

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   JAY F. HEIN, WHITE HOUSE OFFICE       :  
4   OF FAITH-BASED AND COMMUNITY         :  
5   INITIATIVES, ET AL.,                   :  
6   Petitioners,   :

7                   v.   :   No. 06-157

8   FREEDOM FROM RELIGION                 :  
9   FOUNDATION, INC., ET AL.,             :

10  - - - - - x

11   Washington, D.C.

12   Wednesday, February 28, 2007

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14   The above-entitled matter came on for oral  
15   argument before the Supreme Court of the United States  
16   at 10:06 a.m.

17   APPEARANCES:

18   GEN. PAUL D. CLEMENT, ESQ., Solicitor General,  
19       Department of Justice, Washington, D.C.; on behalf  
20       Of Petitioners.

21   ANDREW J. PINCUS, ESQ., Washington, D.C.; on behalf of  
22       On behalf of Respondents.

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P R O C E E D I N G S

[10:06 a.m.]

CHIEF JUSTICE ROBERTS: We will hear argument this morning in case 06-157, Hein versus Freedom From Religion Foundation.

General Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONER

GENERAL CLEMENT: Mr. Chief Justice, and may it please the Court:

In *Flast* against *Cohen*, this Court recognized narrow circumstances in which a taxpayer could satisfy the requirements of Article III in challenging a congressional exercise of its spending and taxing authority. This Court in doing so rejected the suggestion of Justice Douglas that it allow all taxpayers to sue in all manner of claims, as well as the slightly more modest suggestion of Justices Stewart and Fortas that the Court allow taxpayer standing for all Establishment Clause challenges.

This Court's subsequent cases such as *Valley Forge* have made clear just how narrow the rule of *Flast* is. In order for a taxpayer to satisfy the requirements of Article III, the taxpayer must challenge a congressional exercise of the taxing and spending

1 authority, and assert that the act of spending itself is  
2 what gives rise to the Establishment Cause violation.  
3 The court of appeals in the decision below substantially  
4 expanded the scope of taxpayer standing and in doing so,  
5 the court adopted a doctrine that I think can fairly be  
6 only understood as an exception to, not an application  
7 of, normal principles of Article III standing.

8           The court did so on the rationale that there  
9 is much that the executive branch can do to violate  
10 the establishment cause, but there is much that all  
11 three branches of Government could conceivably do to  
12 violate the Establishment Cause, and that has never  
13 been thought a sufficient reason to extend taxpayer  
14 standing to all Government action, nor has it been  
15 thought a sufficient reason to relax the irreducible  
16 minimum requirements of Article III.

17           JUSTICE SCALIA: If I understand your  
18 position correctly, if Congress enacts a program that  
19 favors religion over non-religion, which is supposedly  
20 what the Establishment Cause prohibits, that's bad; but  
21 if Congress enacts a perfectly valid general program and  
22 the President implements it in a fashion that favors  
23 religion over non-religion, that's okay, insofar as the  
24 ability of anybody to challenge it is concerned. Is  
25 that an accurate description?

1           GENERAL CLEMENT: Well, I don't think so,  
2 Justice Scalia. I mean, first of all --

3           JUSTICE SCALIA: Why not?

4           GENERAL CLEMENT: I mean, I think that may  
5 be sort of overinclusive and underinclusive.

6           JUSTICE SCALIA: Okay.

7           GENERAL CLEMENT: Which is to say, it's not  
8 a congressional program, it's a congressional spending  
9 statute that is the key predicate. And then once  
10 there's a congressional spending program, whether it's  
11 facial challenge or an as-apply challenge that relies on  
12 an intervening ministerial act of the Executive branch,  
13 taxpayer standing will lie under this Court's precedent.

14          JUSTICE GINSBURG: If this -- if Congress  
15 had enacted this Executive order that's in question  
16 here, if it had been congressional legislation, would  
17 there be standing?

18          GENERAL CLEMENT: I don't think so,  
19 Justice Ginsburg, but let me just be clear. I don't  
20 think it's just a matter of this Executive order that's  
21 challenged in this case and Congress could have enacted  
22 that into statute. As I understand it, the -- what is  
23 really at issue here is not the Executive order. It is  
24 the way that certain conferences were conducted by  
25 Executive branch officials. That's what the dispute --

1 JUSTICE KENNEDY: Well, I had the same question  
2 as Justice Ginsburg, and I think was also suggested by  
3 Justice Scalia's question. Suppose that Congress passed  
4 a statute that said we hereby appropriate a million  
5 dollars to the President to use to call religious  
6 conferences, and then it spelled out these conferences.  
7 Is there standing there?

8 GENERAL CLEMENT: I don't think so,  
9 Justice Kennedy, because I look at this Court's --

10 JUSTICE KENNEDY: But -- and I of course want  
11 the answer, but then, why is that consistent with what  
12 you told us at the beginning that there had to be a  
13 statute?

14 GENERAL CLEMENT: Because there has to be  
15 two things. There has to be a statute. And then there  
16 has to be an allegation that the statute creates a  
17 unique injury in the context of spending that affects  
18 taxpayers differently than anybody -- than any other  
19 citizen. And if you have a situation like your  
20 hypothetical statute, where you don't have any spending  
21 that goes outside of the Government, then you might have  
22 an Establishment Cause problem, but it wouldn't be an  
23 Establishment Cause problem where the nub of the  
24 problem is the fact that money is spent. Because if  
25 there's a problem with what's going --

1 JUSTICE SCALIA: So you're saying if the  
2 Government, the Executive, or the Congress, if the  
3 congressional statute authorizes the giving of money for  
4 the building of a church, that's bad; but if it  
5 authorizes -- it makes a general authorization to the  
6 President -- no. If the congressional statute says the  
7 Government will build a church, that's okay, because  
8 then the money doesn't go outside the Government?

9 GENERAL CLEMENT: Well, importantly,  
10 Justice Scalia, it's not a matter of it being okay.  
11 It's a question of whether it logically --

12 JUSTICE SCALIA: Well, as far as standing is  
13 concerned. Yes --

14 GENERAL CLEMENT: -- it logically gives  
15 rise to taxpayer standing. So -- and I think there is  
16 --

17 JUSTICE SCALIA: What is your answer to  
18 that? That in fact it's bad in the first situation and  
19 okay in the second, as far as standing is concerned?

20 GENERAL CLEMENT: What I would say is in  
21 either case it's bad. I would say that there is  
22 taxpayer standing to challenge the disbursement of funds  
23 outside the Government, but not your horrible  
24 hypothetical about an internal Government church.

25 JUSTICE SCALIA: There is no standing for

1 the internal Government church?

2 GENERAL CLEMENT: Not taxpayer standing.  
3 Anybody who's subjected to the mass at the church  
4 probably has standing as a matter of direct --

5 JUSTICE SCALIA: No, we're not forcing  
6 anybody in at gunpoint. We're just building a  
7 Government church.

8 GENERAL CLEMENT: With respect,  
9 Justice Scalia, nobody forced Van Orden to walk by the  
10 Ten Commandments display in Texas at gunpoint, and yet  
11 this Court said that he could bring an establishment  
12 clause challenge. So I think there would be directly  
13 injured people who could challenge your sort of end of  
14 the slippery slope --

15 JUSTICE SCALIA: But we're talking taxpayer  
16 standing. And you think there is a real difference  
17 insofar as whether the taxpayer is harmed between the  
18 Congress saying we're going to give the money to a  
19 religious organization to build a church and Congress  
20 saying we're going to build a church. You really think  
21 there's a difference?

22 GENERAL CLEMENT: I think there's a  
23 difference in the extent to which there is a  
24 conceptually direct injury for the taxpayer as taxpayer.  
25 The citizens are clearly injured when the Government



1 sets up a church.

2 JUSTICE SCALIA: In both cases money is  
3 being used for a purpose that is contrary to the  
4 Establishment Cause, according to the taxpayer.

5 GENERAL CLEMENT: But with respect, in the  
6 context of the internal Government church, the fact that  
7 money is being spent to establish that church is the --

8 JUSTICE GINSBURG: Taxpayer money.

9 GENERAL CLEMENT: -- least of your concerns.  
10 It's the fact that the Government is establishing it  
11 that's the principal concern.

12 JUSTICE SCALIA: I don't care whether it's  
13 the least of the concerns, it's a concern. It's the  
14 same Establishment Cause concern in both cases. Now  
15 you may well be correct that there's a -- freedom of  
16 religion clause violation in one case and not in the  
17 other, but as far as the Establishment Cause violation,  
18 I find it difficult to understand the difference between  
19 the two.

20 GENERAL CLEMENT: Well, Justice Scalia, I  
21 think it's a difference suggested by this Court's cases,  
22 and they do make an important distinction between the  
23 distribution of money outside the Government where the  
24 spending itself is the injury and what this Court has  
25 termed the "incidental expenditure of money" in the

1 context of an Executive branch activity that itself is  
2 alleged to violate the Establishment Cause.

3 JUSTICE SOUTER: And why should that make  
4 any difference if the entire theory behind it is sort of  
5 the Madisonian theory, if not threepence from the pocket  
6 for a religious purpose? If you start with the  
7 Madisonian view, there should be no distinction of the  
8 two cases that Justice Scalia puts.

9 GENERAL CLEMENT: I'm not quite sure that's  
10 right, Justice Souter, because I think that there's  
11 really two ways the Government can establish religion.  
12 One is they can do it themselves directly. And if they  
13 do that, I think that the primary problem is the primary  
14 Executive branch conduct in doing so. The other way  
15 they can establish --

16 JUSTICE SOUTER: No, but let's talk about  
17 establishing -- and maybe this is what you're going to  
18 do, establishing religion by spending the threepence.

19 GENERAL CLEMENT: Exactly. And that is  
20 precisely what --

21 JUSTICE SOUTER: And in his case, when you  
22 build the church, you're spending the threepence whether  
23 -- whether a -- a Government employee is laying the  
24 bricks or a contract -- an outside contractor is laying  
25 the bricks, or a third-party institution to which a grant

1 has been made is laying the bricks. It's the same  
2 threepence.

3 GENERAL CLEMENT: Well, but with respect,  
4 in the one case it is the threepence itself that is the  
5 establishment violation. It is the very act of handing  
6 Government money into the coffers of the outside religious  
7 entity --

8 JUSTICE SOUTER: I thought it was the very act  
9 of taking the money out of the pocket and using it for a  
10 particular purpose, and the money comes out of the pocket  
11 in each case. The purpose is the same in each case.

12 GENERAL CLEMENT: Again, I would take issue  
13 with that and say that the primary concern that Madison  
14 was focused on was the taking of the money and then giving  
15 it to the outside religious entity, because that was --

16 JUSTICE GINSBURG: Would it make it -- you've  
17 covered the case where the Government itself, the Executive  
18 is the actor, and you say that's not covered by Flast. What  
19 is covered is if you give the money directly to the  
20 religious organization.

21 If the money goes instead of to the  
22 Government -- take this case, if the conferences are run  
23 by a private contractor -- contractor with the  
24 Executive, where would that fall?

25 GENERAL CLEMENT: I think it might depend on

1 the nature of the claim actually. If the nature of the  
2 claim --

3 JUSTICE GINSBURG: It's this claim. These  
4 conferences are run now instead of within the Executive  
5 branch by various agencies, they are run by contractors,  
6 specialists in conferences that have been engaged by the  
7 Executive to help people make grant applications.

8 GENERAL CLEMENT: Then I think the better  
9 view, if the challenge is exactly this one, which is not  
10 that there's something wrong with the recipient, but  
11 that there's something wrong with what goes on at these  
12 conferences. Then in that context, I don't think there  
13 would be taxpayer standing.

14 JUSTICE GINSBURG: That's -- that's a  
15 question on the merits. Right now we have to take the  
16 allegations of the complaint on the merits as -- the  
17 allegation is, I take it, that religious organizations  
18 are being favored over secular organizations; but that's  
19 a merits question.

20 You've -- you've -- you have been clear that  
21 if the Government itself spends the money, then there's  
22 no standing. You've, you've been clear that if it gives  
23 the money to the religious group, there is standing.

24 Now money is going outside the Government,  
25 it's going outside the Government, but is not going to

1 the religious organization. Where do you fit that?

2 GENERAL CLEMENT: Again, I think if I  
3 understand the question, I would say that there's no  
4 taxpayer standing there. And I think -- but, but and I  
5 apologize for sort of bleeding over into the merits.  
6 But with all due respect, I don't think you can really  
7 meaningfully talk about the Flast nexus test without  
8 bleeding over a little bit into the merits, because the  
9 Court did it itself in Flast. And what I would say is  
10 if you have a challenge where the problem is that it's  
11 the very act of money going to the third-party  
12 conference organizers that's the problem, then it really  
13 is a spending case, and I think the taxpayer standing  
14 would logically lie.

15 But if it's really, what the concern here is  
16 the primary conduct of what was done at the conferences,  
17 and not the fact that there's spending on the  
18 conferences at all, then I think it's more -- it is a  
19 case where there would not be taxpayer standing.

20 CHIEF JUSTICE ROBERTS: There wouldn't be  
21 tax -- taxpayer standing, but of course there would be  
22 regular Article III standing in the sense that in a  
23 party claiming to be injured because they didn't get a  
24 grant, and a religious organization did, and the reason  
25 was religion, can bring any kind of claim they want

1 under Article III. It's just they wouldn't qualify for  
2 the special exception to the general rule that there is  
3 no taxpayer standing for Establishment Cause cases.

4 GENERAL CLEMENT: That's exactly right. And  
5 it's a very important point. Because for example, when  
6 this Court recognized that the Bible reading in Doremus  
7 did not give rise to taxpayer standing, that didn't stop  
8 the parents who were directly injured by the same  
9 practice in Schempp from bringing an establishment  
10 clause --

11 JUSTICE KENNEDY: Just one, one more question  
12 on this, on this line, and I won't belabor the hypothetical.  
13 Again that the Federal statute for the conference, and  
14 the moneys go for air tickets to various religious --  
15 ministers and priests. So it goes -- that meets your  
16 outside-the-Government test, standing there?

17 GENERAL CLEMENT: I think there would be  
18 taxpayer standing if I understand that. And I realize  
19 that, you know, one could say well, that's a fairly  
20 artificial distinction. But I do think that it is  
21 suggested by this Court's precedents and the reason that  
22 it makes sense is that when you have injury -- where the  
23 real injury is the spending, the fact that you're not  
24 supposed to pay for plane tickets for ministers, that's  
25 an Establishment Cause injury, then it makes sense to

1 say that people that provided that money in the in the  
2 first place have a distinct injury.

3 JUSTICE SCALIA: But not -- but not if the  
4 President just gives the money out of a general  
5 appropriation, authorizing him to give money to people  
6 who are helping in the programs that the Faith-Based  
7 Initiative was -- was designed to help?

8 GENERAL CLEMENT: Well --

9 JUSTICE SCALIA: If the President hands over  
10 the money, that's okay?

11 GENERAL CLEMENT: Not necessarily,  
12 Justice Scalia, but it's important to focus on what this  
13 case is about.

14 JUSTICE SCALIA: Why, why not necessarily?  
15 I thought that was your -- your proposition, that it has  
16 to be a congressional violation, not an Executive.

17 GENERAL CLEMENT: Right. And it would  
18 depend a little bit on where the President is getting the  
19 money. I think the way that we would look at it --

20 JUSTICE SCALIA: He's getting the money from  
21 Congress under a general, under a general appropriation.  
22 And he takes this money and he says here, use it for a  
23 religious purpose, that's okay?

24 GENERAL CLEMENT: He --

25 JUSTICE SCALIA: As far as standing is

1 concerned, he can't be sued?

2 GENERAL CLEMENT: If he, if he's taking it  
3 from a general appropriation that makes no indication  
4 it's to go outside the Government so one could not in  
5 any way articulate that as an as-applied challenge to  
6 the appropriations, then I suppose that there would not  
7 be standing. But I think --

8 JUSTICE BREYER: I don't understand. I'm  
9 back -- I really -- I'm surprised. And it's probably my  
10 fault. But that I thought -- I started where  
11 Justice Scalia was with his first question. I thought  
12 this had something to do with whether Congress passed a  
13 statute or the President acted on his own. But  
14 listening to you now I think, I can't decide -- I think  
15 you have a different argument.

16 Suppose -- I'm just trying to understand it.  
17 Suppose that Congress passes a law and it says it's a  
18 very nice thing to commemorate the Pilgrims by building  
19 a Government church at Plymouth Rock, where we will have  
20 the regular worship in the Puritan religion. Now can a  
21 taxpayer from California, in your view, challenge that?

22 GENERAL CLEMENT: I would say that that's a  
23 much harder case than this --

24 JUSTICE BREYER: Yes, but --

25 GENERAL CLEMENT: -- but I say no. I would



1 say no to answer your question.

2 JUSTICE BREYER: No. Why not? Because I  
3 thought Flast made clear that they could.

4 GENERAL CLEMENT: No. What Flast makes  
5 clear is that you can challenge a congressional statute  
6 that is a taxing and spending statute. And I think to  
7 understand the circumstances in which you should give  
8 rise to taxpayer standing, you need two things: You  
9 need a congressional statute that is an exercise of the  
10 taxing and spending authority; but then you need the  
11 money to go outside the Government.

12 And that's precisely what --

13 JUSTICE BREYER: Then you mean go to a  
14 private group?

15 GENERAL CLEMENT: Right. Because there's,  
16 again, there's two ways --

17 JUSTICE BREYER: So you're saying that if  
18 the Government has the most amazing, let's -- I'm trying  
19 to think of something more amazing than what I just  
20 thought of.

21 (Laughter.)

22 JUSTICE BREYER: All over America, they  
23 build churches dedicated to one religion; and Congress  
24 passes a statute and says in every city, town, and  
25 hamlet, we are going to have a minister, a Government

1 minister, a Government church, and dedicated to the  
2 proposition that this particular sect is the true sect;  
3 and they pass a statute like that, nobody could  
4 challenge it?

5 GENERAL CLEMENT: Horrible hypothetical.

6 JUSTICE BREYER: Is that what you're saying,  
7 though?

8 GENERAL CLEMENT: I mean, I think the bottom  
9 line is that there would not be taxpayer standing.  
10 Plenty of people could probably challenge that.

11 JUSTICE BREYER: I don't know, I mean --

12 GENERAL CLEMENT: Probably --

13 JUSTICE BREYER: -- everybody else who  
14 doesn't want to go just avoids it. So that they don't  
15 have to do anything. They just have to --

16 CHIEF JUSTICE ROBERTS: Any, presumably any  
17 other denomination that is not of the established church  
18 could bring a challenge that they're being discriminated  
19 against, because they're favoring a particular church  
20 over them. Your proposition is simply that somebody --  
21 somebody in Oregon can't challenge the fact that they're  
22 building a church in Florida simply because the person  
23 in Oregon pays taxes, right?

24 GENERAL CLEMENT: Exactly, and not just the  
25 person in Oregon. But everybody in between Oregon and

1 Florida all have the same amount of standing. No, what  
2 we're saying is plenty of people would be able to  
3 challenge that. But not --

4 JUSTICE BREYER: Who? Who?

5 GENERAL CLEMENT: As -- as the Chief Justice  
6 suggested I think anybody from a different denomination  
7 that said that this was discriminatory probably could  
8 bring a claim. I also think that anybody who walked  
9 into one of those churches could bring the claim. And  
10 again, this Court -- this Court --

11 JUSTICE BREYER: Maybe they don't walk into  
12 it because it is not "our church." So they don't walk  
13 into it.

14 GENERAL CLEMENT: Well, we --

15 JUSTICE BREYER: And moreover, they don't --  
16 they don't feel it's discriminatory. It's just we're  
17 doing this to commemorate the Pilgrims, and we'll give  
18 the money to any group that's a Pilgrim.

19 (Laughter.)

20 GENERAL CLEMENT: With respect -- with  
21 respect, Justice Breyer, I think you're underestimating  
22 the ingenuity of plaintiffs to think that somebody that  
23 walked by going to Plymouth Rock thinking I was going  
24 to see a nice historical exhibit, and is forced to see a  
25 church, wouldn't bring a -- an action. And that there

1 wouldn't be Article III standing for that particular  
2 individual, not the taxpayer --

3 JUSTICE ALITO: General Clement, are you --  
4 are arguing that these lines that you're drawing make a  
5 lot of sense in an abstract sense? Or are you just  
6 arguing that this is the best that can be done within  
7 the body of precedent that the Court has handed down  
8 in this area?

9 GENERAL CLEMENT: The latter, Justice Alito.  
10 (Laughter.)

11 GENERAL CLEMENT: And I appreciate -- I  
12 appreciate the question.

13 JUSTICE SCALIA: Why didn't you say so?  
14 (Laughter.)

15 JUSTICE SCALIA: I -- I've been trying to  
16 make sense out of what you're saying.

17 (Laughter.)

18 GENERAL CLEMENT: Well, and I've been trying  
19 to make sense out of this Court's precedents.

20 (Laughter.)

21 GENERAL CLEMENT: And the best that I can do  
22 -- the best that I can do, when I put together Flast --

23 JUSTICE STEVENS: Do we think have a duty to  
24 follow precedents that don't make any sense?

25 GENERAL CLEMENT: Well, I think -- as a

1 matter of first course, the Court tries. And here -- if  
2 I could put the precedents on a map, though, I do  
3 think they make a modicum of sense in the following way.  
4 You start with Flast. Flast says that you can bring a  
5 challenge to a congressional spending statute. Okay,  
6 fair enough. Valley Forge comes along and says that  
7 you, that you don't have taxpayer standing to challenge  
8 an Executive branch action. Now that raises a very  
9 obvious --

10 JUSTICE GINSBURG: The difference was that  
11 it was because it was under the property clause, and  
12 made a distinction between property and money.

13 GENERAL CLEMENT: Well, Justice --

14 JUSTICE GINSBURG: We are talking about  
15 money, not property?

16 GENERAL CLEMENT: But Justice Ginsburg, in  
17 fairness, the Court could not have been more clear in  
18 Valley Forge that there were two reasons that there  
19 weren't taxpayer standing there. One was there was a  
20 challenge to executive branch action. The second was  
21 that it was the property clause rather than the spending  
22 clause.

23 Now, you could sort of take the view that  
24 the third of the cases, Kendrick, overrules the first  
25 aspect of the decision in Valley Forge. Now I think

1 that's wrong. I think the way to understand Kendrick is  
2 as follows: You have a decision that says you can --  
3 you can challenge congressional spending, not executive  
4 branch action. That naturally poses the question what  
5 about an as-applied challenge to a spending statute?  
6 Surely, I mean, because spending is something only the  
7 Congress does, and disbursement is a ministerial act  
8 that only the Executive does, what do you do when  
9 there's an intervening ministerial act of disbursement?  
10 Does that mean that it's still an as-applied challenge  
11 to the spending statute? Or does --

12 JUSTICE GINSBURG: Was it just --

13 GENERAL CLEMENT: -- that mean that it's  
14 executive branch action?

15 JUSTICE GINSBURG: Was it just a ministerial  
16 act or did the Executive have discretion in Bowen, about  
17 who would receive the grant?

18 GENERAL CLEMENT: Well, Justice Ginsburg,  
19 two things. One, in Bowen, there was -- there is  
20 certainly always a degree of discretion. But it is  
21 worth noting that in Bowen as in Flast, the statute  
22 itself, on its face, made clear that money was to go to  
23 outside entities that were religion. In Bowen it did  
24 so in express terms by four times referring to religious  
25 organizations. In Flast it did so by saying that money

1 was going to go, or in-kind aid, rather, was to going to  
2 go to private schools. And that was at a time when this  
3 Court roughly contemporaneously, in *Lemon v. Kurtzman*, said  
4 that 93 percent of the private schools were religious.  
5 So both of those -- the gravamen of what's the complaint,  
6 that money is being spent by Congress on religious  
7 entities, was not within the discretion of the Executive  
8 Branch.

9           And again, the way I would understand  
10 Kendrick is simply reconciling *Valley Forge* and *Flast*  
11 *v. Cohen* to preserve, not broad challenges to Executive  
12 Branch action, which would have overruled *Valley Forge*,  
13 but rather to simply preserve the notion that you can  
14 bring an as-applied challenge to a spending statute.

15           JUSTICE GINSBURG: But you can reconcile  
16 *Valley Forge* simply by saying when it's money from the  
17 Federal Treasury, whether it is a general appropriation  
18 or a specific appropriation, it is money from the  
19 Treasury, and that's what *Flast* is about. Because  
20 whether it is spent by the Executive under an executive  
21 program, which you have said can violate the  
22 Establishment Clause as well as a congressional program.

23           So why isn't that the line to draw based on  
24 *Flast*, that it's money from the Treasury that makes the  
25 difference?

1           GENERAL CLEMENT: Well, Justice Ginsburg, it  
2 is certainly not the line I would draw from reading  
3 these cases side by side and together.

4           JUSTICE SCALIA: Or to, or to put it another  
5 way, to put Justice Ginsburg's point another way, every  
6 Executive action that involves the expenditure of  
7 congressionally authorized funds is an as-applied  
8 challenge to an expenditure statute. Because the only  
9 way the statute is applied is through Executive action.  
10 And whenever the Executive spends the funds improperly,  
11 you have an as-applied challenge to the congressional  
12 statute authorizing the funds, whether it's a general  
13 statute or a more -- single-shot statute.

14           GENERAL CLEMENT: Justice Scalia, I would  
15 have said that no one would have conceptualized that as  
16 an as-applied challenge to a general appropriation  
17 statute. I mean, I guess you would. But I --

18           JUSTICE SCALIA: It's a --

19           GENERAL CLEMENT: Even, even if you would do  
20 that in another case, I don't see how you could do it in  
21 this case. If you look at their complaint they don't  
22 identify a single appropriation statute that they take  
23 issue with. Even before the Tenth -- the Seventh  
24 Circuit, if you look at page 10a of the petition  
25 appendix --



1 JUSTICE SCALIA: That's the essence of an  
2 as-applied challenge. You say the statute's okay. It  
3 is just what is being done under the statute that is  
4 bad. You don't have to identify a bad statute. You're  
5 saying it is a perfectly good statute, but the President  
6 is -- is violating the Constitution in the way that he's  
7 applying it.

8 GENERAL CLEMENT: With respect,  
9 Justice Scalia, I've never heard of an as-applied  
10 challenge to a statute that doesn't identify the statute  
11 that's unconstitutional as applied. And if you're right --

12 CHIEF JUSTICE ROBERTS: Under that, under  
13 that approach, when a U.S. Marshal executes a search and  
14 there's a Fourth Amendment claim that the search is  
15 illegal, that's really a challenge to the appropriation  
16 of the Marshals Service on an as-applied basis.

17 GENERAL CLEMENT: That's exactly right,  
18 Mr. Chief Justice. And every constitutional right could  
19 be sort of transmogrified into a claim that oh, that's  
20 an as-applied appropriations challenge, because the  
21 Government's not supposed to spend money to do unlawful  
22 things.

23 JUSTICE BREYER: So what's wrong with just  
24 saying that Flast stands for the proposition that when  
25 the Government spends money in violation of the

1 Establishment Cause, a taxpayer -- after all, the money  
2 comes from the taxpayer -- can bring a lawsuit? And the  
3 reason that they do that is because the establishment  
4 clause is an important joint part of the religion  
5 clauses; and there'd be no other way to bring such a  
6 challenge. And so it has that simple principle,  
7 and when you depart from that principle, say by giving  
8 property away instead of giving money away, you don't  
9 have the standing. So we have a pretty clear, simple  
10 rule. That rule applies whether it's Congress or the  
11 President acting under congressional authority, et  
12 cetera, which I think is close to what the other side --

13 JUSTICE STEVENS: Can I just add this  
14 thought before you answer? And isn't that exactly what  
15 Justice Stewart said in his concurring opinion?

16 GENERAL CLEMENT: Absolutely. I mean, if  
17 this Court wants to go the route of Justice Stewart,  
18 which it pointedly rejected, the majority of the Court  
19 pointedly rejected in *Flast*, and say, Establishment Cause  
20 challenges, we're going to relax the normal Article III  
21 standards -- now, I'm not quite sure where the Court gets  
22 the authority to relax the normal Article III standards.  
23 But assuming that, that would at least be --

24 JUSTICE BREYER: Because there is a real  
25 case or controversy, because people become terribly

1 upset when they see some other religion getting the  
2 money for the State for the -- for building a church,  
3 for example, and that's why. There's a real  
4 controversy.

5 JUSTICE SCALIA: Getting upset is a  
6 constitutionally adequate reason to bring a lawsuit? If  
7 people get upset about spending money for purposes that  
8 the Federal Government is not allowed to spend money for  
9 because of States' rights, that also would justify  
10 Article III standing, wouldn't it?

11 GENERAL CLEMENT: I suppose under that  
12 theory, and obviously the plaintiffs in Richardson and  
13 Schlesinger were very upset as well, and this Court said  
14 that --

15 JUSTICE BREYER: It is the kind of upset  
16 that is a genuine injury if you look to the objectives  
17 of the Establishment Cause and possibly that kind of  
18 genuine injury is not the case when you look to  
19 objectives of various other clauses of the Constitution.

20 GENERAL CLEMENT: Justice Breyer, let me try  
21 to answer in two ways if I can. One is to say that that  
22 way of looking at it takes you even beyond where Justice  
23 Brennan was in Valley Forge. Even Justice Brennan would  
24 have drawn the line at what he called bestowals of  
25 Government largesse to third parties.

1 JUSTICE BREYER: That's what I was saying.  
2 I said that Flast then encapsulates that principle drawn  
3 out of the objectives of the Establishment Cause in a  
4 rule; and the rule is what I suggested.

5 GENERAL CLEMENT: Well, again, but he --

6 JUSTICE BREYER: Based on money.

7 GENERAL CLEMENT: But again, he didn't say  
8 just spending of money to do the executive branch's  
9 everyday operations and maybe -- and one day they go a  
10 little too far in praising religion. He said the  
11 bestowal of Government largesse outside the Government.  
12 The second point I would make is I still don't understand  
13 where, in just being upset, you satisfy the irreducible  
14 minimum requirements of Article III, and even though  
15 Flast is probably the outer limit of what's an Article  
16 III injury under normal principles, there is at least  
17 what Judge Leventhal in Public Citizen against Simon  
18 called "conceptual directness" between the injury to the  
19 taxpayer and the injury that comes when tax money is  
20 spent outside the Government to a religious entity. He  
21 differentiated that from what happens when you have  
22 general executive branch activity that's unlawful, where  
23 he said there's no similar arrow between the action and  
24 taxpayers as a class. It's a classic injury that's  
25 inflicted on everybody. It's a generalized grievance,

1 which has never been said to satisfy Article III.

2 JUSTICE GINSBURG: It's talking about an --  
3 an incidental expenditure as part of a regulatory program  
4 is quite different from looking at a discrete program.  
5 The Faith-Based Initiative is a discrete program, and  
6 one component of it is this set of conferences. This is  
7 not an incidental something pursuant to a large  
8 regulatory program. Faith-Based Initiative is the name  
9 of this program.

10 GENERAL CLEMENT: But Justice Ginsburg,  
11 their challenge is not that the money that's spent on  
12 conferences can't be spent on conferences. Their  
13 challenge is that what happened at the conference is  
14 there was too much promotion of religion. The fact that  
15 the money was spent on the conferences is incidental to  
16 the gravamen of the complaint.

17 If I may save my time for rebuttal.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 General Clement.

20 Mr. Pincus.

21 ORAL ARGUMENT OF ANDREW J. PINCUS, ESQ.

22 ON BEHALF OF RESPONDENTS

23 MR. PINCUS: Thank you, Mr. Chief Justice,  
24 and may it please the Court:

25 The Government's argument here is that Flast

1 needs major surgery and, as the discussion I think in  
2 the first part of the argument shows, it's proposing two  
3 very substantial limitations that bear no relation to  
4 the relevant Establishment Clause principles, the  
5 history of the clause, or to this Court's decisions.  
6 And we think there's no basis for drawing the arbitrary  
7 lines that the Government suggests. And maybe I can just  
8 follow up on some of the points that my colleague made  
9 and that the Court made during the questioning.

10 First of all, with respect to the argument  
11 that the money has to go outside the Government.  
12 There's certainly nothing in this Court's cases that say  
13 that and the lower courts, and this Court at least in  
14 part, have found taxpayer standing to challenge the  
15 salaries paid to chaplains that are employed by the  
16 Government, and of course those would be --

17 CHIEF JUSTICE ROBERTS: Well, that's -- I  
18 guess that's where my first question -- I don't  
19 understand under your theory why any taxpayer couldn't  
20 sue our Marshal for standing up and saying "God save the  
21 United States and this honorable Court." Her salary  
22 comes from Congress. You can trace that under your  
23 traceability requirement. So any taxpayer under your  
24 theory could bring that lawsuit.

25 MR. PINCUS: Well, I don't -- I don't think

1 that lawsuit could be brought, Mr. Chief Justice, and  
2 let me explain why. We think that the limitations that  
3 are in this Court's opinions require the taxpayer to  
4 identify a discrete and identifiable non-incidental  
5 expenditure. In other words, it's not just any --

6 CHIEF JUSTICE ROBERTS: It's very -- I can  
7 identify it. It's the appropriations that Congress  
8 extends to this Court that pay the salary of the  
9 Marshal.

10 MR. PINCUS: But, Your Honor, those  
11 appropriations don't do the trick, and maybe I can just  
12 explain our test and explain why. The Court in Doremus  
13 explained why there was standing in Everson to challenge  
14 the payments for bus transportation by saying Everson  
15 showed a measurable appropriation or disbursement of  
16 school district funds occasioned solely by the  
17 activities complained of.

18 In other words, there had to be some -- the  
19 violation caused some unique expenditure. Not that the  
20 moneys wouldn't have been expended, because in this  
21 context the taxpayer doesn't have to show a lower tax  
22 burden, but --

23 JUSTICE ALITO: Well, Mr. Pincus --

24 MR. PINCUS: -- that there was a tie between  
25 -- I'm sorry.

1 JUSTICE ALITO: -- there have been Federal  
2 spending programs that have been declared unconstitutional  
3 under the Establishment Cause, and can you cite any instance  
4 in which such a holding has caused a reduction in tax rates?

5 MR. PINCUS: No, and this Court has said and  
6 the lower courts have said that that is not the  
7 requirement, because the injury here that the taxpayer  
8 complains of, as the Court said in DaimlerChrysler, is  
9 not an increased tax burden. The injury is the  
10 expenditure of funds in a way that violates the  
11 Establishment Cause.

12 JUSTICE ALITO: See, your traceability  
13 either covers every case or it covers no case. In real  
14 world taxation terms, no case would ever meet the test.  
15 But in, in purely conceptual terms, is any Federal money  
16 being spent, every case involving any expenditure of  
17 money, even the portion of the Marshal's salary that is  
18 devoted to convening the Court in the morning, would be  
19 sufficient.

20 MR. PINCUS: Well, respectfully, Your Honor,  
21 that's not what the Court said in Doremus in describing  
22 Everson. It didn't say the mere fact that some money  
23 was being spent was enough. It said that there was a  
24 measurable appropriation or disbursement occasioned  
25 solely by the activities complained of.



1 JUSTICE SCALIA: Let me give you something  
2 more measurable. It is easy to tell from time sheets  
3 and other things how much money is expended on Air Force  
4 One and on security for the President when he goes to  
5 address a religious organization, okay. And he urges  
6 the importance of religion in American life and so  
7 forth. The whole trip is about religion. That's  
8 measurable. Would a taxpayer have standing to --

9 MR. PINCUS: It is measurable, Your Honor. I  
10 don't think so, because, as the court of appeals said,  
11 that this Court has identified a second limitation, which  
12 is not incidental. The money has to be central -- the  
13 money that's being challenged has to be central to the  
14 violation. Just as you couldn't challenge a prayer  
15 breakfast --

16 JUSTICE SCALIA: Well, I don't understand.  
17 The money -- say it again?

18 MR. PINCUS: The money has to be central to  
19 the violation.

20 JUSTICE SCALIA: You mean Congress has to,  
21 has to say that --

22 MR. PINCUS: No. It can be -- in this case,  
23 for example, the challenge is that these conferences  
24 were -- the entire conference program was a program to  
25 prefer religion over non-religion.

1 JUSTICE SCALIA: Well, what about Bowen?  
2 The money wasn't central to the violation there.

3 MR. PINCUS: I'm sorry, Justice Scalia?

4 JUSTICE SCALIA: It was, you know, a  
5 pregnancy program and the Executive added to it certain,  
6 certain restrictions that were challenged as being  
7 religiously based.

8 MR. PINCUS: But the as-applied --

9 JUSTICE SCALIA: And we allowed an  
10 as-applied challenge.

11 MR. PINCUS: You did, an as-replied  
12 challenge to specific grants. That there were  
13 specific grants identified and there was an as-applied  
14 challenge, because the argument was --

15 JUSTICE SCALIA: But this is a specific  
16 grant. There is money allocated to the White House  
17 which goes -- you can identify it in the budget, and  
18 some of it goes to Air Force One. Some of it goes to  
19 the payment of the security guards.

20 MR. PINCUS: Yes, Your Honor, but the money  
21 that's identified in the budget is not -- it's not  
22 the entire Air Force One appropriation that would be  
23 challenged in the kind of claim you're talking about.

24 JUSTICE SCALIA: It wasn't in Bowen either.

25 MR. PINCUS: But it was a specific -- there

1 was a specific action that allocated a specific amount  
2 of money to those grantees. And the argument was those  
3 grantees weren't entitled to any of that money because  
4 the way they were using it violated the establishment  
5 clause. And so there was -- the Government's own action,  
6 by designating a specific sum of money in that grant,  
7 identified a specific sum of money, and the challenge  
8 was to that entire expenditure as identified by the  
9 Government.

10 JUSTICE SCALIA: I really don't think --  
11 there's an identified sum of money that goes to pay the  
12 costs of Air Force One, too, to buy the gas and  
13 everything else. There's an identified sum of money  
14 that goes into the pockets of the security guards who  
15 protect the President. I mean, it really doesn't make  
16 any sense.

17 MR. PINCUS: Well, Your Honor, I think, I  
18 think, as I say, there are two tests. One is whether  
19 there's an identifiable sum, as we were talking about with  
20 respect to grants are the easiest case. There's another  
21 case as when there's a challenge to an entire program  
22 that the Government has identified as a particular  
23 program. And then the question, the second question  
24 that the Court has identified in Flast, was is it  
25 incidental or not. Is it something that is peripheral

1 --

2 CHIEF JUSTICE ROBERTS: Take  
3 Justice Breyer's Pilgrim church. Under your theory, if  
4 the grant was to erect a memorial and suitable museums  
5 or whatever at Plymouth, Plymouth Rock, then there  
6 wouldn't be an identifiable sum if the Government said,  
7 hey, let's use some of this money to build a church?

8 MR. PINCUS: If the Government then singled  
9 out some of that money and said let's --

10 CHIEF JUSTICE ROBERTS: The Government  
11 singles it out. By that you mean the Executive who's  
12 implementing it, as opposed to Congress?

13 MR. PINCUS: Yes. I think --

14 CHIEF JUSTICE ROBERTS: How do they -- in  
15 other words, if they spend the money are they singling  
16 it out? If it turns out it costs a million dollars to  
17 build the little Pilgrim church, is that an identifiable  
18 sum singled out that would satisfy your requirement?

19 MR. PINCUS: Well, I don't think the  
20 singling out -- I don't think whether it's discrete and  
21 identifiable depends on the amount, Your Honor. I think  
22 it depends on how -- whether there is a way -- and this  
23 really is part of both traceability and redressability.  
24 There has to be a way to identify the expenditure that  
25 the taxpayer is seeking to enjoin. And if there is some

1 separate Government grant for the building of a church,  
2 yes, if it's -- if -- if there is some religious activity  
3 --

4 CHIEF JUSTICE ROBERTS: Well, it doesn't  
5 have to be a grant, just that you can say it costs so  
6 much money.

7 MR. PINCUS: Or a contract.

8 CHIEF JUSTICE ROBERTS: Yes.

9 MR. PINCUS: If the Government lets a  
10 contract for the building of the church, yes.

11 JUSTICE SCALIA: Or the contract hiring the  
12 security guards who protect the President, right?  
13 They're employed. That's an employment contract.

14 MR. PINCUS: Well, they are, and that --

15 JUSTICE SCALIA: And they're protecting him  
16 for a religious purpose. He's going to this religious --

17 MR. PINCUS: Well, they're protecting him  
18 for a protection purpose. His trip is for a religious  
19 purpose. And I think our submission is that there is a  
20 distinction that can be drawn there.

21 JUSTICE SCALIA: This is money that is  
22 expended in order to enable the President to do  
23 something for a religious purpose. It wouldn't be  
24 expended but for the fact that he chose to make this  
25 religious trip.

1           MR. PINCUS: But -- but, as with buying the  
2 bagels at a prayer breakfast, the cost of the bagels,  
3 like the cost of the security, is not -- is not paying  
4 for the center of what the violation is. And therefore  
5 we think that that's a basis for a rule that rules  
6 those types of expenditures out.

7           JUSTICE SCALIA: It wasn't, it wasn't the  
8 center in Bowen either. The center in Bowen was  
9 programs for -- to combat pregnancy. And some of the  
10 organizations that were getting the money were placing  
11 conditions on it. It wasn't central to the program. It  
12 was something added that the challenger said shouldn't  
13 have been added.

14           MR. PINCUS: But their claim was the  
15 spending of this entire grant is unconstitutional  
16 because of the way the money is going to be used by the  
17 grantees. It wasn't that \$1.98 of the grant is  
18 unconstitutional and the other million dollars is okay.  
19 It was that because of the way the grantee was using the  
20 money, the entire grant is unconstitutional. We think  
21 that's a different case.

22           JUSTICE SCALIA: I see. It would only come  
23 within your theory if there was one Secret Service agent  
24 who was assigned to religious trips of the President?  
25 Then his entire salary could be challenged. But if it's

1 just some of the salary of a Secret Service agent who  
2 protects the President for all sorts of trips, that  
3 can't be challenged?

4 MR. PINCUS: Yes, and we think --

5 JUSTICE SCALIA: And that makes a lot of  
6 sense?

7 MR. PINCUS: Well, it does make sense  
8 because, unlike the Government's limitations, which have  
9 nothing to do with the rationale of Flast or the  
10 underlying threepence fear of James Madison, that  
11 does -- that is a particular amount of money that the  
12 Government is spending and it's identifiable just  
13 because of religion. We think that --

14 CHIEF JUSTICE ROBERTS: So if we rule in  
15 your favor, then every Government agency has to make  
16 sure that whatever activities they undertake are part of  
17 a broader office? They don't set up a separate White  
18 House office. They just run it out of the White House  
19 office.

20 MR. PINCUS: Well, they may --

21 CHIEF JUSTICE ROBERTS: It's purely -- a  
22 purely formalistic distinction.

23 MR. PINCUS: Well, I don't think so, Your  
24 Honor, because I think it preserves --

25 CHIEF JUSTICE ROBERTS: Well, that would

1     decide whether it's central or not.  If you have a White  
2     House Office of Faith-Based and Community Initiatives,  
3     then you can say it's central to it.  If it's just the  
4     White House office, then the argument would be, no,  
5     that's not central.  They do a lot of other stuff as  
6     well.

7                     MR. PINCUS:  Well, but if there are --

8                     CHIEF JUSTICE ROBERTS:  But the Marshal in  
9     both --

10                    MR. PINCUS:  -- if there are particular  
11    people in that office or a particular, separately  
12    called out program in that office that is focused on  
13    faith-based initiatives only, yes.  What we're trying  
14    to reconcile --

15                    CHIEF JUSTICE ROBERTS:  We're trying to  
16    decide whether it is central.  You have to decide what  
17    unit you're looking at before deciding whether the  
18    activity is central.  And you're just saying well, just  
19    look at the people who are doing the offensive activity,  
20    and it's obviously going to be central to what they're  
21    doing.

22                    MR. PINCUS:  Your Honor, I think I haven't  
23    been clear in the test that I'm suggesting.

24                    JUSTICE GINSBURG:  Mr. Pincus, I would like  
25    you to go back to an answer you gave because it sounds



1 to me like it wasn't right. The President needs  
2 protection at all times no matter where he goes. The  
3 President may be doing something that violates the  
4 Establishment Cause, but protection is the job, and it  
5 doesn't make any difference where the President is. And  
6 so your answer to the question, well, suppose he had a  
7 special protector who just took care of his religious  
8 activities? I would still say that it's -- protection is  
9 the thing. So I don't -- I think you didn't -- the answer  
10 that you gave isn't consistent with your theory of this  
11 case.

12 MR. PINCUS: Well, I think that's right, and  
13 I think that's because there are two steps to our  
14 analysis, Justice Ginsburg. One is, is there a discrete  
15 and identifiable expenditure that only arises with  
16 respect to religious activities?

17 The second question is, does that particular  
18 expenditure, is that particular expenditure an  
19 incidental one? Flast said incidental expenditures  
20 don't give rise to standing. And I think you're right  
21 in that situation, that expenditure --

22 JUSTICE SCALIA: But in response to  
23 Justice Ginsburg's point, you could have said the same  
24 thing about the expenditure in Bowen. That money would  
25 have been spent anyway.

1 MR. PINCUS: But the question --

2 JUSTICE SCALIA: It happened to have been  
3 spent badly, but it would have been spent anyway.

4 MR. PINCUS: But it would have been spent  
5 differently, Your Honor, and I think that's the critical  
6 --

7 JUSTICE SCALIA: That was her point, that it  
8 would have been spent differently. If the President  
9 hadn't gone to this religious event, he would have gone  
10 somewhere else and the money would have been spent  
11 differently. That didn't make the difference in  
12 Bowen. Why should it make the difference here?

13 MR. PINCUS: Well, I think --

14 JUSTICE SCALIA: The fact is it was spent  
15 for a bad purpose, and that's the essential grievance of  
16 the plaintiff, it seems to me.

17 MR. PINCUS: We agree completely. But we  
18 also agree that there are some limits that -- the Court  
19 has said that every single dollar that's expended for a  
20 bad purpose doesn't give rise to a challenge. My  
21 example, if there's a prayer breakfast and all -- the  
22 only money that's spent is on the bagels, we don't  
23 believe that the bagels are a basis for a taxpayer  
24 challenge to the prayer breakfast.

25 JUSTICE BREYER: So in fact, you have --

1 just help me with one point here.

2 I mean, I see that deciding what's  
3 incidental and what isn't incidental will be difficult.  
4 I guess many of these cases would end up being decided  
5 on the merits, there is no violation on the merits, or  
6 maybe sometimes there is.

7 But I'd started thinking of the question of  
8 standing by thinking that there are strong feelings when  
9 the Government spends money in favor of one religion and  
10 not another. After all, they led to the Thirty Years'  
11 War. We see that in other places in the world today.  
12 People feel strongly. And if, in fact, they have that  
13 terribly strong feeling and can't make any challenge  
14 because the feelings are shared by many, then there are  
15 no cases in the courts at all, and the Government can do  
16 what it wants without challenge.

17 So in Flast, they carved out an exception,  
18 and the exception was where the taxing and spending  
19 clauses were involved, because Madison and others said  
20 this is aimed at "Government shall not tax and spend".  
21 So that was my theory. And all we're saying is where  
22 there's a big taxing and spending and it isn't  
23 incidental, there's standing.

24 Now we'll worry about the merits. Simple  
25 and clear. To which the response was, which has me a

1 little worried frankly, was that, well, that was Justice  
2 Stewart's position, or roughly speaking. But the Court  
3 rejected that quite clearly, and if you look at later  
4 cases, they reject it too. And therefore, whatever you  
5 might think of it, it isn't the law. And I'm not free  
6 to think whatever, I have to think exactly in accordance  
7 with what the cases say. So what is your response? I'd  
8 like you to focus on that.

9 MR. PINCUS: Well, respectfully, I think  
10 that's exactly what Justice Stewart said. Justice  
11 Stewart in his concurrence did not espouse a broader  
12 theory than the one that the Court adopted in Flast.  
13 And he said he joined the judgment, the opinion of the  
14 Court, and he said, "I understand it to hold only that  
15 a Federal taxpayer has standing to assert that a  
16 specific expenditure of Federal funds violates the  
17 Establishment Cause of the First Amendment."

18 JUSTICE BREYER: So you're saying that what  
19 Justice Stewart's view, insofar as it was rejected, that  
20 Flast suggested even broader standing, but it suggested  
21 at least what Justice Stewart said?

22 MR. PINCUS: Yes. I think it's --

23 JUSTICE BREYER: Is that right or not?

24 MR. PINCUS: Yes.

25 CHIEF JUSTICE ROBERTS: If Justice Stewart

1 agreed completely with what the Court said, why did he  
2 write a separate opinion?

3 MR. PINCUS: Well, in the -- sometimes  
4 despite the Court's desire sometimes to have a less  
5 separate opinion, sometimes justices do. And what he  
6 said here is he was just explaining his reason why he  
7 believed that Flast was distinguishable from  
8 Frothingham, and notes specifically that taxpayers have  
9 a clear stake because of the threepence comment.

10 Justice Fortas did say, did have a broader  
11 theory, although he -- in addition, that the Court did  
12 not adopt -- but he also said, recognizing very similar  
13 language to Justice Stewart, what the Court's opinion  
14 held. So I think Justice Stewart's opinion is useful  
15 because he doesn't talk about Congress, he talks about  
16 expenditures.

17 JUSTICE KENNEDY: It seems to me unduly  
18 intrusive for the courts to tell the President that it  
19 cannot talk to specific groups to see if they have  
20 certain talents that the Government may use to make sure  
21 that all of their energies are used properly by the  
22 Federal Government.

23 It's almost like a speech rationale.

24 And perhaps you would say that's just a  
25 judgment on the merits, but it seems to me that there's

1 a standing concern here, too, that we would be  
2 supervising the White House and what it can say, what  
3 it can -- whom it can talk to. And it seems to me  
4 that's quite intrusive from the standpoint of standing  
5 purposes.

6 I'm not sure that this makes a standard  
7 that distinguishes the case from Flast/Cohen or brings it  
8 within those -- within those cases.

9 MR. PINCUS: Well, Your Honor, we believe  
10 that the incidental test, and what I've been talking  
11 about in terms of what the limits are, that it has to be  
12 a non-incidental expenditure protects against that.  
13 Because if the argument is some Government official, for  
14 part of his day met with three ministers, and therefore  
15 we want to challenge because Government shouldn't be  
16 meeting with ministers, I think it's both for the reason,  
17 both because of the fact that this is not an argument that  
18 the expenditure on the hour of his day that it took to have  
19 those meetings is clearly not central to anything.

20 JUSTICE SCALIA: You really want to condemn  
21 the Federal courts to deciding case-by-case at the  
22 instance of all these people who feel passionately about  
23 this, case by case whether the expenditure was  
24 incidental or not. It doesn't seem to me an intelligent  
25 expenditure of any sensible person's time.

1 MR. PINCUS: Well --

2 CHIEF JUSTICE ROBERTS: And just to add to  
3 the question, before you answer, at the jurisdictional  
4 stage. In other words, this would be litigation over  
5 whether the individual taxpayer has standing. The Court  
6 would first have to determine whether the activity  
7 you're challenging is incidental or not.

8 MR. PINCUS: Well, Your Honor, I think the  
9 fact that there haven't been a lot of these challenges  
10 that the Government has been able to point to, indicates  
11 that this may not be a big problem.

12 CHIEF JUSTICE ROBERTS: Maybe they're  
13 reading Flast different than you read it. There are not  
14 a lot of these challenges because you don't have  
15 standing under Flast.

16 MR. PINCUS: But the Court also said in  
17 Allen against Wright, you know, the absence of precise  
18 standards does not leave the courts at sea in applying  
19 the law of standing. Standing isn't an area, really,  
20 that is susceptible to precise definitions. It seems to  
21 me that both because of the incidental test and the  
22 concerns that Justice Kennedy articulated, if someone's  
23 claim is people in the White House have five meetings  
24 in the course of a year that they're upset about, it  
25 would not take much at the jurisdictional stage to say

1 --

2 JUSTICE ALITO: Well, what would  
3 happen if --

4 MR. PINCUS: -- even if it's true -- even if  
5 it's true --

6 CHIEF JUSTICE ROBERTS: Well, but then, five  
7 meetings isn't enough. How many?

8 JUSTICE SCALIA: What about 10?

9 CHIEF JUSTICE ROBERTS: 20?

10 JUSTICE SCALIA: I was about to ask, 20.

11 MR. PINCUS: Well, Your Honor, our position  
12 --

13 JUSTICE SCALIA: We'll litigate it. We'll  
14 figure out a number eventually, I'm sure.

15 MR. PINCUS: Well, you know, in Allen  
16 against Wright, and Linda R.S., there are a whole series  
17 of cases where this Court has set up guidance, and the  
18 lower courts have evaluated whether the connection  
19 between the challenged conduct and the claimed injury --  
20 here the expenditure -- is close enough for there to be  
21 standing. And this -- the inquiry that we're suggesting  
22 really isn't that different from that.

23 JUSTICE ALITO: What would happen if when  
24 this program was set up, nothing was said about faith  
25 whatsoever? This was just going to be a general program



1 of outreach to community service organizations, but  
2 plaintiffs claimed that as the program was being  
3 administered it was heavily favoring religious  
4 organizations. Would that come out the same way in your  
5 judgment?

6 MR. PINCUS: If their challenge was that the  
7 entire -- the whole program essentially, as the court of  
8 appeals characterized the complaint here, the whole  
9 program essentially is facially neutral, but in reality  
10 is a preference, yes. Then it would come out the same  
11 way and the question would be --

12 JUSTICE ALITO: It depends totally on how  
13 they characterize?

14 MR. PINCUS: Well, that's true in many  
15 standing questions. The question is, how do you  
16 characterize the claim? But the question -- the problem  
17 here --

18 JUSTICE SCALIA: The claim, the gravamen here,  
19 is the Government is doing stuff with money that's been  
20 taxed from me that it shouldn't do. I fail to see how it  
21 makes any difference to the people who care so passionately  
22 about this, as Justice Breyer suggests, whether it's just an  
23 incidental expenditure or whether it's part of a targeted  
24 program.

25 We don't do that in any other area of

1 constitutional law. If someone has been subjected to an  
2 unreasonable search and seizure, we don't say well, you  
3 know, it was just incidental. Yes, we know you feel  
4 badly about it, but this was just an incidental search  
5 and seizure, and you don't have standing.

6 It doesn't make any sense, given the  
7 gravamen that you're directing this law against, to  
8 establish such a standard.

9 MR. PINCUS: Well, Your Honor, it is the  
10 standard that the Court established in Flast. It is  
11 what the Court --

12 JUSTICE SCALIA: And you also acknowledge  
13 we're not here to try to make sense.

14 MR. PINCUS: No. I actually think the  
15 Court's precedents line up pretty neatly. I think --

16 JUSTICE BREYER: But not neatly, I mean, in  
17 terms of the purposes of the thing. Are your clients  
18 claiming that it would violate the Establishment Cause  
19 for the President to go to lots and lots of prayer  
20 breakfasts?

21 MR. PINCUS: No we're not.

22 JUSTICE BREYER: No. I've never met anyone  
23 who did, but I guess there is a legitimate concern,  
24 somebody might think that, I guess. And I guess that if  
25 people -- there is some tendency of the people that are

1 worried, you know, there are pro ses, there are all  
2 kinds of people, somebody could claim that. So you want  
3 a way to keep them out.

4 MR. PINCUS: You want a way to keep them  
5 out --

6 JUSTICE BREYER: It's Justice Kennedy's  
7 concern.

8 MR. PINCUS: Exactly. And --

9 JUSTICE BREYER: But what they're worried  
10 about is will this word "incidental" and -- be  
11 sufficient to keep out the people who might somehow  
12 decide they want to claim, which sounds like a frivolous  
13 claim, that the President can't go to a prayer  
14 breakfast. Now does the word "incidental" do that?  
15 That's what I think --

16 MR. PINCUS: Well, our submission is that it  
17 does, Your Honor, because we think --

18 CHIEF JUSTICE ROBERTS: Again -- I asked  
19 this before, and I think you were cut off before you had  
20 a chance. Incidental with respect to what? All of the  
21 money for a particular meeting, a particular breakfast,  
22 a particular whatever, is it incidental to that, or is  
23 it incidental to however many times the President has  
24 breakfast if he goes to a prayer breakfast?

25 MR. PINCUS: It's incidental to what --

1 what's the focus of the claim? The focus of the claim  
2 isn't that bagels were served. The focus of the claim  
3 is there was prayer and that it was a religious meeting.  
4 If there was -- just to think of what such a claim might  
5 be. And so, if the expenditure that -- that's been  
6 identified is the bagels, it really is pretty tangential  
7 compared to the focus of what someone's complaining  
8 about. And so we think that's a rational test for doing  
9 what Justice Kennedy was talking about.

10 CHIEF JUSTICE ROBERTS: So if the expenditure  
11 is very small, but to take a particular religious symbol  
12 that might be offensive to some other people, is that  
13 incidental because the meeting went on longer and cost  
14 more than the particular religious symbol?

15 MR. PINCUS: No. I think there probably  
16 there would be two challenges, because there would be a  
17 challenge to the Government's purchase of the religious  
18 symbol to have at the meeting in addition to the  
19 meeting, and I think then --

20 CHIEF JUSTICE ROBERTS: So if it was two  
21 dollars, you would say it's not incidental because it  
22 covered the whole cost of purchasing the religious  
23 symbol?

24 MR. PINCUS: Yes, I don't think this is --  
25 and I think the Government agrees with this. I don't

1 think this is a test about how much. I think this is a  
2 test about the relationship between the expenditure  
3 that's challenged and the claim, what's alleged to be  
4 unlawful about this complex of Government activity.

5 JUSTICE SCALIA: So there's no standing to  
6 challenge a Presidential directive which says we are  
7 going to buy bagels for all evangelistic Christian  
8 breakfasts?

9 (Laughter.)

10 JUSTICE SCALIA: Okay? But not for any --

11 MR. PINCUS: No, I think there would be  
12 standing.

13 JUSTICE SCALIA: Why would there be  
14 standing?

15 MR. PINCUS: Because there the challenge is  
16 to the discriminatory purchase. It's not about the  
17 prayer breakfast, it's about the idea that the  
18 Government is purchasing bagels in a religiously  
19 non-neutral way.

20 CHIEF JUSTICE ROBERTS: Of course. But the  
21 point is that makes --

22 MR. PINCUS: So there absolutely would be  
23 standing.

24 CHIEF JUSTICE ROBERTS: But that shows how  
25 totally manipulable your incidental test is. You just

1 have to phrase your claim so that it covers  
2 whatever expenditure --

3 MR. PINCUS: But, Your Honor --

4 CHIEF JUSTICE ROBERTS: -- is offending you.  
5 It's not -- incidental doesn't protect you from  
6 frivolous or insignificant claims in any way.

7 MR. PINCUS: Your Honor, I think it does,  
8 because there would have to be an allegation in that  
9 situation that bagels were being purchased on a  
10 religious basis, and that's going to be awfully hard for  
11 a lawyer to sign in good faith. I think the problem, if  
12 I may --

13 JUSTICE SCALIA: How does that confer  
14 standing? How does that confer standing?

15 MR. PINCUS: The purchase -- the idea that  
16 bagels are being purchased only for evangelicals and not  
17 for Jewish breakfasts?

18 JUSTICE SCALIA: Right. Right.

19 MR. PINCUS: Because the Government --

20 JUSTICE SCALIA: Standing by Joe Doaks, not  
21 from somebody who's starting a Jewish prayer breakfast  
22 and says, you know, what could be worse than not buying  
23 bagels for a Jewish prayer breakfast.

24 (Laughter.)

25 With him I could understand, he has

1 standing. But I'm just talking about one of these many  
2 people who feel passionately about this just in general.  
3 You walk in and say he can't do this because I'm a  
4 taxpayer, and you say I'm sorry, being a taxpayer is not  
5 enough, we don't care how passionately you feel about  
6 it --

7 MR. PINCUS: I don't think general passion  
8 is enough. I think what the Court has said is there has  
9 to be a tie-in, and let me say that I think what's  
10 critical here is any test obviously is susceptible to  
11 hypotheticals, but the Government -- our test at least  
12 keeps in taxpayer standing the core of what the framers  
13 were worried about, which is Government expenditure of  
14 funds --

15 JUSTICE SOUTER: Mr. Pincus, may I ask you  
16 this question? Do you think your theory is consistent  
17 with Valley Forge?

18 MR. PINCUS: Yes, Your Honor, we do, because  
19 in Valley Forge -- first of all, as Justice Ginsburg said,  
20 the Court relied on the fact that it was a property  
21 clause claim. There is a passage in Valley Forge that  
22 refers to Executive action, but the Court in Kendrick  
23 when it talked about Valley Forge said, in  
24 characterizing that case, said Executive action pursuant  
25 to the property clause. And we think those things are

1 tied together and there's a reason why. In the  
2 appropriations context, there always is congressional  
3 action with respect to the very money that's at issue  
4 because there has to be a congressional appropriation.  
5 That's not true in the property context. Congress  
6 doesn't have to say, pass a statute saying here are the  
7 58 property sites that we want the Executive to get rid  
8 of.

9 JUSTICE ALITO: Do you think the distinction  
10 between taxing, between taxing and spending and the  
11 property clause, makes any sense? Do you think James  
12 Madison would not be upset if the Commonwealth of  
13 Virginia transferred 10,000 acres to the Anglican  
14 Church? That would be okay, but the threepence in  
15 taxation would not?

16 MR. PINCUS: Well, I think that the core of  
17 what was the concern was, was the taking of the money  
18 and the using it for religious purposes. And I  
19 think what the --

20 JUSTICE SCALIA: Well, it's not the same  
21 money used. It's not the same property.

22 MR. PINCUS: No, it's not the same money.

23 JUSTICE SCALIA: It goes into some pot of  
24 fungible money and it's other money used. So instead of  
25 using other money, you use land. Does that make a



1 difference?

2 MR. PINCUS: Well, I think that the Court  
3 decided that it made a difference, and I think in terms  
4 of cabining, in terms of the worry that perhaps Flast was  
5 going to be overbroad and the need to have Congress  
6 involved, which I think is key -- there was no  
7 congressional involvement at all in designating those  
8 properties and there is in the appropriations context,  
9 and I think that's a key difference. But I think what's  
10 important here, and the Court's colloquy in the first  
11 part of the argument showed me this -- but the  
12 Government's position, the idea that it's only grants to  
13 third parties, means the Government could hire a corps of  
14 chaplains and send them out to civilians and to the  
15 populace at large and that couldn't be challenged,  
16 because all it is is Executive pay; and the idea that  
17 there's some difference between a *Bowen v. Kendrick*  
18 situation, where the Executive had tremendous discretion  
19 in terms of where it was going to give the money, and  
20 the situation here, which is the exercise of precisely  
21 the same Executive discretion, makes no sense.

22 The injury is the same. The conduct  
23 that's -- that's the core of the violation is the same.  
24 It's an executive branch decision to use funds in a way  
25 that's impermissible under the Establishment Clause, and

1 we think drawing the lines that the Government is trying  
2 to draw just make no sense, and to leave out -- insulated  
3 from any taxpayer challenge really huge swaths of conduct  
4 that is really at the very core of what Madison was  
5 concerned about.

6           So our submission is that that really makes  
7 no sense. There's no basis in history, for example, for  
8 the Government's claim that executive branch decisions  
9 are somehow different and insulated with respect to  
10 spending. It's the spending of the same threepence, and  
11 if history indicates anything it's that concerns about  
12 establishment were focused just as much on the King, as  
13 on the Parliament, in terms of the history that the  
14 framers understood.

15           And so the idea that the Executive would be  
16 given free rein to exercise discretion with respect to  
17 spending and there would be no concern about the types  
18 of injuries that gave rise to Flast, we think is just not  
19 right.

20           If the Court has no further questions, thank  
21 you.

22           CHIEF JUSTICE ROBERTS: Thank you,  
23 Mr. Pincus.

24           General Clement, you have three minutes  
25 remaining.

1 REBUTTAL ARGUMENT OF PAUL D. CLEMENT  
2 ON BEHALF OF PETITIONERS

3 GENERAL CLEMENT: Thank you, Mr. Chief  
4 Justice. Just a few points in rebuttal.

5 First of all, I think it's important to  
6 emphasize that if this Court recognizes that there is  
7 not taxpayer standing, that does not mean that there  
8 won't be lawsuits, that there won't be directly injured  
9 plaintiffs that can bring claims. Doremus and Schempp  
10 prove that point. But even more broadly, any time the  
11 Establishment Cause injury takes the form of alleged  
12 coercive conduct, the individuals who are coerced are  
13 going to have standing to bring the suit.

14 The second point to make clear is it's just  
15 not an accurate description of this Court's cases to say  
16 that the spending of appropriated funds by the Executive  
17 is enough to give rise to taxpayer standing. The  
18 property distribution plan at issue in Valley Forge took  
19 a tremendous amount of appropriated funds to run.  
20 Nobody thought that was a basis for taxpayer standing.  
21 The Bibles that were purchased and the salaries of the  
22 teachers in Doremus presumably cost at least a  
23 threepence. But that was not found enough.

24 Now, I think in trying to understand the  
25 Court's cases you really have to focus on this word

1 "incidental." And I think that the colloquy in the  
2 second half of the argument shows that you can't look at  
3 incidental as being minimal. It doesn't mean that. It  
4 doesn't mean minimal. It doesn't mean incremental. It  
5 is trying to distinguish an incidental expenditure of  
6 funds when -- as to something where the expenditure of  
7 funds is central or vital to the Establishment Cause  
8 violation. In the context of money going to third-party  
9 religious entities, nobody would say that the spending  
10 is incidental. It's the whole violation. In the  
11 context of Bible reading or anything else the Executive  
12 Branch does, the fact that money went to fund the  
13 executive branch to violate the Establishment Cause is  
14 the least of the problems. The problem is the primary  
15 conduct of the executive branch in violating the  
16 Establishment Cause, but that's not a spending injury.  
17 The funding that goes into that is incidental. I think  
18 that's the way to make sense of this Court's cases.

19           It's important to emphasize what's at issue  
20 here. It's not a general challenge to the Faith-Based  
21 Office. It's not a challenge to the name of the office.  
22 It is a challenge to the particular conferences and the  
23 assertion that the executive branch officials at the  
24 conferences spent too much time talking about  
25 faith-based groups and not enough talking about

1 community-based groups. If that isn't intrusive on the  
2 executive branch, I don't know what is.

3 The last point I would leave you with is  
4 that if something has to go in this area, if you have to  
5 choose between the logic of Flast and the irreducible  
6 minimum requirements of Article III, I think it's an  
7 easy choice. You don't abandon the basic requirements  
8 of Article III that distinguish the judiciary from the  
9 political branches of Government.

10 I think the Seventh Circuit, with all due  
11 respect, lost sight of that. Its decision should be  
12 reversed. Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you, General.

14 The case is submitted.

15 [Whereupon, at 11:05 a.m., the case in the  
16 above-entitled matter was submitted.]

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