No. 09-1295

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

RESPONSE TO CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED

Did the U.S. Court of Appeals for the Sixth Circuit err in applying *Flast v. Cohen*, 392 U.S. 83 (1968)'s "legislative enactment" nexus test when it determined the conditional Cross-Petitioners lacked federal taxpayer standing to challenge Kentucky's discretionary executive branch child care contracts with a purported "proselytizing religious organization"?

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COUNTERSTATEMENT OF THE CASE

A. Conditional Cross-Petitioners' Pleadings

On April 17, 2000, the Cross-Petitioners filed this action in the U.S. District Court for the Western District of Kentucky. Their initial Complaint did not refer to any Congressional enactment, did not name any federal defendants, did not articulate any Establishment Clause or other claim against the federal government, and did not ask for any relief against the federal government. Instead, they brought a claim against Cross-Respondents Brown and Miller (or their predecessors in office), the secretaries of two Kentucky executive branch agencies (collectively, "Kentucky") alleging that the administration of Kentucky's contracts with Cross-Respondent Kentucky Baptist Homes for Children, Inc. ("KBHC") violated the Establishment Clause. KBHC was named as a necessary party to this claim pursuant to Fed. R. Civ. P. 19. The initial Complaint focused solely on the Cross-Petitioners' status as *State* taxpayers and upon the alleged inappropriate use of *State* funds. App. 1-26, Original Complaint.

On April 16, 2003, the District Court denied Kentucky and KBHC's preliminary dispositive motions challenging the Cross-Petitioners' taxpayer standing to sue. *See* App. 27-30, Apr. 16, 2003 Order. The District Court permitted the Cross-Petitioners to file an amended complaint supplementing the factual predicate for their claimed taxpayer standing. App. at 30. This First Amended Complaint claimed that

unspecified "federal funds"[1] were used to support Kentucky's contracts with KBHC, but did not identify any specific federal legislative enactments, name any federal defendants, articulate any Establishment Clause claim against the federal government, or ask for any relief against the federal government. The gravamen of the amendment was to assert both State and federal taxpayer standing, but with no change in the substance of the claim, the parties, or the relief sought. *See* Appendix, Petition in Case No. 09-1121 ("Primary Pet. App.") at 82-126, First Amended Complaint.

On July 31, 2006, the Cross-Petitioners filed a motion to further amend their complaint, this time proffering a pleading framing KBHC as a "State actor" and demanding recoupment of all State and "federal funds" KBHC had received from Kentucky. *See* App. 31-64, July 2006 Proposed Second Amended Complaint. On January 30, 2007, the District Court denied this motion to amend in full, citing the "number of tide-shifting amendments" contained within the proposed complaint and the Cross-Petitioners' failure to justify the six-year delay in bringing these substantive amendments. *See* App. 65-69, Jan. 30,

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[1] As the Cross-Petitioners acknowledge in their Cross-Petition and elsewhere, KBHC receives no "federal funds" as such from the federal government. The "federal funds" ostensibly at issue in this case are funds paid to Kentucky, which does not provide those funds directly to KBHC, but simply incorporates those funds into the State's own budget revenues.

2007 Order. This proposed pleading also failed to identify any specific federal legislative enactments, name any federal defendants, articulate any Establishment Clause claim against the federal government, or ask for any relief against the federal government.

On September 18, 2007, more than seven years after they had filed their initial Complaint, and while the parties were briefing the Cross-Respondents' renewed motions to dismiss for lack of standing in light of *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007) and *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 342 (2006), the Cross-Petitioners filed a third motion to amend their complaint. This motion proposed new, expanded substantive allegations and demands for relief, as well as two new paragraphs identifying federal statutes and appropriations that purportedly violated the Establishment Clause as applied to Kentucky's discretionary executive branch contracts with KBHC. This third proposed amended complaint still did not name any federal defendants, articulate any Establishment Clause claim against the federal government, or ask for any relief against the federal government. *See* App. 70-103, September 2007 Proposed Second Amended Complaint.

B. The District Court's Memorandum Opinion and Order

On March 31, 2008, the District Court issued its Memorandum Opinion and Order (Primary Pet. App. 29-51, 533 F.Supp.2d 853 (W.D. Ky. 2008)) dismissing Cross-Petitioners' Establishment Clause claims for lack of federal and State taxpayer standing. With regard to Cross-Petitioners' putative federal taxpayer standing, the District Court held:

> At best, the Amended Complaint alleges that KBHC receives funds through contracts with various Kentucky agencies. [. . .] However, the 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. [. . .] Plaintiffs cite provisions of the Social Security Act's Title IV-E program as well as Kentucky statutory provisions which authorize the Kentucky agencies to pay for the necessary care and treatment of wards of the State. *These general funding provisions are alleged to be the ultimate source of funds, but there are no allegations that these congressional actions bear any connection to the alleged constitutional violation. Indeed, they are wholly non-directive, general funding provisions.* [. . .] We conclude that the Amended Complaint, even embellished with the proposed recitation of funding sources, fails to demonstrate taxpayer standing to

> bring the Establishment Clause challenge herein.

Primary Pet. App. 47-48, 533 F.Supp.2d at 861-62 (emphasis added). The District Court accordingly granted Kentucky and KBHC's motion to dismiss for lack of standing, and denied the Cross-Petitioners' third motion to amend as futile. Primary Pet. App. 33, 47-49, 50, 533 F.Supp.2d at 862.

C. The Sixth Circuit Panel's Opinion and Judgment

On August 31, 2009, the Sixth Circuit issued an Order and Judgment (Primary Pet. App. 1-28, 579 F.3d 722 (6th Cir. 2009)) affirming the District Court in part and reversing in part. Of relevance here, the Sixth Circuit unanimously affirmed the District Court's determination that the Cross-Petitioners lacked federal taxpayer standing to sue:

> Looking at the record that was before the district court, we find that the plaintiffs have not alleged a sufficient [*Flast v. Cohen*, 392 U.S. 83 (1968) legislative enactment] nexus to show federal taxpayer standing. Even considering the proposed second amended complaint, as the district court did, the question before us is whether the plaintiffs' invocation of the Social Security Act's Title IV-E and Supplemental Security Income programs . . . as congressional authorization of funds to KBHC satisfies *Flast*. [. . .] Drawing on the fact that federal funds from these programs

> are regularly funneled to service providers in Kentucky, the plaintiffs argue that these programs are specific legislative actions for purposes of satisfying the first prong of the *Flast* test.
>
> Even though the plaintiffs refer to specific federal programs and specific portions of these programs, they have failed to explain how these programs are related to the alleged constitutional violation. These statutes are general funding provisions for childcare; they do not contemplate religious indoctrination. [. . .] While the plaintiffs do challenge congressional legislation, as required by *Flast* . . . the plaintiffs' claims are simply too attenuated to form a sufficient [*Flast* legislative enactment] nexus between the legislation and the alleged [Establishment Clause] violation.

Primary Pet. App. 17-18, 579 F.3d at 730-31.[2] The Cross-Petitioners did not seek either panel rehearing or *en banc* review of this federal taxpayer standing decision, nor did they notify the Attorney General of their purported constitutional challenge to any federal "legislative enactments" until the filing of their conditional cross-petition with this Court. Sup. Ct. R. 29(4)(b). *But see* Fed. R. Civ. P. 5.1 (requiring

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[2] The Sixth Circuit panel went on to opine that Cross-Petitioners had established State taxpayer standing to sue on these same facts (App. 19-24, 579 F.3d at 731-33); this decision is the subject of Kentucky and KBHC's petition for writ of certiorari.

such notice by challenging party at District Court level); FRAP 44(a) (requiring such notice by challenging party at Court of Appeals level); 28 U.S.C. § 2403(a) (requiring such notice at any and every judicial level).

The Sixth Circuit panel considered the Cross-Petitioners' proposed amended complaint as it related to standing, but affirmed the District Court's denial of the Cross-Petitioners' third motion to amend to the extent that the proposed pleading contained novel substantive issues. Primary Pet. App. 14-15, 579 F.3d at 729. *The Cross-Petitioners did not and do not now* seek any relief from the Sixth Circuit panel's holding rejecting their last proffered amendment.

REASONS TO DENY THE CROSS-PETITION

The Cross-Petitioners contend the Sixth Circuit erred in its application of the well-settled *Flast v. Cohen* "legislative enactment" nexus test for federal taxpayer standing. This assignment of error need not be addressed further, however, to resolve the *State* taxpayer standing questions raised in Kentucky and KBHC's primary petition. The courts below applied settled law, as recently reaffirmed in *Hein*, to determine that the Cross-Petitioners lacked federal taxpayer standing. No other reasons support granting certiorari on this issue. The cross-petition should be denied.

I. Kentucky and KBHC's Petition for Writ of Certiorari Does Not Require Any Re-examination of *Flast* As Applied to Federal Taxpayer Standing.

As a threshold matter, the *State* taxpayer standing questions raised in Kentucky and KBHC's petition can be fully decided without reconsidering any aspect of the Court's *federal* taxpayer standing jurisprudence.

Kentucky and KBHC's petition presents two questions for the Court: (1) whether *Flast*'s "legislative enactment" nexus test applies to plaintiffs seeking State taxpayer standing in Establishment Clause cases, and (2) if so, whether Article III gives federal courts broader authority to apply that test when analyzing potential Establishment Clause violations by State legislatures.[3]

The two-part *Flast* nexus test is universally regarded as the correct formula for federal taxpayer standing in Establishment Clause cases. *See In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008), *Freedom From Religion Foundation, Inc. v. Nicholson*, 536 F.3d 730 (7th Cir. 2008), *Laskowski v. Spellings*, 546 F.3d 822 (7th Cir. 2008), *Pedreira v. Ky. Baptist Homes for Children, Inc.*, 579 F.3d 722 (6th Cir. 2009) (post-*Hein* appellate decisions applying

[3] As set forth at length in Kentucky and KBHC's petition, these two questions address both the principal and "alternative" holdings of the Sixth Circuit panel opinion.

Flast in federal taxpayer standing analysis); *see also Univ. of Notre Dame v. Laskowski*, 551 U.S. 1160 (2007) (GVR disposition of federal taxpayer standing Establishment Clause case for further consideration in light of *Hein*). While Cross-Petitioners quibble here with how this *Flast* test was applied by the courts below, they do not and cannot argue a different test should have been used to ascertain their federal taxpayer standing. Likewise, Kentucky and KBHC have not asked the Court to reconsider the Sixth Circuit's federal taxpayer standing analysis. Instead, Kentucky and KBHC ask the Court to consider fully how *Flast* informs State taxpayer standing to bring Establishment Clause claims in federal court. This is the only issue presented which has not been definitively resolved by the Supreme Court and which is the subject of circuit conflict in the lower courts.

While this Court may very well consider the Article III underpinnings of *Flast* when deciding if, when, and how to apply that case's "legislative enactment" nexus test to State taxpayers, nothing requires the Court to reconsider *Flast* in its indigenous federal taxpayer standing context. Indeed, that exercise was accomplished by this Court only three terms ago in *Hein,* and the Cross-Petitioners provide no reason to retread that same ground so soon. Accordingly, the Court should reject Cross-Petitioners' invitation to engage in a comprehensive re-examination of federal taxpayer standing when a narrow exegesis of *Flast*'s application *vel non* to State taxpayers would suffice.

II. Without A Federal Defendant, Cross-Petitioners' Asserted Federal Taxpayer Standing Is Immaterial and Moot.

More fundamentally, Cross-Petitioners have failed – in any of the four versions of their complaint over the decade of this litigation – to articulate a claim alleging a federal Establishment Clause violation against a federal defendant. As a result, the issue of their federal taxpayer standing is academic at best, and therefore fails to merit this Court's review.

The Cross-Petitioners' *only* Establishment Clause claim in this case alleges that "the Commonwealth of Kentucky . . . provid[ed] government funds to finance KBHC staff positions that are filled in accordance with religious tenets [. . .] and to finance KBHC services that seek to install Christian values to the youth in its care[.]" Primary Pet. App. 104, First Am. Comp. paras. 63-64. To remedy these alleged violations, Cross-Petitioners have sought the following:

> 1. A declaration that the Commonwealth of Kentucky has violated the Establishment Clause of the First Amendment of the United States Constitution by funding KBHC;
>
> 2. An order enjoining the Commonwealth of Kentucky from providing further funding to KBHC for staff positions as long as they continue to be filled in accordance with religious tenets and for services as long as they seek to instill Christian values and teachings to youth in KBHC's care;
>
> 3. An order requiring KBHC to reimburse the Commonwealth of Kentucky for any

> Commonwealth funds it has received since ALICIA PEDREIRA's termination that have been used to fund PEDREIRA's former position and/or any other position that was filled pursuant to KBHC's unlawful employment policy, according to proof;
>
> 4. An award of costs, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988;
>
> 5. Such other relief as the Court deems just and appropriate.

(Primary Pet. App. 110, First Am. Complaint, "Request for Relief").

This relief has been sought solely against Kentucky and KBHC. The Cross-Petitioners have not named a federal defendant, articulated an Establishment Clause claim against the federal government, or asked for any relief against the federal government in this case. They do not seek a declaratory judgment that any federal statute is unconstitutional, an injunction barring the enforcement of any federal statute, or any other remedy barring any executive agency or official of the United States from disbursing funds to Kentucky or from acting or refraining to act in any other way. It is foolhardy to suggest that such monumental relief against a non-existent federal defendant would be embodied within the throwaway phrase "[s]uch other relief as the Court deems just and appropriate."

Furthermore, because the Sixth Circuit affirmed the denial of new substantive amendments to the complaint – a final, law-of-the-case decision not

challenged here – this lawsuit will *never* involve these federal parties, claims, or forms of relief. The Cross-Petitioners' original and amended Establishment Clause claims are directed solely at Kentucky. The Cross-Petitioners' "federal" standing allegations are completely untethered to any judicial mechanism that could remedy the constitutional violation the Cross-Petitioners now belatedly claim the federal government has committed. In other words, the Cross-Petitioners assert federal taxpayer standing in a vacuum, and vacuous standing does not satisfy Article III.

Undaunted by this impenetrable jurisdictional obstacle, Cross-Petitioners seek to use federal taxpayer standing as a "back-door" basis through which they might challenge any State expenditure that includes any funds originally appropriated by Congress. Given the ubiquitous nature of federal spending within and among the fifty States, this proposal would result in an unprecedented expansion of taxpayer standing. Hundreds of millions of federal taxpayers could use the federal courts to halt (and potentially reverse) any spending decision made by any State any time undifferentiated federal pass-through funds constituted even a tiny fraction of the challenged State spending.

Indeed, under the Cross-Petitioners' theory, a federal taxpayer located in Hawaii could bring suit in federal court to challenge the manner in which Maine spends its federal dollars. To date, this Court's jurisprudence has not permitted persons who "claim

that the government has violated the Establishment Clause" to exercise "a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Valley Forge Christian College v. Am. United for Separation of Church and State, Inc.*, 454 U.S. 464, 487 (1982). But if such a mindboggling reversal of basic Article III requirements is ever to be considered seriously by this or any other court, at least it should occur in a case to which the United States or one of its officials is a party and the federal government's position has been heard. That is not the case here.

The Cross-Petitioners' proposed federal taxpayer standing "by osmosis," moreover, has no support in this Court's decisions and abrogates basic Article III standing principles. To establish standing, the Cross-Petitioners must demonstrate the relief they seek will "redress or prevent actual or imminently threatened injury to [them] caused by private or official violation of law." *Summers v. Earth Island Inst.*, 555 U.S. ___, 129 S.Ct. 1142 (2009) (slip op. at 4). Here, the Cross-Petitioners only seek relief against Kentucky regarding a discrete category of public funds used to support certain KBHC staff positions. This Kentucky-specific, expenditure-specific relief will not "redress or prevent" Congress or the Secretary of Health and Human Services's past, present, or future appropriations or distributions of the Social Security Act funds that allegedly constitute the Cross-Petitioners' federal taxpayer "injury". *Cf. Flast,* 392 U.S. at 87-88 (citing plaintiffs' prayer to enjoin, *inter alia*, federal

Secretary of Health, Education and Welfare from approving any expenditure of federal funds for allegedly unconstitutional purposes); *Bowen v. Kendrick*, 487 U.S. 589, 597 (1988) (citing plaintiffs' claim for declaratory and injunctive relief against, *inter alia*, federal Secretary of Health and Human Services).

A federal court cannot determine whether a complained-of injury can be properly traced to a party that is not before it, nor can it order an absent defendant to provide redress for that injury. It is black letter law that both traceability and redressability, along with injury in fact, are irreducible requirements of Article III standing. *See, e.g., Valley Forge,* 454 U.S. at 471-72, n.9 (citing decisions). Accordingly, in *Eastern Ky. Welfare Rights Org. v. Simon*, 426 U.S. 26 (1976), the Court rejected for lack of standing a claim brought only against government officials whose tax policy had allegedly "'encouraged' hospitals to deny services to indigents." *Id.* at 42. As "no hospital [was] a defendant," there was no case or controversy in the context of the suit. *Id.* at 41. The Court summarized the constitutional issue succinctly:

> . . . [T]he "case or controversy" limitation of Article III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.

Id.

Like the plaintiffs in *Simon*, the Cross-Petitioners seem to believe that the federal government has somehow "encouraged" other parties to misbehave by funneling Social Security Act funds to Kentucky; but even if such a theory were sufficient to bring the federal government before the courts, they have not pled it. Instead, like the plaintiffs in *Simon*, they have brought to the court a theory without a defendant. *Cf. Mitchell v. Helms*, 530 U.S. 793 (2000) (plaintiffs challenging provision of federal funds to state educational agencies named as defendants both state education officials as well as federal Secretary of Education and Department of Education) *with Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (plaintiffs challenging state school voucher program named only state and local officials). This failure is fatal. The Cross-Petitioners' claim is constitutionally deficient, an academic inquiry only. The Cross-Petition should be denied.

III. The Cross-Petitioners Cannot Satisfy *Flast's* Federal Taxpayer Standing Test.

A. The Courts Below Correctly Ruled Cross-Petitioners Could Not Satisfy the "Legislative Enactment" Nexus Test.

Flast requires a plaintiff to demonstrate a nexus between his or her status as a federal taxpayer and the federal "legislative enactment" that is alleged to violate the Establishment Clause. The Cross-Petitioners, however, have only alleged that *Kentucky* violated the Establishment Clause through its

maladministration of discretionary *executive branch* contracts with KBHC. The federal "legislative enactments" relied on by the Cross-Petitioners in the courts below are general, non-directive appropriations that Congress has not required or expressly contemplated would be used by States to fund "proselytizing religious providers." After these funds leave the federal coffers, they must still pass through two independent, highly discretionary levels of Kentucky State government – the Kentucky General Assembly and the Cross-Respondent Kentucky executive agencies – before they might reach KBHC (assuming a contract exists, children are placed at KBHC, and post-audit invoices for reimbursement for their care are approved). The various appropriating, contracting, and auditing decisions of these two intervening levels of Kentucky government sever any connection between Congress and KBHC. The District Court and the Sixth Circuit both recognized this, and correctly concluded that the *Flast* "legislative enactment" nexus test had not been and could not be met.

B. Cross-Petitioners Cannot Fabricate A "Legislative Enactment" Nexus Using the Charitable Choice Statute.

Undoubtedly aware of their arguments' shortcomings in the courts below, here the Cross-Petitioners attempt to cobble together a more direct "legislative enactment" claim by artificially conjoining the generic Social Security Act appropriations

referenced above with the "Charitable Choice" non-discrimination statute, 42 U.S.C. § 604a, which the Cross-Petitioners wrongly allege "expressly requires States to include religious institutions among the recipients of [federal] funding." Cross-Petition at 8, citing 42 U.S.C. § 604a(b)-(c). The Cross-Petitioners' creative amalgam should be rejected for several reasons.

First, the Charitable Choice statute does not require States to favor religiously-affiliated child care providers over secular providers, or take any other affirmative measures to ensure that religiously-affiliated providers receive public funding. As its nickname implies, the Charitable Choice statute is a nondiscrimination statute that merely requires the government to consider all social service entities equally, without regard to their religious affiliation (if any). *See Freedom From Religion Foundation, Inc. v. McCallum*, 179 F.Supp.2d 950, 982 (W.D. Wis. 2002), *aff'd* 324 F.3d 880 (7th Cir. 2003) ("The charitable choice provisions authorize religious and faith-based organizations to participate in federally funded social service programs on the same basis as any other non-governmental service provider."); *see also* U.S. Dept. of Health and Human Servs., "What is Charitable Choice?", available at http://www.hhs.gov/fbci/choice/html (last visited May 4, 2010) ("While Charitable Choice is designed to improve access to federal funding for faith-based organizations, it does not establish a new funding stream dedicated to these groups.").

Second, consistent with jurisprudence under the Establishment Clause, the Charitable Choice statute expressly prohibits the use of direct governmental aid for religious worship, instruction or proselytization. 42 U.S.C. § 604a(j), *McCallum*, 179 F.Supp.2d at 982. Thus, even if the Charitable Choice statute could be grafted onto other federal legislation in the manner the Cross-Petitioners propose, it could not satisfy the *Flast* "legislative enactment" nexus test because it *expressly prohibits* funding religious instruction and proselytization – the alleged conduct at the heart of the Cross-Petitioners' Establishment Clause claim.

Third, the Charitable Choice statute expressly provides that "nothing in this section shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations." 42 U.S.C. § 604a(k). This language ensures each State has the ultimate discretion to decide for itself whether to contract with or otherwise financially support religiously-affiliated entities, a prerogative endorsed by this Court in *Locke v. Davey*, 540 U.S. 712, 722-25 (2003). Accordingly, the alleged illegality of any State funding emanates from the State's decisions and decisionmakers, not from the Charitable Choice statute. Congress could not possibly be deemed to have *required* Kentucky to spend money on religiously-affiliated entities through the Charitable Choice statute when that very statute guarantees Kentucky an option to do otherwise.

Fourth, Kentucky's contracts with KBHC have never been negotiated or formed under the auspices of the Charitable Choice statute. Kentucky's contractual relationship with KBHC easily predates this 1996 statute, and nothing before the Court suggests, and the Cross-Petitioners have not alleged, that KBHC and Kentucky entered into their arms-length, discretionary contracts because of the statute. *See* App. 87-88 (First Am. Complaint, paras. 18-21). KBHC's payments from Kentucky for services rendered are owed exclusively to the discretion of the Cross-Respondent Kentucky executive agencies, which would be free to continue contracting with KBHC (or not) with or without federal funds supplying a portion of Kentucky's child care budget. The Charitable Choice statute has never been implicated in Kentucky's decision to contract with KBHC (and the Cross-Petitioners do not so allege), and thus cannot be used to construct a "legislative enactment" that satisfies *Flast*.[4]

Fifth, if simply superimposing the Charitable Choice statute upon a generic Congressional appropriation were able to yield federal taxpayer standing,

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[4] The Cross-Petitioners' unsupported conclusion that Charitable Choice applies in the first place to Title IV-E or XVI of the Social Security Act is belied by the fact that the United States Department of Health and Human Services does not include those statutes within the coverage of Charitable Choice. U.S. Dept. of Health and Human Servs., "Understanding the Regulations Related to the Faith-Based and Community Initiative," available at http://www.hss.gov/fbci/regulations/index.html (last visited May 11, 2010).

Flast's "narrow exception" to the general bar on taxpayer standing would quickly become the rule. Federal taxpayers nationwide would have standing to challenge any federal social services appropriation in every State, simply because that expenditure may have been made through the nondiscrimination prism of the Charitable Choice statute designed to ensure religious neutrality by the government. This is not the law. Neither of the legislative enactments espoused by the Cross-Petitioners could establish federal taxpayer standing on its own (one is a generic appropriation, and the other does not spend any money at all). The lawyer-invented combination of the two cannot do so either.

Finally, Cross-Petitioners' plan to use the Charitable Choice statute to bootstrap federal taxpayer standing was barely mentioned in the courts below, and has not been addressed in any similar form by other federal courts or any federal official within the other two branches. Accordingly, the matter has not been developed enough for this Court to address as a matter of national importance, despite brief mention in a conditional cross-petition for certiorari.

In sum, Cross-Petitioners cannot satisfy the *Flast* "legislative enactment" nexus test – with or without the Charitable Choice statute – and thus lack federal taxpayer standing. The Sixth Circuit's holding on this point was correct, as evidenced by the Cross-Petitioners' failure to seek review of that decision initially, and need not be reviewed further by this Court.

IV. The Sixth Circuit's Federal Taxpayer Standing Analysis is Consistent with This Court's Precedent.

The Sixth Circuit's federal taxpayer standing analysis is wholly consistent with *Flast*, *Bowen, Hein*, and this Court's other federal taxpayer standing precedents. *Flast* involved a Congressional enactment made pursuant to Article I, Section 8 of the Constitution that allegedly violated the Establishment Clause by expressly requiring federal funds to be provided to "private schools" – a term which, at that time, was functionally equivalent to "religious schools". Here, however, only Kentucky is alleged to have made an executive branch expenditure that violated the Establishment Clause. As discussed above, the only Congressional enactments implicated in the Cross-Petitioners' proposed, but not filed, pleadings are (1) generic, non-directive block-grant appropriations and authorization statutes; and (2) a nondiscrimination statute that spends no money. Neither of these enactments has any connection with the alleged Establishment Clause violations asserted by Cross-Petitioners – Kentucky's financial support of certain KBHC staff functions and services.

In *Bowen*, this Court found the plaintiffs had established federal taxpayer standing where grants were awarded to religious organizations by executive branch officials – but, as this Court later emphasized in *Hein*, "the key to that conclusion was . . . that [the Adolescent Family Life Act] was at heart a program of disbursement of funds pursuant to Congress's

taxing and spending powers," and that the *Bowen* plaintiffs' claims "call[ed] into question how the funds authorized by Congress [were] being disbursed *pursuant to the AFLA's statutory mandate*." *Hein*, 551 U.S. at 607, citing *Bowen*, 487 U.S. at 619-20 (emphasis added). AFLA "not only expressly authorized and appropriated specific funds for grantmaking, *it also expressly contemplated that some of those moneys might go to projects involving religious groups*." *Id.* (emphasis added).

Here, of course, there is no federal "program of disbursement" – just an *ad hoc* amalgamation of block grants to States (not to Kentucky or KBHC as such), generic authorization statutes (to help fund care for needy children nationally), and a non-discrimination statute (designed to promote religious neutrality, not preference). The Charitable Choice statute is a general provision that certainly does not "expressly contemplate" that federal funds will be awarded to fund staff positions at "proselytizing religious groups" in Kentucky. The Charitable Choice statute expressly forbids the funding of proselytization, and does not circumscribe the discretion of State public officials at all; it simply reiterates those officials' longstanding Constitutional duty not to discriminate against social service providers because of their religious affiliation. The State executive branch officials named here had no "statutory mandate" to spend federal funds in any particular manner. *Bowen* has no relevance here.

In contrast, *Hein* is highly relevant in that it illuminated and reaffirmed *Flast*'s two-part test for determining federal taxpayer standing. The *Hein* plaintiffs lacked federal taxpayer standing because, like here, the expenditures alleged to have violated the Establishment Clause "were not expressly authorized or mandated by any specific congressional enactment" made pursuant to Congress's taxing and spending powers. *Hein*, 551 U.S. at 608. Similarly, no Congressional enactment made pursuant to Article I, Section 8 expressly authorizes or acknowledges that Kentucky could spend federal funds to pay for staff positions filled in accordance with religious tenets at KBHC. Just as in *Hein*, KBHC's contractual payments here are the result of "purely discretionary Executive Branch expenditure[s]." *Id.* at 615. The Sixth Circuit's federal taxpayer standing analysis is consistent with existing law, and need not be revisited.

V. No Compelling Reasons Favor Granting Certiorari On the Cross-Petition.

As a final matter, Cross-Petitioners' conditional cross-petition fails to present any of the "compelling reasons" that it should be heard. Kentucky and KBHC's principal petition presents an acknowledged circuit split on critical Article III and federalism questions; Cross-Petitioners' conditional petition presents no circuit split at all. Kentucky and KBHC have explained that the Sixth Circuit's State taxpayer standing holding significantly expands Article III

standing in Establishment Clause cases, and contradicts several decisions of this Court. In contrast, even if the Sixth Circuit's denial of federal taxpayer standing was error, the end result would be, perforce, consistent with this Court's well-established jurisprudence requiring any exception to the general prohibition on taxpayer standing to be applied rigorously. Here, the Sixth Circuit took great care to follow *Flast*, *Bowen*, and *Hein*, and is not an outlier on the question of federal taxpayer standing. At worst, the Cross-Petitioners complain of an isolated and inconsequential misapplication of correct law by the Sixth Circuit – after having failed to seek rehearing on the matter in the court below.

In the context of State taxpayer standing, of course, the Sixth Circuit's analysis was markedly different. The Sixth Circuit strained to sidestep this Court's *Cuno* and *Hein* decisions, clinging instead to its own older circuit precedent without meaningfully considering how *Cuno* and *Hein* may have changed the landscape. The court of appeals's cramped consideration of this Court's precedent is especially disconcerting given the context of *Cuno* (where the Sixth Circuit was reversed for its expansive standing determination) and *Hein* (where the Seventh Circuit was reversed for its expansive standing determination). If this Court intended those two decisions to remind the lower courts of the rigors of Article III standing analyses, the Sixth Circuit failed to receive the message.

The Sixth Circuit is an outlier on the issue of State taxpayer standing, and its decision demands oversight by this Court to a degree not remotely akin to that requested by the Cross-Petitioners on the issue of federal taxpayer standing. A particular plaintiff's lack of federal taxpayer standing in a particular case is not an event of national consequence: it does not expand Article III judicial power, it does not impact separation of powers or federalism, it does not disrupt the national social services system, and it does not create two different standing tests for taxpayer litigants to invoke as expedient. It simply means that particular plaintiff must find a new judicial or political forum to advance his or her cause. The Court need not spend its time and resources resolving an issue that, at best, would only impact a single dispute – particularly when that dispute requires, for its resolution, a defendant that has not even been brought before the court.

CONCLUSION

For the foregoing reasons, the conditional cross-petition should be denied.

Respectfully submitted,

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