

made this point directly:

"I agree that the congressional powers to tax and spend are limited by the prohibition upon Congress to enact laws 'respecting an establishment of religion.' This thesis, slender as its basis is, provides a direct 'nexus,' as the Court puts it, between the use and collection of taxes and the congressional action here. Because of this unique 'nexus,' in my judgment, it is not far-fetched to recognize that a taxpayer has a special claim to status as a litigant in a case raising the 'establishment' issue. This special claim is enough, I think, to permit us to [\*\*781] allow the suit, coupled, as it is, with the interest which the taxpayer and all other citizens have in the church-state issue. In terms of the structure and basic philosophy of our constitutional government, it would be difficult to point to any issue that has a more intimate, pervasive, and fundamental impact upon the life of the taxpayer -- and upon the life of all citizens.

"Perhaps the vital interest of a citizen in the establishment issue, without reference to his taxpayer's status, would be acceptable as a basis for this challenge. We need not decide this. But certainly, I believe, we must recognize that our principle of judicial scrutiny of legislative acts which raise important constitutional questions requires [\*\*\*737] that the issue here presented -- the separation of state and church -- which the Founding Fathers regarded [\*515] as fundamental to our constitutional system -- should be subjected to judicial testing. This is not a question which we, if we are to be faithful to our trust, should consign to limbo, unacknowledged, unresolved, and undecided.

"On the other hand, the urgent necessities of this case and the precarious opening through which we find our way to confront it, do not demand that we open the door to a general assault upon exercises of the spending power. The status of taxpayer should not be accepted as a launching pad for an attack upon any target other than legislation affecting the Establishment Clause." *Id.*, at 115-116.

Today the Court holds, in effect, that the Judiciary has no greater role in enforcing the Establishment Clause than in enforcing other "[norms] of conduct which the Federal Government is bound to honor," *ante*, at 484, such as the Accounts Clause, United States v. Richardson, 418 U.S. 166, and the Incompatibility Clause, Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208. Ironically, however, its decision rests

on the premise that the difference between a disposition of funds pursuant to the Spending Clause and a disposition of realty pursuant to the Property Clause is of fundamental jurisprudential significance. With all due respect, I am persuaded that the essential holding of *Flast v. Cohen* attaches special importance to the Establishment Clause and does not permit the drawing of a tenuous distinction between the Spending Clause and the Property Clause.

For this reason, and for the reasons stated in Parts I, II, and III of JUSTICE BRENNAN's opinion, I would affirm the judgment of the Court of Appeals.

## REFERENCES

Requirements of Article III of Federal Constitution as affecting standing to challenge particular conduct as violative of federal law

59 Am Jur 2d, Parties 27, 30; 74 Am Jur 2d, Taxpayers' Actions 18

Federal Procedure, L Ed, Parties 59:12, 59:13

23 Am Jur Pl & Pr Forms (Rev), Taxpayers' Actions, Forms 21, 22

40 USCS 471 et seq.; Constitution, Article III

US L Ed Digest, Parties 3, 22

L Ed Index to Annos, Parties

ALR Quick Index, Capacity to Sue and be Sued; Parties

Federal Quick Index, Parties; Taxpayers' Actions

## Annotation References:

Requirements of Article III of Federal Constitution as affecting standing to challenge particular conduct as violative of federal law. 70 L Ed 2d 941.

Supreme Court's view as to what is a "case or controversy" within the meaning of Article III of the Federal Constitution or an "actual controversy" within the meaning of the Declaratory Judgment Act (28 USCS 2201). 40 L Ed 2d 783.

Supreme Court cases involving establishment and freedom of religion clauses of Federal Constitution. 37 L

454 U.S. 464, \*515; 102 S. Ct. 752, \*\*781;  
70 L. Ed. 2d 700, \*\*\*737; 1982 U.S. LEXIS 22

Ed 2d 1147.

federal court. 20 L Ed 2d 1671.

Taxpayer's standing to raise constitutional question in

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF FRESNO

I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

On January 7, 2011, I served the foregoing document(s) described as

**NOTICE OF LODGING FEDERAL AUTHORITIES IN SUPPORT OF PLAINTIFFS' REPLY  
TO OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE  
FOR SUMMARY ADJUDICATION AND TRIAL**

on the interested parties in this action by placing

☐ the original

☒ a true and correct copy

thereof enclosed in sealed envelope(s) addressed as follows:

Edmund G. Brown, Jr.  
Attorney General of California  
Zackery P. Morazzini  
Supervising Deputy Attorney General  
Peter A. Krause  
Deputy Attorney General (185098)  
1300 I Street, Suite 125  
P.O. Box 944255  
Sacramento, CA 94244-2550

(BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.

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(PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the addressee.

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X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

\_\_\_\_\_  
CLAUDIA AYALA