No. 10-1973

IN THE

United States Court of Appeals for the Seventh Circuit

FREEDOM FROM RELIGION FOUNDATION, INCORPORATED, ET AL.,
Plaintiffs-Appellees,

v.

BARACK OBAMA, PRESIDENT OF THE UNITED STATES, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court
For the Western District of Wisconsin
Case No. 08–CV–588
The Honorable Judge Barbara B. Crabb

BRIEF OF DR. JAMES C. DOBSON, THE FAMILY RESEARCH COUNCIL, FOCUS ON THE FAMILY ACTION, AMERICAN CIVIL RIGHTS UNION, LET FREEDOM RING, LIBERTY COUNSEL, INDIANA FAMILY INSTITUTE, CITIZENS FOR COMMUNITY VALUES, CENTER FOR ARIZONA POLICY, NEW JERSEY FAMILY POLICY COUNCIL, FLORIDA FAMILY POLICY COUNCIL, SOUTH DAKOTA FAMILY POLICY COUNCIL, MONTANA FAMILY FOUNDATION, NORTH DAKOTA FAMILY ALIANCE, FAMILY ACTION OF TENNESSEE, FAMILY FOUNDATION OF KENTUCKY, CORNERSTONE-ACTION, WISCONSIN FAMILY ACTION, MISSOURI FAMILY POLICY COUNCIL, NORTH CAROLINA FAMILY POLICY COUNCIL, KANSAS FAMILY POLICY COUNCIL, ALASKA FAMILY COUNCIL, OKLAHOMA FAMILY POLICY COUNCIL, MINNESOTA FAMILY COUNCIL & INSTITUTE, FAMILY POLICY INSTIUTE OF WASHINGTON, IOWA FAMILY POLICY CENTER, MASSACHUSETTS FAMILY INSTITUTE, DELAWARE FAMILY POLICY COUNCIL, LOUISIANA FAMILY FORUM, ASSOCIATION OF MARYLAND FAMILIES, THE FAMILY FOUNDATION, PENNSYLVANIA FAMILY INSTITUTE, FAMILY FIRST, INDEPENDENCE LAW CENTER, AND FAMILY POLICY COUNCIL OF WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL AND VACATUR

KELLY J. SHACKELFORD
JEFFREY C. MATEER
HIRAM S. SASSER, III
JUSTIN E. BUTTERFIELD
LIBERTY INSTITUTE
2001 W. Plano Parkway, Suite 1600
Plano, Texas 75075
(972) 941-4444

KENNETH A. KLUKOWSKI
Counsel of Record
FAMILY RESEARCH COUNCIL
801 G Street N.W.
Washington, D.C. 20001
(202) 393-2100
kklukowski@frc.org

Attorneys for Amici Curiae

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

1. The full name of every party that the attorneys represent in this case:

   James C. Dobson, the Family Research Council, Focus on the Family Action, the American Civil Rights Union, Let Freedom Ring, Liberty Counsel, Indiana Family Institute, Citizens for Community Values, Center for Arizona Policy, New Jersey Family Policy Council, Florida Family Policy Council, South Dakota Family Policy Council, Montana Family Foundation, North Dakota Family Alliance, Family Action of Tennessee, Family Foundation of Kentucky, Cornerstone-Action, Wisconsin Family Action, Missouri Family Policy Council, North Carolina Family Policy Council, Kansas Family Policy Council, Alaska Family Council, Oklahoma Family Policy Council, Minnesota Family Council & Policy Center, Family Policy Institute of Washington, Iowa Family Policy Center, Massachusetts Family Institute, Delaware Family Policy Council, Louisiana Family Forum, Association of Maryland Families, The Family Foundation, Pennsylvania Family Institute, Independence Law Center, Family First, Family Policy Council of West Virginia

2. The names of all law firms whose partners or associates have appeared for the party in this case or are expected to appear:

   Kenneth A. Klukowski is a sole practitioner.

   Kelly J. Shackelford, Jeffrey C. Mateer, Hiram S. Sasser III, and Justin E. Butterfield are attorneys with Liberty Institute, a public-interest law firm in Texas.

3. For all *amici curiae* that are corporations:

   i. Identify all parent corporations for all *amicus* parties:

      None.

   ii. List any publicly held company that owns 10% or more of any *amicus* party's stock:

      None.

s/ Kenneth A. Klukowski
Kenneth A. Klukowski

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

James C. Dobson, Ph.D., a psychologist and a marriage, family, and child counselor, is founder and chairman emeritus of Focus on the Family. Focus on the Family is an international Christian ministry dedicated to strengthening and preserving the family through the application of biblical principles. Dr. Dobson is also the author of numerous best-selling books, and has been active in governmental affairs and has advised three U.S. presidents on family matters.

The Family Research Council ("FRC") is a 501(c)(3) nonprofit organization that exists to develop and analyze governmental policies that affect the family and religious liberty. Under its president, Tony Perkins, FRC is committed to advance and restore religious liberty as understood since the founding of the Republic and codified in the First Amendment's religion clauses.

Focus on the Family Action is a 501(c)(4) nonprofit cultural action organization that provides a platform for informing, inspiring, and rallying those who care deeply about the family and the moral, cultural, and political issues affecting the United States.

The American Civil Rights Union ("ACRU") is a 501(c)(3) nonprofit legal policy organization dedicated to defending all constitutional rights, not just those conforming to a particular ideology. Founded by President Ronald Reagan's longtime policy advisor Robert Carleson and with leaders such as Reagan's former Attorney General

[1] Amici affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than Amici and their counsel made such a monetary contribution. Counsel of record for both petitioners and respondents were notified of Amici's intent to file this brief six days before the brief's due date, and their letters granting such consent have been filed with the Clerk's office.

Edwin Meese III serving on its Policy Board, ACRU seeks to defend traditional public expressions of faith as consistent with the Constitution.

Let Freedom Ring ("LFR") is a 501(c)(4) nonprofit organization formed for the purpose of mobilizing American citizens to engage in protecting fundamental American values. Led by its president, Colin Hanna, LFR promotes constitutional government and traditional values, both of which are advanced by Congress' law instructing the president to annually proclaim a National Day of Prayer.

Liberty Counsel is a 501(c)(3) nonprofit litigation, education, and policy organization dedicated to advancing religious freedom, the sanctity of human life, and the family. Under its chairman, Mathew Staver, Liberty Counsel seeks to restore public recognition of expressions of faith, such as the National Day of Prayer.

Remaining *amici* are twenty-nine state-level organizations formed to invest in the future of America's families. These Family Policy Councils conduct policy analysis, promote responsible and informed citizenship, and advocate for family ideals.

INTRODUCTION

This Court lacks jurisdiction to hear the instant case, in which Appellees allege that the National Day of Prayer violates the Establishment Clause. Appellees in this case lack Article III standing under this Court's recent precedents, holdings that faithfully apply the most recent Supreme Court decision governing the narrow Establishment Clause exception to the bar on taxpayer standing.

Should this Court nonetheless find standing, the National Day of Prayer is constitutional under the Supreme Court's governing framework derived from *Marsh v.*

Chambers—not *Lemon v. Kurtzman*, as Appellees argue, nor *Lynch v. Donnelly*, as Appellants argue.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction to consider the merits of the instant case. A straightforward application of this Court's recent precedents governing the Establishment Clause exception to the bar on taxpayer standing, an exception arising from *Flast v. Cohen*, 392 U.S. 83 (1968), forecloses the possibility that Appellees have Article III standing in this case.

The Supreme Court has repeatedly emphasized that the *Flast* exception to the bar on taxpayer standing is exceedingly narrow. The Court recently emphasized just how narrow this exception is in *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007). In *Hein*, the Court clarified that *Flast* does not extend to incidental executive-branch expenditures that support religion, and instead only applies where a specific appropriations statute enacted by Congress explicitly funds the allegedly-unconstitutional government action involving religion.

Subsequent to *Hein*, this Court has had three opportunities to examine and apply the Establishment Clause exception to the rule against taxpayer standing. First in *Hinrichs v. Speaker of the House of Reps.*, 506 F.3d 584 (7th Cir. 2007), this Court held that after *Hein* the Establishment Clause exception is only triggered by a congressional appropriations statute, and *not* by any other type of statute, that explicitly directs taxpayer money to be spent in support of religion. It is Congress' act of appropriating funds, not the executive's action of spending those funds, that consti-

tutes the injury-in-fact required by Article III. This Court reaffirmed that holding and emphasized the narrow contours of *Flast* in *Freedom From Religion Found., Inc. v. Nicholson*, 536 F.3d 730 (7th Cir. 2008). This Court then restated the rule in *Laskowski v. Spellings*, 546 F.3d 822 (7th Cir. 2008), holding that after *Hein* "the reach of *Flast* is now strictly confined to the *result* in *Flast*." *Id.* at 827. As a result, it is the law in this Circuit "that taxpayers continue to have standing to sue for injunctive relief against specific congressional appropriations alleged to violate the Establishment Clause, *but that is all*." *Id.* (emphasis added).

In the instant case, Appellees cite no congressional appropriations statute, nor do they carry the burden of explaining how their objection to the National Day of Prayer satisfies the requirements for standing under *Hinrichs*, *Nicholson*, and *Laskowski*. Moreover, they cite no alleged injury other than an Establishment Clause violation. Therefore, Appellees lack Article III standing to bring the instant case.

Alternatively, should this Court nonetheless find standing, the history and tradition of the National Day of Prayer demonstrate its constitutionality under the Establishment Clause and the Supreme Court's governing framework as set forth in *Marsh v. Chambers*, 463 U.S. 783 (1983). The National Day of Prayer is consistent with other expressions or accommodations of faith that the Supreme Court has upheld over the years and is consistent with the practices prevalent at the Framing of the Constitution.

The National Day of Prayer is a benign acknowledgement of the religious nature of the American people. Moreover, participation in this acknowledgement is entirely voluntary, and does not entail any person's being subjected to unwelcome assertions of religious faith.

Congress amended the National Day of Prayer statute in 1988 to specify the calendar day upon which the observance is proclaimed. This amendment, too, was an accommodation of religion consistent with Supreme Court precedent, as well as the precedent of this Court.

Invalidating the National Day of Prayer would be an act of hostility to religion, not the accommodating neutrality required by the Establishment Clause. The National Day of Prayer is completely consistent with the First Amendment.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO DECIDE THE MERITS OF THE INSTANT CASE BECAUSE THE PLAINTIFFS LACK ARTICLE III STANDING.

The instant case involves a remarkably straightforward application of this Court's recent precedents governing taxpayer standing for an alleged Establishment Clause violation. To satisfy Article III, a plaintiff must demonstrate an actual or imminent injury that is fairly traceable to the defendant's challenged conduct and can likely be redressed by a court's granting the requested relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The law in this Circuit regarding the scope and contours of the Establishment Clause exception to the general bar on taxpayer standing clearly forecloses the possibility that Appellees Freedom From Religion Foundation and co-plaintiffs ("FFRF") have standing in this case.

A. Supreme Court precedent emphasizes that the Establishment Clause permits taxpayer standing only in very narrow circumstances.

In almost all cases, a taxpayer's objection to the government's spending of tax dollars is an insufficiently generalized grievance to satisfy the Article III case-or-controversy requirement. *See Frothingham v. Mellon*, 262 U.S. 447, 487–88 (1923).

The sole exception to this general prohibition is for certain government actions involving the Establishment Clause. The Supreme Court recognized this exception in *Flast v. Cohen*, 392 U.S. 83 (1968), declaring that the Establishment Clause is a limitation on Congress' spending power, *id.* at 104, and thus a citizen may sometimes have standing as a taxpayer to bring Establishment Clause suits, *id.* at 105–06. The Court arrived at this conclusion by declaring that a taxpayer could have standing by establishing a "logical nexus" between taxpayer status and the claim being presented. *Id.* at 102. The Court reasoned that if the Establishment Clause specifically entails a limitation on federal spending, then there are circumstances where a taxpayer might have standing as such to challenge religious actions involving taxpayer funds. *Id.* at 104–06.

Since its inception, the Supreme Court has consistently emphasized that the *Flast* exception to *Frothingham* is narrow, tightly circumscribing its limits. "No 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." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (citations omitted). As an essential element of the Article III case-or-controversy requirement, standing doctrine serves to "limit the federal judicial power 'to those disputes which confine

federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.'" *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 472 (1982) (quoting *Flast*, 392 U.S. at 97). Therefore, the Court clarified that *Flast* does not vitiate the bar on taxpayer standing to the point of authorizing a broad array of Establishment Clause challenges. *Id.* at 488–90. To the contrary, the Supreme Court emphasizes that *Flast* creates only a "*narrow* exception" to the bar on taxpayer standing. *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988) (emphasis added).

The Supreme Court recently emphasized in concrete terms just how narrow the *Flast* exception is in *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007), which was brought by FFRF, the same lead plaintiff in the instant case. Finding that *"Flast* focused on congressional action," the Supreme Court "decline[d] . . . to extend [*Flast*'s] holding to encompass discretionary Executive Branch expenditures." *Hein,* 551 U.S. at 609 (plurality opinion of Alito, J.)[2] *Hein* was a challenge to the validity of a White House office involved with faith-based activities, and the Court held that the plaintiffs lacked standing "because the expenditures at issue here were not made pursuant to any Act of Congress." *Id.* at 605. The Court found it insufficient for standing purposes that the challenged funding came from "general appropriations to the Executive Branch to fund its day-to-day activities" and thus could not be traced to a specific line in federal spending legislation. *Id.*

[2] Justice Alito's plurality opinion in *Hein* is controlling. *Freedom From Religion Found., Inc. v. Nicholson*, 536 F.3d 730, 738 n.11 (7th Cir. 2008) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)).

The *Hein* Court provided a lengthy discussion of the Establishment Clause exception to the bar on taxpayer standing. Although the Justices who joined the controlling opinion in *Hein* found it unnecessary to decide whether *Flast* should be overruled to eliminate altogether the Establishment Clause exception to *Frothingham*, those Justices did warn that *Flast* should not be "expanded to the limits of its logic." *Id.* at 615. Instead, the Court regarded it as "significant that, in the four decades since its creation, the *Flast* exception has largely been confined to its facts." *Id.* at 609. Accordingly, the Court stressed the narrowness of taxpayer standing for cases implicating *Flast*.

B. This Court has repeatedly recognized that taxpayer standing is very narrow under the Establishment Clause.

This Court first considered the import of *Hein* in *Hinrichs v. Speaker of the House of Reps.*, 506 F.3d 584 (7th Cir. 2007), challenging the practice of having daily prayers in the Indiana House of Representatives.[3] In *Hinrichs*, this Court found controlling the statement "in *Hein* that only 'expenditures made pursuant to an express congressional mandate and a specific congressional appropriation' [satisfy *Flast*]; the plurality rejected the plaintiffs' claim that any 'expenditure of government funds in violation of the Establishment Clause' would meet this requirement." *Id.* at 598 (quoting *Hein*, 551 U.S. at 608 (plurality opinion of Alito, J.)). "In the context of an alleged Establishment Clause violation, the nexus requirement is not met

[3] It is of no moment that *Hinrichs* involved a challenge to the actions of a state, rather than federal action, because the requirements for taxpayer standing involving challenges to alleged federal violations of the Establishment Clause are identical to those of state and local governments. *Hinrichs*, 506 F.3d at 598 (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006)).

absent 'the very extract[ion] and spend[ing] of tax money in aid of religion.'" *Id.* (quoting *Cuno*, 547 U.S. at 348) (internal quotation marks omitted) (brackets in the original).

This Court found the connection between general government funding and the alleged violation too attenuated to confer standing under *Hein*. *Id.* at 598–99. At a minimum, the challenge must be to an appropriations statute, and that statute must "expressly authorize, direct, or [at least] mention the expenditures." *Id.* at 599. This Court was careful to specify that *Hein* requires "that the 'use' of funds for the allegedly unconstitutional program, without more, is not sufficient to meet the nexus required by *Flast*. Instead, it is the appropriation of those funds for the allegedly unconstitutional purpose that provides the link between taxpayer and expenditure necessary to support standing." *Id.* at 599–600 (footnote omitted). In other words, *Hein* makes clear that it is the *appropriating* of funds for the express purpose of funding religion—rather than the *spending* of funds—that confers standing under *Flast*. Therefore, a plaintiff must be able to cite an appropriations statute, rather than an administrative action, to have standing.

The following year, in *Freedom From Religion Found., Inc. v. Nicholson*, 536 F.3d 730 (7th Cir. 2008), this Court considered whether the U.S. Department of Veterans Affairs' offering a chaplain service violates the Establishment Clause. This chaplaincy expressly includes "pastoral service," *id.* at 732, which as a matter of judicial notice includes praying.[4]

[4] Finding that pastoral service includes prayer is further supported by this Court's notation that such chaplains are charged with "perform[ing] all the duties incident to [their] profes-

In denying FFRF standing in *Nicholson*, this Court reasoned that Congress did not "appropriate funds expressly to be used in connection with the Chaplain Service. . . ." *Id.* Consistent with *Hinrichs*, this Court characterized the Supreme Court's action in *Hein* as refusing to extend *Flast* beyond specific congressional appropriations to include expenditures by the executive. *Id.* at 739. In so doing, this Court correctly characterized *Hinrichs* as holding that *Flast* only applies where (1) there is a logical link between taxpayer status and both (a) the type of legislation attacked and (b) the precise nature of the Establishment Clause infringement, and (2) the nexus between taxpayer status and the legislation must be an *express* congressional mandate. *Id.* at 740 (citations omitted).

Nicholson also found decisive that in *Valley Forge* the Supreme Court rejected standing where an Act of Congress authorizes the challenged executive action, because even *Flast* "limited taxpayer standing to challenges directed only at exercises of congressional power." *Id.* at 745 (quoting *Valley Forge*, 454 U.S. at 479 (quoting in turn *Flast*, 392 U.S. at 102)) (internal quotation marks and brackets omitted). Otherwise stated, if an Act of Congress authorizes an executive action, and that action entails spending by the executive, but Congress itself does not appropriate funds expressly for that action, then the executive branch's spending general operating funds in the carrying out of its action does not satisfy *Flast* under *Hein*. Only a congressional appropriations statute that explicitly appropriates funds to support religion supplies the requisite nexus.

---

sion and position, administering to the spiritual wants and comforts of [soldiers]." *Nicholson*, 536 F.3d at 732, which presumably would include praying.

This Court again explained and restated the *Flast* exception in *Laskowski v. Spellings*, 546 F.3d 822 (7th Cir. 2008), which involved the use of federal education funds for a religious-oriented program at the University of Notre Dame. *Laskowski* reiterated the rule "that a plaintiff's payment of taxes is generally insufficient to establish standing to challenge the constitutionality of a government program or activity." *Id.* at 825 (citing, *inter alia*, *Hein*, 127 S. Ct. at 2562; *Cuno*, 547 U.S. at 342–44). This Court noted that *Laskowski* differed from *Hein* only in that *Laskowski* challenged a specific congressional spending authorization (as required by *Hinrichs* and *Nicholson*), whereas *Hein* challenged "an Executive Branch program supported by general appropriations." *Id.* at 824. However, even where congressional appropriations statutes are involved, "*Flast* did not . . . create an exception to the taxpayer-standing bar for *all* Establishment Clause cases. Only when a taxpayer challenges a specific congressional appropriation—not a government program or activity funded from general appropriations—will the link to Article 1, Section 8 taxing and spending power be sufficient to support standing under *Flast*." *Id.* at 826 (citations omitted).

This Court went on to hold that the Establishment Clause exception to the bar on taxpayer standing reaches no further than the results in *Flast*. *Id.* at 827 (quoting *Hein*, 551 U.S. at 610 (internal citation omitted)). After *Hein*, "the reach of *Flast* is now strictly confined to the *result* in *Flast*. And the result in *Flast* is that the taxpayers had standing to seek an injunction to halt a specific congressional appropriation alleged to violate the Establishment Clause." *Id.*

In conclusion, it is the law in this Circuit "that taxpayers continue to have standing to sue for injunctive relief against specific congressional appropriations alleged to violate the Establishment Clause, but that is all." *Id.*

C. Under this Court's precedents, Appellees lack Article III standing.

These precedents are not merely on point; they are directly controlling of the instant case. Yet, surprisingly, not only did the district court not distinguish *Hinrichs*, *Nicholson*, and *Laskowski*, the district court completely ignored them. Not one of these three recent Seventh Circuit precedents was mentioned even once in the district court's opinion finding that Appellees have standing. Although the district court did mention *Hein*, *Freedom From Religion Found., Inc. v. Obama*, 691 F. Supp. 2d 890, 898, 906, 914 (W.D. Wis. 2010), it utterly failed to consider any of the aforementioned cases in which this Court authoritatively explicated *Hein*.[5]

Standing requires that a plaintiff "allege[] such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction." *Horne v. Flores*, 129 S. Ct. 2579, 2592 (2009). It is well settled that "taxpayers have no direct, personal interest in the money in the Treasury simply by virtue of having paid taxes and therefore suffer no redressable injury when the federal government puts money to unconstitutional use." *Laskowski*, 546 F.3d at 825 (citing *Hein*, 551 U.S. at

[5] The fact that this Court's decisional law governing standing doctrine after *Hein* was inadequately argued and examined in the court below does not forfeit the standing issue since standing is a matter of subject-matter jurisdiction that "can never be forfeited or waived," *United States v. Cotton*, 535 U.S. 625, 630 (2002). Additionally, this Court has an independent duty to examine standing even without the parties raising the issue, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999).

593). FFRF must demonstrate the *Flast* nexus between themselves as taxpayers and the National Day of Prayer, which they cannot do.

As previously explained, this Court has repeatedly acknowledged the Supreme Court's holdings that there is no taxpayer standing absent an express congressional appropriation. Three years ago, this Court dismissed a case for lack of standing, finding conclusive to the standing question that "[a]lthough there is some minimal amount of funds expended in the administration of the program, the plaintiffs have not pointed to any specific appropriation of the funds by the legislature to implement the program." *Hinrichs*, 506 F.3d at 598. The challenged statute here, 36 U.S.C. § 119 (2006) (providing that the president shall proclaim a National Day of Prayer on a specified day each year), is not an exercise of Congress' taxing and spending power. Here, as in *Hinrichs*, Appellees "have not shown that the legislature has extracted from them tax dollars for the establishment and implementation of a program that violates the Establishment Clause." *Hinrichs*, 506 F.3d at 599. Therefore, just as the lack of singling out a specific appropriations statute was fatal to standing in *Hinrichs*, so too is the lack of singling out a specific appropriations statute fatal to Appellees' standing in the instant case.

The district court attempted to find standing by examining at length a variety of precedents of this Court and other courts, wherein there was either a holding that the plaintiff had standing or an implicit understanding that the court found standing *sub silentio* because the court proceeded to consider the merits of the case. *Obama,* 691 F. Supp. 2d at *passim*. But those cases are of no moment, because they

all preceded *Hein*. *See id.* (dating all examined cases between the years of 1962 and 2005). Justice Alito's controlling opinion in *Hein* is the modern statement of the contours of the *Flast* exception to the bar on taxpayer standing, as this Court has recently reaffirmed. *Laskowski*, 546 F.3d at 827. In doing so, this Court also emphasized that "the Supreme Court has now made it abundantly clear that *Flast* is not to be expanded *at all*." *Id.* at 826. Therefore, to the extent that the earlier cases relied upon by the district court are inconsistent with *Hein*, they are no longer good law.

Appellees do not assert any basis for this Court's jurisdiction apart from the Establishment Clause exception in *Flast*. The district court noted that Appellees did not even have "physical or visual contact with a religious display." *Obama,* 691 F. Supp. 2d at 894. Yet that fact alone was sufficient for the Fifth Circuit to dismiss for lack of standing a post-*Hein* case involving public prayer. *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 497–98 (5th Cir. 2007) (*en banc*). Likewise, the District of Columbia Circuit recently dismissed for lack of standing a challenge to future prayers at the presidential Inauguration. *See Newdow v. Roberts*, 603 F.3d 1002 (D.C. Cir. 2010). Thus, several of this Court's sister circuits share this Court's understanding of the *Flast* exception's narrowness after *Hein*.

The district court further stated that "[a]lthough plaintiffs do not have to 'pass by' the National Day of Prayer, they are confronted with the government's message and affected by it just as strongly as someone who views a religious monument or sits through a 'moment of silence,' if not more so. To find standing in those cases

while denying it in this one would be an exercise in formalism." *Obama,* 691 F. Supp. 2d at 894–95.

That reasoning is incorrect in two respects. First, a bare awareness—mere speculative cogitation—of the unadorned fact that the day in question is designated as a National Day of Prayer cannot affect someone as strongly as viewing a religious display. For the mental awareness of any religious significance is similar in both, if not stronger during an actual activity, yet the latter—viewing a religious display—carries additional sensory and experiential elements that are completely lacking in the National Day of Prayer designation.

Second, although denying standing in the instant case is premised on far more than formalism, even assuming *arguendo* that it would be pure formalism does not derogate in the slightest the import of this constitutional imperative. To the contrary, as Justice Scalia explains:

> The rule of law is *about* form. If, for example, a citizen performs an act—let us say the sale of a certain technology to a foreign country—which is prohibited by a widely publicized bill proposed by the administration and passed by both houses of Congress, *but not yet signed by the President*, that sale is lawful. It is of no consequence that everyone knows both houses of Congress and the President wish to prevent that sale. Before the wish becomes a binding law, it must be embodied in a bill that passes both houses and is signed by the President. Is that not formalism? A murderer has been caught with blood on his hands, bending over the body of his victim; a neighbor with a video camera has filmed the crime; and the murderer has confessed in writing and on videotape. We nonetheless insist that before the state can punish this miscreant, it must conduct a full-dress criminal trial that results in a verdict of guilty. Is that not formalism? Long live formalism. It is what makes a government a government of laws and not of men.

Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 25 (1997). Conflicts between jurists notwithstanding, however, the prerequisite for Establish-

ment Clause standing is citing a federal appropriations act that explicitly funds the allegedly-invalid action through a line-item designation. Disquisitions on formalism are irrelevant.

Appellees cannot establish standing in this Circuit absent such a statutory citation. The party invoking federal jurisdiction must carry the burden of establishing Article III standing. *Cuno*, 547 U.S. at 341–42. No federal court can reach the merits of a case unless the plaintiffs first establish that they have standing. *Id.*

Appellees have not carried that burden, as they have not even claimed—to say nothing of established—that Congress appropriated funds expressly for the purpose of funding a National Day of Prayer, as required under *Hinrichs*, *Nicholson*, and *Laskowski*. With FFRF lacking standing, this Court's power is restricted to "announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)).

II. THE HISTORY AND CONTEXT OF THE NATIONAL DAY OF PRAYER STATUTE AND PROCLAMATIONS DEMONSTRATE THAT THEY DO NOT VIOLATE THE ESTABLISHMENT CLAUSE UNDER THE TEST IN *MARSH V. CHAMBERS*.

In 1952, Congress passed a statute calling for the president to issue a proclamation designating one day each year as a day in which interested persons across the United States are invited to join together in prayer for their nation. 36 U.S.C. § 119. In doing so, Congress looked to the history of the United States and memorialized the virtually unbroken tradition, custom, and practice of presidents from Washington to Truman of designating a day of prayer. Congressional action in this regard is

not without precedent, as "both Houses of Congress ha[d], by their joint committee, requested [President Washington] 'to recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God. . . .'" H. R. Jour., 1st Cong., 1st Sess., 123 (1826 ed.); S. Jour., 1st Cong., 1st Sess., 88 (1820 ed.).

After over fifty years, this Act of Congress calling for a National Day of Prayer, consistent with history, remains in accord with the Constitution. Holding otherwise would destroy that long-cherished accommodation of religious beliefs and institute a climate of "callous indifference" that is itself anathema to the Establishment Clause. As the Supreme Court explained:

> It has never been thought either possible or desirable to enforce a regime of total separation. . . . Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the "callous indifference" we have said was never intended by the Establishment Clause. Indeed, we have observed, such hostility would bring us into "war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion."

Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (internal citations omitted). Such hostility to religion is irreconcilable with a historical understanding of the Establishment Clause. *See* Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 Geo. J.L. & Pub. Pol'y 219, 225–26 (2008).

A. The appropriate test to adjudicate the challenge to the National Day of Prayer statute is found in *Marsh v. Chambers.*

The Supreme Court has declined to establish one particular test as *the* test for Establishment Clause violations. *See, e.g., County of Allegheny v. ACLU,* 492 U.S. 573, 655–56 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part); *Lynch,* 465 U.S. at 679 ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area"). The Court in *Marsh v. Chambers,* however, held that government acknowledgement of religion and its appeal to divine guidance and solemnity of occasion, enjoying a long tradition, custom, and practice, is within the bounds of appropriate constitutional decorum.[6] *Marsh v. Chambers,* 463 U.S. 783, 792 (1983) ("To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely help among the people of this country"). *See also Lynch*:

> [L]egislative prayers of the type approved in *Marsh v. Chambers,* government declaration of Thanksgiving as a public holiday, printing of "In God We Trust" on coins, and opening court sessions with "God save the United States and this honorable court" [are] government acknowledgments of religion [that] serve, in the only ways reasonably possible in our culture, the legitimate secular purpose of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those prac-

[6] Some courts have limited the application of *Marsh* to nonsectarian prayers, *see, e.g.*, Klukowski, *supra*, at 239–40, 244–48 (examining cases). However, doing so ignores that the Establishment Clause applies to "religion over nonreligion" as much as to one sect over another. *Allegheny,* 492 U.S. at 665 n.4 (Kennedy, J., concurring in judgment in part and dissenting in part). It also ignores that there are no judicially-manageable standards for such application. Klukowski, *supra*, at 252–54.

> tices are not understood as conveying government approval of particular religious beliefs.

465 U.S. at 693 (O'Connor, J., concurring). Under *Marsh,* the history and tradition of Congress' invocation of divine guidance and acknowledgment of the benevolence of religious sentiment are important factors in Establishment Clause analysis. *Marsh,* 463 U.S. at 791 ("This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged."). The Court concluded that legislative prayer involved no more potential for religious establishment than providing school transportation, higher-education grants, or religious tax exemptions. *Id.* (citing *Everson v. Bd. of Educ.,* 330 U.S. 1 (1947), *Tilton v. Richardson,* 403 U.S. 672 (1971), *Walz v. Tax Comm'n,* 397 U.S. 664 (1970), respectively). Because congressional calls for the president to declare a day of prayer are rooted in the Framing, *Marsh* is the appropriate standard to apply when determining such acts' constitutionality.

B. History and tradition favor the National Day of Prayer statute under *Marsh v. Chambers.*

Congress' calling for a National Day of Prayer is but one of many governmental actions throughout history that have called for willing Americans to seek divine guidance and favor.[7] In particular, the president has regularly declared days of prayer and thanksgiving. In *Lynch,* 465 U.S. at 675–76, the Supreme Court stated:

---

[7] Beginning with the charter of the United States, the Declaration of Independence, the "Representatives of the united States of America . . . appeal[ed] to the Supreme Judge of the world for the rectitude of our intentions." The Declaration of Independence para. 6 (U.S. 1776). Additionally, the fourth verse of our national anthem, "The Star Spangled Banner,"

> Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders. . . . Executive Orders and other official announcements of Presidents and of the Congress have proclaimed both Christmas and Thanksgiving National Holidays in religious terms. And, by Acts of Congress, it has long been the practice that federal employees are released from duties on these National Holidays, while being paid from the same public revenues that provide the compensation of the Chaplains of the Senate and the House and the military services. Thus, it is clear that Government has long recognized—indeed it has subsidized—holidays with religious significance.

It is true that longstanding tradition alone cannot cure a violation of the Constitution. The Supreme Court, however, has emphasized that the *meaning* of the Establishment Clause is determined by reference to historical practices and understandings. *Marsh,* 463 U.S. at 790 ("It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended to forbid what they had just declared acceptable."). The Court thus was not creating an exception to justify a violation of the Establishment Clause but was instead saying that the prayer at issue in *Marsh* never was a violation of the Establishment Clause. *Allegheny,* 492 U.S. at 670 (Kennedy, J., concurring in judgment in part and dissenting in part). The actions of the First Congress are looked to for guidance in understanding the *meaning* of the Constitution, particularly as to the proper interpretation of the Establishment Clause. As the Supreme Court stated in *Lynch v. Donnelly,*

---

exhorts us to praise God: "Blest with vict'ry and peace, may the heav'n-rescued land / Praise the Pow'r that hath made and preserved us a nation. / Then conquer we must, for our cause it is just, / And this be our motto: 'In God is our trust.' / And the Star-Spangled Banner in triumph shall wave / O'er the land of the free and the home of the brave!"

> The Court's interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees. . . . The interpretation of the Establishment Clause by Congress in 1789 takes on special significance in light of the Court's emphasis that the First Congress "was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument."

Lynch, 465 U.S. at 673–74 (internal citations omitted).

This analysis is particularly relevant in the instant case as the First Congress called for the president to declare a national day of thanksgiving and prayer *the same day as* it finalized the language of the First Amendment itself. *Marsh,* 463 U.S. at 788 & n.9 ("On September 25, 1789, three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights . . . Interestingly, September 25, 1789, was also the day that the House resolved to request the President to set aside a Thanksgiving Day[8] to acknowledge 'the many signal favors of Almighty God.'") (internal cites omitted). There was no conflict between the two actions in the minds of the Framers. To determine otherwise would be to indict the Founders as "unable to understand their handiwork (or, worse, hypocrites about it)" in the extreme. *Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Twp.*, 980 F.2d 437, 445 (7th Cir. 1992) (rejecting an Establishment Clause challenge to the Pledge of Allegiance).

C. The National Day of Prayer statute invokes benign religious acknowledgment and calls for voluntary participation.

In *Lee v. Weisman,* the Supreme Court held that a school may not have prayer at its graduation because the primary audience for the prayer is composed of children;

[8] The resolution actually called for the President to set aside "a day of public thanksgiving and prayer." H. R. Jour., *supra,* at 123; S. Jour., *supra,* at 88.

and they are effectively a captive audience, with no practical opportunity to avoid the prayer. *Lee v. Weisman,* 505 U.S. 577 (1992). Unlike the school prayer at issue in *Lee,* the National Day of Prayer lacks the pressure to participate that a prayer at a school graduation could place upon a student. *See id.* at 590 ("[S]chool officials['] . . . effort to monitor prayer will be perceived by the students as inducing a participation [the students] might otherwise reject."). A person, going throughout his day on the National Day of Prayer, could easily see no sign that there had been any call to prayer. Even were such signs to be found, many people do not participate in National Day of Prayer activities. Unlike in *Lee,* the options are *not* to participate or to protest. *See id.* at 593 ("Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. . . . [W]e think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position."). Rather, the National Day of Prayer may safely be ignored by those who so desire without any ramifications to that person. *See Allegheny*:

> There is no suggestion here that the government's power to coerce has been used to further the interests of Christianity or Judaism in any way. No one was compelled to observe or participate in any religious ceremony or activity. Neither the city nor the county contributed significant amounts of tax money to serve the cause of one religious faith. . . Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.

492 U.S. at 664 (Kennedy, J., concurring in judgment in part and dissenting in part).

Finally, the actual audience for the National Day of Prayer, those engaging in its activities, is composed of consenting adults. As the Supreme Court said in *Marsh*:

> The Establishment Clause does not always bar a state from regulating conduct simply because it "harmonizes with religious canons." Here, the individual claiming injury by the practice is an adult, presumably not readily susceptible to "religious indoctrination" . . . or peer pressure. . . .

463 U.S. at 792 (internal citations omitted).

III. THE AMENDMENT OF THE NATIONAL DAY OF PRAYER STATUTE AS AN ACCOMMODATION TO RELIGIOUS ORGANIZATIONS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The National Day of Prayer statute was amended in 1988 to "bring more certainty to the scheduling of events related to the National Day of Prayer and permit more effective long-range planning." *Obama,* 2010 U.S. Dist. LEXIS 37570, at *45 (W.D. Wis. Apr. 15, 2010). Specifically, the National Day of Prayer was fixed on the first Thursday in May. 36 U.S.C. § 119. The district court held that because "the 1988 amendment does not serve any purpose for the government or the country as a whole, but simply facilitates the religious activities of particular religious groups," it runs afoul of the Establishment Clause. *Id.* The Supreme Court, however, rejects the concept that scheduling events to benefit religious organizations is a violation of the Establishment Clause, stating:

> When the state encourages religious instruction or co-operates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. . . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

Van Orden v. Perry, 545 U.S. 677, 684 (2005) (alteration in original) (plurality opinion) (quoting *Zorach v. Clauson,* 343 U.S. 306, 313–14 (1952)). *See also Allegheny*:

> [T]he Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious. A categorical approach would install federal courts as jealous guardians of an absolute "wall of separation," sending a clear message of disapproval. In this century . . . it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality.

492 U.S. at 657–58 (Kennedy, J., concurring in judgment in part and dissenting in part). To invalidate the 1988 amendment to the National Day of Prayer statute merely because it fixes a schedule to aid those religious organizations wishing to participate in National Day of Prayer activities is to establish not neutrality towards religion, but active hostility.

CONCLUSION

For the foregoing reasons, the judgment of the District Court for the Western District of Wisconsin should be reversed in part and vacated in part, and the case be remanded with instructions to dismiss for want of jurisdiction.

Respectfully submitted,

s/ Kenneth A. Klukowski
Kenneth A. Klukowski
Counsel of Record
Family Research Council
801 G Street N.W.
Washington D.C., 20001
Telephone: (202) 393-2100
Fax: (202) 393-2134

Kelly J. Shackelford
Jeffrey C. Mateer
Hiram S. Sasser, III
Justin E. Butterfield
Liberty Institute
2001 W. Plano Parkway, Suite 1600
Plano, Texas 75075
Telephone: (972) 941-4444
Fax: (972) 423-6162

Attorneys for Amici Curiae

July 7, 2010

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. RULE 32(a)

The undersigned counsel of record for *amici curiae* affirms and declares as follows:

This brief complies with the type-volume limitation of Fed. R. App. P. Rule 32(a)(7) for a brief utilizing proportionally-spaced font, because the length of this brief is 6,993 words, excluding the parts of the brief exempted by Fed. R. App. P. Rule 32(a)(7)(B)(iii).

This brief also complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(b), and the type-style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in proportionally-spaced typeface using Microsoft Word in 12-point Century Schoolbook font, with footnotes in 11-point Century Schoolbook font.

Executed this 7th day of July, 2010.

s/ Kenneth A. Klukowski
Kenneth A. Klukowski

APPENDIX

In addition to Dr. James C. Dobson, the Family Research Council, Focus on the Family Action, the American Civil Rights Union, Let Freedom Ring, and Liberty Counsel, there are twenty-nine state-level family policy councils joining this brief as *amici curiae*. These family policy councils, along with their states of operation if not given in their names, are as follows:

Indiana Family Institute
Citizens for Community Values (Ohio)
Center for Arizona Policy
New Jersey Family Policy Council
Florida Family Policy Council
South Dakota Family Policy Council
Montana Family Foundation
North Dakota Family Alliance
Family Action of Tennessee
Family Foundation of Kentucky
Cornerstone-Action (New Hampshire)
Wisconsin Family Action
Missouri Family Policy Council
North Carolina Family Policy Council
Kansas Family Policy Council
Alaska Family Council
Oklahoma Family Policy Council
Minnesota Family Council & Policy Center
Family Policy Institute of Washington
Iowa Family Policy Center
Massachusetts Family Institute
Delaware Family Policy Council
Louisiana Family Forum
Association of Maryland Families
The Family Foundation (Virginia)
Pennsylvania Family Institute
Independence Law Center (affiliated with Pennsylvania Family Institute)
Family First (Nebraska)
Family Policy Council of West Virginia

CERTIFICATE OF SERVICE

I hereby certify that I served two true and correct copies and a CD of the foregoing Brief of *Amici Curiae* on the following by Second Day service:

Lowell V. Sturgill Jr., Esq.
Civil Rights Division, Appellate Section
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Attorney for Appellants

Richard L. Bolton, Esq.
Boardman, Suhr, Curry & Field LLP
1 S. Pinckney St., Suite 410
Madison, WI 53701
Attorney for Appellees

I further certify that on this day I have served electronically a copy of the foregoing brief on the above-listed counsel via email to rbolton@boardmanlawfirm.com and Lowell.Sturgill@usdoj.gov. This brief was also filed this day by sending 15 copies to the Clerk of this Court, along with an electronic version checked for viruses containing a PDF version of this brief.

Executed this 7th day of July, 2010.

s/ Kenneth A. Klukowski
Kenneth A. Klukowski