No. 09-1121

In the Supreme Court of the United States

J. MICHAEL BROWN, *et al.*,
Petitioners,

v.

ALICIA PEDREIRA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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PARTIES TO THE PROCEEDINGS BELOW

The Defendants-Petitioners' statement is correct, except that, according to the institution's website, Defendant-Petitioner Kentucky Baptist Homes for Children has changed its name to "Sunrise Children's Services." The institution has taken no steps to change its name in this litigation, however, so we refer to it here as "Kentucky Baptist Homes for Children," or just "Baptist Homes."

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

INTRODUCTION

This case is a challenge to the provision of state and federal funds by the Defendant-Petitioner Kentucky agencies to Defendant-Petitioner Kentucky Baptist Homes for Children, which uses those funds to support proselytization of the children whom the state agencies place at the Homes. The Defendants have repeatedly sought to preclude the Plaintiffs from litigating the merits of the case. The Petition presents only the most recent round in this effort. The questions presented by the Petition are not worthy of this Court's review.

Addressing the questions presented would be nothing more than an academic exercise that cannot affect the outcome of the case, unless the Court also decides a question that is *not* presented by the Petition. The two questions the Petition presents raise the same issue: Did the court of appeals err by holding that state taxpayers in Establishment-Clause cases need not meet the "legislative nexus" test that is applicable to federal taxpayers? But the court of appeals also held, in the alternative, that the Plaintiffs-Respondents *did* meet that test in their capacity as state taxpayers. That latter holding is not challenged by either of the Petition's two questions. And even if that alternative holding had been presented, that holding does not deserve review by this Court, because it simply involves the panel's application of existing precedent to particular facts.

On the issue that the Petition does present, there is no conflict between the panel's holding and this

Court's decisions, as this Court has never required state taxpayers in Establishment-Clause cases to meet the "legislative nexus" test.

Furthermore, the alleged "circuit split" to which the Defendants point is superficial, undeveloped, and may very well resolve itself without the Court's intervention. The Court has only recently — in 2006 and 2007 — clarified the law regarding taxpayer standing. Since then, only two circuits have analyzed whether state taxpayers must meet the "legislative nexus" test: the Seventh Circuit in *Hinrichs* v. *Speaker of the House*, 506 F.3d 584 (7th Cir. 2007), and the Sixth Circuit below. While those circuits reached opposite results, the Seventh Circuit reached its conclusion summarily, without considering the arguments presented to the Sixth Circuit. And the ultimate ruling in *Hinrichs* would have been the same regardless of whether the "legislative nexus" test had been applied, so the Seventh Circuit's conclusion on the governing test was not necessary to the outcome of the case. A subsequent panel of the Seventh Circuit may, under the Seventh Circuit's rules, reach a contrary result and thereby resolve the current circuit split. The other circuits, when confronted with this issue, may very well agree with the panel below.

Indeed, that is highly likely because requiring state taxpayers to meet the "legislative nexus" test makes little sense. The test was originally derived from the fact that the U.S. Constitution vests the federal government's power to tax and spend exclusively in Congress. But many state constitutions vest some taxing and spending powers with executive-branch officials or directly with the people (through referenda). The "legislative nexus"

test also effectuates the federal judiciary's special concern — based on the federal separation-of-powers doctrine — about interfering with the internal affairs of the co-equal federal executive branch. The separation-of-powers doctrine, however, does not apply to the federal judiciary's relationship with the States.

Finally, the merits of this case have not yet been adjudicated. Any questions about standing can and should be raised after final judgment, if they are still relevant, rather than at this interlocutory stage of the proceedings.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The following statutes, set forth in the Petitioners' and Respondents' appendices, are principally relevant: Ky. Rev. Stat. Ann. §§ 199.641, 199.650, 199.801, 199.805, 200.115, 605.090, 605.100, 605.120, 605.130.

STATEMENT

Facts

The Commonwealth of Kentucky contracts with private childcare facilities to care for abused, neglected, and abandoned children. C.A. App. 495. One of these facilities is Kentucky Baptist Homes for Children, which receives the majority of its funding from the Commonwealth, including more than $100 million over the past decade. Pet. App. 88, ¶¶ 19-21; C.A. App. 264, 995.

Most of the children in the care of Baptist Homes are either temporary or permanent wards of the state. Pet. App. 88, ¶ 21. State or county social workers — not the youths or their relatives — decide

whether to place these children at Baptist Homes. *Ibid.*; see also Ky. Rev. Stat. Ann. §§ 199.801(2), 199.805, 605.090(d).

Baptist Homes indoctrinates these vulnerable youths in its religious views, coerces them to take part in religious activity, and attempts to convert them to its version of Christianity. Pet. App. 90-91, 100-103, ¶¶ 26-27, 57-59. In its own words, the institution is a "Christian ministry" that strives to "permeate[] the environment of [its] programs with Christian influences," to "confront [children] with their need for God," and to "attempt to bring spiritual matters into their lives." Pet. App. 100-101, ¶ 57. Baptist Homes pressures its child residents to attend Baptist church services, to participate in Bible studies, to say prayers before meals, and to attend religious camps and concerts. Pet. App. 100-103, ¶¶ 57, 59. A contractor retained by the Commonwealth to monitor private childcare facilities reported several hundred complaints by children (in exit interviews) about Baptist Homes' religious practices, including that the children had been denied the opportunity to practice their own religions, had been forced to attend Baptist activities, and had been pressured to become Christians. C.A. App. 327, 333, 352. And in reports to the Kentucky Baptist Convention, Baptist Homes has boasted about its successes in converting children to Christianity, announcing that "[t]he angels rejoiced [one] year as 244 of our children made decisions about their relationships with Jesus Christ." Pet. App. 102-103, ¶ 59.

Baptist Homes receives state funding for its proselytism pursuant to a comprehensive statutory scheme — consisting of at least seventeen statutes

principally enacted through two pieces of legislation in 1950 and 1986 — that authorizes and governs the funding of private childcare facilities. See 1986 Ky. Acts ch. 423 (enacting Ky. Rev. Stat. §§ 199.645, 605.090, 605.100, 605.120, 605.130, 605.150); 1950 Ky. Acts ch. 125 (enacting Ky. Rev. Stat. §§ 199.640, 199.650, 199.660, 199.670); Ky. Rev. Stat. Ann. §§ 199.641, 199.680, 199.801, 199.805, 200.115, 605.095, 605.160. The Kentucky legislature has mandated that two state agencies — the Cabinet for Health and Family Services and the Department of Juvenile Justice — provide care for neglected, abused, and delinquent children. Ky. Rev. Stat. Ann. §§ 605.100(1), 605.130. The legislature has authorized these agencies to place children in private childcare facilities and to use state funds to pay those facilities, and has established detailed standards for setting the payment rates. Ky. Rev. Stat. Ann. §§ 199.641(2), 199.650, 200.115(1), 605.090(1)(d), 605.120(1).

The Kentucky legislature has also regularly appropriated specific sums for private childcare providers, out of which the Commonwealth makes payments to Baptist Homes. Pet. App. 76, 79; Resp. App. 7a-8a; C.A. App. 373-375. What is more, the Kentucky legislature has long understood that its childcare appropriations have been financing Baptist Homes. Indeed, the legislature's 2004-2006 budget expressly directed $200,000 for one Baptist Homes facility. Pet. App. 77. Further, in 1998, a Kentucky Legislative Research Commission's report to the legislature noted that tens of millions of state dollars were being paid to private childcare providers, listing Baptist Homes as one of the providers that received a significant number of child placements from the Commonwealth. C.A. App. 481. In 2006, a chamber

of the legislature issued a "legislative citation" to Baptist Homes, praising it for its "extraordinary efforts in assisting those children within the Commonwealth in need." Pet. App. 80-81. And numerous newspaper articles have discussed Baptist Homes' extensive receipt of state funds, including front-page articles in Kentucky's largest newspaper reporting that Baptist Homes is Kentucky's largest provider of private childcare services, a fact that Baptist Homes itself confirms on its website. C.A. App. 499, 501, 505, 594-629.

Finally, as discussed in detail in the Plaintiffs-Respondents' Conditional Cross-Petition, in addition to paying Baptist Homes state funds, Kentucky pays Baptist Homes substantial amounts of federal dollars pursuant to two congressionally authorized and funded programs that are subject to a federal statute (42 U.S.C. 604a) that requires inclusion of religious organizations among funding recipients.

Proceedings

The Plaintiffs-Respondents — state and federal taxpayers — filed this action on April 17, 2000. The Taxpayers alleged that Kentucky's provision of public funding to Baptist Homes violates the Establishment Clause of the First Amendment, because the funding supports religious indoctrination of the youth in Baptist Homes' care, and because Baptist Homes is a thoroughly religious institution. Pet. App. 100-103, 105, ¶¶ 57-59, 64-65. As the district court noted, the Taxpayers brought an "as applied" constitutional challenge, akin to *Bowen* v. *Kendrick*, 487 U.S. 589, 618-622 (1988), where this Court held that taxpayers had standing to challenge particular grants that were issued under a facially constitutional federal statute. C.A. App. 96; Docket

Entry 124, Aug. 27, 2003, at 2; Docket Entry 131, Nov. 17, 2003, at 2.

On April 18, 2002, the Defendants filed motions to dismiss the Taxpayers' Establishment-Clause claims based on standing. Docket Entries 82-83. On April 16, 2003, the district court denied that motion while allowing the Taxpayers to file an Amended Complaint. C.A. App. 225-27. On July 31, 2006, the Taxpayers sought leave to file a Second Amended Complaint that would have added new substantive allegations, but the district court denied the request. C.A. App. 229, 310.

On August 10, 2007, shortly after this Court issued its decision in *Hein* v. *Freedom From Religion Foundation*, 551 U.S. 587 (2007), the Defendants filed a new round of motions to dismiss challenging the Taxpayers' standing. Docket Entries 275-276. On September 18, 2007, in response to attacks in the Defendants' motions against the adequacy of the Amended Complaint, the Taxpayers sought leave to file a new Second Amended Complaint. C.A. App. 772-778. This time, the proposed amendments were limited to clarifying the Taxpayers' allegations relating to standing, by adding details about the statutes and appropriations supporting the funding of Baptist Homes and expressly confirming that the Taxpayers are challenging these statutes and appropriations "as applied." Cross-Pet. App. 23a-25a, ¶¶ 22, 66; C.A. App. 772-775, 787, 826.

On March 31, 2008, the district court granted the Defendants' motions to dismiss for lack of standing, apparently concluding that the Taxpayers had to show that the Kentucky legislature made a "particular appropriation" to Baptist Homes, and ignoring that the legislature did in fact make such an

appropriation. Pet. App. 47. The district court also denied the motion to amend, solely on futility grounds. Pet. App. 31.

On August 31, 2009, a unanimous panel of the court of appeals reversed the district court's ruling. The court of appeals held that the Taxpayers satisfied the test for Establishment-Clause state-taxpayer standing formulated in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952), as they alleged that substantial amounts of state dollars have been funding Baptist Homes' religious indoctrination in violation of the Establishment Clause. Pet. App. 19-20. The court concluded that it was not necessary for state taxpayers to satisfy the "legislative nexus" test applicable to federal taxpayers under *Flast* v. *Cohen*, 392 U.S. 83, 102 (1968), explaining that there was a lack of authority to support applying that test on the state level. Pet. App. 21-22.

The court of appeals further held that even if the "legislative nexus" test were applicable to state taxpayers, the Taxpayers (as state taxpayers) satisfied the test. Pet. App. 22-23. The court cited the Kentucky statutes that authorized state funding of private childcare facilities, the Kentucky legislature's direct appropriation of state funds to Baptist Homes, and the legislature's long-standing knowledge that its funds were going to Baptist Homes. Pet. App. 19-20, 22-23. The court noted that this case "falls squarely within the line of cases where the Supreme Court and our sister circuits have upheld taxpayer standing when grants, contracts, or other tax-funded aid are provided to private religious organizations pursuant to explicit legislative authorization." Pet. App. 23.

The court of appeals also concluded that the Taxpayers did not have standing as federal taxpayers to challenge the federal funding of Baptist Homes, a matter discussed further in the Taxpayers' Conditional Cross-Petition. Pet. App. 18. The court reversed the district court's denial of the Taxpayers' motion to amend the allegations in their complaint relating to standing, a ruling that the Defendants do not challenge in their Petition. Pet. App. 24. Finally, the court affirmed the district court's dismissal of statutory employment-discrimination claims brought against Baptist Homes by two of the Plaintiffs (Pet. App. 12), a ruling on which we do not cross-petition.

On December 16, 2009, the court of appeals denied petitions filed by the Defendants for rehearing en banc. Pet. App. 52-53. Not a single judge requested a vote on the petitions. Pet. App. 52.

REASONS FOR DENYING THE PETITION

I. This case presents an exceedingly poor vehicle for this Court to address whether the "legislative nexus" test applies to state taxpayers.

Addressing the "Questions Presented" in this case would be a purely academic exercise. Even if that were not so, there is no good reason for the Court to take up the Questions Presented at this time, for the panel's holding on them conflicts with no decision of this Court, and any circuit split that exists is cursory and undeveloped.

A. Adjudicating the questions presented in the Petition would be a purely academic exercise, unless the Court were also to decide an issue that the Petition does not present.

The first of the two "Questions Presented" in the Petition is "Does *Flast v. Cohen*'s 'legislative enactment' nexus test apply to State taxpayers as it does to federal taxpayers?" Pet. ii. The second is "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?" *Ibid.* The second question is nothing more than a rhetorical restatement of the first. Both questions attack only the panel's holding that state taxpayers need not meet the "legislative nexus" test. Neither challenges the panel's alternative holding that the Taxpayers (as state taxpayers) satisfied that test.

But unless the Court addresses that alternative holding, consideration of whether state taxpayers must satisfy the "legislative nexus" test will be nothing more than an academic exercise that cannot affect the outcome of the case. See *Powerex Corp.* v. *Reliant Energy Services, Inc.*, 551 U.S. 224, 236 (2007); *Michigan* v. *Long*, 463 U.S. 1032, 1040-1041 (1983). And the Defendants have failed to bring that alternative holding before the Court, placing it outside the Court's purview. See Sup. Ct. R. 14(1)(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

Even if the Court were to deem the alternative holding to be properly presented by the Petition, that holding is unworthy of review because it raises

nothing more than the question whether the panel properly applied existing precedent to a particular set of facts. See Section II, *infra*.

B. The Sixth Circuit's ruling on whether the "legislative nexus" test applies to state taxpayers does not conflict with any decision of this Court.

Even if the Court were inclined to overlook the procedural problems with addressing the applicability of the "legislative nexus" test here, the issue is not worthy of the Court's review. There is no conflict between the panel's ruling and any decision of the Court. There is also no mature circuit split supporting certiorari. See Section I(C), *infra*. We discuss this Court's decisions before those of the circuits, for the former aid understanding of the latter.

The Court has expressly upheld the standing of state taxpayers in three Establishment-Clause cases, but in none of those cases did the Court hold that state taxpayers must demonstrate a link between challenged expenditures and legislative action. See *School District* v. *Ball*, 473 U.S. 373, 380 n.5 (1985), overruled in part on other grounds by *Agostini* v. *Felton*, 521 U.S. 203 (1997); *Marsh* v. *Chambers*, 463 U.S. 783, 786 n.4 (1983); *Meek* v. *Pittenger*, 421 U.S. 349, 356 n.5 (1975), overruled on other grounds by *Mitchell* v. *Helms*, 530 U.S. 793 (2000). The Court has also adjudicated numerous other state-taxpayer Establishment-Clause suits without discussing standing at all, much less requiring the taxpayers to satisfy the "legislative nexus" test. See, *e.g.*, *Mueller* v. *Allen*, 463 U.S. 388, 392 (1983); *Roemer* v. *Board of Public Works*, 426 U.S. 736, 744 (1976); *Hunt* v. *McNair*, 413 U.S. 734, 735 (1973); *Sloan* v. *Lemon*,

413 U.S. 825, 827 (1973); *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 762 (1973); *Levitt* v. *Committee for Public Education & Religious Liberty*, 413 U.S. 472, 478 (1973); *Lemon* v. *Kurtzman*, 403 U.S. 602, 608, 610-611 (1971).

Nonetheless, the Defendants contend that five decisions of this Court have required federal and state taxpayers to be treated identically in all circumstances: *Doremus*, 342 U.S. 429; *Flast*, 392 U.S. 83; *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972); *ASARCO Inc.* v. *Kadish*, 490 U.S. 605 (1989); and *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332 (2006). The Court held no such thing in any of these cases.

Doremus. In *Doremus*, the Court held that a state taxpayer did not have standing to challenge a state statute that called for Bible-reading at the beginning of each school day. 342 U.S. at 435. The Court explained, "[t]here is no allegation that this activity is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school." *Id.* at 433. The Court distinguished *Everson* v. *Board of Education*, 330 U.S. 1, 3, 5, 17 (1947) — where the Court adjudicated a state taxpayer's challenge to a statute authorizing the use of state funds to transport students to parochial schools — explaining that "*Everson* showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of." *Doremus*, 342 U.S. at 434. What was fatal to standing in *Doremus* thus was not the lack of a "legislative nexus" — indeed, the taxpayer's challenge was directed at a

legislative enactment — but the lack of any substantial spending on the challenged activity.

Flast. In *Flast*, the Court held that federal taxpayers had standing to bring an Establishment-Clause challenge to the implementation of a federal statute providing aid to children in public and private schools. 392 U.S. at 103. The Court ruled that *federal* taxpayers have standing when two conditions are met. *Id.* at 101-104. One of these — which we call the "injury nexus" — is that taxpayers "establish a nexus between [taxpayer] status and the precise nature of the constitutional infringement alleged." *Id.* at 102. The Court explained that Establishment-Clause claims satisfy this requirement because a principal purpose of the Clause was to prevent the use of government funds to support religion. *Id.* at 103-104. The second requirement — which we call the "legislative nexus" — is that taxpayers challenge "exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution." *Id.* at 102. The Court did not discuss state-taxpayer standing at all, except when it noted that "[i]t will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute," and explained that this restriction "is consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus*." *Ibid.*

Moose Lodge. In *Moose Lodge*, the Court briefly rejected an argument that a plaintiff's status as a state taxpayer could support jurisdiction for an injunction requiring a state liquor-board to revoke the license of a discriminatory club. 407 U.S. at 167. The Court merely noted that *Doremus* requires that

challenged expenditures be more than "incidental," and that, unlike in *Flast*, no Establishment-Clause claim was involved. *Ibid.* The Court did not rely on any failure to show legislative action.

ASARCO. In *ASARCO*, 490 U.S. at 613-614, a plurality of the Court concluded that — like federal taxpayers (see *Massachusetts* v. *Mellon*, 262 U.S. 447, 487 (1923)) — state taxpayers generally lack standing to challenge expenditures of tax funds. The opinion did not discuss standing in Establishment-Clause cases, however.

DaimlerChrysler. In *DaimlerChrysler*, 547 U.S. at 346, a 2006 Commerce-Clause challenge to a state tax credit, the Court as a whole agreed with the *ASARCO* plurality's conclusion. The Court reasoned that state taxpayers, like their federal counterparts, have only a minute interest in state treasuries. *Id.* at 343-345. The Court distinguished its precedents approving standing in Establishment-Clause challenges, explaining that — unlike the Commerce Clause — the Establishment Clause was specifically intended to prevent injury to taxpayers. *Id.* at 348. In other words, the Court concluded that the state taxpayers before it could not satisfy *Flast*'s "injury nexus." The Court had no reason to decide, and thus did not address, whether state taxpayers must satisfy *Flast*'s "legislative nexus" — the plaintiffs lacked standing "[q]uite apart from whether the [challenged] tax credit is analogous to an exercise of congressional power under Art. I, § 8." *Id.* at 347.[1]

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[1] Contrary to the Defendants' contention (cf. Pet. 18), *DaimlerChrysler* did not hold that municipal taxpayers must meet the "legislative nexus" test. In fact, the Court reaffirmed

Hein. In its 2007 decision in *Hein*, 551 U.S. 587, the Court denied federal taxpayers standing to mount an Establishment-Clause challenge to conferences that were presented by the federal executive branch — and supported by general funds not designated by Congress for any particular purpose — during which executive-branch officials gave speeches that used religious imagery and praised faith-based social-service providers. 551 U.S. at 592, 595-596. While the Defendants cite *Hein* often, they do not claim that *Hein* required state taxpayers to meet the "legislative nexus" test. In fact, *Hein* did not discuss the standards for state-taxpayer standing. But, as explained below in Section I(D), *Hein* did clarify the legal principles underlying the "legislative nexus" test — principles that cannot justify importing the test into the state-taxpayer context.

C. There is no circuit conflict justifying certiorari.

Since *DaimlerChrysler* and *Hein* were decided, only one court of appeals, other than the Sixth Circuit, has even analyzed whether state taxpayers must meet the "legislative nexus" test in Establishment-Clause cases. And that circuit — the Seventh — failed to consider whether the principles underlying the test support applying it at the state level. The other circuits cited by the Defendants — the Second, Fifth, Eighth, Ninth, and Eleventh —

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that municipal taxpayers have general standing to challenge unlawful uses of municipal funds. 547 U.S. at 349. The Court merely ruled in *DaimlerChrysler* that because the taxpayers challenged state and not local decision-making, the lenient municipal-taxpayer test was inapplicable. *Id.* at 349-350.

have not analyzed the question at all. Thus there is no developed circuit split on the question.

Seventh Circuit. The only post-*DaimlerChrysler* circuit opinion, other than the panel's decision below, that has actually considered whether state taxpayers must satisfy the "legislative nexus" test in Establishment-Clause cases is *Hinrichs*, 506 F.3d 584. There, state taxpayers challenged the sectarian nature of prayers at the openings of sessions of the Indiana House of Representatives. *Id.* at 586-587. The Seventh Circuit held that the taxpayers had to meet the "legislative nexus" test, and that they had failed to do so. *Id.* at 598-599. But the taxpayers' claim for standing was also quite weak under the more generous *Doremus* test applied by the Sixth Circuit below. The expenditures at issue were "minimal" ("$8.46 per prayer"), not necessary for the administration of the prayer practice, and unrelated to the sectarian nature of the prayers. *Id.* at 587, 598; *id.* at 603 (Wood, J., dissenting). Under *Doremus*, these outlays would likely have been treated as "incidental expenditures" insufficient for standing. See *Flast*, 392 U.S. at 102 (explaining *Doremus*, 342 U.S. 429).

Hinrichs' conclusion that state taxpayers must satisfy the "legislative nexus" test not only was unnecessary to the outcome of the case but also was not founded on any in-depth analysis. The Seventh Circuit merely accepted the argument the Defendants make here — that because *DaimlerChrysler* applied the same rule to state taxpayers that applies to federal taxpayers outside the Establishment-Clause context, these two types of taxpayers should be treated identically in Establishment-Clause cases too. *Id.* at 595-598.

Hinrichs summarily reached that conclusion without considering whether the principles upon which the "legislative nexus" test is based are even applicable to state taxpayers. Those principles — which were clarified in the Court's 2007 decision in *Hein* — in fact do not support applying the test at the state level. See Section I(D), *infra.* Because *Hinrichs*' contrary conclusion was neither needed for the outcome of the case nor based on substantial analysis, a future panel of the Seventh Circuit may very well bring the circuit into alignment with the Sixth.[2]

Second Circuit. In *Board of Education* v. *New York State Teachers Retirement System*, 60 F.3d 106, 110 (2d Cir. 1995), which was not even an Establishment-Clause case, the Second Circuit ruled (as *DaimlerChrysler* did subsequently) that state taxpayers, like federal taxpayers, do not have general standing to challenge government action merely by virtue of their status as taxpayers. The Second Circuit has not analyzed, however, whether state taxpayers must meet the "legislative nexus" test in Establishment-Clause cases.

Fifth Circuit. The Fifth Circuit has not had an opportunity to consider state-taxpayer standing in an Establishment-Clause case since *DaimlerChrysler* and *Hein* were decided. Earlier Fifth Circuit cases had held that state taxpayers should be treated like federal taxpayers in non-Establishment-Clause

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[2] In the Seventh Circuit, a panel can overrule a prior panel so long as the proposed opinion is circulated to the en banc court and a majority of the judges do not vote for en banc hearing. 7th Cir. R. 40(e).

cases, but that in Establishment-Clause cases they need only show — in accordance with *Doremus* — that "tax revenues are expended on the disputed practice." See *Ward* v. *Santa Fe Independent School District*, 393 F.3d 599, 606 (5th Cir. 2004); *Henderson* v. *Stadler*, 287 F.3d 374, 379-381 & n.7 (5th Cir. 2002); *Doe* v. *Duncanville Independent School District*, 70 F.3d 402, 408 (5th Cir. 1995).

Eighth Circuit. Prior to *DaimlerChrysler* and *Hein*, Eighth Circuit decisions likewise had held that state taxpayers in Establishment-Clause cases "must only show that there has been a disbursement of tax money in potential violation of constitutional guarantees." *Minnesota Federation of Teachers* v. *Randall*, 891 F.2d 1354, 1358 (8th Cir. 1989); see also *Pulido* v. *Bennett*, 848 F.2d 880, 885 n.8, 886 (8th Cir. 1987), modified on other grounds, 860 F.2d 296 (8th Cir. 1988). The Eighth Circuit had also held, consistently with *DaimlerChrysler*, that state taxpayers lack standing in non-Establishment-Clause cases. See *Booth* v. *Hvass*, 302 F.3d 849, 854 (8th Cir. 2002); *Tarsney* v. *O'Keefe*, 225 F.3d 929, 938 (8th Cir. 2000). After *DaimlerChrysler* and *Hein* were decided, in *Americans United for Separation of Church & State* v. *Prison Fellowship Ministries*, 509 F.3d 406, 420 (8th Cir. 2007), the Eighth Circuit noted that a legislative nexus existed in upholding the standing of a group of state taxpayers challenging a religious program in a state prison, but the court did not analyze whether state taxpayers were *required* to show such a nexus.

Ninth Circuit. Before *DaimlerChrysler* and *Hein*, the Ninth Circuit took the position that state taxpayers could challenge any improper expenditure of state funds under any provision of the U.S.

Constitution. See *Doe* v. *Madison School District No. 321*, 177 F.3d 789, 793-797 (9th Cir. 1999); *Cammack* v. *Waihee*, 932 F.2d 765, 769-770 (9th Cir. 1991); *Hoohuli* v. *Ariyoshi*, 741 F.2d 1169, 1178-1180 (9th Cir. 1984). In *Arakaki* v. *Lingle*, 477 F.3d 1048, 1061-1063 (9th Cir. 2007), the Ninth Circuit recognized that *DaimlerChrysler* abrogated the circuit's prior decisions to the extent that they had permitted state-taxpayer standing in non-Establishment-Clause suits, but the Court did not determine the requirements for state-taxpayer standing in Establishment-Clause controversies.

Eleventh Circuit. In *Pelphrey* v. *Cobb County*, 547 F.3d 1263, 1280-1281 (11th Cir. 2008), the Eleventh Circuit upheld the standing of a group of municipal taxpayers. The court stated that "*Flast* pertains only to federal taxpayers and does not apply to municipal taxpayers." *Id.* at 1280. The court did not analyze whether it would be appropriate to apply the "legislative nexus" test to state taxpayers.

Given the paucity of analysis among the circuits on the applicability of the "legislative nexus" test to state taxpayers — and the lack of any analysis at all about whether the legal principles underlying the test support importing it to the state level (a question we discuss next) — it would be premature for this Court to address the matter. The courts of appeals should be afforded a sufficient opportunity to assess the impact of *DaimlerChrysler* and *Hein* on state-taxpayer Establishment-Clause challenges.

D. Neither logic nor policy supports applying the "legislative nexus" test to state taxpayers.

Flast's "legislative nexus" requirement is rooted in two grounds. One of these is that in the federal system of government, the power to tax and spend is vested exclusively in Congress. See *Flast*, 392 U.S. at 102; U.S. Const. art. I, § 8. The second is the separation-of-powers doctrine. See *Hein*, 551 U.S. at 610-612 (plurality opinion). Neither of these grounds supports applying the "legislative nexus" test to state taxpayers.

Flast explained that federal taxpayers must establish a logical link between the government actions they challenge and their status as taxpayers. 392 U.S. at 102. As the exercise of taxing and spending power creates such a link, and as that power resides only in Congress at the federal level, *Flast* required federal taxpayers to show a nexus with legislative action. See *ibid.*; U.S. Const. art. I, § 8.

Many state constitutions, however, vest considerable spending or taxing power in the state governor. Nebraska, for example, gives its governor primary authority over the state budget, unless three fifths of the legislature overrule him. Neb. Const. art. IV, § 7. West Virginia gives its governor the right to amend or supplement its budget with legislative consent. W. Va. Const. art. VI, § 51. Florida grants its governor the power to reduce state spending to ensure that the state budget is balanced. Fla. Const. art. IV, § 13. The Michigan Constitution allows its governor to do the same with consent of legislative appropriations committees, and provides that "[n]o appropriation shall be a mandate to spend." Mich.

Const. art. V, § 20. And forty-three states grant their governors a line-item veto. National Conference of State Legislatures, Gubernatorial Veto Authority with Respect to Major Budget Bill(s) (2008), http://www.ncsl.org/IssuesResearch/BudgetTax/GubernatorialVetoAuthoritywithRespecttoMajor/tabid/12640/Default.aspx.

Some state constitutions provide taxing and spending power directly to the people, through referenda. The constitutions of Arizona and Ohio provide the people with power to adopt or reject any item in any appropriations bill. Ariz. Const. art. XXI; Ohio Const. art. II, § 1(a). And Kentucky itself requires certain kinds of taxing and spending measures to be ratified by popular vote. Ky. Const. § 50.

It makes little sense to apply to state taxpayers a test derived from a federal constitutional regime that is quite different from the states' constitutional structures. To be sure, state taxpayers must establish standing under Article III of the U.S. Constitution to have their claims adjudicated in federal court, but the test for whether they have done so cannot legitimately turn on a provision of the U.S. Constitution that governs the U.S. Congress alone.

The second principle supporting the "legislative nexus" test is, as explained in *Hein*, the separation-of-powers doctrine — in particular, a special concern about intrusion by the federal judiciary on the internal, day-to-day operations and speech of the federal executive branch. See 551 U.S. at 610-612 (plurality opinion); *id.* at 615-618 (Kennedy, J., concurring). *Hein*'s emphasis of the separation-of-powers doctrine was consistent with earlier decisions

of this Court that denied standing based on separation-of-powers concerns when the federal judiciary was asked to intervene in internal executive-branch operations. See *Allen* v. *Wright*, 468 U.S. 737, 752, 759-761 (1984); *Laird* v. *Tatum*, 408 U.S. 1, 13-14 (1972); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 129-132 (1940).

As the Court has repeatedly recognized, however, the "separation-of-powers principle * * * has no applicability to the federal judiciary's relationship to the States." *Elrod* v. *Burns*, 427 U.S. 347, 352 (1976) (plurality opinion). For example, in *United States* v. *Gillock*, 445 U.S. 360, 370 (1980), the Court held that limits applicable to federal prosecutions of members of Congress did not apply to federal prosecutions of state legislators, in part because those limits were based on the federal separation of powers. In *Baker* v. *Carr*, 369 U.S. 186, 210, 217, 226 (1962), the Court held that the political-question doctrine did not bar federal courts from adjudicating the constitutionality of the apportionment of state election districts, because the political-question doctrine is based on the separation of powers. See also *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-324 (1966) (noting that State could not invoke separation-of-powers doctrine against federal government in challenge to Voting Rights Act). Thus the separation-of-powers doctrine does not support applying the "legislative nexus" test to state taxpayers.[3]

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[3] In contrast, the rationale supporting *Flast*'s "injury nexus" test — that a taxpayer must be suing under a constitutional clause aimed at preventing injury to taxpayers (see 392 U.S. at 102-103) — applies with equal force to state and federal taxpayers. It is the clause that taxpayers are suing

The Defendants contend that failing to use the "legislative nexus" test at the state level will cause the Establishment Clause to apply more onerously to the States, and that such a result would be inconsistent with federalism principles. Pet. 29. But the substantive prohibitions imposed by the Establishment Clause on federal and state governments are the same regardless of any standing rules. And government officials have a duty to comply with the Constitution regardless of whether anyone has standing to sue them. See, *e.g.*, *Hein*, 551 U.S. at 618 (Kennedy, J., concurring).

Moreover, any limits that federalism principles may impose on state-taxpayer standing would have no connection to whether the moving force behind challenged spending is legislative or executive. In contrast to the special concerns expressed about judicial oversight of the federal executive branch in this Court's separation-of-powers jurisprudence, this Court's federalism cases have singled out state judicial bodies, not state executive or state legislative conduct, for special protection. See *Kelo* v. *City of New London*, 545 U.S. 469, 482 (2005); *Growe* v. *Emison*, 507 U.S. 25, 35-36 (1993); *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 38 (1985); *Gregg* v. *Georgia*, 428 U.S. 153, 186-87 (1976); *Rizzo* v. *Goode*, 423 U.S. 362, 380 (1976); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 604 (1975); *Lemon* v. *Kurtzman*, 411 U.S. 192, 208 (1973).

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under, not whether they are federal or state taxpayers, that determines whether they are injured. Accordingly, the Court in *DaimlerChrysler*, 547 U.S. at 348, applied *Flast*'s "injury nexus" to determine that state taxpayers lack standing to sue under the Commerce Clause.

Declining to require state taxpayers to meet the "legislative nexus" test will not, as the Defendants hyperbolically contend, "[j]eopardize[] the [f]ederal-[s]tate [s]ocial [s]ervices [f]unding system." Cf. Pet. 31. Otherwise, the social-services system would surely have already collapsed in the States covered by the Fifth, Sixth, Eighth, and Ninth Circuits, for all these circuits have long used the same *Doremus* test to decide whether state-taxpayer standing exists in Establishment-Clause cases that the panel used below and that the Defendants contend is too lenient. See Section I(C), *supra*; see also *Johnson* v. *Economic Development Corp.*, 241 F.3d 501, 507-508 (6th Cir. 2001); *Hawley* v. *City of Cleveland*, 773 F.2d 736, 742 (6th Cir. 1985). The Defendants do not claim that these circuits have been inundated with lawsuits challenging public funding of religious social-service providers, and in fact no such thing has occurred.

The Defendants also express concern that failure to apply the "legislative nexus" test to state taxpayers would allow such taxpayers to "[c]ircumvent *Flast*'s [r]equirements" when challenging federal funding that is passed through state governments. Pet. 34. This argument assumes that state taxpayers need only meet the test for *state*-taxpayer standing when challenging a state's use of *federal* funds, an issue has not been litigated or decided in this litigation or, to the Taxpayers' knowledge, in any other case. What is more, if the courts ultimately decide the question in the way the Defendants assume, such a resolution would not constitute an improper "circumvention" of *Flast*, but would merely reflect a judgment that state-taxpayer-standing rules should apply when state decisions are challenged, while federal-taxpayer-standing rules should govern challenges to federal decision-making.

Cf. *DaimlerChrysler*, 547 U.S. at 349-353 (municipal taxpayers had to satisfy state-taxpayer-standing rules, not more lenient municipal-taxpayer rules, in challenging state decisions that affected municipal fisc).

E. The vitality of the "pervasively sectarian" test is not in issue at this stage of the proceedings.

The Defendants concede that they are not asking the Court to grant certiorari on the extent to which the "pervasively sectarian" doctrine remains good law. Pet. 35. They did not raise this issue before the court of appeals, so the question was not preserved. See, *e.g.*, *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981). Nevertheless, the Defendants quote out of context a statement the Sixth Circuit made in reaching its alternative holding that the Taxpayers met the "legislative nexus" test: "the plaintiffs have demonstrated a nexus between Kentucky and its allegedly impermissible funding of a pervasively sectarian institution." Pet. App. 23. The Defendants argue that the Sixth Circuit thus somehow injected the "pervasively sectarian" doctrine into its standing analysis. Pet. 35-36.

In fact, the Sixth Circuit's entire standing analysis was focused on how Baptist Homes is funded, not on the nature of the institution. Pet. App. 16-23. The language upon which the Defendants rely was simply a restatement by the panel of some of the Taxpayers' allegations — hence the use of the word "allegedly" — and did not constitute the court's analysis. Indeed, the Sixth Circuit began the paragraph containing the quoted language by stating its holding without even mentioning the "pervasively sectarian" nature of Baptist Homes: "the plaintiffs

have sufficiently demonstrated a link between the challenged legislative actions and the alleged constitutional violation, namely that Kentucky's statutory funding for neglected children in private childcare facilities knowingly and impermissibly funds *a* religious organization." Pet. App. 22-23 (emphasis added).

In any event, the Taxpayers allege that the public funding of Baptist Homes is unconstitutional not only because Baptist Homes is pervasively sectarian but also, regardless of how sectarian the institution is, because Baptist Homes uses taxpayer dollars for religious indoctrination. Pet. App. 99-103, 105, ¶¶ 56-59, 64. To be sure, there is a significant divergence between the decisions of the Sixth Circuit and those of the Fourth and Tenth Circuits concerning the vitality of the "pervasively sectarian" inquiry. See Pet. 35. This case, in its current posture, does not present an opportunity to resolve that tension. The Court may well have an opportunity to consider the matter if the case were to circle back to the Court after the merits of the Taxpayers' claims are adjudicated. At that time, the Court would also be able to consider the standing issue presented by the Petition, most likely with the benefit of additional analysis from intervening decisions by the courts of appeals. See *MLB Players Association* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001).

* * *

In sum, the Court would be engaging in a purely academic exercise if it were to grant certiorari on the questions that the Petition presents. And the ruling that the Questions Presented challenge is consistent with the decisions of this Court, involves a matter that is undeveloped in the courts of appeals, and was

eminently correct. The Court should allow the courts of appeals further opportunity to develop the issue, and if a full-fledged circuit split were to arise, the Court would have ample opportunity to consider the issue in the future — in this case or another — with the benefit of other lower courts' input.

II. The Sixth Circuit's alternative holding that the Taxpayers satisfy the "legislative nexus" test does not merit this Court's review.

As explained in section I(A) above, the Sixth Circuit's alternative holding is not properly before this Court because it was not raised in the Petition's "Questions Presented." But even if it had been properly raised, the alternative holding is even less worthy of the Court's treatment than the questions that *were* presented. The Sixth Circuit's alternative holding represents a straightforward application of this Court's precedents. The alternative holding does not conflict with any ruling of another court of appeals. At most, the "asserted error consists" of "the misapplication of a properly stated rule of law" (cf. Sup. Ct. R. 10), though even that claim is specious.

A. The Sixth Circuit's application of the "legislative nexus" test does not conflict with any decision of this Court.

The Defendants take issue in several ways with how the court of appeals applied the "legislative nexus" test. But the Defendants do not take issue with the panel's statement of the legal standard: that taxpayers must "demonstrate a link between the challenged legislative actions and the alleged constitutional violations." Pet. App. 22-23. The panel's application of that standard to the facts of

the case falls well outside the range of issues worthy of this Court's review.

The Defendants contend that the Taxpayers failed to challenge any particular statute or appropriation. Pet. 22, 27. In fact, the Taxpayers challenge "as applied" the statutes and appropriations authorizing the funding of Baptist Homes. Cross-Pet. App. 23a-25a, ¶¶ 22, 66. To the extent that the Defendants contend that the "legislative nexus" test limits taxpayers to facial challenges, their argument is foreclosed by *Bowen*, 487 U.S. 589. Although the statute authorizing the funding challenged by the taxpayer-plaintiffs there was facially constitutional, the Court held that the plaintiffs had standing to bring an "as-applied" challenge aimed solely at the religious use of specific grants. *Id.* at 618, 620-622; see also *Flast*, 392 U.S. at 87, 89-90 (plaintiffs were allowed to proceed even though they asserted that aid was being provided to religious schools in a manner *prohibited* by the statute in question, and even though they took issue with a single school district's provision of aid).

Second, the Defendants suggest that taxpayer standing exists only when legislation expressly calls for public funding to be directed to a religious institution in an unconstitutional manner. See Pet. 22-23, 26. Again, this is contrary to *Bowen*, for the legislation that authorized the grants at issue there did not require that any grant moneys be provided to religious or even private organizations. See 487 U.S. at 593, 604, 608. Instead, Congress merely "*contemplated* that some of those moneys *might* go to projects *involving* religious groups." *Hein*, 551 U.S. at 607 (citing *Bowen*, 487 U.S. at 595-596) (emphasis added). In addition, in *Flast*, the legislation at issue

did not even mention religious schools, much less require that any aid to them be delivered in an unconstitutional manner. See 392 U.S. at 86-88. And in *Hein*, the Court found standing lacking where the challenged spending was not "expressly *authorized or* mandated" by Congress. 551 U.S. at 608 (emphasis added).

Third, and relatedly, the Defendants argue that standing is lacking because Kentucky executive-branch officials had discretion to decide whether to fund Baptist Homes. Pet. 26-27. Once more, *Bowen* forecloses the Defendants' contention, as the Court there held that the plaintiffs had standing to challenge specific grants that the federal executive branch had awarded on a discretionary basis. 487 U.S. at 618-620. In *Flast* too, federal, state, and local executive officials exercised considerable discretion over how the statute in question was implemented. See 392 U.S. at 86-87, 90 & n.3.

Fourth, the Defendants complain about the Sixth Circuit's statement that the Kentucky legislature has long been aware that it has been funding Baptist Homes. Pet. 26-27. The panel's statement simply echoes the *Hein* plurality's observation — made in explaining why the taxpayers had standing in *Flast* — that because the authorizing statute there was passed at a time when most private schools were religious, Congress "surely understood" that the aid made available by that statute for students in private schools "would find its way to religious schools." 551 U.S. at 604 n.3. Here, the Kentucky legislature had actual knowledge that its funding was going specifically to Baptist Homes. And the panel did not err by considering evidence of legislative knowledge that arose after the initial

complaint was filed but before the Second Amended Complaint was submitted, for when a complaint is amended it is proper for courts to look at the facts that exist at the time of amendment in assessing standing. See *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 51 (1991).

More generally, the Defendants contend that *Hein* substantially narrowed the circumstances where standing is available under the "legislative nexus" test. Pet. 23-26. In fact, *Hein* left all of the Court's precedents intact. The Court was confronted with unusual circumstances unlike those presented by any of the Court's other taxpayer-standing cases. The activities challenged in *Hein* were financed not by money designated by Congress for any particular program or function, but out of general, lump-sum appropriations that executive-branch departments could use for any purpose. 551 U.S. at 595, 607-608. And what the *Hein* plaintiffs challenged was not the payment of public funds to religious institutions that used such funds for religious indoctrination, but merely certain statements made by executive-branch officials promoting federal aid to faith-based institutions. *Id.* at 592, 595-596. The plurality in *Hein* thus carefully limited the case's holding: federal taxpayers lack standing to challenge such "a purely discretionary Executive Branch expenditure." *Id.* at 615. The opinion cautioned, "[w]e need go no further to decide this case" and "we decide only the case at hand." *Ibid.* The plurality expressly rejected a request to overrule *Flast*, and it cited *Bowen* with approval. *Id.* at 606-608, 615.

Here, the Taxpayers challenge the payment of more than one hundred million dollars to a private religious organization; the religious organization is

financed through programs specifically authorized and funded by the Kentucky legislature; the legislature has repeatedly appropriated funding for these programs with knowledge that the funding would be paid specifically to this religious organization; and the legislature even designated a specific amount for this religious organization by name. The panel's decision thus falls squarely within a long line of cases where taxpayers have been permitted to challenge the distribution by administrative officials of substantial amounts of public aid to private religious institutions pursuant to a legislatively authorized scheme. See, *e.g.*, *Mitchell*, 530 U.S. 793; *Agostini*, 521 U.S. 203; *Bowen*, 487 U.S. at 619-620; *Ball*, 473 U.S. at 380 n.5; *Roemer*, 426 U.S. at 744; *Hunt*, 413 U.S. at 735; *Tilton* v. *Richardson*, 403 U.S. 672, 675-676 (1971); *Flast*, 392 U.S. at 85-88; see also *Freedom From Religion Foundation* v. *Bugher*, 249 F.3d 606, 608-611 (7th Cir. 2001); *DeStefano* v. *Emergency Housing Group*, 247 F.3d 397, 403-405 (2d Cir. 2001); *Lamont* v. *Woods*, 948 F.2d 825, 829-831 (2d Cir. 1991); *Pulido*, 860 F.2d at 297-298.

B. The Sixth Circuit's application of the "legislative nexus" test does not create any conflict among the courts of appeals.

In suggesting that a circuit split exists over how the "legislative nexus" test should be implemented, the Defendants cite only two cases: *Hinrichs*, 506 F.3d 584, and *Prison Fellowship*, 509 F.3d 406. Pet. 17-18. Neither of these decisions conflicts with the panel's ruling.

The practice at issue in *Hinrichs* — the Indiana House's opening of its sessions with sectarian

prayers — was not authorized by any statute. 506 F.3d at 598-599. It was funded not by any specific appropriation, but out of general House operating funds. *Id.* at 587, 598-599. As noted above, the contested expenditures were minimal and did not support the challenged aspect of the prayers. *Id.* at 587, 598. And, similarly to *Hein*, the plaintiffs were not challenging any payments outside the government to private parties for religious activities, but instead were seeking an injunction against an internal practice of the state government. *Id.* at 585, 587, 598. There is not even a remote conflict between the Seventh Circuit's denial of standing on those facts and the Sixth Circuit's conclusion below.

Nor is there any conflict between the decision below and the ruling in *Prison Fellowship*, 509 F.3d at 420, upholding taxpayers' standing to challenge a religious prison program. Contrary to what the Defendants contend (cf. Pet. 18), nothing in *Prison Fellowship* suggests that taxpayers must identify an appropriation that specifically requires funding of a religious program. In fact, the appropriations in *Prison Fellowship* were merely "for a values-based treatment program" at a prison and left the Iowa executive branch with discretion to select a secular contractor. *Id.* at 417-418, 420. The Eighth Circuit indicated that the Iowa legislature knew when it passed the appropriations that the Iowa executive branch had already selected a religious contractor as the provider of the program, although the court did not suggest that such knowledge was required. See *id.* at 420. The Eighth Circuit thus found standing despite the exercise of executive discretion and partly in reliance on legislative knowledge — just like the Sixth Circuit below.

It is hardly surprising that there is no inter-circuit conflict over how the "legislative nexus" test should be implemented, given that *Hein* was issued less than three years ago. Perhaps such a conflict may develop with time, but none has surfaced to date, so there is no reason for the Court to take up the matter now.

CONCLUSION

The issue presented by the Defendants — whether state taxpayers must meet the "legislative nexus" test — is not ripe for this Court's review. Even if it were, in order to avoid engaging in a purely academic exercise, the Court would need to adjudicate another issue not presented by the Petition. That issue — *how* the "legislative nexus" test should be applied — falls well outside the range of issues worthy of this Court's consideration and was resolved consistently with the decisions of this Court and the other circuits. The Petition should be denied.

Respectfully submitted.

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