No. _____

In The Supreme Court of the United States

SUNRISE CHILDREN'S SERVICES, INC.,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY, SECRETARY OF THE CABINET FOR HEALTH AND FAMILY SERVICES; COMMONWEALTH OF KENTUCKY, SECRETARY OF THE JUSTICE AND PUBLIC SAFETY CABINET; ALICIA PEDREIRA; PAUL SIMMONS; JOHANNA W.H. VAN WIJK-BOS; AND ELWOOD STURTEVANT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Flast v. Cohen, 392 U.S. 83 (1968) created a controversial exception to the general rule prohibiting taxpayer standing, holding that federal taxpayers only have standing to bring an Establishment Clause challenge if they can show a "nexus" exists between the taxpayer's status "and the type of legislative enactment attacked."

This case presents an Establishment Clause challenge by State taxpayers to contracts between Kentucky executive branch agencies and a private, religiously affiliated entity that provides social services to thousands of abused and neglected wards of the Commonwealth. The U.S. Court of Appeals for the Sixth Circuit reaffirmed an earlier panel decision in this case fundamentally loosening this *Flast* "nexus" contrary to decisions of this Court in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 342 (2006); *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007); *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011) and other Circuits, which have consistently tightened this "nexus." This Court, moreover, has never held that *Flast* applies to State taxpayers, and the Courts of Appeals are divided on the matter.

The questions presented by this petition are, accordingly, the following:

1. Whether *Flast* should be overruled.

2. Whether *Flast* should be expanded to State taxpayers.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is Sunrise Children's Services, Inc.

Respondents are Commonwealth of Kentucky, Secretary of the Cabinet for Health and Family Services, in its official capacity; Commonwealth of Kentucky, Secretary of the Justice and Public Safety Cabinet, in its official capacity; Alicia Pedreira; Paul Simmons; Johanna W.H. Van Wijk-Bos; and Elwood Sturtevant.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, Petitioner states as follows:

Sunrise Children's Services, Inc. is a non-profit Kentucky corporation and has neither a parent corporation nor any publicly held corporation that owns ten percent or more of its stock.

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DECISIONS BELOW

The United States Court of Appeals for the Sixth Circuit entered its panel decision on October 6, 2015. This decision is reported at 802 F.3d 865 (6th Cir. 2015) and is reprinted at Petitioner's appendix ("App.") 1-19. The Sixth Circuit subsequently entered an order denying Petitioner's petition for rehearing and rehearing *en banc* on November 12, 2015. This order is unreported but reprinted at App. 136-37.

The United States District Court for the Western District of Kentucky, the court of first instance, entered its final opinion and order on June 30, 2014. This order and opinion is unreported but reprinted at App. 20-82.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its panel decision on October 6, 2015. Petitioner's petition for rehearing and rehearing *en banc* was denied on November 12, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2 of the United States Constitution provides that "[t]he judicial power shall extend to all cases, in law and equity, arising under this

Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

A. Factual Background

1. Kentucky's Contracts with Sunrise Children's Services, Inc.

Kentucky has one of the nation's highest mortality rates for abused and neglected children. Thousands of Commonwealth wards each year require intensive institutional treatment and therapy to overcome the devastating effects of this abuse and

neglect. Executive branch agencies of the Commonwealth engage a wide array of secular and religiously affiliated providers to fulfill this great need.

Petitioner Sunrise Children's Services, Inc. ("Sunrise")[1] is the largest private institutional child care provider in Kentucky. Since 1869, Sunrise has continually affiliated with Kentucky Baptists. While Sunrise receives substantial funds from private donors, it also receives public funds through discretionary contracts with Kentucky executive branch agencies, including Respondent Cabinet for Health and Family Services and Respondent Justice and Public Safety Cabinet's Department of Juvenile Justice (collectively, through their respective Secretaries, the "Kentucky Respondents"). *See, e.g.*, excerpted Private Child Care Agreement between Cabinet for Health and Family Services and Sunrise (July 1, 2004) (without attachments), App. 219-31.

These contracts promise only to reimburse Sunrise after-the-fact for audited, documented, secular child care expenses. In other words, they do not constitute a grant program. These reimbursements, in turn, are provided by executive agency expenditures of money generally appropriated to each agency by the Kentucky General Assembly (and, indirectly, by Congress) for general, unrestricted child care purposes. The legislatures have not, however, used

[1] Sunrise was formerly identified in this litigation as Kentucky Baptist Homes for Children, Inc. ("KBHC").

these powers to mandate or expressly designate expenditures for out-of-home child care placement services of any sort, public or private. Kentucky's decision to contract with any child care provider at all – much less a private child care provider, or a religiously affiliated provider, or Sunrise specifically – rests solely with the discretion of Kentucky executive branch agencies. Similarly, the creation of the terms of Kentucky's service contracts with Sunrise, and the authority to determine Sunrise's compliance with those contract terms, rests with those agencies.

2. Taxpayer Respondents' Establishment Clause Claim Exclusively Targets Kentucky's Executive Branch Contracts with Sunrise.

On April 17, 2000, Plaintiff-Respondents (the "Taxpayer Respondents") filed this action in the United States District Court for the Western District of Kentucky. Taxpayer Respondents brought claims against the Kentucky Respondents pursuant to 42 U.S.C. § 1983 alleging violations of the Establishment Clause of the First Amendment to the U.S. Constitution.[2] Sunrise was named as a necessary party to these claims pursuant to Fed. R. Civ. P. 19.

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[2] One of the Taxpayer Respondents (Pedreira) alleged that Sunrise had discriminated against her because of religion in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, as amended, and the Kentucky Civil Rights Act, K.R.S. §§ 344.010, *et seq*. These claims were conclusively

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Taxpayer Respondents objected to the receipt and use of taxpayer funds by Sunrise in light of its religious affiliation and inspiration. Specifically, those Respondents alleged that Sunrise wrongfully used state and federal funds to "hire employees who [were] required to accept and abide by the institution's religious beliefs, and to pay for services that [sought] to teach youth the institution's version of Christian values." *See* Amended Complaint, Introduction, App. 165-66. Taxpayer Respondents requested declaratory relief, an order prospectively enjoining the Kentucky Respondents from providing further funding to Sunrise for staff positions purportedly filled in accordance with religious tenets, an order requiring Sunrise to reimburse Kentucky for state funds used to finance such positions, fees, and court costs. *Id.*, Request for Relief, App. 193.

3. Taxpayer Respondents Base Their Article III Standing on Legislative Activity That Is Not Challenged as Unconstitutional.

Sunrise has consistently challenged Taxpayer Respondents' Article III standing to sue, citing this Court's general bar against taxpayer standing and the narrow exception for Establishment Clause cases met only by satisfying the exacting "legislative

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resolved in Sunrise's favor. *See* 579 F.3d at 727-28 (panel decision affirming dismissal pursuant to Fed. R. Civ. P. 12(b)(6)), App. 90-94.

enactment" nexus requirement established in *Flast v. Cohen*, 392 U.S. 83 (1968).[3] Critically, Taxpayer Respondents have never based their taxpayer standing on the activities they challenged as unconstitutional: the Kentucky Respondents' discretionary executive branch contracts with Sunrise or the administration of those contracts. Taxpayer Respondents have instead sought to show, through other legislative activity, that the Kentucky General Assembly "knew" and constructively "approved" of the Kentucky Respondents' contracts with Sunrise and their alleged maladministration of those contracts.[4]

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[3] Sunrise's initial standing challenges were denied by the District Court under then controlling circuit precedent. *See Johnson v. Econ. Dev. Corp. of the County of Oakland*, 241 F.3d 501, 507 (6th Cir. 2001). Sunrise's renewed dispositive motion made after this Court's decision in *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007), however, was granted by the District Court, which gave rise to the first appeal. 553 F.Supp.2d at 862, App. 130-31.

[4] This legislative activity included: (1) enabling statutes authorizing (*i.e.*, not requiring) executive branch agencies to spend money on child care generally, *see* K.R.S. §§ 199.641(2), 200.115, 605.120, App. 143-46, 155-57; (2) general appropriation acts funding the operational budgets of the Kentucky Respondents; (3) regulatory statutes authorizing executive branch agencies to condition a child care provider's eligibility for public service on various licensing criteria, *see* K.R.S. §§ 199.640(1), (5)(a)-(b), 199.650, 605.090, App. 138-42, 145, 147-55; (4) a bricks-and-mortar appropriation of the Kentucky General Assembly made in 2005, five years after Taxpayer Respondents' Complaint was filed, for the construction of classrooms for State wards educated at Sunrise, *see* 2005 Ky. Laws Ch. 173 (H.B. 267, Part I, § H.10 (5)), App. 158-60; and (5) a legislative commendation approved by one house of the bicameral General Assembly

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Taxpayer Respondents urged that these legislative activities constituted a sufficient nexus between an explicit legislative appropriation and an alleged Establishment Clause violation to support taxpayer standing under this Court's precedents.

B. Proceedings Below

1. The District Court Grants Sunrise's Motion to Dismiss for Lack of Standing Based on this Court's *Cuno* and *Hein* Decisions.

On March 31, 2008, the District Court granted Sunrise's motion to dismiss Taxpayer Respondents' Establishment Clause claims for lack of standing pursuant to Fed. R. Civ. P. 12(b)(1).[5] App. 130-33. This motion was filed shortly after this Court decided *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007), which had illuminated the narrow *Flast* "legislative enactment" nexus.

Having concluded that *Flast* was applicable to Taxpayer Respondents' claims, regardless of whether

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in 2006, six years after Taxpayer Respondents' Complaint was filed, thanking Sunrise for its secular work with abused and neglected children, *see* Ky. H.R. Jour., 2006 Reg. Sess. No. 57, March 24, 2006, Leg. Citation No. 142, App. 163-64.

[5] Ms. Pedreira's religious discrimination claims had been dismissed on the merits in 2001. 186 F.Supp.2d at 762. Accordingly, the final and appealable March 31, 2008 order resolved all claims in Sunrise's favor.

they are based upon the federal or State taxes paid, the District Court determined that there was no standing in either context due to the absence of the requisite legislative enactment nexus. 553 F.Supp.2d at 858-59, App. 121-31. In reaching this decision, the court relied on *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 342 (2006) as well as *Hinrichs v. Speaker of the House of Representatives of the Indiana General Assembly*, 506 F.3d 584 (7th Cir. 2007), a post-*Cuno*, post-*Hein* Establishment Clause case brought by Indiana taxpayers that had applied the *Flast* analysis to deny State taxpayer standing. *Id*.

2. The Sixth Circuit Affirms on Federal Taxpayer Standing, But Reverses on State Taxpayer Standing.

Taxpayer Respondents appealed to the Sixth Circuit. While affirming on the issue of federal taxpayer standing pursuant to *Hein*, the Sixth Circuit reversed the District Court on the issue of State taxpayer standing. The panel held that State taxpayer standing required only a "good faith pocketbook injury" – purportedly satisfied here by Taxpayer Respondents' bare assertion of "lost revenue" – and that *Flast*'s "legislative enactment" nexus requirement was inapplicable to State taxpayers. 579 F.3d at 731-33, App. 101-04 ("*Pedreira I*"), *citing Johnson*, 241 F.3d at 507 (establishing lenient State taxpayer standing test akin to that for municipal taxpayer standing).

The Sixth Circuit then reasoned in the alternative that even if the *Flast* "legislative enactment" nexus requirement did apply to State taxpayers, Taxpayer Respondents would still have standing, as they had purportedly "demonstrated a nexus between Kentucky and its impermissible funding of a pervasively sectarian institution." *Id*. at 732-33, App. 104-06. In support of this finding, the Sixth Circuit cited Taxpayer Respondents' reference to "Kentucky statutory authority, legislative citations acknowledging Sunrise's participation, and specific legislative appropriations to [Sunrise]." *Id*. at 732, App. 105; *see also infra* n.4. The Sixth Circuit thus reversed the District Court's dismissal of Taxpayer Respondents' State taxpayer Establishment Clause claim and remanded the case for further proceedings consistent with its limited mandate. *Id*. at 734, App. 108. After their motions for rehearing and rehearing *en banc* were denied, Sunrise and the Kentucky Respondents petitioned this Court for certiorari. App. 134-35. This petition was denied. 563 U.S. 935 (2011).

3. On Remand, Taxpayer Respondents Amend Their Amended Complaint; Sunrise and Kentucky File Their Motions for Summary Judgment.

Shortly after remand, Taxpayer Respondents filed a second amended complaint identifying two Kentucky enabling statutes allegedly authorizing the expenditure of public funds in violation of the Establishment Clause through unspecified general "appropriation

acts." Second Amended Complaint, paras. 19, 55, *citing* K.R.S. §§ 200.115(1), 605.120(1), App. 202-03, 216.

On November 21, 2012, Sunrise filed a Fed. R. Civ. P. 56 motion for summary judgment, demonstrating that Kentucky maintains a policy of neutrality between religiously-inspired and secular organizations participating in its private child care system (the "PCC System"), and accordingly did not violate the Establishment Clause by contracting with Sunrise. The Kentucky Respondents concurred in Sunrise's Rule 56 motion. Taxpayer Respondents filed no response to either motion, instead filing several successful motions to extend, and ultimately stay, briefing to permit the negotiation of a consent decree with the Kentucky Respondents.

4. The District Court Enters a Bilateral Consent Decree Over Sunrise's Objections.

In March 2013, attorneys representing Taxpayer Respondents and Kentucky Respondents executed a bilateral settlement agreement (the "Agreement"). App. 44-82. Although Sunrise, a party to the suit since its inception, is not a party to the Agreement, Americans United for Separation of Church and State ("AU"), the Americans Civil Liberties Union ("ACLU") and the ACLU of Kentucky, never parties to this case, are parties to the Agreement. App. 44-45. In addition, the ACLU and AU were granted "the same rights to enforce the [Agreement] that are provided to the

other Parties." App. 73. These entities are not Kentucky taxpayers.

On motion of all Respondents, over Sunrise's objections, the District Court entered a dismissal order on June 30, 2014 incorporating the Agreement's terms and retaining jurisdiction to enforce the Agreement – an order that Sunrise, and later the Court of Appeals, correctly recognized as a consent decree. App. 43-82. The consent decree outlines numerous regulatory changes to the Kentucky PCC System that will result in new duties and obligations for private agencies, including Sunrise, that contract with the Kentucky Respondents to serve the abused and neglected children in their care. App. 46-63.

Sunrise, moreover, will be forced to submit to special, heightened scrutiny not imposed on other private agencies. Specifically, for seven years, the Kentucky Respondents must provide information to the ACLU and AU concerning Sunrise that they are not required to produce about any other private agencies. App. 63-65. The ostensible purpose of this Sunrise-specific monitoring is to detect alleged violations of children's Free Exercise rights and to provide the ACLU and AU entrée to challenge such alleged infringements. But the consent decree would not bar Sunrise, an allegedly "pervasively sectarian" entity, from receiving taxpayer funds or prevent Sunrise from using public funds for religious activities.

On the date the District Court entered this consent decree, it also denied a new motion filed by

Sunrise to dismiss the Taxpayer Respondents' Second Amended Complaint (and the court's corresponding power to enter and enforce the Respondents' consent decree) for lack of subject-matter jurisdiction. Sunrise's and Kentucky's motions for summary judgment were neither considered nor decided by the District Court.

5. The Sixth Circuit Reaffirms Its Idiosyncratic State Taxpayer Standing Rule.

Sunrise timely appealed, renewing both its objections to standing and to the consent decree. The Sixth Circuit affirmed the denial of Sunrise's motion to dismiss for lack of standing, holding that even though *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011) endorsed the equal application of the *Flast*/*Hein* "nexus" test to State and federal taxpayers alike (thus abrogating the principal State taxpayer holding of its predecessor panel), it nevertheless remained bound by the prior panel's *alternative* conclusion that State taxpayer standing existed pursuant to its own lenient restatement of that "nexus" test. 802 F.3d at 870, App. 8-9 ("*Pedreira II*"). The Sixth Circuit further held that the District Court's dismissal order incorporating the Agreement was indeed a consent decree, but declined to reverse it outright, instead vacating and remanding the matter for the District Court to conduct a fairness hearing. *Id*. at 872, App. 13-15.

Sunrise's petition for rehearing and rehearing *en banc* was denied on November 12, 2015. App. 136-37. Sunrise's motion to stay the mandate was filed on November 18, 2015, and granted by the original panel on November 19, 2015.

REASONS TO GRANT THE PETITION

The reasons for granting the petition are straightforward and compelling. Article III standing requires (1) a concrete and particularized injury-in-fact that is (2) fairly traceable to the defendant's alleged unlawful conduct and (3) likely to be redressed by a favorable decision. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Yet here, four Kentucky taxpayers ostensibly have standing based on allegations – made solely in their capacities as Kentucky taxpayers – that two Kentucky executive agencies have spent their (and others') taxpayer funds through discretionary service contracts in a manner that violates the Establishment Clause. These taxpayer plaintiffs have been able to initiate and perpetuate federal litigation against a sovereign State for nearly sixteen years based on this general grievance, and ultimately secure a consent decree that does nothing to redress their purported financial injury, as a result of the narrow, dubious *Flast* exception to this Court's general prohibition against taxpayer standing.

Flast should be overruled. It has always been an outlier, but after this Court's recent decisions in *Cuno*, *Hein*, and *Winn*, it has been narrowed beyond any further principled or practical *raison d'etre*. If left unaddressed, *Flast*'s only functions will be to contradict Article III, confound the lower courts, and confuse the necessary boundaries between the branches and seats of government. This Court should grant review and give careful scrutiny to whether *Flast* deserves the continued benefit of *stare decisis*.

Alternatively, this Court should grant review so it may squarely consider, for the first time, whether *Flast* should be expanded to State taxpayers. In other contexts, this Court has recently and serially committed to limiting *Flast* – a federal taxpayer case – to its result. Cabining *Flast* to the federal level will guarantee its idiosyncratic effects are not multiplied by the differing frameworks of fifty different States, ensure future applications of *Flast*'s "nexus" test are made within the federal context addressed in previous decisions construing that test, and eliminate considerable confusion in the Courts of Appeals regarding *Flast*'s applicability to State taxpayers.

I. *FLAST* HAS BEEN FATALLY UNDERMINED BY *CUNO*, *HEIN*, AND *WINN*, AND SHOULD BE OVERRULED.

A. *Flast* is a failed experiment that has been narrowed by *Cuno*, *Hein*, and *Winn* beyond the point of continued viability. At *Flast*'s core is a two-part

test, which, while perhaps sufficient to decide the presenting circumstances of that case, has proven to be an ambiguous and unhelpful boundary for Article III standing ever since:

> First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8 of the Constitution. [. . .] Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.

Flast, 392 U.S. at 102-03. From its genesis, the rationale of *Flast* has been criticized as inconsistent with traditional, plaintiff-oriented standing analyses. *See id*. at 122 (Harlan, J., dissenting) (observing that while the "difficulties with [*Flast's*] criteria are many and severe . . . it is enough for the moment to emphasize that they are not in any sense a measurement of any plaintiff's interest in the outcome of any suit."). *Flast*'s rationale has also been expressly assailed for disregarding critical separation of powers concerns.

Lewis v. Casey, 518 U.S. 343, 353 n.3 (1996); *Spencer v. Kemna*, 523 U.S. 1, 11-12 (1998). Because of these and other misgivings about loosening Article III standing for taxpayers, *Flast* taxpayer standing has never been extended beyond cases challenging legislative spending that purportedly violated the Establishment Clause. *U.S. v. Richardson*, 418 U.S. 166 (1974); *Schlesinger v. Reservists Cmte.*, 418 U.S. 208 (1974); *Valley Forge Christian College v. Am. United for Separation of Church and State*, 454 U.S. 464 (1982); *Bowen v. Kendrick*, 487 U.S. 569 (1988). The Court, however, had not recently addressed taxpayer standing – until *Cuno*.

B. In *Cuno*, the Court unanimously rejected the broader possibilities of taxpayer standing made available by *Flast*. *Cuno* held that State taxpayers lacked Article III standing to challenge a State business-development franchise tax credit on Commerce Clause grounds. 547 U.S. at 349. While not an Establishment Clause case, *Cuno*'s analysis narrowed *Flast* in several important ways. First, *Cuno* narrowly described the injury alleged in *Flast* Establishment Clause challenges as "the very 'extraction and spending' of 'tax money' in aid of religion alleged by a plaintiff" – a concept that would prove dispositive in *Hein* and *Winn*. *Id.*, *citing Flast*, 392 U.S. at 106. Second, *Cuno* restricted the "constitutional limitation" that would satisfy the second prong of the *Flast* test, *supra*, to Establishment Clause violations, holding that no other restriction on Article I, Section 8 implicated the same type of serious taxpayer interests. The

Cuno Court reasoned that broadening *Flast* to include taxpayer Commerce Clause suits would necessarily open the door to taxpayer standing in cases involving a host of other limitations on the Taxing and Spending Clause – an outcome that would be "quite at odds" with what it described as "*Flast*'s own promise that it would not transform federal courts into forums for taxpayers' 'generalized grievances.'" *Id*., *citing Flast*, 392 U.S. at 106. Finally, *Cuno* restated and reaffirmed the Court's jurisprudence describing standing as a necessary component of the Article III case-or-controversy requirement, implicitly rejecting *Flast*'s conception of standing as a malleable, prudential element of justiciability. *Id*. at 601-05; *Flast*, 392 U.S. at 91-93. *Cuno*'s unanimity on these points represented a break from divided decisions of the past, and set the stage for the Court to scrutinize *Flast* more directly in *Hein*.

C. In *Hein*, the Court considerably narrowed *Flast* by limiting taxpayer standing to challenges of express legislative spending. Citing *Flast* and *Bowen*, the *Hein* plurality endorsed the "result" of *Flast* – *i.e.*, taxpayer standing exists only where an offending expenditure was expressly contemplated by legislative action – while declining to embrace what the remainder of the Court clearly considered the *rationale* of *Flast*, *i.e.*, the defense of a taxpayer's "mental displeasure" with government spending in violation of the Establishment Clause. Accordingly, by "leaving *Flast* where [it] found it," the Court necessarily excised from the *Flast* exception all discretionary

executive branch expenditures made from general legislative appropriations.

Both the *Hein* dissent and Justices Scalia and Thomas's concurrence criticized the seemingly arbitrary manner in which the Court endorsed standing for some plaintiffs suffering a judicially cognizable taxpayer injury (as recognized in *Flast* and then *Bowen*) but not others – depending on the manner in which the *defendant* allegedly perpetrated the injury. The dissent contended that *Flast* standing should be applied to all taxpayers forced to effectively "contribute three pence . . . for the support of any one [religious] establishment," regardless of the manner in which the government spent the funds. *Hein*, 551 U.S. at 462 (Souter, J., dissenting) (*citing* 2 Writings of James Madison 183, 186 (G. Hunt ed. 1901)). The dissent further lamented that "if the Executive could accomplish through the exercise of discretion exactly what Congress cannot do through legislation, Establishment Clause protection [will] melt away." *Id*. at 463 (Souter, J., dissenting). The two-justice concurrence pointedly argued that the only way to avoid "utterly meaningless distinctions" in Article III standing law was to deny taxpayer standing in that case, overrule *Flast* entirely, and re-embrace *Frothingham v. Mellon*, 262 U.S. 497 (1923). *Id*. at 450 (Scalia, J., concurring).

In sum, while *Hein* did not overrule *Flast*, it quarantined *Flast* to its facts, undercut *Flast*'s ability to allow federal taxpayers to vindicate their special "stake" against Establishment Clause violations, and

highlighted an obvious work-around for governments seeking to evade judicial review of support for religion. Four years later, the Court would further limit *Flast* in the context of an Arizona tax credit program.

D. In *Winn*, the Court narrowed *Flast* (and *Hein*) even further, holding that though taxpayers might have standing to challenge legislative expenditures to aid religious entities, they lack standing to challenge legislative tax credit programs for the same purposes. In reaching this distinction, the *Winn* court (now a majority) again stressed a narrow, precedent-bound interpretation of *Flast*, and specifically seized upon *Flast* (and *Cuno*)'s characterization of the taxpayer injury as the mental displeasure of the "dissenter whose tax dollars are 'extracted and spent' [who] knows that he has in some small measure been made to contribute to an establishment in violation of conscience." *Winn*, 563 U.S. at 142, *citing Flast*, 392 U.S. at 106. Thus, while the majority acknowledged that "it is easy to see that tax credits and governmental expenditures can have similar economic consequences," a tax credit program did not "implicate individual taxpayers in sectarian activities" since the program only facilitated individual taxpayer choices, and did not theoretically compel anyone to pay tax funds towards a religious entity. *Id*., *citing Flast*, 392 U.S. at 106.

The *Winn* dissenters emphasized the significant practical consequences of the majority's approach. The Court's "hair-splitting" on taxpayer injury, they argued, read a distinction into *Flast* that simply did

not exist, and elevated a strict reading of that case over well-established Article III principles and previous decisions of the Court equating tax expenditures with tax credits. *Winn*, 563 U.S. at 148 (Kagan, J., dissenting) ("This novel distinction in standing law . . . has as little basis in principle as it has in our precedent. Cash grants and targeted tax breaks are means of accomplishing the same government objective – to provide financial support to select individuals or organizations."); *see also id*. at 157 (Kagan, J., dissenting) (collecting prior decisions recognizing that "tax breaks are often 'economically and functionally indistinguishable from a direct monetary subsidy.'") (citation omitted). As a result, "[p]recisely because appropriations and tax breaks can achieve identical objectives, the government can easily substitute one for the other," easily "enabl[ing it] to end-run *Flast*'s guarantee of access to the judiciary." *Id*. at 148 (Kagan, J., dissenting). For this reason, *Winn*'s dissenters viewed the Court's decision as "the effective demise of taxpayer standing." *Id*.

E. *Flast* no longer serves as an effective or reliable method for challenging alleged Establishment Clause violations after *Cuno*, *Hein*, and *Winn*. This Court should aspire to reach consensus on Article III standing precepts grounded in logical developments in the law. *Flast*'s continued existence, however, forces the Court to compromise its precedents and injects unnecessary instability into a critical separation of powers (and federalism) matter. There is unanimity on the general *Frothingham* bar

on taxpayer standing; readopting that standard would greatly enhance the predictability, stability, and integrity of both Article III standing and Establishment Clause jurisprudence.

Overruling *Flast*, moreover, would not provide a "green light" for Establishment Clause violations; as this Court has previously recognized, there are other potential plaintiffs besides taxpayers, other courts besides the federal judiciary, and other branches with their own independent Constitutional responsibilities. *See, e.g.*, *Hein*, 551 U.S. at 447 (plurality op.), 449-50 (Kennedy, J., concurring). Abandoning *Flast* would merely return Establishment Clause violations to an equal footing with every other type of Constitutional violation before the federal courts.

Finally, *Flast* persists as an unnecessary stumbling block for the lower courts, which can derive little guidance from the text or trend of this Court's cases. *Hein*, 551 U.S. at 636-37 (Scalia, J., concurring) ("In the proceedings below, well-respected federal judges declined to hear this case *en banc*, not because they thought the issue unimportant or the panel decision correct, but simply because they found our cases so lawless that there was no point in, quite literally, second-guessing the panel."). So long as this Court salutes *Flast*, its vague, two-part test will be misunderstood, necessarily enabling judicial overreach and all the corresponding social costs of public litigation.

F. The Sixth Circuit's decisions below provide ample evidence of how this Court's *Flast* jurisprudence has failed to effectively guide the lower courts. In its alternative State taxpayer standing analysis from the *Pedreira I* panel, which was then re-adopted as the primary taxpayer standing analysis by the *Pedreira II* panel, the Sixth Circuit gutted the *Flast* "legislative enactment" nexus test and considered legislative activity far beyond that considered in *Flast* and *Hein* – after rejecting federal taxpayer standing a few pages earlier through a conventional *Flast*/*Hein* analysis.

The first prong of the *Flast* test requires a taxpayer to identify an express legislative funding authorization or appropriation that itself violates the Establishment Clause. *Flast*, 392 U.S. at 102-03; *Hein*, 551 U.S. at 605. Taxpayer standing can arise from an executive disbursement only when those funds are spent pursuant to an express statutory mandate. *See id*. at 607. The *Pedreira I* panel, however, required only that Taxpayer Respondents identify some "link" between Kentucky (but not necessarily its legislature, its legislation, or legislative taxing or spending) and ultimate payments to a religiously affiliated institution, dramatically broadening that prong of *Flast*. *See* 579 F.3d at 732-33, App. 105 ("[T]he plaintiffs have demonstrated a nexus between Kentucky and its allegedly impermissible funding of a pervasively sectarian institution.").

To arrive at this mischaracterization of the *Flast* "legislative enactment" requirement, the *Pedreira I*

panel understated the import of *Hein*, finding that this Court "did not change the standards for standing" and "explicitly refused to alter the standards for taxpayer standing" in that case. 579 F.3d at 731 n.4, App. 102-03. This interpretation unduly minimizes *Hein*'s powerful effect on Establishment Clause taxpayer standing jurisprudence. *See Hinrichs*, 506 F.3d at 599 ("Although the Supreme Court's [*Hein*] plurality characterized its opinion as effecting no change in *its* view of taxpayer standing, the plurality's decision, especially when read with *Cuno*, clarified significantly the law of taxpayer standing for the lower federal courts.") (emphasis original). While the *Hein* court declined to overrule *Flast*, its plurality opinion clearly intended to retrench the *Flast* "nexus" test as a bright-line matter of express legislative enactment, and in that respect significantly impacted the taxpayer standing standards required to be used by the lower federal courts.

After expanding *Flast's* "legislative enactment" nexus parameters well beyond those required by *Hein*, the *Pedreira I* panel likewise considered Kentucky legislative activity well beyond that permitted by *Flast*, *Hein*, and other decisions of this Court. Indeed, the *Pedreira I* panel's brief summary of the Kentucky legislative activity here unfolds as if *Hein* was never decided. Taxpayer Respondents' Establishment Clause claim is based on the alleged maladministration of reimbursement contracts between Kentucky executive branch agencies and Sunrise that are not required by any statute. The Kentucky

General Assembly (and, indirectly, Congress) generally appropriated funds to two Kentucky executive branch agencies for unrestricted child care purposes. These agencies, in turn, had unfettered discretion to spend these funds on child care in whatever manner they deemed appropriate – including, but not limited to, direct government secular child care providers, contracts with private secular child care providers, contracts with religiously affiliated private child care providers besides Sunrise, or contracts with Sunrise. The agencies freely chose to contract with Sunrise for after-the-fact, post-audit, secular child care services.

Taxpayer Respondents' Establishment Clause claim is not based upon a "commendation" passed by one chamber of the Kentucky legislature six years after the complaint was filed evidencing "awareness" (App. 163-64), or a single brick-and-mortar appropriation for classrooms made five years after the complaint was filed (App. 158-60). Taxpayer Respondents' claim does not challenge the constitutionality of enabling statutes permitting Kentucky executive branch agencies to spend money on child care generally (App. 143-45, 146, 155-57) or regulatory statutes setting forth requirements for a child care license in the Commonwealth (App. 138-42, 145, 147-55). The purportedly unconstitutional contract administration is wholly separate from these legislative actions. Neither *Pedreira* panel explained, as *Flast* and *Hein* demand, how the legislative activity cited to establish standing (App. 202-03, 216) actually violates the Establishment Clause – or how any relief, much less

the consent decree actually entered by the District Court, would redress alleged spending violations arising from the executive contracts. Nor did they explain how a taxpayer's standing can be premised upon one set of government activities (legislative commendation, school appropriation, enabling and regulatory statutes, *supra*) while the taxpayer's claim on the merits is based on another (Sunrise's child care reimbursement contracts, App. 220-32), and while the taxpayer's relief seeks to achieve monitoring and regulation over yet another (Sunrise and other agencies' compliance with those contracts, App. 44-82). Such a conclusion cannot be explained because this reasoning was expressly rejected in *Cuno*. 547 U.S. at 350-52 (unanimously reversing Sixth Circuit on this very point).

As reflected by the foregoing, enforcing an increasingly esoteric *Flast* exception in the lower courts is exceedingly – and needlessly – difficult.

G. In sum, the changed historical circumstances, the weight of this Court's heavy, collective criticism, and *Flast*'s constitutional foundation compel its reconsideration. While *stare decisis* "is the preferred course . . . when governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (citations and quotations omitted). The doctrine of *stare decisis*, moreover, "is at its weakest when [the Court] interpret[s] the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our

prior decisions." *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (citations omitted). Thus, that doctrine does not prevent the Court "from overruling a previous decision where there has been a significant change in or subsequent development of our constitutional law." *Id*., *citing U.S. v. Gaudin*, 515 U.S. 506, 521 (1995); *Alabama v. Smith*, 490 U.S. 794, 803 (1989); and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 857 (1992).

These general precepts are easily satisfied here. The reasoning and analysis of *Flast* have been expressly repudiated by this Court since its rendition. All that effectively remains of *Flast* today is its two-pronged test, untethered from Article III, left to sow confusion in the lower courts. As Justice Scalia urged in *Hein*:

> Overruling prior precedents, even precedents as disreputable as *Flast*, is nevertheless a serious undertaking, and I understand the impulse to take a minimalist approach. But laying just claim to be honoring *stare decisis* requires more than beating *Flast* to a pulp and then sending it out to the lower courts weakened, denigrated, more incomprehensible than ever, and yet somehow technically alive. [. . .]
>
> [ ] *Flast*'s lack of a logical theoretical underpinning has rendered our taxpayer standing doctrine such a jurisprudential disaster that our appellate judges do not know what to make of it. And of course the case has engendered no reliance interests, not only because

> one does not arrange his affairs with an eye to standing, but also because there is no relying on the random and irrational. I can think of few cases less warranting of *stare decisis* respect. It is time – it is past time – to call an end.

551 U.S. at 637 (Scalia, J., concurring). This case is proof positive of how even a carefully limited *Flast* exception will result in outcomes far afield of what this Court envisioned. *Flast* should not simply be left alone, or defined down to a narrower restatement of itself; it should be overruled.

II. ALTERNATIVELY, THE NARROW *FLAST* EXCEPTION SHOULD NOT BE EXPANDED TO STATE TAXPAYER PLAINTIFFS.

If this Court, however, is not willing to overrule *Flast*, it should expressly consider and decide whether the logic of its recent taxpayer standing decisions "leav[ing] *Flast* as [the Court] found it," *Hein*, 551 U.S. at 448, prohibits *Flast* from being expanded to State taxpayers.

A. State taxpayers do not generally have Article III standing. In *Cuno*, the Court unanimously held that "state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers." 547 U.S. at 346. *Cuno*, however, did not address the question presented here: whether State taxpayers enjoy an Establishment Clause exception to the general rule

against taxpayer standing. But the Court did emphasize that the rationale for rejecting federal taxpayer standing "applies with undiminished force to state taxpayers." *Id*. at 345 (*citing Doremus v. Bd. of Educ. of Hawthorne*, 342 U.S. 429 (1952)). Accordingly, the default rule is that State taxpayers lack Article III standing.

B. The minimalist rationale of *Cuno*, *Hein*, and *Winn* forecloses State taxpayer standing in Establishment Clause cases. As addressed at length above, *supra*, this Court has repeatedly refused to extend *Flast* beyond its original Spending Clause/Establishment Clause rationale. *See Flast*, 392 U.S. at 102 ("Thus, our point of reference in this case is the standing of individuals who assert only the status of *federal* taxpayers and who challenge the constitutionality of a *federal* spending program.") (emphasis added). In *Cuno*, for example, the plaintiffs sought to extend *Flast* to State taxpayer challenges under the Commerce Clause. But this Court unanimously rejected standing, holding that "a broad application of *Flast*'s exception to the general prohibition on taxpayer standing would be quite at odds with its narrow application in our precedent[.]" *Cuno*, 547 U.S. at 348 (quoting *Flast*, 392 U.S. at 106).

Similarly, in *Hein*, the plaintiffs sought to extend *Flast* to federal taxpayer challenges based on executive, as opposed to legislative, action. Again, this Court rejected standing, explaining that because the challenged expenditures were "not expressly authorized or mandated by any specific congressional

enactment, respondents' lawsuit is not directed at an exercise of congressional power, and thus lacks the requisite 'logical nexus' between taxpayer status 'and the type of legislative enactment attacked.'" *Hein*, 551 U.S. at 608-09 (*citing Valley Forge*, 454 U.S. at 479, and quoting *Flast*, 392 U.S. at 102).

Finally, in *Winn*, the plaintiffs sought to extend *Flast* to cover state statutory tax credits, as opposed to an act of legislative taxing or spending. This Court again disagreed, holding that without an affirmative governmental tax or expenditure, "there is no . . . connection between dissenting taxpayer and alleged establishment[,]" and, accordingly approving standing on those facts constituted a "departure from *Flast*'s stated rationale." *Winn*, 563 U.S. at 143.

Just as *Cuno* rejected an expansion of *Flast* based on the Commerce Clause, and *Hein* rejected an expansion of *Flast* based on executive action, and *Winn* rejected an expansion of *Flast* based on tax credits, this Court should now consider whether *Flast* should be expanded to State taxpayers. The acts of State legislatures, much less State executive agencies, simply do not rely on "congressional power" under the Spending Clause – the touchstone of *Flast*. The restrictive reasoning of *Flast*, *Cuno*, *Hein*, and *Winn* stands in stark contrast with the expansive proposition of granting Article III standing to hundreds of millions of State taxpayers, and the issue should be resolved.

C. Although this Court has several times assumed that State taxpayers have standing to bring Establishment Clause cases in federal court, and has discussed the *Flast* test while explaining why state taxpayer standing does *not* exist in a particular case, it has never squarely addressed the matter. Since *Everson v. Board of Education*, 330 U.S. 1 (1947), incorporated the Establishment Clause against the States, there have been at least eighteen cases where this Court arguably relied on or assumed State taxpayer standing. *See infra*. In none of these cases did the Court squarely consider State taxpayer standing, much less announce a *Flast*-like exception to the general rule described in *Cuno*. Because such "drive-by jurisdictional rulings . . . have no precedential effect," *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998), the availability of State taxpayer standing under Article III remains unresolved.

In *Doremus*, the first post-*Everson* case to mention State taxpayer standing, the Court held that the taxpayer plaintiffs lacked Article III standing to bring an Establishment Clause claim. According to the Court, the plaintiffs lacked any "direct and particular financial interest" that was threatened by the unconstitutional conduct; instead, they suffered an injury only "in some indefinite way in common with people generally." 342 U.S. at 434-35. *Doremus* thus stands for the proposition that there is no State taxpayer standing in the absence of a "direct injury." *Id*. But it

does not resolve whether State taxpayers may resort to a *Flast*-like exception to demonstrate this "injury."[6]

Since *Doremus*, there have been at least fourteen Establishment Clause cases where the Court apparently assumed the existence of State taxpayer standing without ever analyzing the question. *See Walz v. Tax Comm'n*, 397 U.S. 664, 666 (1970); *Lemon v. Kurtzman*, 403 U.S. 602, 611 (1971); *Sloan v. Lemon*, 413 U.S. 825, 827 (1973); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 762 (1973); *Hunt v. McNair*, 413 U.S. 734, 735 (1973); *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472, 478 (1973); *Marburger v. Public Funds for Public Schools of New Jersey*, 417

[6] *Cuno*'s definition of what constitutes a sufficient "injury" for Article III State taxpayer standing – along with its express analogy of State to federal taxpayer standing – was disregarded by the Sixth Circuit in *Pedreira I*. *See Cuno*, 547 U.S. at 344. There, the Sixth Circuit followed its own pre-*Cuno* precedent analogizing State and *municipal* taxpayer standing. App. 102, *citing Johnson*, 241 F.3d at 508 (6th Cir. 2001). The *Pedreira I* panel found that because the Taxpayer Respondents had identified several Kentucky legislative acts related to Sunrise, they had identified a "direct injury" that justified standing. *Id*. The fact that these legislative acts did not perpetrate the Establishment Clause violations about which they had complained, or that the "direct injury" found was no different than that experienced by any other like-minded taxpayer of Kentucky, was of no consequence to the *Pedreira I* panel. Thus, if this Court decides that *Doremus* and *Cuno* govern State taxpayer standing in Establishment Clause cases, it should not hesitate to summarily reverse the Sixth Circuit on this gross misstatement of the "injury" requirement specified in those two decisions.

U.S. 961 (1974) (mem.); *Griggs v. Public Funds for Public Schools of New Jersey*, 417 U.S. 961 (1974) (mem.); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 744 (1976); *Wolman v. Walter*, 433 U.S. 229, 232 (1977); *Mueller v. Allen*, 463 U.S. 388, 392 (1983); *Board of Education of Kiryas Joel School District v. Grumet*, 512 U.S. 687, 694 n.2 (1994); *Mitchell v. Helms*, 530 U.S. 793, 801 (2000) (plurality); *Zelman v. Simmons-Harris*, 536 U.S. 639, 648 (2002). In none of these cases did the Court address the standing of the State taxpayer plaintiffs, or refer to *Doremus* or *Flast*.

In three other post-*Doremus* cases, the Court found standing in passing, but did not examine the question of State taxpayer standing in any detail. *See School District of City of Grand Rapids v. Ball*, 473 U.S. 373, 380 n.5 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997); *Marsh v. Chambers*, 463 U.S. 783, 785 n.4 (1983); *Meek v. Pittinger*, 421 U.S. 349, 355 n.5 (1975), *overruled by Mitchell*, 530 U.S. at 808.

Most recently, in *Winn*, the Court discussed *Flast* in denying taxpayer standing to State taxpayers challenging certain Arizona tax credits. 563 U.S. at 138-45. The Court did not, however, squarely decide that the *Flast* test applied to State taxpayers, and in fact expressly disclaimed the precedential effect of decisions passing on questions of jurisdiction *sub silentio*. *Id*. at 144-45. *Winn* cited the general "rule against taxpayer standing, a rule designed both to avoid speculation and to insist on a particular

injury[,]" and the State taxpayer plaintiffs' need to reply on an exception to bring their Establishment Clause claims. *Id.* at 138. The taxpayer plaintiffs in that case argued *Flast* was an applicable exception. *Id*. The Court proceeded to analyze standing under *Flast*, but found that because the Arizona tax credit at issue was not a "government expenditure" that could be redressed by an injunction, the taxpayer plaintiffs' claims did not meet the second prong of the *Flast* test requiring a nexus between their taxpayer status and "the precise nature of the constitutional infringement alleged" in an Establishment Clause case. *Id*. at 139, 142-43.

Accordingly, having rejected the plaintiffs' presenting argument (*i.e.*, could *Flast* standing exist on the facts presented), the *Winn* Court had no occasion to decide the underlying constitutional question – whether the *Flast* exception should be expanded to State taxpayers at all. The Court cannot, moreover, assume that necessary issue was decided by implication; indeed, *Winn* itself restated the principle that "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed," and warned that "[t]he Court would risk error if it relied on assumptions that have gone unstated and unexamined." *Id*. at 145 (citations omitted).

D. Given the absence of a definitive holding from this Court, the Courts of Appeal have haphazardly veered between *Doremus* and *Flast* in their

State taxpayer standing analyses. Before *Cuno*, *Hein*, and *Winn*, the Second, Sixth, Ninth and Tenth Circuits applied *Doremus*, not *Flast*, to State taxpayer standing analyses. *See Taub v. Kentucky*, 842 F.2d 912, 918-19 (6th Cir. 1988); *Colorado Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394 (10th Cir. 1992); *Board of Education v. N.Y.S. Teachers Retirement Sys.*, 60 F.3d 106, 110 (2d Cir. 1995); *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 793 (9th Cir. 1999) (*en banc*); *Johnson*, 241 F.3d at 507. The Eighth Circuit, however, applied *Flast* to state taxpayers. *See Tarsney v. O'Keefe*, 225 F.3d 929, 934-38 (8th Cir. 2000); *Minn. Federation of Teachers v. Randall*, 891 F.2d 1354 (8th Cir. 1989).

After *Cuno* and *Hein*, the Seventh and Eighth Circuits have held that *Flast* does indeed apply to State taxpayer plaintiffs. *Hinrichs*, 506 F.3d at 598; *Americans United for Separation of Church and State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 419-20 (8th Cir. 2007). And in the instant case, the initial "*Pedreira I*" Sixth Circuit panel hedged, principally holding that *Flast* was inapplicable to state taxpayers, but then concluding in the alternative that Taxpayer Respondents would nevertheless satisfy *Flast*'s two-part test. App. 101-06. This latter conclusion was then reaffirmed by the "*Pedreira II*" panel as both consistent with *Winn* and the law of the case. App. 8-9; *see also Smith v. Jefferson County Bd. of Education*, 641 F.3d 197 (6th Cir. 2011) (*en banc*) (*citing Doremus* and *Hein* in discussion of state taxpayer standing standards, but declining to clarify

applicable standard in Establishment Clause case). The Court's review is necessary to provide the lower courts guidance and confidence on this important question.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR RECONSIDERING *FLAST*.

This case provides an exceptionally strong platform for reviewing *Flast*. First, the facts upon which Taxpayer Respondents' standing is based are plainly stated in the pleadings; no factual record is required to answer the questions presented. Second, Sunrise has exhausted its opportunities to secure a proper application of this Court's precedent in the Sixth Circuit. This case has percolated through the lower courts for nearly sixteen years, and the Sixth Circuit's opinions below indicate that court will not revisit its taxpayer standing analyses absent a new opinion from this Court. Third, the case features dedicated interest-group parties, a sovereign State, and a faith-based social service provider that have vested interests in securing finality on the issues presented by this petition. Finally, this case provides the Court with a number of potential avenues for addressing *Flast*: it can overrule *Flast*, limit *Flast* to federal taxpayers, clarify *Flast*'s two-part test further, or simply choose to enforce *Flast*.

The parties do not yet have a final judgment, but that should not dissuade the Court from granting review. This Court's cases reflect a strong commitment

to ensuring Article III standing is addressed and definitively resolved as a threshold inquiry. *See, e.g.*, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-88 (1999) (unanimously holding that federal courts must confirm subject matter jurisdiction before considering the merits of a case); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 88-89 (1988). The significance accorded to confirming standing, especially in cases like the one at bar, was recently reaffirmed in *Winn*:

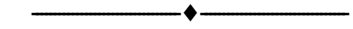
> Few exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them. *In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so.* Making the Article III standing inquiry all the more necessary are the significant implications of constitutional litigation, which can result in rules of wide applicability that are beyond Congress' power to change.

563 U.S. at 145-46 (emphasis added).

No good – and a great deal of harm – will result from a decision to delay review here. After fifteen years of litigation, the Sixth Circuit permitted Taxpayer Respondents to use their limited standing

mandate to achieve broad, non-financial relief that exceeds anything the District Court could have possibly awarded them – but fails to redress the taxpayer injury alleged in their pleadings. The Taxpayer Respondents' second amended complaint only sought declaratory and prospective injunctive relief seeking to stop Kentucky's executive branch payments to Sunrise. Yet – through artful pleading, confused taxpayer standing standards, and the fatigue of litigation, Taxpayer Respondents were able to avoid responding to Sunrise's summary judgment motion, and reach consent decree terms with Kentucky that provided to them (and their non-taxpayer patrons, the ACLU and AU) far-reaching oversight over the Kentucky Respondents and their private child care providers for years to come. The District Court entered the Respondents' consent decree over Sunrise's objections. The fairness of this jurisdictional bait-and-switch aside, it was possible only because the courts below overlooked and misapplied Article III standing requirements, *supra*, and decided that a policy in favor of settling disputes – with the imprimatur of the federal judiciary – trumped those requirements.

No further proceedings will change the compelling questions presented in this petition. Any fairness hearing held by the District Court on the Respondents' consent decree cannot and will not moot standing issues – and, in fact, would only perpetuate the prejudice caused thus far. Now is the time to grant review and reverse the decision below.



CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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