

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., :

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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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1 P R O C E E D I N G S

2 [10:06 a.m.]

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

6 General Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONER

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

11 In Flast against Cohen, this Court
12 recognized narrow circumstances in which a taxpayer
13 could satisfy the requirements of Article III in
14 challenging a congressional exercise of its spending and
15 taxing authority. This court in doing so rejected the
16 suggestion of Justice Douglas that it allow all
17 taxpayers to sue in all manner of claims, as well as the
18 slightly more modest suggestion of Justices Stewart and
19 Fortas that the Court allow taxpayer standing for all
20 establishment clause challenges.

21 This Court's subsequent cases such as Valley
22 Forge have made clear just how narrow the rule of Flast
23 is. In order for a taxpayer to satisfy the requirements
24 of Article III, the taxpayer must challenge a
25 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 clause 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 clause, 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 clause 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 over inclusive and under inclusive.

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: I had the same question as
2 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 clause problem, but it wouldn't be an
23 establishment clause 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 billing 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.

14 GENERAL CLEMENT: Yeah, 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 the church.

2 JUSTICE SCALIA: In both cases money is
3 being used for a purpose that is contrary to the
4 establishment clause, 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 clause 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 clause 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 clause.

3 JUSTICE SOUTER: And why should that make
4 any difference if the entire theory behind it is sort of
5 a 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 -- maybe this is what you're going to do,
18 establishing religion by spending the threepence.

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

21 JUSTICE SOUTER: And in this 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 contractor -- 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: With respect in the one
4 respect it is the three pence itself that is the
5 establishment violation. It is the act of handing
6 Government money into the coffers --

7 JUSTICE SOUTER: Taking the money out of the
8 pocket and using it for a particular purpose, and the
9 money comes out of the pocket in each case. The purpose
10 is the same in each case.

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

15 JUSTICE GINSBURG: Would -- you've covered
16 the case where the Government itself, the executive is
17 the actor and said that's not covered by Flast. But it
18 is covered -- what is covered is if the give the money
19 directly to the religious organization.

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

24 GENERAL CLEMENT: I think it might depend on
25 the nature of the claim actually. If the nature of the

1 claim --

2 JUSTICE GINSBURG: This claim, these
3 conferences are run now instead of within the executive
4 branch by various agencies, they are run by contractors,
5 specialists in conferences that have been engaged by the
6 executive to help people make grant applications.

7

8 GENERAL CLEMENT: But I think the better
9 view, is 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 -- 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 Going outside the Government. But is not going to the

1 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 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 clause 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 Shemp from bringing an establishment
10 clause --

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

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 is 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 clause 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 -- you 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 about where the President is
19 getting the money. I think the way that we would look
20 at it --

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

25 GENERAL CLEMENT: He --

1 JUSTICE SCALIA: As far as standing is
2 concerned, he can't be sued?

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

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

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

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

25 JUSTICE BREYER: Yes, but --

1 GENERAL CLEMENT: -- but I say no. I would
2 say no, no.

3 JUSTICE BREYER: Why not? Because I thought
4 Flast made clear that they could.

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

13 And that's precisely what --

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

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

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

22 (Laughter.)

23 JUSTICE BREYER: All over America, they
24 build churches dedicated to one religion; and Congress
25 passes a statute and says in every city, town, and

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

6 GENERAL CLEMENT: Horrible hypothetical.

7 JUSTICE BREYER: Is that what you're saying,
8 then?

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

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

13 GENERAL CLEMENT: Probably --

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

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

25 GENERAL CLEMENT: Exactly, and not just the

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

5 JUSTICE BREYER: Who? Who?

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

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

15 GENERAL CLEMENT: Well, we --

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

20 (Laughter.)

21 GENERAL CLEMENT: With respect -- with
22 respect, Justice Breyer, I think you're underestimating
23 the ingenuity of plaintiffs to think that somebody that
24 walked by going to Plymouth Rock okay thinking I was
25 going to see a nice historical exhibit, and is and to

1 see a church, wouldn't bring a -- an action. And that
2 there wouldn't be Article III standing for that
3 particular individual, not the taxpayer --

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

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

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

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

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

18 (Laughter.)

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

21 (Laughter.)

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

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

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

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

14 GENERAL CLEMENT: Well, Justice --

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

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

24 Now, you could sort of take the view that
25 the third of the cases, Kendrick, overrules the first

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

13 JUSTICE GINSBURG: Was it just --

14 GENERAL CLEMENT: That mean that it's
15 Executive Branch action?

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

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

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

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

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

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

1 difference?

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

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

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

19 JUSTICE SCALIA: It's a --

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

1 appendix --

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

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

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

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

24 JUSTICE BREYER: So what's wrong with just
25 saying that Flast stands for the proposition that when

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

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

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

25 JUSTICE BREYER: Because there is a real

1 case or controversy, because people become terribly
2 upset when they see some other religion getting the
3 money from the State for the -- for building a church,
4 for example, and that's why: There's a real
5 controversy.

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

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

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

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

1 Government largesse to third parties.

2 JUSTICE BREYER: That's what I was saying.

3 I said that Flast then encapsulates that principle drawn
4 out of the objectives of the establishment clause in a
5 rule; and the rule is what I suggested.

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

7 JUSTICE BREYER: Based on money.

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

1 inflicted on everybody. It's a generalized grievance,
2 which has never been said to satisfy Article III.

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

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

18 If I may save my time for rebuttal.

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

21 Mr. Pincus.

22 ORAL ARGUMENT OF ANDREW J. PINCUS, ESQ.

23 ON BEHALF OF RESPONDENTS

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

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

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

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

1 bring that lawsuit.

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

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

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

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

25 JUSTICE ALITO: Well, Mr. Pincus --

1 MR. PINCUS: -- that there was a tie between
2 -- I'm sorry.

3 JUSTICE ALITO: -- there have been Federal
4 spending programs declared unconstitutional under the
5 establishment clause, and can you cite any instance in
6 which such a holding ing has caused a reduction in tax
7 rates?

8 MR. PINCUS: No, and this Court has said and
9 the lower courts have said that that is not the
10 requirement, because the injury here that the taxpayer
11 complains of, as the Court said in Daimler Chrysler, is
12 not an increased tax burden. The injury is the
13 expenditure of funds in a way that violates the
14 establishment clause.

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

23 MR. PINCUS: Well, respectfully, Your Honor,
24 that's not what the Court said in Doremus in describing
25 Everson. It didn't say the mere fact that Some money

1 being spent was enough. It said that there was a
2 measurable appropriation or disbursement occasioned
3 solely by the activities complained of.

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

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

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

20 MR. PINCUS: The money has to be central to
21 the violation.

22 JUSTICE SCALIA: You mean Congress has to,
23 has to say that --

24 MR. PINCUS: No. It can be -- in this case,
25 for example, the challenge is that these conferences

1 were -- the entire conference program was a program to
2 further religion over non-religion.

3 JUSTICE SCALIA: Well, what about Bowen?

4 The money wasn't central to the violation there.

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

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

10 MR. PINCUS: But the --

11 JUSTICE SCALIA: And we allowed an
12 as-applied challenge.

13 MR. PINCUS: You did, an as-replied
14 challenge to the specific grants. But there were
15 specific grants identified and there was an as-applied
16 challenge. But the argument was --

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

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

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

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

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

19 MR. PINCUS: Well, Your Honor, I think, I
20 think, as I say, there are two tests. One is whether
21 there's an identifiable sum. We were talking about with
22 respect to grants are the easiest case. There's another
23 case as when there's a challenge to an entire program
24 that the Government has identified as a particular
25 program. And then the question, the second question

1 that the Court has identified in Flast, was is it
2 incidental or not. Is it something that is peripheral
3 --

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

10 MR. PINCUS: If the Government then singled
11 out some of that money --

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

15 MR. PINCUS: Yes. I think --

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

21 MR. PINCUS: Well, I don't think the
22 singling out -- I don't think whether it's discrete and
23 identifiable depends on the amount, Your Honor. I think
24 it depends on how --whether there is a way -- and this
25 really is part of both traceability and redressability.

1 There has to be a way to identify the expenditure that
2 the taxpayer is seeking to enjoin. And if there is some
3 separate Government grant for the building of a church,
4 yes, if it's -- if -- if there is some religious --

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

8 MR. PINCUS: Or a contract.

9 CHIEF JUSTICE ROBERTS: Yes.

10 MR. PINCUS: If the Government let the
11 contract for the building of the church, yes.

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

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

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

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

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

1 religious trip.

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

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

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

23 JUSTICE SCALIA: I see. It would only come
24 within your theory if there was one Secret Service agent
25 who was assigned to religious trips of the President?

1 Then his entire salary could be challenged. But if it's
2 just some of the salary of a Secret Service agent who
3 protects the President for all sorts of trips, that
4 can't be challenged?

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

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

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

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

21 MR. PINCUS: Well, they may --

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

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

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

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

9 CHIEF JUSTICE ROBERTS: But the Marshall in
10 both --

11 MR. PINCUS: -- if there are particular
12 people in that office for a particular, separately
13 called out program in that office that is focused on
14 faith-based initiatives only, yes.

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 clause, 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 think -- I think you didn't --
10 the answer you gave isn't consistent with your theory of
11 this 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. But that didn't make the difference in
12 Bowen. Why should it make the difference here?

13 MR. BOWEN: 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 the bagels are the 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 30 Years War.
11 We see that in other places in the world today. People
12 feel strongly. And if, in fact, they have that terribly
13 strong feeling and can't make any challenge because the
14 feelings are shared by many, then there are no cases in
15 the courts at all, and the Government can do what it
16 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're worried 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 that to hold only that
15 a Federal taxpayer has standing to assert that a
16 specific expenditure of federal funds violates the
17 establishment clause 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 -- who it can talk to. And it seems to me that's
4 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 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 that some Government
14 official, for part of his day met with three ministers,
15 and therefore we want to challenge because Government
16 shouldn't be meeting with ministers, I think it's both
17 for the reason, both because of the fact this is not an
18 argument that the expenditure on the hours of the day it
19 took to have those meetings is clearly not central to
20 anything.

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

1 expenditure of any sensible person's time.

2 MR. PINCUS: Well --

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

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

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

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

1 does not take much at the jurisdictional --

2 CHIEF JUSTICE ROBERTS: 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 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.F., 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.

23 JUSTICE ALITO: What would happen if when
24 this program was set up, nothing 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?

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

24 We don't do that in any other area of
25 constitutional law. If someone has been subjected to an

1 unreasonable search and seizure, we don't say well, you
2 know, it was just incidental. Yeah, we know you feel
3 badly about it, but this was just an incidental search
4 and seizure, and you don't have standing.

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

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

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

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

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

19 MR. PINCUS: No.

20 JUSTICE BREYER: No. I never met anyone who
21 did, but I guess there is a legitimate concern, somebody
22 might think that, I guess. And I guess that if
23 people -- there is some tendency of the people that are
24 worried, you know, there are pro ses, there are all
25 kinds of people, somebody could claim that. So you want

1 a way to keep them out.

2 MR. PINCUS: You want a way to keep them
3 out --

4 JUSTICE BREYER: It's Justice Kennedy's
5 concern.

6 MR. PINCUS: Exactly. And --

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

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

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

23 MR. PINCUS: It's incidental to what --
24 what's the focus of the claim? The focus of the claim
25 isn't that bagels were served. The focus of the claim

1 is there was prayer and that it was a religious meeting.
2 If there was -- just to think of what such a claim might
3 be. And so the expenditure that -- that's been
4 identified is the bagels, it really is pretty tangential
5 compared to the focus of what someone's complaining
6 about. And so we think that's a rational test for doing
7 what Justice Kennedy was talking about.

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

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

19 CHIEF JUSTICE ROBERTS: So if it was 2
20 dollars, you would say it's not incidental because it
21 covered the whole cost of purchasing the religious
22 symbol?

23 MR. PINCUS: Yes, but I don't think this --
24 and I think the Government agrees with this. I don't
25 think this is a test about how much. I think this is a

1 test about the relationship between the expenditure
2 that's challenged and the claim, what's alleged to be
3 unlawful this complex of Government activity.

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

8 (Laughter.)

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

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

12 JUSTICE SCALIA: Why would there be
13 standing?

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

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

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

23 CHIEF JUSTICE ROBERTS: But that shows how
24 totally manipulable your incidental test is. You just
25 have to phrase your claim so that it covers

1 whatever expenditure --

2 MR. PINCUS: But, Your Honor --

3 CHIEF JUSTICE ROBERTS: -- is offending you.

4 It's not -- incidental doesn't protect you from
5 frivolous or insignificant claims in any way.

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

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

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

17 JUSTICE SCALIA: Right. Right.

18 MR. PINCUS: Because the Government --

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

23 (Laughter.)

24 With him I could understand, he has
25 standing. But I'm just talking about one of these many

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

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

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

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

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

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

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

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

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

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

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

21 The injury is the same. The conduct
22 that's -- that's the core of the violation is the same.
23 It's an Executive Branch decision to use funds in a way
24 that's impermissible under the establishment clause, and
25 we've been drawing the lines that the Government has

1 been trying to draw just makes no sense, and to leave
2 out, to insulate from any taxpayer challenge really huge
3 swaths of conduct that is really at the very core of
4 what Madison was concerned about.

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

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

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

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

23 General Clement, you have three minutes
24 remaining.

25 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

1 ON BEHALF OF PETITIONERS

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

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

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

23 Now, I think in trying to understand the
24 Court's cases you really have to focus on this word
25 "incidental." And I think that the colloquy in the

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

18 It's important to emphasize what's at issue
19 here. It's not a general challenge to the Faith-Based
20 Office. It's not a challenge to the name of the office.
21 It is a challenge to the particular offices and the
22 assertion that the Executive Branch officials at the
23 conferences spent too much time talking about
24 faith-based groups and not enough talking about
25 community-based groups. If that isn't intrusive on the

1 Executive Branch, I don't know what is.

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

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

12 CHIEF JUSTICE ROBERTS: Thank you, general.

13 The case is submitted.

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

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