No. 06-157

IN THE

Supreme Court of the United States

JAY F. HEIN, DIRECTOR, WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, ET AL.,
Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, ET AL.,
Respondents.

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

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Brief of *Amicus Curiae* Foundation for Moral Law, Inc., Suggesting Reversal

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QUESTION PRESENTED FOR REVIEW

1. Whether taxpayers have standing under Article III of the Constitution to challenge on Establishment Clause grounds the actions of Executive Branch officials pursuant to an Executive Order, where the plaintiffs challenge no Act of Congress, the Executive Branch actions at issue are financed only indirectly through general appropriations, and no funds are disbursed to any entities or individuals outside the government.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Foundation for Moral Law, Inc.[1] ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the Godly principles of law upon which this country was founded. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice systems. To those ends, the Foundation has directly assisted, or filed *amicus* briefs, in several cases concerning the public display of the Ten Commandments, public aid to the Boy Scouts, and others that implicate the Establishment Clause of the First Amendment.

The Foundation has an interest in this case because it believes that religious freedom is best served by strictly adhering to the words of the Establishment Clause which preclude the plaintiffs' action in this case. Fundamental principles of our constitutional system are at stake in this case and the need for constitutional fidelity drives the Foundation's legal advocacy. This brief primarily focuses on whether the text of the Constitution should be determinative in this case; and whether a faithful reading of the text precludes the plaintiffs' action.

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[1] *Amicus curiae* Foundation for Moral Law, Inc., files this brief with letters of consent by counsel for both Petitioners and Respondents. Counsel for *amicus* authored this brief in its entirety. No person or entity—other than *amicus*, its supporters, or its counsel—made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

It is the responsibility of this Court and any court exercising judicial authority under the United States Constitution to decide *cases and controversies* based on the text of the document from which that authority is derived. A court forsakes its oath-bound duty when it rules based upon decisions that bear no resemblance to or take the focus away from the text of the constitutional provision at issue. *Amicus* urges this Court to return to first principles in this case and once again to embrace the plain and original text of the Constitution to guide its judgment of Establishment Clause jurisprudence.

Standing is a fundamental gate-keeping requirement designed to ensure that only properly redressable grievances are handled in courts of law. The doctrine implicitly recognizes that some offenses must be corrected by means other than litigation. Individual suits concerning violations of the Establishment Clause do not belong in the courts because the clause does not confer an individual right capable of vindication in the courts. Instead, the Establishment Clause is a federalism provision that seeks to protect the states' rights with regard to religion; breaches of it must be corrected by the Executive branch, the states, and the voting process.

This Court invented the exception in *Flast v. Cohen* out of whole cloth for the unnecessary purpose of ensuring supposedly proper enforcement of the Establishment Clause. This "*Flast* fiat" undermined the basic principles of standing doctrine and initiated a rash of litigation that has further twisted the meaning and purpose of the clause. The instant case continues the deterioration of standing principles through its extension of the *Flast* exception. The Court should abandon its misguided effort to ensure Establishment Clause enforcement and reinforce the historic parameters of the standing doctrine.

ARGUMENT

I. THE STANDING OF THE PLAINTIFFS SHOULD BE DECIDED ACCORDING TO THE TEXT OF THE CONSTITUTION, NOT JUDICIALLY FABRICATED TESTS.

"The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when it was adopted, it means now." *South Carolina v. United States*, 199 U.S. 437, 448 (1905). In contrast to this Court's incongruous standing precedents, the "written instrument" has remained unchanged from its original, ratified, and popularly approved form. It is time for this Court to return to the words of the United States Constitution in deciding cases.

Our Constitution dictates that *the Constitution itself* and all federal laws pursuant thereto are the "supreme Law of the Land." U.S. Const. art. VI. All judges take their oath of office to support *the Constitution*—not a person, office, government body, or judicial opinion. *Id.* *Amicus* respectfully submits that the words of this Constitution and the solemn oath thereto are still relevant today and should control, above all other competing powers and influences, the decisions of federal courts.

As Chief Justice John Marshall observed in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the very purpose of a *written* constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . . . Why otherwise does it direct the judges to take an oath to support it?" *Id.* at 179-80.

James Madison insisted that "[a]s a guide in expounding and applying the provisions of the Constitution . . . . the legitimate meanings of the Instrument must be derived from the text itself." James Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). Chief Justice Marshall confirmed that this was the proper method of interpretation:

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824).

Justice Joseph Story later succinctly summarized these thoughts on constitutional interpretation:

> [The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840).

Thus, "[i]n expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is

evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840). Instead of heeding these truths, the court of appeals below evaluated the issue of standing under the guise of a judicially fabricated taxpayer standing exception of *Flast v. Cohen*, 392 U.S. 83 (1968),[2] and thus it erred in concluding that the plaintiffs below possessed standing in this case.

II. THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT DOES NOT CONFER AN INDIVIDUAL RIGHT UPON WHICH A SUIT CAN BE FILED.

Members of Freedom From Religion Foundation filed this suit based on their status as taxpayers claiming a violation of the Establishment Clause. However, a proper interpretation of the text of the Establishment Clause does not provide a basis for this or any individual suit to enforce this provision of the First Amendment. This is so because the Establishment Clause does not confer a right upon individuals that is capable of vindication in the courts. Without such a right, the plaintiffs lack a "personal stake" in the outcome of this case. *See Warth*

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[2] The court below openly admitted it was not following the original meaning of the words of the Constitution:

> The district judge . . . would have been correct in his thinking under an earlier view of Article III's limitation of the federal judicial power to deciding "Cases" and "Controversies." It was once thought that these terms . . . limited federal jurisdiction to cases in which the plaintiff alleged the kind of injury that would have supported a lawsuit in the eighteenth century. . . . The tangible harm to the taxpayer complaining of the expenditure was too attenuated to satisfy *eighteenth-century notions of standing embodied in Article III*.

Freedom from Religion Foundation, Inc. v. Chao, 433 F.3d 989, 990 (7th Cir. 2006) (emphasis added).

v. Seldin, 422 U.S. 490, 498-99, (1975) ("[T]he standing question [tests] whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify the exercise of the court's remedial powers on his behalf") (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

"Those who do not possess Art. III standing may not litigate as suitors in the courts of the United States." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475-76 (1982). In fact, "[i]f a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, __ U.S. __, __ 126 S. Ct. 1854, 1860-61 (2006). Yet, in Establishment Clause cases this Court has bent over backwards to ensure that would-be plaintiffs receive a hearing in court without ever considering whether the Establishment Clause permits such suits.

A. The Establishment Clause protects states, not individuals.

The Establishment Clause of the First Amendment provides that: "**Congress shall make no law respecting an establishment of religion** . . . ." U.S. Const. amend. I. (emphasis added). Plainly read, this is a statement about Congressional power and jurisdiction regarding the area of religion, not a statement about an individual right. As Justice Joseph Story explained in his *Commentaries on the Constitution*: "The real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an [sic] hierarchy the exclusive patronage of the national government." II Joseph Story, *Commentaries on the Constitution* § 1871 (1833).

The Establishment Clause is distinctive for what it does *not* say in comparison to the other clauses of the First Amendment. The other clauses speak of the "free exercise" of religion, "freedom of speech," "freedom of . . . the press," the "right . . . to peaceably assemble," and the "right . . . to petition the government for redress of grievances." The Establishment Clause, in contrast, speaks only of a limitation on congressional power concerning what was at the time a common government institution, *i.e.*, establishments of religion.[3] "[U]nless we are to presume the 'founders of the United States [were] unable to understand their own handiwork,'" this difference in wording marks a difference in meaning. *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 404 (4th Cir. 2005) (quoting *Sherman v. Cmty Consol. Sch. Dist. 21*, 980 F.2d 437, 445 (7th Cir. 1992)). That difference is a focus on federalism rather than individual rights. "The Establishment Clause does not purport to protect individual rights. By contrast, the Free Exercise Clause plainly protects individuals against congressional interference with the right to exercise their religion, and the remaining Clauses within the First Amendment expressly disable Congress from "abridging [particular] *freedom[s]*." *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring in the judgment).

The language of the Establishment Clause, then, dictates a two-fold focus: (1) the absence of congressional power concerning national church establishments and (2) a

[3] At the time the First Amendment was adopted in 1791, "five of the nation's fourteen states (Vermont joined the Union in 1791) provided for tax support of ministers, and those five plus seven others maintained religious tests for state office." Mark A. Noll, *A History of Christianity in the United States and Canada* 144 (1992).

prohibition on federal inference with state establishments.[4] "[T]he Establishment Clause was primarily an attempt to ensure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments" *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 309-10 (1963) (Stewart, J., dissenting). *See e.g.*, *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) ("The Establishment Clause was adopted to prohibit such an establishment of religion at the federal level (and to protect state establishments of religion from federal interference))." The result is that the clause protects the states' rights concerning religion[5] while leaving concerns about individual rights regarding religion to the Free Exercise Clause.[6]

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[4] The incorporation doctrine is not implicated in this case because the plaintiffs challenge federal rather than state action. Even so, incorporation does not affect the above reading of the Establishment Clause as some may claim it does. *See, e.g., Van Orden v. Perry*, 545 U.S. 677, 125 S. Ct. 2854, 2888 (2005) (Stevens, J., dissenting) ("It is this unique history [of the Establishment Clause], not incorporation writ large, that renders incoherent the postincorporation reliance on the Establishment Clause's original understanding"). Even if by judicial fiat the clause is amended to read "Congress *and the States* shall make no law respecting an establishment of religion," the language still does not confer an individual right of any kind because it solely addresses government power. Therefore, individuals could not bring suit to enforce the provision.

[5] "The original establishment clause, on close reading, is not antiestablishment but pro-states' rights; it is agnostic on the substantive issue of establishment versus nonestablishment and simply calls for the issue to be decided locally." Akhil Reed Amar, *The Bill of Rights* 34 (1998).

[6] This structural view of the Establishment Clause answers the criticism that the clause must concern more than the "'coercive' features and incidents of establishment," because otherwise it is a redundancy covered by the Free Exercise Clause. *Lee*, 505 U.S. at 621 (Souter, J., concurring). The Establishment Clause concerns "actual legal coercion," *Newdow*, 542 U.S. at 52 (Thomas, J., concurring), yet is not an "ornament

Thus far in its jurisprudence this Court has ignored the stark difference between the wording of the Establishment Clause and the wording of the "expressive rights" provisions contained in the rest of the Bill of Rights. Akhil Reed Amar, *The Bill of Rights* 34, 41 (1998). In essence, the assumption has been that all of the first nine amendments are talking about individual rights, but this is not true in the case of the Establishment Clause. It refers to a state right, which is the reason for the difference in wording. *See id*., at 34. The failure to recognize this distinction has produced an unnecessary and illogical deviation in the legal standing requirements of Article III.

B. The Court has erroneously assumed that standing must be manufactured to ensure enforcement of the Establishment Clause.

This Court has started with the assumption that the Establishment Clause confers an individual right and from that assumption it has tried to divine ways in which to grant litigants standing to sue for alleged Establishment Clause violations. The results of this divination range from the implausible to the patently absurd. For example, ordinarily in order to possess standing under Article III, a plaintiff must allege a "concrete and particularized" injury "other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Valley Forge*, 454 U.S. at 485. In Establishment Clause litigation, however, plaintiffs need only demonstrate that the conduct at issue makes them feel like "'outsiders'" who are not "'full members

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to the First Amendment" because the Clause is addressing a different subject than the Free Exercise Clause, *i.e.*, it deals with the federal/state relationship regarding religion while the Free Exercise Clause deals with federal action upon individuals regarding religion.

of the political community.'" *McCreary County, Ky., v. ACLU of Kentucky*, 545 U.S. 844, 125 S. Ct. 2722, 2733 (2005) (quoting *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290 (2000)).

Similarly, in general "the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing, even though the plaintiff contributes to the public coffers as a taxpayer." *Valley Forge*, 454 U.S. at 477. This is so because any alleged harm to the taxpayer is considered "comparatively minute and indeterminable; . . . and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain" that the complaint amounts to a generalized grievance. *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923). The court below admitted as much, observing that, "the tangible harm [to a taxpayer plaintiff] would often be zero because if the complained-of expenditure was enjoined, the money would probably be used to defray some other public expense that would not benefit the taxpayer, rather than returned to him in the form of a lower tax rate." *Chao*, 433 F.3d at 990. Yet in *Flast* this Court carved out an exception to this rule for Establishment Clause claims on the reasoning that "that clause of the First Amendment operates as a specific constitutional limitation upon the exercise of Congress of the taxing and spending power conferred by Art. I, § 8." *Flast*, 392 U.S. at 104 (footnotes omitted).

The problem with such a rationale, as Justice Harlan observed in his dissent in *Flast*, is that "[t]he Establishment Clause is . . . only one of many provisions of the Constitution that might be characterized in this fashion." *Flast*, 392 U.S. at 129 n. 18 (Harlan, J. dissenting). There is *nothing* in the wording of the Establishment Clause that specifically indicates it is peculiarly meant to curtail Congress's taxing and spending power. *See Flast*, 392 U.S. at 127 (Harlan, J. dissenting) (observing that "only in some Pickwickian sense are any of the provisions with which the Court is concerned 'specific(ally)'

limitations upon spending, for they contain nothing that is expressly directed at the expenditure of public funds."). That is a gloss the Court has placed upon the provision solely based on its selective reading of history.[7] *See Flast*, 392 U.S. at 103, 126.

This straining of logic and selective sifting of the historical record have been done "so that tax-and expenditure-based violations of the Establishment Clause do not go unremedied," a danger that seemingly exists "because of the inherent difficulty in enforcing the specific prohibition of the Establishment Clause against the expenditure of government funds for the establishment of religion." *Chao*, 433 F.3d at 998 (Ripple, J., dissenting). In other words, the *Flast* exception is an allowance made on the basis of a perceived shortcoming in the constitutional design. But expedience is no excuse for subverting constitutional principles.[8]

The Court is ignoring the import of the language of the Establishment Clause—which would deny its enforceability in the courts—because of a belief that there must be a litigation remedy for such an important constitutional provision. However,

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[7] There certainly are characteristics of an "establishment" other than just financial support for a particular sect. At the very least it must also include the use of government force to compel certain beliefs or actions concerning religion. *See, e.g.*, *Lee*, 505 U.S. at 640 (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was *coercion of religious orthodoxy* and of financial support by *force of law and threat of penalty*") (first emphasis added).

[8] "The Constitution is, in the end, a unitary, cohesive document and every time any piece of it is ignored or interpreted away in the name of expedience, the entire fragile endeavor of constitutional government is made that much more insecure." *Colgrove v. Battin*, 413 U.S. 149, 187 (1973) (Marshall, J., dissenting).

> [i]mplicit in the foregoing is the philosophy that the business of the federal courts is correcting constitutional errors, and that 'cases and controversies' are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor. This philosophy has no place in our constitutional scheme. It does not become more palatable when the underlying merits concern the Establishment Clause.

Valley Forge, 454 U.S. at 490.

C. Adequate remedies exist for Establishment Clause violations.

Some constitutional provisions are non-justiciable and must be enforced by other means. "The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action."[9] *Colegrove v. Green*, 328 U.S.

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[9] Among those provisions that the Court has recognized as being not judicially enforceable are: the Guarantee Clause of Art. IV, § 4, *see Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912); the Impeachment Clause of Art. I, § 3, *see Nixon v. United States*, 506 U.S. 224 (1993); and the duty that the laws must be faithfully executed, *see Mississippi v. Johnson*, 71 U.S. 475 (1866).

While the above examples specifically implicate the "political question" doctrine rather than the standing doctrine, they nonetheless illustrate that not all clauses of the Constitution are amenable to the judicial forum. "Each of these doctrines poses a distinct and separate limitation," yet, either "suffices to prevent the power of the federal judiciary from being invoked by the complaining party." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) (citations omitted).

The Establishment Clause does not fit within the political question doctrine because cases that could arise under it do not contain the usual characteristics of a political question such as a lack of judicially discoverable or manageable standards for resolution or the potential for expressing a lack of respect for the coordinate branches of government. *See*

549, 556 (1946). Indeed, this is a key assumption behind the very idea of standing. "[T]he case-or-controversy limitation is crucial in maintaining the 'tripartite allocation of power' set forth in the Constitution." *Cuno*, 126 S. Ct. at 1861 (quoting *Valley Forge*, 454 U.S. at 474) (other citation omitted). Ignoring this idea—even when it concerns the First Amendment—undermines our constitutional model. As Justice Harlan astutely observed in his dissent in *Flast*:

> I do not doubt that there must be "some effectual power in the government to restrain or correct the infractions" of the Constitution's several commands, but *neither can I suppose that such power resides only in the federal courts*. We must as judges recall that, as Mr. Justice Holmes wisely observed, the other branches of the Government "are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

Flast, 392 U.S. at 130 (Harlan, J. dissenting) (quoting *Missouri, Kansas & Texas R. Co. of Texas v. May*, 194 U.S. 267, 270 (1904)) (footnotes omitted) (emphasis added).

"The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." *Colegrove*, 328 U.S. at 556. If Congress oversteps the boundaries of the Establishment Clause, it is the duty of the President to thwart the implementation of the unconstitutional congressional action. Because it is a specific federalism

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Baker v. Carr, 369 U.S. 186, 217 (1962). In contrast, standing is a roadblock to Establishment Clause plaintiffs because the wording of the clause does not allow for individual enforcement of the provision; thus, it concerns whether such cases are appropriate for the judicial process. *See Lujan*, 504 U.S. at 560.

provision, states are also empowered to enforce the provision by bringing suits against the federal government under the clause. If both the federal executive and the states fail in their respective duties to ensure congressional fidelity to the Establishment Clause, the ballot box still remains as the ultimate enforcement of constitutional dictates.[10]

"Quite simply, the Establishment Clause is best understood as a federalism provision—it protects state establishments from federal interference but **does not protect any individual right**." *Newdow*, 542 U.S. at 50 (Thomas, J., concurring in the judgment) (emphasis added). Without an underlying individual right, there can be no basis for standing to sue in this case.

Restraint counsels following the judicial oath of office by ruling according to the words of the Establishment Clause and permitting violations of its command to be redressed through these proper mechanisms of the tripartite system. The failure to do so has opened a judicial Pandora's Box that the ruling below exacerbates.

III. THE *FLAST* EXCEPTION AND *CHAO'S* EXPANSION OF IT EVISCERATE THE NATURE AND PURPOSE OF THE FUNDAMENTAL DOCTRINE OF STANDING

"The modern doctrine of constitutional standing was hardborn and has endured a difficult adolescence." *Chao*, 433

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[10] As was mentioned in note 4, *supra*, this case does not require an examination of the incorporation doctrine because it involves federal actions. If the Establishment Clause is binding upon the states—a highly dubious proposition if it is interpreted as a federalism provision—then enforcement in the states would occur in the same manner as its federal counterparts, *i.e.*, governors must police the actions of state legislatures to ensure that no breach of the Establishment Clause is tolerated, and the people must police both branches in order to protect their religious freedom.

F.3d at 997 (Ripple, J. dissenting). This is a generous understatement. The fact is that while standing doctrine is designed as "a constitutional limitation of federal-court jurisdiction," *Cuno*, 126 S. Ct. at 1861 (citation omitted), the *Flast* exception has opened the door to a potential flood of litigation. That this case has come to this Court at all is a testament to the fact that it is now exceedingly difficult for courts to know who does and does not have standing because *Flast* jettisoned the "injury in fact" requirement to make way for a supposedly special exception brought about by the unique nature of Establishment Clause violations.

The purpose of ensuring that plaintiffs have proper standing is "to identify those disputes which are appropriately resolved through the judicial process." *Lujan*, 504 U.S. at 560. The *Flast* majority itself admitted that standing is designed to prevent potential plaintiffs from "employ[ing] a federal court as a forum in which to air . . . generalized grievances about the conduct of government," and then it proceeded to obliterate that constitutional design by granting taxpayer standing for Establishment Clause plaintiffs. *Flast*, 392 U.S. at 106.

The only stipulation in *Flast* preventing a complete collapse in standing doctrine—at least when the Establishment Clause is implicated—was the requirement that the challenged action be linked to the Taxing and Spending Clause of Art. I, § 8 of the Constitution. This was not a particularly strong barrier to stopping the spread of standardless standing, [11] but the court

[11] There are other provisions in the Constitution that could just as legitimately be deemed limitations on Congress's spending power, including the Commerce Clause, the Due Process Clause of the Fifth Amendment, and the Tenth Amendment. The only discernable reason that the Court does not permit taxpayer standing to challenge actions under these provisions but does allow taxpayer standing in Establishment Clause cases is because it wants to do so. *See, e.g.*, *Flast*, 392 U.S. at 129 n.18 (Harlan, J. dissenting).

below side-stepped even that requirement in granting these plaintiffs standing. In so doing the court changed "the specter of a citizen bringing a lawsuit in a federal court to rectify an undifferentiated injury" into a present reality. *Chao*, 433 F.3d at 997-98 (Ripple, J., dissenting).

Flast's impact on Establishment Clause jurisprudence was felt almost immediately—and most significantly—in the watershed case of *Lemon v. Kurtzman*. This Court never grappled with the standing issue in its well-known opinion,[12] but the trial court in *Lemon I* certainly did, relying solely on *Flast* to determine that plaintiff Alton Lemon had standing as a taxpayer "to challenge the Education act under the establishment and free exercise clauses of the First Amendment." *Lemon v. Kurtzman*, 310 F. Supp. 35, 42 (E.D. Pa. 1969). The court noted that Lemon was suing as a *state* taxpayer and that *Flast* "concerned itself with the status of a federal taxpayer," but dismissed this distinction, justifying its expansion of *Flast* on the ground that "the First Amendment applies to State governmental powers." *Id.* at 41 (citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940)). Thus, the *Flast* exception made quick work of paving the way for *Lemon*, the case that, more than any other, has doggedly defined (and some would say confused) Establishment Clause jurisprudence for the past 34 years.

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[12] This Court in *Lemon I* never discussed why (or whether) Lemon or the other individual plaintiffs had standing, merely noting that the trial court found Lemon had standing and recounting these facts about him:

> Appellant Lemon, in addition to being a citizen and a taxpayer, is a parent of a child attending public school in Pennsylvania. Lemon also alleges that he purchased a ticket at a race track and thus had paid the specific tax that supports the expenditures under the Act.

403 U.S. 602, 611 (1971). The Court's reference to Lemon's having "paid the specific tax" at issue in the case may have been as significant to the Court as it was to the trial court's analysis under *Flast*.

In *Bowen v. Kendrick*, this Court upheld the standing of federal taxpayers who challenged grants by a federal agency to religious institutions, pursuant to an act of Congress, for services relating to adolescent sexuality and pregnancy. 487 U.S. 489 (1988). The *Bowen* Court considered there to be "no dispute that [plaintiffs had] standing to raise their [facial] challenge," noting that it has "consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing established in *Frothingham v. Mellon*." *Id.* at 618 (citation omitted). *Flast* gave the taxpayers in *Bowen* the standing exception that they otherwise would not have had.

Flast continues to open its unique courthouse door to taxpayer plaintiffs in cases currently in the federal appellate system. Besides the instant case, the Seventh Circuit Court of Appeals has before it two recent cases brought by taxpayer-plaintiffs who relied on *Flast* for standing. In *Winkler v. Chicago School Reform Board of Trustees*, federal taxpayers sued the Department of Defense and other agencies for expenditure of federal tax funds, pursuant to several acts of Congress, to support programs and events of Boy Scouts of America. No. 99-C-2424, Slip Op. at 1 (Mar. 16, 2005 N.D. Ill.). Although the defendants in *Winkler* argued that the acts at issue were passed pursuant to Congress's authority over the military and over federal property, the court held that the plaintiffs had standing because Congress had also acted pursuant to its taxing and spending power, thus slipping the plaintiffs through the *Flast* loophole in standing doctrine. *Id.*, slip op. at 11-25.

That same year, in a case also on appeal, a federal trial court in *Hinrichs v. Bosma* held that Indiana taxpayers had standing to sue the Indiana House of Representatives for "sectarian Christian prayers" often given by invited clergy at the opening of the House's sessions. 400 F. Supp. 2d 1103 (S.D. Ind. 2005). Although the court in *Hinrichs* relegated

Flast to a footnote, its analysis of standing in the case nonetheless tracks the *Flast* requirements for standing. The court explained that Indiana tax funds spent on mailings and thank-you letters to invited clerics were "measurable disbursements of governments funds,[13] occasioned solely because of the prayer practice," and were therefore "sufficient to support standing for the plaintiff-taxpayers who object to the practice supported by the expenditures." *Id.* at 1110. After its *Flast* footnote, the *Hinrichs* court—perhaps painting with too broad of a brush—states that "[a] state taxpayer can satisfy the standing requirement in an Establishment Clause case by showing that tax funds are expended on the challenged practice." *Id.* at 1111.

The *Hinrichs* court ordered the Indiana Speaker of the House to stop permitting sectarian prayers in the House, and the Speaker appealed. The Seventh Circuit denied a stay pending appeal and ruled, in part, that the Speaker was unlikely to succeed on his standing argument because taxpayer-plaintiffs had standing under *Flast* and its progeny. *Hinrichs v. Bosma*, 440 F.3d 393, 395 (7th Cir. 2006). In both *Winkler* and *Hinrichs*, the taxpayer-plaintiffs were proper parties to suit only because of *Flast's* evisceration of constitutional standing principles.

It should not be surprising that once this Court unhinged Establishment Clause standing from the anchor of the Constitution it has floated into a vast sea of uncertainty. "The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S.

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[13] The *Hinrichs* court's measure of disbursements associated with the prayers—letters, photographs, postage, webcasts, etc.—came to an estimated $448.38 for the 2005 session.

208, 227 (1974). And without even a pretext of a limitation on taxpayer standing for the Establishment Clause, the only safeguard against a plaintiff-free-for-all is this Court's say-so. To abandon basic standing principles changes this Court's proper limited role[14] into that of a "Council of Revision which, despite Madison's support, was rejected by the Constitutional Convention." *Flast*, 392 U.S. at 130 (Harlan, J. dissenting).

This Court has "no authority . . . to read exceptions into [the Constitution] which are not there." *Reid. v. Colvert*, 354 U.S. 1, 14 (1957). It has done so anyway through the *Flast* exception, leading lower courts to grab that exception take it further from the Constitution's standing principles, decimating this constitutional bulwark against judicial usurpation.

> [T]his court in a very special sense is charged with the duty of construing and upholding the Constitution; and in the discharge of that important duty, it ever must be alert to see that a doubtful precedent be not extended by mere analogy to a different case if the result will be to weaken or subvert what it conceives to be a principle of the fundamental law of the land.

Dimick v. Schiedt, 293 U.S 474, 485 (1935).

This Court has a duty not to extend the dubious *Flast* exception because it will, without doubt, weaken the "landmark" principle of standing to the point that it is completely emptied of its constitutional meaning and purpose. *Lujan*, 504 U.S. at 560. This case presents the perfect platform for the Court to return consistency and coherence to the standing doctrine by not only reversing the decision below, but

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[14] "As this Court has explained, '[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Cuno*, 126 S. Ct. at 1861 (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)) (other citation omitted).

also by closing the indefensible loophole that opened the door for these plaintiffs to bring such a generalized complaint.

CONCLUSION

For the reasons stated, this Honorable Court should not only reverse the decision of the Seventh Circuit Court of Appeals and deny standing to the plaintiffs in this case, it should also reverse *Flast v. Cohen* and hold that because the Establishment Clause concerns a jurisdictional prohibition rather bestowing an individual right, it is not meant to be vindicated via individual suits in courts of law.

Respectfully submitted,

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