No. 09121 MAR 16 2010

In The Supreme Court of the United States

J. MICHAEL BROWN, Secretary of the Justice and Public Safety Cabinet, Commonwealth of Kentucky, JANIE P. MILLER, Secretary of the Cabinet for Health and Family Services, Commonwealth of Kentucky, and KENTUCKY BAPTIST HOMES FOR CHILDREN, INC.,

Petitioners,

v.

ALICIA PEDREIRA, KAREN VANCE, 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

This case presents important Article III standing questions involving an Establishment Clause challenge 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 billions of dollars in direct State funding and federal pass-through funding for these and similar engagements in many other States necessarily derive from legislatively authorized budgets. However, there has been no legislative enactment expressly appropriating funds for this engagement.

Flast v. Cohen, 392 U.S. 83 (1968) established that taxpayers lack Article III taxpayer standing for Establishment Clause challenges unless a nexus exists between the taxpayer's status "and the type of legislative enactment attacked." Here, the U.S. Court of Appeals for the Sixth Circuit, following *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007), correctly held that the Respondents lacked Article III standing as federal taxpayers because no explicit legislative enactment was at issue. The Sixth Circuit, however, created an acknowledged circuit conflict when it also held, contrary to *Hein* and *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 342 (2006), that Respondents need not establish *Flast*'s legislative enactment nexus for State taxpayer standing, thus enabling Respondents to proceed with an

QUESTIONS PRESENTED – Continued

Establishment Clause challenge as *State* taxpayers that Article III denies them as *federal* taxpayers.

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

1. Does *Flast v. Cohen*'s "legislative enactment" nexus test apply to State taxpayers as it does to federal taxpayers?

2. Does Article III confer upon the federal courts broader authority to address alleged Establishment Clause violations by State Legislatures than those same courts have to address alleged Establishment Clause violations by Congress?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are J. Michael Brown, Secretary of the Justice and Public Safety Cabinet, Commonwealth of Kentucky, in his official capacity; Janie P. Miller, Secretary of the Cabinet for Health and Family Services, Commonwealth of Kentucky, in her official capacity; and Kentucky Baptist Homes for Children, Inc.

Respondents are Alicia Pedreira; Karen Vance; Paul Simmons; Johanna W.H. Van Wijk-Bos; and Elwood Sturtevant. Vance is a federal taxpayer and all others are both federal and Kentucky taxpayers.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, Petitioners state as follows:

Kentucky Baptist Homes for Children, 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 August 31, 2009. This decision is reported at 579 F.3d 722 (6th Cir. 2009), and is reprinted at Petitioners' appendix ("App.") 1-26. The Sixth Circuit subsequently entered an order denying Petitioners' petition for rehearing and rehearing *en banc* on December 16, 2009. This order is unreported but reprinted at App. 52-53.

The United States District Court for the Western District of Kentucky, the court of first instance, entered its final opinion and order on March 31, 2008. This opinion is reported at 553 F.Supp.2d 853 (W.D. Ky. 2008), and is reprinted at App. 29-49.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its panel decision on August 31, 2009. Petitioners' petition for rehearing and rehearing *en banc* was denied on December 16, 2009. 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 Kentucky Baptist Homes for Children, Inc. Are Due Exclusively to Executive Branch Discretion.

Kentucky has the nation's highest mortality rate for abused and neglected children. Thousands of Commonwealth wards each year require intensive

residential 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 responsibility.

Petitioner Kentucky Baptist Homes for Children, Inc. ("KBHC") is the largest private residential child care provider in Kentucky. While KBHC receives substantial funds from private donors, it also receives public funds through discretionary contracts with Kentucky executive branch agencies, including Petitioner Cabinet for Health and Family Services and Petitioner Justice and Public Safety Cabinet's Department of Juvenile Justice (collectively, through their respective secretaries, the "Kentucky Petitioners"). *See, e.g.,* excerpted Private Child Care Agreement Between Cabinet for Health and Family Services and KBHC (July 1, 2004) (without attachments), App. 114-126.

The Commonwealth's decision to contract with any child care provider at all – much less a private child care provider, or a religiously affiliated child care provider, or KBHC specifically – rests solely with those executive branch agencies. The terms of the Commonwealth's service contracts with KBHC are created solely by those agencies. Finally, the authority to determine KBHC's compliance with those contract terms rests solely with those agencies.

These contracts promise only to reimburse KBHC after-the-fact for audited, documented, secular child

care expenses. In other words, it is not a grant program. This reimbursement, in turn, is 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. Indeed, any public funds that eventually make their way to the Kentucky Petitioners, and then KBHC, *must* originate with the Kentucky General Assembly. Section 230 of the Kentucky Constitution states that "[n]o money shall be drawn from the State Treasury, except in pursuance of appropriations made by law." Sections 36(1) and 171 of the Kentucky Constitution provide the General Assembly with the exclusive power to tax and spend.

The General Assembly has not, however, used these powers to mandate or expressly designate expenditures for out-of-home child care placement services of any sort, public or private. Likewise, Congress has not used its taxing and spending power to dictate such expenditures. *See* 42 U.S.C. § 672(b)(2) (federal Social Security Act provision permitting, but not requiring, States to use funds appropriated under that Act to pay public or private child care entities), App. 54. KBHC's participation in Kentucky's social services system is controlled exclusively by the Kentucky Petitioners.

2. Respondents' Substantive Establishment Clause Allegations Exclusively Target Kentucky's Executive Branch Contracts.

On April 17, 2000, Respondents filed this action in the United States District Court for the Western District of Kentucky. All Respondents brought claims against the Kentucky Petitioners pursuant to 42 U.S.C. § 1983 alleging violations of the Establishment Clause of the First Amendment to the U.S. Constitution.[1] KBHC was named as a necessary party to these claims pursuant to Fed. R. Civ. P. 19.

Respondents, all Kentucky and/or federal taxpayers, objected to the receipt and use of taxpayer funds by KBHC in light of its religious affiliation and inspiration. Specifically, Respondents alleged that KBHC 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. 82-83. As to these taxpayer claims, Respondents requested declaratory relief, an order prospectively enjoining the Kentucky Petitioners from providing further funding to KBHC

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[1] Additionally, two of the Respondents alleged that KBHC had discriminated against them because of religion in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, or the Kentucky Civil Rights Act, K.R.S. § 344.010 *et seq.* These claims were conclusively resolved in KBHC's favor. *See* 579 F.3d at 727-28 (panel decision affirming dismissal pursuant to Fed. R. Civ. P. 12(b)(6)), App. 8-12.

for staff positions purportedly filled in accordance with religious tenets, and an order requiring KBHC to reimburse Kentucky for State funds used to finance such positions. *Id.*, Request for Relief, App. 110-112. Respondents' subsequent amended complaint stressed their status as federal taxpayers and the manner in which State and federal funds eventually reached KBHC, but did not amend Respondents' request for relief. *See generally* Amended Complaint, App. 82-113.

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

Petitioners have consistently challenged 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 enactment" nexus requirement established in *Flast v. Cohen*, 392 U.S. 83 (1968).[2] Critically, Respondents have never based their putative *Flast* taxpayer standing on the activities they challenged as unconstitutional: the Kentucky Petitioners' discretionary executive branch

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[2] Petitioners' 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). Petitioners' renewed dispositive motions made after this Court's decision in *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007), however, were granted, giving rise to the instant appeal. 553 F.Supp.2d at 862, App. 49.

contracts with KBHC or the administration of those contracts. Nor do Respondents challenge the appropriation statutes generally funding the Kentucky Petitioners.

Respondents have instead sought to show, through other legislative activity, that the General Assembly "knew" and constructively "approved" of the Kentucky Petitioners' contracts with KBHC and their alleged maladministration of those contracts. 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. 61-62, 63, 72-74; (2) 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. 55, 56-59, 62, 64-72; (3) a bricks-and-mortar appropriation of the Kentucky General Assembly made in 2005, five years after Respondents' Complaint was filed, for the construction of classrooms for State wards educated at KBHC, *see* 2005 Ky. Laws Ch. 173 (H.B. 267, Part I, § H.10(5)), App. 75-77; and (4) a legislative commendation approved by one house of the bicameral General Assembly in 2006, six years after Respondents' Complaint was filed, thanking KBHC 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. 80-81.

Respondents urged that these legislative activities created an irrefutable presumption that the General Assembly was necessarily linked to *any* child care funding that found its way to KBHC – and, in turn, was inextricably linked to the alleged misuse of those funds by KBHC. These links, Respondents concluded, constituted a sufficient nexus between an explicit legislative appropriation and an alleged Establishment Clause violation to support taxpayer standing under this Court's precedents.

Alternatively, Respondents argued this Court's Establishment Clause taxpayer standing canon, including *Flast*, was inapplicable to State taxpayers altogether. In support of their argument, Respondents cited a 2001 Sixth Circuit panel decision permitting State taxpayers to establish standing for an Establishment Clause challenge by simply alleging an offending expenditure of public funds, measurable appropriation, or loss of revenue. Respondents further contended that the Supreme Court's decisions generally equating State and federal taxpayer standing were distinguishable as a matter of law, and thus inapposite.

B. Proceedings Below

1. The District Court Granted Petitioners' Motions to Dismiss for Lack of Standing Based on this Court's Recent *Cuno* and *Hein* Decisions.

On March 31, 2008, the District Court granted Petitioners' motions to dismiss Respondents'

Establishment Clause claims for lack of standing pursuant to Fed. R. Civ. P. 12(b)(1).[3] App. 29-49. These motions were 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 Respondents' claims, regardless of whether they are characterized according to 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. 39-41. 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. 553 F.Supp.2d at 858-59, App. 39-41.

The District Court determined that Respondents' pleadings did not allege the direct, legislative Establishment Clause violation required by *Flast*, finding, in relevant part:

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[3] Respondents' religious discrimination claims had been dismissed in 2001. 186 F.Supp.2d at 762. Accordingly, this final and appealable March 31, 2008 order resolved all claims in Petitioners' favor.

> [T]he Amended Complaint fails to allege any particular appropriation, and thus obviously also fails to allege any legislative action through such appropriation which exceeded the taxing and spending powers of the legislature. Thus no nexus has been shown between any legislation, state or federal, and the alleged constitutional violation. The sole focus of the Amended Complaint is the contracts between KBHC and the Kentucky agencies.

553 F.Supp.2d at 861, App. 47. Consequently, the District Court dismissed Respondents' Establishment Clause claims for lack of Article III standing. *Id.* at 862, App. 49.

2. The Court of Appeals Affirmed the District Court on Federal Taxpayer Standing, But Reversed the District Court on State Taxpayer Standing.

Respondents timely appealed to the Court of Appeals. While affirming on the issue of federal taxpayer standing pursuant to *Hein*, a three-judge panel of the Sixth Circuit[4] 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 Respondents' assertion of "lost revenue" – and

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[4] One member of the panel, the Hon. J. Ronnie Greer, U.S. District Judge for the Eastern District of Tennessee, sat by designation.

that *Flast*'s "legislative enactment" nexus requirement was wholly inapplicable to State taxpayers. 579 F.3d at 731-33, App. 19-24.

In reaching this conclusion, the panel expressly acknowledged its decision was in conflict with the Seventh Circuit's decision in *Hinrichs*, *supra*, but failed to distinguish its reasoning from that of the *Hinrichs* Court. *Id.* at 732, App. 21. In effect, the Sixth Circuit brushed off the post-*Cuno*, post-*Hein Hinrichs* decision in favor of its own pre-*Hein*, pre-*Cuno* precedent. *See Johnson*, 241 F.3d at 507 (establishing State taxpayer standing test akin to that for municipal taxpayer standing). The panel's reasoning, moreover, necessarily determined that none of this Court's seminal taxpayer standing cases from the last four decades, including *Flast*, *Valley Forge Christian College v. Am. United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), *Bowen v. Kendrick*, 487 U.S. 569 (1988), *Cuno,* and *Hein* was controlling on the issue of State taxpayer standing in Establishment Clause cases.

Perhaps recognizing the discord between its principal holding and this Court's precedents, the panel then reasoned that even if the *Flast* "legislative enactment" nexus requirement did apply to State taxpayers, 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. 22-23 (citing *Ams. United for Separation of Church & State v. Sch. Dist. of City of Grand Rapids*, 718 F.2d 1389 (6th Cir. 1983), without noting its overruling by

Agostini v. Felton, 521 U.S. 203, 236 (1997)). In support of this finding, the panel cited Respondents' reference to "Kentucky statutory authority [the executive enabling and licensing legislation, App. 55-74], legislative citations acknowledging KBHC's participation [the 2006 Kentucky House of Representatives' "thank you," App. 80-81], and specific legislative appropriations to KBHC [the 2005 school construction, App. 75-77]." *Id.* at 732, App. 23. The panel thus reversed the District Court's dismissal of Respondents' State taxpayer Establishment Clause claims and remanded the case for further proceedings. *Id.* at 734, App. 26.

Petitioners' petition for rehearing and rehearing *en banc* was denied without opinion or dissent on December 16, 2009.

Petitioners' motion for stay of mandate was filed on December 23, 2009, and remains pending before the author of the panel opinion.

REASONS TO GRANT THE PETITION

This case presents a rare opportunity for the Court to resolve an acknowledged circuit conflict over the federal courts' Constitutional authority to oversee executive State agencies at the behest of their taxpayers. Because this conflict implicates several issues of enduring national importance, including the scope of the federal judicial power, federalism, the funding of America's social service providers, taxpayer rights,

and church-state relations, Petitioners' petition presents truly compelling reasons for certiorari, and should be granted.

I. THE PANEL DECISION CREATES AN ACKNOWLEDGED CIRCUIT CONFLICT REGARDING ARTICLE III TAXPAYER STANDING.

A. Article III Standing Is Critically Important to a Limited Federal Judiciary.

Litigants invoking the federal courts' jurisdiction must establish, *inter alia*, standing to sue. U.S. Const., art. III, § 2, *Valley Forge*, 454 U.S. at 471. The importance of Article III standing cannot be overstated; without it, a federal court may not act in any capacity, much less adjudicate the fiscal affairs of a sovereign State. Indeed, this Court emphatically reaffirmed as much last Term, explaining that:

> In limiting the judicial power to "Cases" and "Controversies," Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. *Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action.* [. . .] The doctrine of standing is one of several doctrines that reflect this fundamental limitation.

Summers v. Earth Island Inst., 129 S.Ct. 1142, 1148-49 (2009) (citations omitted) (emphasis added).

Taxpayer standing, moreover, is the single most restrictive path into federal court. To ensure federal courts do not exceed Article III and infringe on the political branches of government, this Court has repeatedly warned the lower courts to apply its narrow taxpayer standing exception rigorously. *See, e.g., Valley Forge*, 454 U.S. at 481, *Hein*, 551 U.S. at 609. As federal courts regularly enforce constitutional rights incorporated through the Fourteenth Amendment to the States, including those protected by the Establishment Clause, those courts must proceed with particular caution out of deference to their limited jurisdiction, and to avoid imposing more onerous federal constitutional obligations on the States than those applied to the federal government itself.

Unsurprisingly, given the paramount importance of subject matter jurisdiction, this Court has not hesitated to grant certiorari whenever jurisdictional questions come before the Court, even if the merits of the case have yet to be decided. *See, e.g., Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 88-89 (1998) (jurisdiction is "a threshold question that must be resolved in [Respondents'] favor before moving to the merits."); *Sinochem Int'l Co. v. Malaysia Int'l Shipping Co.*, 549 U.S. 422, 430-31 (2007) ("[A] federal court generally may not rule on the merits of a case without first determining it has jurisdiction over the category of claim in suit (subject-matter

jurisdiction) and the parties (personal jurisdiction)."). In fact, in *Cuno*, this Court reversed the Sixth Circuit *sua sponte* on Article III standing grounds following that Circuit's erroneous reversal of the District Court's dismissal of the suit at the pleading stage. 574 U.S. at 354. By all accounts, Article III standing and its jurisdictional consequences are considerations of the highest order.

B. An Acknowledged Circuit Conflict Exists Between the Sixth and Seventh Circuits on Taxpayer Standing, Deepening an Intractable Rift with Several Other Circuits.

Article III standing, like any jurisdictional element, must be analyzed and applied in a uniform, straightforward manner throughout the federal courts. *See Hertz Corp. v. Friend*, No. 08-1107 at 16 (slip op.), ___ S.Ct. ___ (2010) ("[C]ourts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case."). No such uniformity exists on the applicable test for State taxpayer standing in Establishment Clause cases. In fact, the court below openly acknowledged that its State taxpayer standing test derived from its own precedent conflicted with that adopted by the Seventh Circuit derived from this Court's precedents.

Here, after employing the *Flast* "legislative enactment" nexus test to determine the Respondents lacked federal taxpayer standing, the Sixth Circuit

declined to use *Flast* when analyzing the Respondents' State taxpayer standing. *Cf.* 579 F.3d at 729-31, App. 15-18, with *id.* at 731-33, App. 21-22. Observing that "very few cases have dealt with State taxpayer standing as it relates to the Establishment Clause,"[5] the Sixth Circuit deemphasized recent decisions of this Court equating federal and State taxpayer standing, opting instead to adhere to *dicta* in *Johnson v. Econ. Dev. Corp. of the County of Oakland,* a Sixth Circuit panel decision which used a State taxpayer standing test akin to that used in municipal taxpayer standing cases. *Id.* at 732, *citing* 241 F.3d at 507. Using this relaxed standard, the Court of Appeals concluded Respondents suffered a "good-faith pocketbook injury," and thus had State taxpayer standing. 579 F.3d at 733.

The Sixth Circuit's refusal to equate federal and State taxpayer standing analyses conflicts with the precedent of the Second, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits. *Bd. of Educ. v. N.Y.S. Teachers Retirement Syst.*, 60 F.3d 106, 109-111 (2nd Cir. 1995); *Henderson v. Stalder*, 287 F.3d 374, 380-81 n.7 (5th Cir. 2002); *Hinrichs*, 506 F.3d at 598; *Booth v. Hvass,* 302 F.3d 849, 851-53 (8th Cir. 2002); *Am. United for Separation of Church and State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 420 (8th

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[5] *But see Flast*, 392 U.S. at 102-03 (equating federal and State taxpayer standing). *See also Marsh v. Chambers*, 463 U.S. 783, 786 n.4 (1983) (adopting Eighth Circuit ruling that State taxpayer had standing by establishing the *Flast* legislative nexus, 675 F.2d 228, 231 (8th Cir. 1982)).

Cir. 2007); *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 796-97 (9th Cir. 1999); *Arakaki v. Lingle*, 477 F.3d 1048, 1061-66 (9th Cir. 2007); *Pelphrey v. Cobb County*, 547 F.3d 1263, 1280 (11th Cir. 2008); *see also Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 167-69 (1972). The Sixth Circuit partially acknowledged this split, noting with disapproval that in *Hinrichs* the Seventh Circuit had "required a demonstration of [*Flast*] legislative enactment nexus for state taxpayer standing[.]" 579 F.3d at 732. The Court of Appeals, however, made no effort to distinguish or explain away *Hinrichs*, and did not address any of the other appellate decisions cited, *supra*.

No doubt mindful of the circuit split it was creating, the panel then conducted an alternative State taxpayer standing analysis purportedly using the *Flast* test, and concluded the Respondents also had State taxpayer standing under that test. 579 F.3d at 732-33. In reaching this conclusion, however, the Court of Appeals materially mischaracterized *Flast*, and considered much broader types of legislative activity than that permitted by *Flast* and *Hein*. The legislative activities relied upon by the Sixth Circuit were also much broader than those considered permissible by the Seventh and Eighth Circuits in light of *Hein*. *See Hinrichs*, 506 F.3d at 598-600 ("[I]t is the *appropriation* of those [State] funds for the allegedly unconstitutional purpose that provides the link between taxpayer and expenditure necessary to support standing.") (emphasis added); *Prison*

Fellowship Ministries, 509 F.3d at 420 ("In this case, the Iowa legislature made *specific appropriations* from public funds to [a faith-based program for inmates]. . . . [t]herefore, [Plaintiffs] satisfy the narrow exception for taxpayer standing.") (emphasis added).

In fact, the Sixth Circuit considered dispositive the very type of legislative actions that had been utilized by the Sixth and Seventh Circuits to find taxpayer standing in *Cuno* and *Hein*, respectively, which were then rejected as insufficient by this Court. *See Cuno*, 547 U.S. at 349-50 (*sua sponte* reversal of Sixth Circuit) (finding legislative conduct lacking even in lenient *municipal* standing analysis); *Hein*, 551 U.S. at 603-09 (reversal of Seventh Circuit). Thus, in seeking to mitigate or assuage the split caused by its principal State taxpayer standing holding, the Sixth Circuit created a second issue on which it differs markedly from its sister circuits and this Court. Because these splits result in a significant "fail[ure] to achieve a nationally uniform interpretation" of the federal judicial power vis-à-vis the States, this Court should grant certiorari and resolve the conflicts. *Hertz*, No. 08-1107 at 13 (slip op.).

II. THE PANEL DECISION UNDERMINES THIS COURT'S RECENT TAXPAYER STANDING CASES.

In an effort to follow its own circuit precedent, the Sixth Circuit minimized the import of both *Cuno*

and *Hein*. The result is an appellate court analysis nearly identical to that overturned in those two cases. Granting certiorari would give the Court an opportunity to elucidate the scope of these important taxpayer standing decisions in the context of State taxpayer Establishment Clause challenges.

A. The Panel Decision Undermines *Cuno* and the Equivalence of State and Federal Taxpayer Standing In Establishment Clause Challenges.

First, this Court should decide whether this Court's unanimous *Cuno* decision, a non-Establishment Clause case, permits the use of different standing tests for federal and State taxpayers in Establishment Clause cases. While this Court has equated federal and State taxpayer standing for decades, *see Doremus v. Bd. of Educ. of Hawthorne*, 342 U.S. 429, 434 (1952), *Flast*, 392 U.S. at 102-03, *Moose Lodge*, 407 U.S. at 167-69, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613-14 (1989) (Kennedy, J.) ("[W]e have likened state taxpayers to federal taxpayers" for purposes of taxpayer standing), that question seemed definitively settled by *Cuno*. There, after discussing the general considerations barring federal taxpayer standing, this Court unequivocally proclaimed that "[t]he foregoing rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers." 547 U.S. at 345. *See also* 547 U.S. at 354 (Ginsburg, J., concurring in relevant part) ("*Frothingham* [*v. Mellon,*

262 U.S. 447 (1923)] held nonjusticiable a federal taxpayer's suit challenging a federal spending program. *Doremus* applied *Frothingham*'s reasoning to a state taxpayer's suit.") (citations omitted).

The *Cuno* Court then turned its attention to the plaintiffs' argument that they had State taxpayer standing[6] by operation of the *Flast* test. *Id.* at 347-49. Importantly, this Court applied the *Flast* test in *Cuno*, but found the plaintiffs had not satisfied the second prong of that test, requiring an allegation that Ohio had exceeded a specific constitutional limitation imposed upon the exercise of the legislative taxing and spending power. Specifically, this Court rejected the plaintiffs' attempt to analogize the Commerce Clause to the Establishment Clause. *Id.* at 347-48 ("Quite apart from whether the franchise tax credit is analogous to an exercise of congressional power under Article I, § 8, plaintiff's reliance on *Flast* is misguided: Whatever rights plaintiffs have under the Commerce Clause, they are fundamentally unlike the right not to 'contribute three pence . . . for the support of any one [religious] establishment.'") (citation and quotation omitted). Thus, while applying the *Flast* test to State taxpayers, this Court found it unnecessary to decide whether the *Flast* "legislative enactment" nexus requirement was met by the Ohio franchise tax credits under review, as the need for

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[6] The *Cuno* plaintiffs "principally claim[ed] standing by virtue of their status as Ohio taxpayers[.]" *Id.* at 342.

that determination was moot. *Id.* The unanimous *Cuno* court did not suggest that any element of the *Flast* test was inapposite simply because the plaintiffs appeared as State taxpayers. Indeed, this Court had unmistakably equated federal and State taxpayer standing just a few pages earlier.[7]

Accordingly, the Sixth Circuit's bifurcation of standing tests for State and federal taxpayers, possible only through a cramped reading of *Cuno*, presents a compelling reason for further review. The Sixth Circuit's observation that "the Supreme Court did not apply the *Flast* nexus requirement in [*Cuno*]" and "no Supreme Court . . . case has applied the [*Flast*] nexus test to analyze state taxpayer standing" denotes a material misapprehension of *Cuno*'s analysis. 579 F.3d at 732. Given *Cuno*'s heavy reliance on Establishment Clause jurisprudence, and given the wealth of precedent otherwise equating State and federal taxpayer standing – including several decisions of this Court and several sister circuit courts which found nothing controversial in citing

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[7] The Sixth Circuit decision below expressly acknowledged this Court's history of equating the two types of taxpayer standing. 579 F.3d at 732 ("Noting that no Supreme Court or Sixth Circuit case has applied the [*Flast* legislative enactment] nexus test to analyze state taxpayer standing, *even while discussing the similarities of the two analyses*, we decline to find that *Hein* overrules our precedent that specifically instructs that nexus [sic] is *un*necessary in state taxpayer cases.") (emphasis added).

Cuno for this very proposition[8] – an important question for *certiorari* exists as to whether *Cuno*'s analysis extends to State taxpayers in Establishment Clause cases.

B. The Panel Decision Undermines *Flast*, *Hein*, and the Contours of the "Legislative Enactment" Nexus In State Taxpayer Establishment Clause Challenges.

Second, this Court should address the scope of the *Flast* test, as illuminated by *Hein*, when applied to the States and their taxpayers. In its alternative State taxpayer standing analysis, the Sixth Circuit overstated the *Flast* "legislative enactment" nexus test and considered State legislative activity beyond that considered in *Flast* or *Hein* – after rejecting *federal* taxpayer standing a few pages earlier through a conventional *Flast* analysis. Thus, this Court should determine not only whether *Flast* applies to State taxpayers, but the extent to which it applies.

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

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[8] *See Hinrichs*, 506 F.3d at 598; *Arakaki*, 477 F.3d at 1061-66; *Prison Fellowship Ministries*, 509 F.3d at 420.

mandate. *See id.* at 607 (describing how taxpayers in *Bowen v. Kendrick* achieved standing under *Flast* test). The Sixth Circuit, however, required only that Respondents identify some "link" between the Commonwealth of Kentucky (but not necessarily its legislature or its legislation) and ultimate payments to a religiously affiliated institution, subtly but dramatically broadening that prong of *Flast*. *See* 579 F.3d at 732-33, App. 22-23 ("[T]he plaintiffs have demonstrated a nexus between Kentucky and its allegedly impermissible funding of a pervasively sectarian institution.").

To arrive at this characterization of the *Flast* "legislative enactment" requirement, the Court of Appeals 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. This interpretation unduly minimizes *Hein*'s powerful effect on Establishment Clause taxpayer standing jurisprudence within the *lower* federal courts. *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 did decline to overrule *Flast* – thus "leav[ing *Flast*] as [the Court] found it" – 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 paradigms used by the lower federal courts.[9] *See also Hein*, 551 U.S. at 637-43 (Souter, J., dissenting) (explaining view that fundamental change was wrought by *Hein* plurality opinion).

Hein's effect can be measured by comparing the Seventh Circuit taxpayer standing decision that was overturned in *Hein* (*Freedom From Religion Foundation, Inc. v. Chao*, 433 F.3d 989 (7th Cir. 2006)) with the Seventh Circuit's post-*Hein* taxpayer standing decision – *Hinrichs*.[10] The *Hein* Court rejected the "broad reading" of the *Flast* test presented by *Chao* – and replicated by the Sixth Circuit here – observing that the Seventh Circuit had "failed to observe 'the rigor with which the *Flast* exception . . . ought to be applied.'" 551 U.S. at 603, citing *Valley Forge*, 454 U.S. at 481.

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[9] Even the Sixth Circuit acknowledged as much in *American Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 284-87 (6th Cir. 2009), observing that "*Hein* ma[de] clear" that the *Flast* exception does not permit standing for claims "challenging executive-branch expenditures of unearmarked funds." *Id.* at 285-86.

[10] Strikingly, in *Chao*, Circuit Judge Ripple wrote in dissent that the majority's "approach, while possessing an initial appeal, simply cuts the concept of taxpayer standing loose from its moorings." 433 F.3d at 998. Later, vindicated by *Hein*, Judge Ripple authored the *Hinrichs* decision.

After adopting *Flast* "legislative enactment" nexus parameters beyond those permitted in *Hein*, the Sixth Circuit considered Kentucky legislative activity beyond that permitted by *Flast*, *Hein*, and other decisions of this Court. *Flast* held that 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." 392 U.S. at 101-03. In *Hein*, this Court subjected the plaintiff's claims to particularly exacting scrutiny on this point:

> The link between congressional action and constitutional violation that supported taxpayer standing in *Flast* is missing here. *Respondents do not challenge any specific congressional action or appropriation; nor do they ask the Court to invalidate any congressional enactment or legislatively created program as unconstitutional.* That is because the expenditures at issue here were not made pursuant to any Act of Congress. Rather, Congress provided general appropriations to the Executive Branch to fund its day-to-day activities. *These appropriations did not expressly authorize, direct, or even mention the expenditures of which respondents complain.* Those expenditures resulted from executive discretion, not congressional action. *We have never found taxpayer standing under such circumstances.*

551 U.S. at 605 (emphasis added).

The *Hein* Court found, moreover, that *Bowen v. Kendrick* could not be used to justify a departure from this explicit link between legislative enactment and constitutional violation. *Id.* at 606-07. The *Hein* Court determined that the key to this Court's conclusion in *Bowen* was an express statutory mandate requiring the executive branch to spend certain funds in an allegedly unconstitutional manner. The *Bowen* statute "not only *expressly authorized and appropriated* specific funds for grant-making, it also *expressly contemplated* that some of those moneys might go to projects involving religious groups." *Id.* (emphasis added). Finally, the *Hein* Court took special care to distinguish between express statutory language and other, more nebulous forms of legislative activity and "awareness." *See id.* at 608 n.7 (citing *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993)).

The Sixth Circuit's brief summary of the Kentucky legislative activity here, however, unfolds as if the discussion from *Hein* outlined above is wholly irrelevant to State taxpayers (which, in fact, the Sixth Circuit had held in its earlier principal ruling). Respondents' Establishment Clause claim is based on the alleged maladministration of reimbursement contracts between Kentucky executive branch agencies and KBHC *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 child care programs, contracts with private secular child care providers, contracts with religiously affiliated private child care providers besides KBHC, or contracts with KBHC, the sole provider targeted in this suit. The agencies freely chose to contract with KBHC for after-the-fact, post-audit, secular child care services.

Respondents' Establishment Clause claim is *not* based upon a "commendation" passed by one house of the Kentucky legislature six years after the complaint was filed evidencing "awareness," (App. 80-81) or a single brick and mortar appropriation for classrooms made five years after the complaint was filed (App. 75-77). Respondents' claim does *not* challenge the constitutionality of enabling statutes permitting Kentucky executive branch agencies to spend money on child care generally (App. 61-62, 63, 72-74), or regulatory statutes setting forth requirements for a child care license in the Commonwealth (App. 55, 56-59, 62, 64-72). The purportedly unconstitutional contract administration is wholly separate from these legislative actions. The Sixth Circuit did not explain, as *Flast* and *Hein* anticipate, how the legislative activity cited to establish standing (App. 55-74, 75-77, 80-81) actually violates the Establishment Clause (or how any relief associated with those unchallenged provisions would redress alleged violations arising from the executive contracts). Nor did it explain how a taxpayer's standing can be premised upon one set of

government activities (legislative commendation, school appropriation, enabling and regulatory statutes, App. 55-74, 75-77, 80-81) while the taxpayer's claim on the merits is based on another (KBHC's child care reimbursement contracts, App. 114-125). Such a conclusion cannot be explained because this reasoning was expressly rejected in *Cuno*. 547 U.S. at 350-52 (reversing Sixth Circuit on this very point).

The Sixth Circuit's alternative application of the *Flast* test to State taxpayer standing closely tracks the Seventh Circuit's analysis in *Chao* that was rejected in *Hein*. This Court should grant review to determine the appropriate scope of the *Flast* test when applied to State legislatures and State taxpayers, and whether the Sixth Circuit's approach here falls within those parameters.

III. THE PANEL DECISION DISRUPTS FUNDAMENTAL PRINCIPLES OF FEDERALISM.

Opening wide the federal courthouse doors for Establishment Clause challenges against States, but not the federal government, would have significant recurring effects on the relationships between the federal government, the States, and the States' taxpayers.

A. Congress and the State Legislatures Should Not Be Treated Differently Under the First Amendment.

The Sixth Circuit's decision to forego the *Flast* test for a less restrictive State taxpayer standing test necessarily implies that the Establishment Clause applies more onerously to the States – or at least the four States within the Sixth Circuit – than to the federal government itself. If the Establishment Clause applies uniformly to the federal and State governments, and federal and State taxpayers share the same status vis-à-vis their sovereigns for standing purposes, the violation of a State taxpayer's Establishment Clause rights should result in the same quality of Article III standing "injury" as that of a federal taxpayer – and thus require the same test to determine standing to seek redress for that injury. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 8-9 (1947) (incorporating Establishment Clause to States), *Marsh v. Chambers*, 463 U.S. 783, 790-91 (1983) (Establishment Clause applies equally to State and federal governments), *Cuno,* 547 U.S. at 345 (equating federal and State taxpayer standing). The State taxpayer standing test adopted by the Sixth Circuit, however, relies on a case equating States to municipal corporations, and implicitly concludes – based solely on circuit *stare decisis* – that the federal courts should regard a State's Establishment Clause violation as a more tangible injury to its respective taxpayers than those perpetrated by the federal

government. 579 F.3d at 732-33 (*citing Johnson*, 241 F.3d at 507-09).

This novel conclusion deserves the Court's full attention. "In applying the First Amendment to the states through the Fourteenth Amendment, *Cantwell v. Connecticut*, 310 U.S. 296 (1940), it would be incongruous to interpret that clause as imposing more stringent First Amendment limits on the States than the draftsmen imposed on the Federal Government." *Marsh,* 463 U.S. at 790-91. Likewise, it would be incongruous for the federal judiciary – courts of limited, express jurisdiction – to have *greater* opportunity for Establishment Clause enforcement over all three branches of independent, sovereign State governments than they have over co-equal branches of the federal government. Indeed, an Establishment Clause violation by a State should arguably result in a *lesser* Article III taxpayer injury, and thus a more restrictive standing test. That Clause is only applied to the States through the Fourteenth Amendment, and virtually every State (including Kentucky) already extends its citizens similar, if not more expansive, rights under its own constitution that are fully enforceable in the State's own courts of plenary jurisdiction. *See, e.g.*, Ky. Const. § 5 (providing rights greater than those protected by federal Establishment Clause).

This Court, moreover, has previously held that States have special "dignitary interests" as separate sovereigns that counsel prudence in the imposition of federal litigation. *See Puerto Rico Aqueduct and*

Sewer Auth. v. Metcalf & Eddy, 506 U.S. 139, 146 (1993). As part of "the federal structure of the original Constitution itself," *Alden v. Maine*, 527 U.S. 706, 728-29 (1999), Article III, much like the Eleventh Amendment, "serves to avoid the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties[.]" *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996) (*citing Metcalf & Eddy, supra*). The Court should explore the juxtaposition of the Sixth Circuit's State taxpayer standing test and these important federalism considerations in greater depth.

B. The Panel Decision Jeopardizes the Federal-State Social Services Funding System.

The Sixth Circuit's State taxpayer standing test, furthermore, would inevitably subject the massive social services funding system among the federal government, the States and private providers to unending federal court challenges.

A principal component of the nation's fiscal affairs is the federal government's use of the "power of the purse" to persuade States to implement various public policy objectives, including the provision of social services. In 2009, the federal government provided $538 billion to State and local governments for a variety of purposes, representing approximately 15% of the federal government's total annual outlays. *See* U.S. Office of Management and Budget, Budget of

the United States, Historical Tables, Tables 1.1 and 12.2, *available at* http://www.whitehouse.gov/omb/budget/historicals (last visited 3/9/10). $74 billion of this amount was budgeted for "education, training, employment, and social services." *Id.* at Table 12.2.

State executive agencies are the recipients of the vast majority of this assistance. *See, e.g.,* "Federal Assistance from Department of Health and Human Services, FY 2009, List of Recipients," *available at* http://www.usaspending.gov/faads (last visited 3/9/10) (search criteria: "By Agency" – Health and Human Services, Fiscal Year 2009, "Low" level of detail). Not surprisingly, federal assistance comprises a critical percentage, if not an outright majority, of many State social services agencies' available budget funds. For example, in 2009, Petitioner Cabinet for Health and Family Services's Department for Community Based Services (the sub-agency that contracts with KBHC) received $533.3 million in federal assistance, constituting 51% of its total funding. 2008-10 Budget of the Commonwealth, Operating Budget, Volume I, Part C, p. 315, *available at* http://www.osbd.ky.gov/Archives/buddocs.htm (last visited 3/9/10). The nation's private social service agencies, in turn, often depend on State and federal pass-through assistance for the financial wherewithal to care for needy citizens.

A lenient State taxpayer standing test all but ensures that these State-implemented social services, and the billions in State and federal pass-through funding supporting these services, will always be

susceptible to protracted second-guessing by State taxpayers invoking federal jurisdiction through Establishment Clause litigation. The potential defendants are perpetual (the fifty States), the potential taxpayer plaintiffs number in the hundreds of millions, and the alleged taxing and spending "injuries" renew on an annual or biannual basis at the very least.[11] A State executive agency's decision to engage a religiously affiliated service provider, no matter how benign, could easily be challenged by any of its taxpayers and scrutinized through years of litigation. The States' social services policies and the federal government's funding objectives would inevitably be affected through attrition. Private social service agencies like KBHC would be subject to both the direct costs of Establishment Clause litigation and the indirect threat of being jettisoned by States wary of more lawsuits. Ultimately, the negative effects of easy taxpayer suits would be felt by the needy citizens and wards whom all of these institutions are designed to help.

Given the size of the potential taxpayer plaintiff class, and the disruption their lawsuits could wreak on the States and their social services providers, it is essential that the parameters of that class be

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[11] Unlike municipalities, States conduct a much greater scope of activities via plenary police powers with considerably greater resources over a greater number of citizens, and are thus much more susceptible to interference should a less stringent standing test be adopted, or left undefined.

carefully prescribed to ensure the national social services system can function as intended. The Court should grant certiorari to consider these issues thoroughly.

C. The Panel Decision Permits Taxpayers to Circumvent Flast's Requirements Where Federal Pass-Through Funds Are At Issue.

Furthermore, the ubiquity of federal pass-through assistance to States, coupled with a divergence in federal and State taxpayer standing tests, would create an obvious loophole for Establishment Clause taxpayer plaintiffs. No longer would such taxpayers have to meet the narrow, stringent *Flast* "legislative enactment" test to challenge a federal expenditure; instead, such taxpayers need only wait until federal dollars are passed through to and ultimately "re-spent" by a State before suing. A more lenient State taxpayer standing threshold thus provides potential plaintiffs with a strong incentive to circumvent *Flast* and its progeny whenever the case involves federal pass-through funds, undermining Article III and this Court's precedent and unduly shifting the litigation costs and potential liability for federal Establishment Clause violations to the States. These inevitable outcomes, wholly inconsistent with the intent of Article III and the Establishment Clause, justify certiorari as a means of ensuring the integrity of this Court's Article III jurisprudence.

IV. THE PANEL DECISION UNNECESSARILY AND ERRONEOUSLY INTRODUCES THE PERVASIVELY SECTARIAN CONCEPT AS AN ARTICLE III STANDING CONSIDERATION.

Finally, this Court's full review is necessary to consider the Sixth Circuit's unprecedented introduction of the "pervasively sectarian" concept as a new factor in Article III taxpayer standing analyses.

The continuing viability of the pervasively sectarian theory in the Establishment Clause context is an open question. In *Mitchell v. Helms*, 530 U.S. 793 (2000), six members of this Court concluded that a public funding recipient's religious character was irrelevant to the merits of an Establishment Clause challenge to that government funding. *See id.* at 829 (plurality op. of Thomas, J.); *see also id.* at 857-60 (concurring op. of O'Connor, J., joined by Breyer, J.). While some circuits have interpreted *Mitchell* as the death knell of the pervasively sectarian rubric, *see, e.g., Columbia Union College v. Oliver*, 254 F.3d 496, 502-04 (4th Cir. 2001) and *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1258-59 (10th Cir. 2008), the Sixth Circuit has been more reticent, choosing to wait until a clear majority of this Court overtly discards that locution. *See American Atheists*, 567 F.3d at 296, *Steele v. Indust. Dev. Bd. of Metro. Gov't Nashville*, 301 F.3d 401, 408-09 (6th Cir. 2002).

This Court need not resolve this substantive Establishment Clause question here, however. Instead,

it need only consider whether a service provider's alleged sectarian nature (*i.e.*, religious affiliation, belief, nature, practices, etc.) is relevant to whether a taxpayer has Article III standing to challenge that provider's State government contract. Here, after describing the various Kentucky legislative activities presented by Respondents, *supra*, the Sixth Circuit found that "[t]hrough these specifications, [Respondents] have demonstrated a nexus between Kentucky and its allegedly impermissible funding of a *pervasively sectarian* institution." 579 F.3d at 732 (emphasis added). The Sixth Circuit then cited with approval *City of Grand Rapids*, 718 F.2d at 1416, without noting that case's overruling by *Agostini*, 521 U.S. at 236.

The pervasively sectarian concept was embraced by earlier Establishment Clause decisions of this Court as a shorthand to define *recipients* of public funding (e.g., religiously affiliated schools) whose secular and religious functions were inextricably intertwined. *Zelman v. Simmons-Harris,* 536 U.S. 639, 692 (2002), *citing Roemer v. Bd. of Public Works of Md.*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971); *see also Columbia Union College v. Clarke*, 527 U.S. 1013, 119 S.Ct. 2357, 2357-58 (1999) (denying certiorari) (dissenting op. of Thomas, J.) ("We invented the 'pervasively sectarian' test as a way to distinguish between schools that carefully segregate religious and secular activities and schools that consider their religious and educational missions indivisible and

therefore require religion to permeate all activities."). "Direct aid" from the government to a pervasively sectarian entity was presumed to be used for religious purposes, and was thus determined to violate the Establishment Clause. *Zelman*, 536 U.S. at 691-92. Accordingly, even in its heyday, this test was only used by this Court to analyze the merits of an Establishment Clause claim brought by a plaintiff who already possessed Article III standing to sue.

Article III standing, however, has always been a *plaintiff*-focused inquiry. As this Court recently restated in *Summers*:

> The doctrine of standing is one of several doctrines that reflect this fundamental [Article III "case" or "controversy"] limitation. It requires federal courts to satisfy themselves that *the plaintiff* has alleged such a *personal stake* in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction. *He* bears the burden of showing that *he* has standing for each type of relief sought. To seek injunctive relief, a plaintiff must show that *he* is under threat of suffering injury in fact that is concrete and particularized; the threat must be actual or imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.

129 S.Ct. at 1149 (citations and quotations omitted) (emphasis added). Similarly, *Flast* ensured taxpayer

standing would exist only when a plaintiff's claimed injury (an Establishment Clause violation) was closely linked to *his or her status as a taxpayer*. 392 U.S. at 102-03. There is no other context where the character of the defendant is used to determine the plaintiff's standing.

Thus, the alleged sectarian nature of KBHC or any other service provider receiving government funds provides *no* insight about the injury caused *to the taxpayer plaintiff* by a legislature's taxing and spending authority. That information does not assist in determining whether the *Flast* "legislative enactment" nexus is satisfied, nor does it even indicate whether the government engaged in "measurable appropriations" or suffered a "loss in revenue." It cannot be the law that the Respondents have standing as taxpayers if KBHC is pervasively sectarian, but do not have standing if it is only sectarian.

The consideration of these sectarian criteria only serves to discriminate against religiously affiliated providers in ways this Court has previously condemned. *See Mitchell*, 530 U.S. at 829 ("In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian [entities] from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, borne of bigotry, should be buried now.") (plurality op. of Thomas, J.). Given the already tenuous position of the pervasively sectarian notion, Petitioners believe

this Court should give careful consideration to that idea before introducing it into Article III analyses.

CONCLUSION

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

Respectfully submitted,

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