative programs. Cases involving expenditures do not distinguish between legislative or executive spending decisions, much less between "in-house expenditures" and grants to third parties. While *amici* have obviously not read every state taxpayer standing case, we have read many (including at least one case from every state that recognizes such standing), and have found no indication that any court has ever before thought to impose Petitioners' novel limits on taxpayer suits. Certainly no hard "rule" has emerged to that effect.

The closest thing to an exception—a decision which in the end undercuts Petitioners' position—is *Schade v. Allegeny County Inst. Dist.*, 386 Pa. 507, 126 A.2d 911 (1956), a challenge to a contract between a state agency and a religious child care agency for care rendered dependent children. Plaintiff taxpayer challenged the reimbursement under a state constitutional provision barring "appropriations" to religious entities.

The state argued that an administrative contract with a sectarian agency was not an "appropriation" within the meaning of the state constitution. The court, however, decisively rejected this substantive claim in terms equally

applicable to Petitioners' standing arguments: "It would be strange, indeed, if the legislature by creating a body politic or corporation to exercise a legislative function could do indirectly what it could not do directly," 386 Pa. at 511.

Petitioners warn that the rejection of their proffered limits on taxpayer standing will lead to overwhelming the executive with taxpayer litigation, Pet. Brief at 47-50. That, however, has not happened in any of the states which have long recognized taxpayer standing in religion and other cases. Neither has recognition of taxpayer standing without Petitioners' proposed restrictions led to government by judiciary. There is no reason to think that the federal executive branch will suffer a different fate. Parades of imagined horribles are unpersuasive in the face of longstanding and widespread contrary experience.

Other limits have in fact been applied in taxpayer cases, as the discussion above demonstrates: the insistence of some courts on special damages; the insistence that complaints first be presented to the Attorney General or other competent official; distinctions between negative and affirmative relief;[10] the exclusion of discretionary matters from the scope of the remedy[11]—each found in the case law and each rationally related to the nature of the taxpayer suit. It is telling and controlling that Petitioners' limits are not among these limits. They should not here and now be grafted onto federal taxpayer suits.

---

[10] *Alliance Affordable Energy*, *supra*, n. 9.

[11] See *Matter of Abrams* (NYCTA), 39 N.Y.2d 990, 355 N.E.2d 289, 387 N.Y.S.2d 235 (1976).

B. State Taxpayer Suits Challenging Government Funding Of Religion Are Likewise Not Governed By Petitioners' Rules

What is true of taxpayer suits generally is equally true of the numerous taxpayer suits under the Establishment Clause. Such suits have been brought since the 19th century.[12] They have been brought to challenge released time programs,[13] classroom prayer[14], Bible reading,[15] distribution of Gideon

---

[12] In *State v. Scheve*, 65 Neb. 853, 91 N.W. 846 (Neb. 1902), the Supreme Court of Nebraska allowed a suit by a taxpayer challenging the school district's policy of permitting sectarian exercises in violation of the state constitution.

Multiple state supreme courts reached similar results. In *Atchison, T. & S.R.R. Co. v. City of Atchison*, 28 P. 1000, 1001 (Kan. 1928), the court upheld the right of a plaintiff railroad company to challenge a tax to support a religious school.

Likewise, *State ex rel Weiss v. District Board of School Dist. No. 8 of City of Edgerton*, 76 Wis. 177, 44 N.W. 967, 968 (Wis. 1890), upheld the right of taxpayers to challenge a school district's policy of allowing teachers to read from the Bible in violation of the state constitutional prohibition on "sectarian instruction" in public schools. See also, *Board of Ed. of Cincinnati v. Minor*, 23 Ohio St. 211 (Ohio 1872) (upholding the suit by taxpayers challenging resolutions that proscribed "religious instruction and the reading of religious books" in Cincinnati public schools as violative of the state constitution); *Nance v. Johnson*, 84 Tex. 401, 404, 19 S.W. 559 (Tex. 1892) (denying taxpayer's petition to enjoin funding a sectarian school for failure to exhaust administrative remedies, but recognizing that "[c]itizens and taxpayers clearly have such interests in the maintenance of nonsectarian public schools and the lawful application of public free school money as entitle them to legal protection").

[13] *Gordon v. Bd. of Educ.*, 78 Cal.App.2d 464, 178 P.2d 488 (1947).

[14] *E.g.*, *Church v. Bullock*, 104 Tex. 1, 135 S.W. 115 (1908).

Bibles in the schools[16] (though, as *Doremus*, *supra*, observes, such practices ordinarily cause no pocketbook injury to taxpayers); prison chaplains;[17] expenditures in aid of religious institutions;[18] lease-lands for churches held by municipalities under colonial charter;[19] development bonds which were not guaranteed by taxpayers;[20] observance of a religious holiday by government pursuant to collective bargaining agreement;[21] lighting city hall in the form of a cross; [22] a wing of a prison set aside for religious indoctrination;[23] and rental of public property for religious

---

15 *Kaplan v. Independent School Dist. of Virginia*, 171 Minn. 142, 214 N.W. 18 (1927).

16 *Tudor v. Bd. of Education*, 14 N.J. 31, 100 A.2d 857 (1953).

17 *Rudd v. Ray*, 248 N.W.2d 125 (Ia. 1976) (legislative appropriations).

18 *E.g.*, *Schade*, *supra*; *Collins v. Martin*, 302 Pa. 144, 153 A.13 (1931) (same).

19 *Mikell v. Town of Williston*, 129 Vt. 586, 285 A.2d 713 (1971); *cf Murray v. Comptroller*, 241 Md. 383, 216 A.2d 897 (1966) (statute exempting religious institutions from tax); *State ex rel Warren v. Reuter*, 44 Wis.2d 201, 170 N.W. 790 (1969) (legislative appropriation to religiously affiliated medical school).

20 *Hunt v. McNair*, 255 S.C. 71, 177 S.E.2d 362 (1970), aff'd, 413 U.S. 734 (1973); *Horace Mann League v. Board*, 242 Md. 645, 220 A.2d 51 (1966).

21 *E.g.*, *Americans United v. Kent County*, 97 Mich.App. 72, 293 N.W.2d 720 (1980); *Mandel v. Hodges*, 54 Cal.App.3d 596, 127 Cal.Rptr. 244, 293 N.W.2d 723 (1976).

22 *Fox v. City and County of Los Angeles*, 22 Cal.Rptr. 792, 587 P.2d 663, 150 Cal.Rptr. 867 (1978).

23 *Williams v. Lara*, 52 S.W.3d 171 (Tex. 2001).

uses.[24] All of this, of course, is in addition to the aid to parochial school cases beginning with *Lemon v. Kurtzman*, 403 U.S. 621 (1971).

Some cases challenging official aid to religion involved expenditures or actions by government itself,[25] others involved grants to third parties. In some, the government itself was charged with operating a religious school[26] or aiding parochial schools or their students by providing transportation or books.[27] Many fit the Petitioners' legislative model, but others involve decisions by Boards of Education, which are quasi-legislative bodies, and still others, such as *Lara*, *supra*, at n. 23, where a sheriff on his own initiative established a "God-pod" in his jail, were unilateral executive decisions.

The fact that the lines of limitation that Petitioners believe inherent in *Flast* taxpayer standing have not occurred to anyone else in these cases involving religious activity, is

---

[24] *Resnick v. E. Brunswick Twshp. Bd. of Educ.*, 77 N.J. 88, 389 A.2d 944 (1978); *Pratt v. Az. Bd. of Regents*, 110 Az. 466, 520 P.2d 514 (1974).

[25] *People ex rel Bernat v. Bicék*, 405 Ill. 510, 91 N.E.2d 588 (1950) (standing judicial order requiring parties in divorce to consult with clergyman).

[26] *Fisher v. Clack. School Dist.*, 13 Or. App. 56, 507 P.2d 839 (1973); *Gerhardt v. Reid*, 66 N.D. 444, 267 N.W. 127 (1936) (public funds paid for public school taught by clergy in former parochial school); *Harfst v. Hoegen*, 349 Mo. 808, 162 S.W.2d 609 (Mo. banc 1942); *Zellers v. Huff*, 55 N.M. 501, 236 P.2d 949 (1951); *Rawlings v. Butler*, 290 S.W.2d 801 (Ky. 1956) (same).

[27] *Chance v. Miss. Textbook Bd.*, 190 Miss. 453, 200 So.2d 706 (1941); *Borden v. La. Bd. of Educ.*, 168 La. 1005, 123 So. 655 (1929), aff'd *sub nom*, *Cochran v. Bd. of Educ.*, 291 U.S. 370 (1930).

further evidence that these are neither useful nor relevant restrictions on federal taxpayer suits in religious subsidy cases.

III. PETITIONERS' SEPARATION OF POWERS ARGUMENT ASSUMES AN EXECUTIVE MORE EQUAL THAN OTHER BRANCHES, NOT CO-EQUAL BRANCHES

The separation of powers "provides an self-executing safeguard against the encroachment … of one of the three co-equal branches … at the expense of another." *Clinton v. Jones*, 520 U.S. 681, 699 (1997) (emphasis added). Contemporary standing doctrine emphasizes separation of power concerns and the equality of all three branches *vis-à-vis* one another, *Valley Forge College v. Americans United*, 454 U.S. 464 (1982); *Daimler-Chrysler v. Cuno*, ___ U.S. ___, 126 S.Ct. 1854 (2006). Until Petitioners' submission, though, the separation of powers has not been thought to aggrandize one branch over others; it is intended to preserve three *co-equal* branches. Petitioners would grant the executive branch a privileged position *vis-à-vis* the other two.

Separation of powers is not an end unto itself, but one way among many of safeguarding liberty and insuring efficient government. It is not the only relevant principle in determining to which branch a citizen's grievance must be addressed, and it must not be given more than it's due. The power of the courts to police the actions of the other branches where an appropriate case or controversy exists is no less a part of the constitutional scheme than the separation of powers. Judicial review is not a constitutional stepchild;

not an embarrassing uncle whose existence must be denied if possible.

To deny standing here while recognizing it in *Bowen* would mean that the executive branch enjoys an immunity from judicial scrutiny that the legislature does not. It is to preserve a rigid, supposedly originalist, vision of the separation of powers while tolerating an executive of a size, and with powers, which would be unrecognizable to the Founders.

Article III cannot be read as if it did not contain a "cases and controversy" requirement. But where, as here, the text of Article III is not controlling, and a controversy seeking redress of a grievance called into being by the Constitution itself presents itself, the Court should not adopt a rigid reading of one part of the Constitution, and a flexible one of others. Cf. *INS v. Chadha*, 462 U.S. 919, 945 (1983); but see, *id*., at 977-78 (White, J., dissenting). The result would be a grave distortion of the constitutional structure.

The modern permanent bureaucracy is far less subject to political checks than is Congress. It is not elected every two or six years. Its work is often invisible to the average citizen. Rarely are its decisions sufficiently prominent to generate a political response. The political safeguards which make it difficult for Congress to intrude on the Constitution do not work well to restrain the modern Executive Branch. The taxpayer suit is thus an important check and, at least in the context of the Establishment Clause, one well within the confines of the case and controversy limitation of Article III. It should not be hobbled by Petitioners' imaginative, but artificial, constraints.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

JEFFREY SINENSKY
American Jewish Committee
165 East 56th Street
New York, NY 10022-2746
(212) 751-4000

MARC D. STERN
Counsel of Record
American Jewish Congress
825 Third Avenue, 18th Floor
New York, NY 10022-7519
(212) 360-1545
mstern@ajcongress.org