No. 15-1021

IN THE

Supreme Court of the United States

SUNRISE CHILDREN'S SERVICES, INC,

Petitioner,

v.

VICKI YATES BROWN GLISSON, SECRETARY, KENTUCKY CABINET FOR HEALTH AND FAMILY SERVICES, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

For nearly half a century, this Court has recognized the right of taxpayers to bring suit — in carefully delineated circumstances — to safeguard the fundamental Establishment Clause right to not be coerced to financially support religious institutions. *See Flast v. Cohen*, 392 U.S. 83 (1968). The questions presented are:

1. Whether the Court should leave taxpayers without any remedy for violations of that right by overruling *Flast*, which held that federal taxpayers have Article III standing to challenge federal expenditures that have a nexus to legislative action and allegedly violate the Establishment Clause.

2. Whether the Court should single out state taxpayers for such harm by overruling the Court's prior decisions holding that state taxpayers have standing to challenge state expenditures when they satisfy *Flast*'s two-part test.

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The Sixth Circuit's opinion is reported at 802 F.3d 865. Pet. App. 1a-17a. The district court's opinion is available at 2014 WL 2946417. Pet. App. 20a-41a.

JURISDICTION

The Sixth Circuit issued its decision on October 6, 2015. Pet. App. 1a. Petitioner filed a timely petition for rehearing en banc, which the court denied on November 12, 2015. Pet. App. 136a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

This Court in 2011 denied petitioner Sunrise Children's Services, Inc.'s *first* petition for certiorari, which sought review of the Sixth Circuit's 2009 holding that plaintiffs-respondents have Article III standing under the legislative-nexus test of *Flast v. Cohen*, 392 U.S. 83 (1968), to challenge the Commonwealth of Kentucky's funding of Sunrise. *See Kentucky Baptist Homes for Children, Inc. v. Pedreira*, No. 09-1121 (pet. denied Apr. 18, 2011).[1]

Undeterred, Sunrise now attempts an even greater feat. It asks the Court to overrule *Flast* altogether. But Sunrise's petition identifies no conflict among the circuits, no intervening change in the law, and no error

[1] Petitioner Sunrise was formerly known as Kentucky Baptist Homes for Children, Inc., including in its previous petition for certiorari. Quotations from documents pre-dating the change refer to it as "KBHC." We have left these references unchanged. The defendant Commonwealth officials, who were appellees in the court below and are respondents in this Court, are Vicki Yates Brown Glisson, Secretary of the Cabinet for Health and Family Services, and John Tilley, Secretary of the Justice and Public Safety Cabinet.

of the court below that could warrant certiorari. Instead, this case presents a crystalline application of long-standing, settled precedent, reaffirmed by this Court as recently as 2011. The Court should deny Sunrise's petition.

A. Factual Background

1. Petitioner Sunrise is a private, religiously affiliated organization that provides services for children in the Commonwealth's custody. Sunrise operates residential facilities for children and arranges foster-care placements. Since 2000, Sunrise has received more than $100 million in state funds, greater than $12.5 million annually. Pet. App. 87, 101.

The record in this case demonstrates a close nexus between legislative action and the Commonwealth's funding of Sunrise, including multiple legislative appropriations specifically to Sunrise, as well as extensive legislative knowledge of payment to Sunrise of other legislatively authorized and appropriated funds:

- The Kentucky legislature enacted numerous statutes that authorize the Commonwealth to contract with private childcare providers such as Sunrise, authorize payment of state funds under such contracts, and comprehensively regulate the providers. *See* Ky. Rev. Stat. Ann. §§ 199.641(1)(b) & (2), 200.115(1), 605.090(1)(d), 605.120(1); *see also* Ky. Rev. Stat. Ann. §§ 199.640(1), 199.640(5)(a)-(b), 199.641(2)(a)-(c), 199.650.

- The legislature has regularly appropriated specific sums for private childcare providers. *See* 2008 C.A. App. 372-75, 377-84, 566; 2014 Kentucky Laws Ch. 117 (HB 235), Part I, § G(9); 2008 Kentucky Laws Ch. 127 (HB 406), Part I, § H(10); *see also* 2012 Kentucky Laws Ch. 144 (HB 265), Part I, § G(9); 2010 Kentucky Laws 1st Ex. Sess. Ch. 1 (HB 1), Part I, § G(9).
- Several of these legislative appropriations specifically directed state funds to Sunrise facilities. *See* 2008 C.A. App. 382; http://www.lrc.ky.gov/budget/06RS/Final/volumeIV.pdf, at 1108, 1112; http://www.lrc.ky.gov/budget/06rs/50h.pdf, at H-84, H-93.
- A legislative committee regularly approved state contracts with Sunrise, including on July 12, 2011, August 10, 2010, November 16, 2006, December 10 and March 12, 2002, December 11 and September 11, 2001, and November 14 and October 10, 2000. *See* minutes at http://www.lrc.ky.gov/statcomm/contracts/meetings.htm.
- The legislature passed a legislative citation thanking Sunrise for its work with children in the Commonwealth's custody. Ky. H.R. Jour., 2006 Reg. Sess. No. 57, Mar. 24, 2006, Legislative Citation No. 142.
- Numerous articles in major Kentucky newspapers have reported on Sunrise's extensive receipt of state funds, noting that Sunrise is the largest publicly funded childcare provider in the state. *See* 2008 C.A. App. 499, 501, 505, 594-629; *see also, e.g.*, *Gay hiring fears hurt*

Baptist agency, Louisville Courier-Journal, Mar. 10, 2014, 2014 WLNR 6501332; Tom Loftus, *Children's agency won't hire gays*, Louisville Courier-Journal, Nov. 9, 2013, 2013 WLNR 28464462; *Baptist children's agency's leader urges considering hiring of gays*, Louisville Courier-Journal, Nov. 1, 2013, 2013 WLNR 27490736; Deborah Yetter, *Stimulus aid rescues child services: Ky. gives $1.4 million to private agencies*, Louisville Courier-Journal, May 23, 2009, 2009 WLNR 15653604.

2. Despite its enormous public funding, Sunrise has long subjected children to religious proselytization and coercion.

Sunrise's religious practices have been a central part of daily life for children entrusted by the Commonwealth to Sunrise's care. In an annual report, Sunrise's president announced: "We know that no child's treatment plan is complete without opportunities for spiritual growth. The angels rejoiced last year as 244 of our children made decisions about their relationships with Jesus Christ." Pet. App. 88. He further committed resources to Sunrise's religious goals: "[W]e are committed to hiring youth ministers in each of our regions of service to direct religious activities and offer spiritual guidance to our children and families." *Id.* In a news release, he said that Sunrise's "mission is to provide care and hope for hurting families through Christ-centered ministries. I want this mission to permeate our agency like the very blood through our bodies. I want to provide Christian support for every child, staff member, and foster parent." *Id.* Sunrise has displayed religious iconography throughout its facilities, led group prayer before meals and during staff meetings, and required its

employees to incorporate its religious tenets in their behavior. *Id.*

The record contains extensive evidence of religious proselytization, coercion, and discrimination at Sunrise facilities. For instance, an independent third party's interviews of children leaving Sunrise's residential facilities and foster-care placements show the pressure on children to participate in religious activities while in Sunrise's care. Over a five-year period, 296 interview responses described Sunrise's religious practices as coercive. *Id.* Just a few of the children's complaints include:

- Child "was not allowed to practice own religion. They tried to more or less force me to become a Christian."
- Child "did not have a choice when or when not to attend religious services. Required, if you didn't go you had to clean up or go to group."
- Child "was not allowed to choose when or when not to attend a religious service because 'had to do some type of Bible study during that time or get consequences.'"
- Child "was not allowed to practice own religion. Child state[s] you had to go or you got in trouble."

Dist. Ct. Dkt. Nos. 274-3, 274-4.

These complaints came from children at every Sunrise residential facility and in every foster-care region statewide. *See id.* All these accounts also post-date the filing of the complaint in this case, covering a period when Sunrise knew that its religious practices would be scrutinized by respondents and the courts.

Sunrise also specifically recruits foster parents who share its missionary aims. In letters soliciting donations and other support from churches and church parishioners, Sunrise repeatedly referred to its foster families as "in-home missionaries" and stated that Sunrise foster parents "are not performing social work — they are performing Kingdom work." Dist. Ct. Dkt. No. 522-8 at PageID#5847; *see also id.* at 5849 ("Individuals and families across Kentucky have the opportunity to become foster parents, or 'in-home missionaries.'"); *id.* at 5850 ("Are you called to become an in-home missionary as a foster parent through Sunrise Children's Services? You can provide children in need with the hope and healing that comes only through the love of Christ."); *id.* at 5852 (Sunrise places children "in our foster or 'In-Home Missionaries' homes."); *id.* at 5854 ("These 'in-home missionaries' are willing to care for the kids."); *id.* at 5855 ("Consider joining this group of in-home missionaries.").

B. Prior Proceedings

1. *The Lawsuit*. Plaintiffs-respondents Alicia Pedreira, Paul Simmons, Johanna W.H. Van Wijk-Bos, and Elwood Sturtevant are Kentucky taxpayers. They brought this case in 2000, asserting that the defendant Commonwealth officials ("Commonwealth Defendants") violated the Establishment Clause by funding Sunrise.[2]

The parties have litigated the question of respondents' standing *ad nauseam*. In 2003, the district court denied Sunrise's Rule 12(c) motion challenging respondents' standing as Kentucky

[2] Respondents also alleged that Sunrise discriminated against actual and potential employees on the basis of religion, a claim that has since been dismissed. Only the Establishment Clause claim is at issue now.

taxpayers to assert their Establishment Clause claim. Pet. App. 114. The parties continued litigating respondents' constitutional claim. Then, on March 31, 2008, the district court reversed course and dismissed the claim for lack of standing. The court held that this Court's then-recent opinion in *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007), narrowed the scope of taxpayer standing in a manner that eliminated respondents' standing in this case. Pet. App. 111-31.

2. *The First Appeal*. On interlocutory appeal, a panel of the Sixth Circuit unanimously reversed, holding that respondents have standing as Kentucky taxpayers. The court explained that federal taxpayers must meet the two-part test set forth in *Flast*. First, they must show a nexus between legislative action and the challenged funding. Second, they must allege a violation of a constitutional limitation on the taxing-and-spending power — the Establishment Clause. Pet. App. 97-98.

The court of appeals held that respondents had standing as state taxpayers for two independent reasons. First, the court held that state taxpayers need not satisfy the "legislative nexus" requirement of *Flast*, but instead must demonstrate only a "good-faith pocketbook" injury, which respondents did. *Id.* at 101-04.

Second, the court of appeals held that, even if *Flast*'s legislative-nexus requirement applies to state taxpayers, respondents satisfied it. The court concluded that respondents "sufficiently demonstrated a link between the challenged legislative actions and the alleged constitutional violations, namely that Kentucky's statutory funding for neglected children in private childcare facilities knowingly and impermissibly funds

a religious organization." *Id.* at 104-05. Relying on "statutory authority, legislative citations acknowledging [Sunrise's] participation, and specific legislative appropriations to [Sunrise]," the court concluded 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." *Id.* at 105.

In particular, the Sixth Circuit explained, the Kentucky legislature "established a regulatory structure to authorize the placement of children with private facilities," under which Sunrise had received $100 million. *Id.* at 101. The legislature also "was well aware that it was funding KBHC and that its funds were used to finance religious activity" — and had even singled out Sunrise with a legislative citation commending its work. *Id.* at 102. And the legislature had appropriated money directly to Sunrise. *Id*.

On the other hand, recognizing the strict nature of the legislative-nexus test, the court held that respondents lacked standing as *federal* taxpayers because the connection between any federal legislative action and Kentucky's funding of Sunrise was too attenuated. *Id.* at 98-100.

3. *Sunrise's First Petition for Certiorari*. Sunrise and the Commonwealth Defendants then sought certiorari on the standing question. *See Kentucky Baptist Homes for Children, Inc. v. Pedreira*, No. 09-1121. In that first petition, Sunrise urged this Court to consider whether *Flast*'s "legislative nexus" requirement applies to state taxpayers — in other words, whether the first of the Sixth Circuit's two alternative holdings was correct.

This Court denied Sunrise's first petition, and the timing of that denial merits note. Sunrise filed the petition on March 16, 2010. On May 24, 2010, the Court granted certiorari in *Arizona Christian School Tuition Organization v. Winn*, No. 09-987. The Court took no action on Sunrise's petition in this case for nearly a year, while *Winn* was pending.

On April 4, 2011, the Court decided *Winn*, holding that taxpayers do not have standing under *Flast* to challenge state tax credits for contributions that individuals may decide voluntarily to make, including to religious entities. *Winn* also clarified that state taxpayers must satisfy the same *Flast* test applicable to federal taxpayers.

The Court redistributed the briefing on Sunrise's petition on April 11, 2011, one week after issuing the decision in *Winn*. On April 18, 2011, the Court denied Sunrise's petition. Notably, the Court did not grant the petition, vacate the decision below, and remand for reconsideration in light of *Winn* — a procedure available to the Court had it viewed *Winn* as affecting in any manner the resolution of this case.

4. *The Settlement Agreement*. On remand, respondents and the Commonwealth Defendants consensually resolved all claims between them in a Settlement Agreement. Sunrise was involved in some of the negotiations, though it is not a party to the Settlement. Under the Settlement, respondents agreed to voluntarily dismiss this action in exchange for the Commonwealth Defendants agreeing to modify their procedures for providing care to children through private entities, including Sunrise.

The Settlement prevents state funds from supporting religious indoctrination or coercion of children in

the care of the Commonwealth's contracted residential providers. Specifically, the Settlement Agreement prohibits the providers from:

- "discriminat[ing] in any manner against any child based on the child's religious faith or lack of religious faith or the child's failure to conform to any religious tenet or practice," Pet. App. 58;
- "requir[ing], coerc[ing], or pressur[ing] any child in any manner to attend religious services or instruction or to otherwise engage in or be present at any activity or programming that has religious content," *id.*;
- "impos[ing] any form of punishment or benefit based on a child's voluntary decision as to whether to participate in or attend any religious service or instruction or any other activity or programming that has religious content," *id.*;
- "proselytiz[ing] any child in any religious beliefs," *id.*; and
- "requir[ing] any child to pray or to participate in any form of prayer, or to attend any form of prayer that is organized, led, or otherwise sponsored or promoted, by the Agency," *id.*

Other terms of the Settlement bar providers from placing religious items in children's rooms or giving children religious materials unless the child asks. *Id.* at 56-58. Providers also must offer comparable nonreligious activities to children who do not wish to attend any offered religious service or activity. *Id.* at 53-55.

The Commonwealth has implemented the required changes to its standard two-year agreements with private contractors, including the most recent agreement with Sunrise. The Settlement also specifies the Commonwealth's responsibilities to monitor compliance by private childcare providers. *Id.* at 59-64.

5. *The District Court's Decision*. After the Settlement was finalized, respondents and the Commonwealth Defendants jointly moved to voluntarily dismiss this action in its entirety with prejudice pursuant to the Settlement. Sunrise opposed that motion and filed its own competing motion to dismiss. Sunrise's motion yet again argued that respondents lack standing under *Flast*. The district court granted respondents' motion for voluntary dismissal, and denied Sunrise's motion under the law-of-the-case doctrine. Pet. App. 36-39.

6. *The Decision Below*. Sunrise appealed, arguing that despite the Sixth Circuit's prior 2009 holding that respondents have taxpayer standing under *Flast*, the court of appeals should examine respondents' standing anew in light of this Court's decision in *Winn*, which clarified that state taxpayers must meet the test set forth in *Flast*.

On August 4, 2015, the Sixth Circuit reaffirmed its previous holding that respondents have standing as Kentucky taxpayers to bring their Establishment Clause claim. Pet. App. 9. The court of appeals noted that "in *Winn* the Supreme Court held that state-taxpayer standing requires a plaintiff to establish the same two elements required for federal-taxpayer standing." *Id.* The court of appeals further determined, however, that it "ha[d] no occasion to revisit [its] holding in *Pedreira I* — because there [the court had] held that, required or not, the plaintiffs had

established both elements of federal-taxpayer standing" under *Flast*. *Id.* Specifically, the previous panel in 2009 concluded that respondents established a sufficient nexus between legislative action and the spending of tax dollars in violation of the Establishment Clause. Because the Sixth Circuit had already applied — as one of two alternative holdings — the same test that *Winn* clarified was applicable, no further analysis was necessary.

The Sixth Circuit also held that the district court did not sufficiently analyze the fairness of the Settlement in approving it, expressing concern about a provision in the Settlement giving respondents greater access to monitoring documents concerning Sunrise than those relating to other providers. *Id.* at 13-15. The court of appeals therefore remanded the case for further proceedings concerning the fairness of the Settlement. *Id.* at 15. To address the court's concern, respondents and the Commonwealth Defendants have amended the Settlement to eliminate any differential treatment of Sunrise.[3]

Sunrise petitioned for rehearing en banc on the standing issue. No judge requested a vote on the petition, and it was denied. Pet. App. 136-37.

Sunrise now asks this Court to overrule *Flast*, or to overrule cases applying *Flast* to state taxpayers.

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[3] Two days before the due date of this brief, the Commonwealth sent respondents a letter taking the positions that (1) the amendment to the Settlement is invalid, (2) the Commonwealth will not comply with the Settlement without further court order, and (3) the Settlement should not be approved on remand. Respondents plan to ask the district court to approve and enforce the Settlement and the amendment on remand.

REASONS FOR DENYING THE PETITION

Sunrise's petition presents no question that remotely merits this Court's review. There is no basis for this Court to overrule its long-standing decision in *Flast*. *Flast*, rather, remains essential to give meaning to the Establishment Clause. Nor is there any logical reason to overrule decisions by this Court that have applied *Flast* to state taxpayers. Certiorari should be denied, just as it was in 2011.

I. This Court Should Not Grant Certiorari to Consider Overruling *Flast v. Cohen*

Sunrise argues that *Flast* is anachronistic and that this Court's more recent decisions have chipped away at its purpose. To the contrary, the precedents that Sunrise cites reaffirm *Flast*'s core holding that taxpayers have standing to challenge legislatively authorized expenditures of their tax dollars in violation of the Establishment Clause. *Flast*, moreover, was correctly decided and remains essential to enforcing the Establishment Clause. And *Flast* has caused no meaningful confusion or conflict among the lower courts.

A. *Flast*'s Underpinnings Remain Firm

1. In *Flast*, this Court applied first principles in a "fresh examination of the limitations upon standing to sue in a federal court and the application of those limitations to taxpayer suits." 392 U.S. at 94. In keeping with key rationales underlying Article III standing requirements, the Court established a two-part test to determine whether a taxpayer may bring suit over an allegedly unlawful government program.

The Court held that "[f]irst, the taxpayer must establish a logical link between that status and the

type of legislative enactment attacked." *Id.* at 102. A federal taxpayer therefore may challenge only "exercises of congressional power under the taxing and spending clause of ... the Constitution," not "incidental expenditure[s] of tax funds in the administration of an essentially regulatory statute." *Id.* This "legislative nexus" requirement guarantees that the taxpayer bringing suit has the requisite "personal stake in the outcome of the controversy ... to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Id.* at 99 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

"Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." *Id.* at 102. To demonstrate such an injury, "the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." *Id.* at 102-03. The Court explained that the Establishment Clause is such a specific constitutional limitation. *Id.* at 103. Under principles of *stare decisis*, *Flast* remains controlling law as a prior decision of this Court absent "special justification" for departure now. *United States v. Int'l Bus. Machines Corp.*, 517 U.S. 843, 856 (1996).

2. Sunrise argues that three recent decisions by this Court have "fatally undermined" *Flast*. Pet. 14. That is wrong: in each case, the Court reaffirmed *Flast*'s key holding while clarifying its boundaries. And this case is in the heartland of *Flast*.

In *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006), this Court distinguished the Establishment Clause from other constitutional provisions for purposes of whether taxpayer standing should lie. *Id.* at 347-48. The Court recognized the unique nature of taxpayers' Establishment Clause rights, noting that "[w]hatever rights plaintiffs have under the Commerce Clause, they are fundamentally unlike the right not to 'contribute three pence ... for the support of any one [religious] establishment.'" *Id.* (citing *Flast*, 392 U.S. at 103 (quoting 2 Writings of James Madison 186 (G. Hunt ed. 1901))). The Court accordingly declined to extend the special rule of *Flast* in a manner that would "leave no principled way of distinguishing those other constitutional provisions that we have recognized constrain governments' taxing and spending decisions." *Id.* at 348. In other words, the Court declined to overturn the general rule against taxpayer standing and instead treated *Flast* as the exception it has always been, because taxpayers' injuries under the Establishment Clause differ fundamentally from other constitutional injuries.

In *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007), this Court reaffirmed the legislative-nexus requirement in *Flast*, concluding that taxpayers do not have standing to challenge programs "paid for out of general Executive Branch appropriations" not designated for any particular purpose. *Id.* at 593. The Court emphasized that the Establishment Clause claim in *Flast* challenged specific legislative enactments, while the claim in *Hein* addressed undifferentiated "appropriations [that] did not expressly authorize, direct, or even mention the expenditures of which respondents complain. Those expenditures resulted from executive discretion, not congressional action." *Hein*, 551 U.S.

at 605. Having failed to meet *Flast*'s first prong, the *Hein* respondents did not have standing.

In a concurring opinion, Justice Kennedy emphasized that the respondents in *Hein* challenged spending for internal executive-branch operations and speech, and therefore raised separation-of-powers concerns. 551 U.S. at 616-17. Justice Kennedy added that because the Establishment Clause "expresses the Constitution's special concern that freedom of conscience not be compromised by government taxing and spending in support of religion ... the result reached in *Flast* is correct and should not be called into question." *Id.* at 616.

Most recently, in *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011), this Court concluded that *Flast* does not support taxpayer standing to challenge tax credits because — unlike governmental spending of coercively extracted tax funds — tax credits do not cause any injury to an objecting taxpayer's conscience. Justice Kennedy's opinion for the Court explained that "individuals suffer a particular injury for standing purposes when, in violation of the Establishment Clause, and by means of 'the taxing and spending power' their property is transferred through the Government's Treasury to a sectarian entity." *Id.* at 139-40 (quoting *Flast*, 392 U.S. at 105-06). "A dissenter whose tax dollars are extracted and spent knows that he has in some small measure been made to contribute to an establishment in violation of conscience." *Id.* at 142 (internal quotation marks omitted). The Court held that a tax credit, on the other hand, does not coercively "'force a citizen to contribute' ... to a sectarian organization." *Id.* (quoting *Flast*, 392 U.S. at 103).

The funding of sectarian groups comes only from taxpayers who wish to support them. *See id.*

Rather than eroding *Flast*'s long-standing holding, these recent cases are wholly consistent with this Court's firmly entrenched recognition of Article III standing for taxpayers to challenge legislatively authorized expenditures under the Establishment Clause. *See also, e.g.*, *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 481 (1982) (noting the "rigor with which the *Flast* exception to the *Frothingham* principle ought to be applied"); *Bowen v. Kendrick*, 487 U.S. 589, 619-20 (1988) (where Congress enacted statutes and appropriations funding a particular grant program, with understanding that grants might involve religious organizations, taxpayers had standing to bring Establishment Clause challenge to executive branch's selection of particular grant recipients). These precedents expressly reaffirm the rule recognized in *Flast* that taxpayers have standing with respect to governmental spending that has a nexus with legislative action and allegedly violates the Establishment Clause. And despite Sunrise's assertions, these cases represent no "significant change in or subsequent development of our constitutional law" that could possibly justify revisiting *Flast*'s settled precedent or otherwise ignoring its *stare decisis* effect. *See Agostini v. Felton*, 521 U.S. 203, 236 (1997). While this Court could have reconsidered *Flast* in any of these cases, it declined to do so in each of them — and the Court should similarly decline to do so here.

B. *Flast* Was Correctly Decided

As this Court has explained, "one of the primary purposes of the Establishment Clause was to prevent

the use of tax moneys for religious purposes." *Valley Forge*, 454 U.S. at 504. The oft-referenced Memorial and Remonstrance Against Religious Assessments by James Madison, "the leading architect of the religion clauses of the First Amendment," *Flast*, 392 U.S. at 103, illustrates the point. In a statement urging the Virginia Assembly to reject a tax to pay for seminaries, Madison explained that "no person, either believer or non-believer, should be taxed to support a religious institution of any kind." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 12 (1947); *see also Flast*, 392 U.S. at 103; *Cuno*, 547 U.S. at 334; *Hein*, 551 U.S. at 638. Such a tax "would coerce a form of religious devotion in violation of conscience," regardless of the "amount of property conscripted for sectarian ends." *Winn*, 563 U.S. at 141.

"The taxpayer was the direct and intended beneficiary of the [Establishment Clause's] prohibition on financial aid to religion." *Valley Forge*, 454 U.S. at 504. As "a specific bulwark against such potential abuses of governmental power," the Establishment Clause's "specific constitutional limitation" on the taxing and spending power guards against the injuries to conscience that flow from coerced contribution to religious institutions. *Flast*, 392 U.S. at 104. The law thus recognizes that when the government spends a taxpayer's dollars to support religion, it harms her by violating her liberty of conscience. It is therefore of no moment that a taxpayer asserting an Establishment Clause injury alleges no pecuniary loss. The actual injury is the compulsory participation in the government's support of religion. The taxpayer herself faces this highly personal harm, and accordingly she is a proper party to bring suit.

What is more, in cases such as this one, not only are taxpayers proper parties to bring suit, they are the only parties likely to do so. In addition to taxpayer standing, a plaintiff may have standing to challenge Establishment Clause violations when she is directly harmed ("such as a mandatory prayer in a public school") or when she faces discrimination ("such as when the availability of a tax exemption is conditioned on religious affiliation"). *See Winn*, 563 U.S. at 129-30. But such plaintiffs are not always able to assert their rights in court. The children whose care is at issue here are wards of the Commonwealth. Many have been neglected or abused, and all depend on the Commonwealth as guardian for their care and well-being. These children are poorly situated to assert their First Amendment rights to be free from publicly funded religious coercion, discrimination, and indoctrination. *Flast* closes this gap by recognizing the Establishment Clause injury to taxpayers from the unlawful expenditure of tax dollars in support of religion.

To overrule *Flast* and deny respondents standing "would coerce a form of religious devotion in violation of conscience" that is incompatible with the First Amendment. *Winn*, 563 U.S. at 141. The rule that Sunrise advocates would deny respondents the ability to challenge the Commonwealth's funding of an institution that has heralded its proselytization of youth in the Commonwealth's custody. Taxpayers unwilling to participate in such a violation of the Establishment Clause must have a way to object — and they do, under this Court's long-standing recognition of taxpayer standing. *Flast*'s holding is thus both correct and efficient, and there is no reason for this Court to revisit it in this case.

C. The Lower Courts Are Not Confused

The Sixth Circuit steadfastly applied the pertinent precedent at each stage of this litigation, contrary to Sunrise's assertion that the court below "understated" or misapplied this Court's decisions since *Flast*. Pet. 22-25. When the Sixth Circuit first considered the standing issue on interlocutory appeal in 2009, *Winn* had not yet been decided. Absent clear precedent that the *Flast* test applied to state taxpayer standing, the court below did what many lower courts would do: It assessed the issue under both the "good-faith pocketbook injury" test and *Flast* — the two arguably applicable tests — and concluded that respondents had standing *under both tests*.

Sunrise argues that the court of appeals "reaffirm[ed] its idiosyncratic" interpretation of *Flast* in the decision below, Pet. 12-13, and "understated the import of *Hein*," Pet. 23, apparently because the court below did not conclude that the appropriations at issue in this case were discretionary executive expenditures falling under *Hein* and not *Flast*. But the Sixth Circuit's analysis and conclusion were fully consistent with *Flast* and *Hein*.

In *Hein*, "[n]o congressional legislation specifically authorized the creation" of the challenged programs. 551 U.S. at 595. By contrast, here, the Kentucky legislature enacted specific legislation authorizing use of state funds to pay private childcare providers such as Sunrise. In *Hein*, the religious "activities [were] funded through general Executive Branch appropriations," without guidance or oversight from Congress. *Id.* at 593. Here, the legislature regularly appropriated funds specifically for private childcare and was aware that the funds were used in part for religious activities. In *Hein*, Congress had not "enacted any law

specifically appropriating money for [the relevant] entities' activities." *Id.* at 595. Here, Sunrise received funds from several appropriations specifically for Sunrise facilities, and a legislative committee approved state contracts with Sunrise on numerous other occasions. In *Hein*, Congress did not "contemplate[ ] that some … moneys might go to projects involving religious groups." *Id.* at 607 (distinguishing *Bowen*, 487 U.S. at 595-96). Here, the legislature commended Sunrise for its work with children, further demonstrating its awareness and approval of the services that Sunrise provides with Kentucky's tax dollars. Giving *Hein* appropriate weight, the Sixth Circuit correctly concluded that the instant case does not suffer the same insufficiencies.

Far from demonstrating confusion about *Flast*, the decision below shows a court carefully applying this Court's precedents. Sunrise points to no other "confusion" in the lower courts about taxpayer standing under *Flast*. It is easy to see why. The *Flast* test is highly practical, and this Court's recent decisions have made it only more so. *Flast* announced that a taxpayer, if she is to have standing, must challenge governmental spending that (1) has a nexus to legislative action and (2) violates the Establishment Clause. The challenge cannot be to a "purely discretionary Executive Branch expenditure," *Hein*, 551 U.S. at 615 — a category excluded by definition by the legislative-nexus concept. The money must actually be spent, not forgone by offering a tax credit. And it has to be spent in violation of the Establishment Clause, not any other part of the Constitution. Should a court err in applying this test — a predicament not presented here — surely *Flast* is not to blame.

II. This Court Should Not Grant Certiorari to Consider Overruling Cases Giving State Taxpayers the Right to Sue Under *Flast*

Sunrise alternatively urges this Court to limit taxpayer standing to federal taxpayers — *i.e.*, to exclude state taxpayers. Pet. 27-35. But the Court repeatedly has recognized that state taxpayers have standing under *Flast* to contest unlawful spending by states in violation of the Establishment Clause. There is no basis for the Court to chart any different course now.

A. This Court Has Repeatedly Recognized State Taxpayer Standing Under *Flast*

This Court has long relied on *Flast* to hold that state taxpayers have rights to challenge state funding of religious institutions under the Establishment Clause. In *Meek v. Pittenger*, the Court cited *Flast* in holding that the lower court "properly concluded that both the individual and the organizational plaintiffs had standing" to challenge a Pennsylvania law providing loans to schools, including religious ones. 421 U.S. 349, 356 n.5 (1975), *merits holding overruled by Mitchell v. Helms*, 530 U.S. 793 (2000). In *School District v. Ball*, the petitioners raised the issue of standing as a threshold argument before this Court. Citing *Flast*, the Court expressly affirmed the lower courts' conclusion that the plaintiffs had standing as state taxpayers, "relying on the numerous cases in which we have adjudicated Establishment Clause challenges by state taxpayers to programs for aiding nonpublic schools." 473 U.S. 373, 380 n.5 (1985) (collecting cases), *merits holding partially overruled by Agostini v. Felton*, 521 U.S. 203 (1997); *see also Marsh v. Chambers*, 463 U.S. 783, 786 n.4 (1983) (holding

that, in his capacity as a state taxpayer, a plaintiff had standing to challenge the opening of legislative sessions with prayers by a state-employed chaplain). Contrary to Sunrise's assertion that the Court has discussed *Flast* only when assessing the absence of state-taxpayer standing, these cases demonstrate that the Court has long applied *Flast* to affirmatively uphold taxpayer standing at the state level.

Later decisions have continued to treat federal and state taxpayers identically for standing purposes. In *Cuno*, for example, the Court quoted Justice Kennedy's plurality opinion in *ASARCO v. Kadish*, 490 U.S. 605 (1989), to note that, "like federal taxpayers," "state taxpayers generally lack standing to challenge expenditures of tax funds." *Cuno*, 547 U.S. at 345 (quoting *ASARCO*, 490 U.S. at 613-14). The Court in *Cuno* elsewhere noted that it "ha[s] likened state taxpayers to federal taxpayers for purposes of taxpayer standing" for decades. *Id.*

Most recently, the Court made crystal-clear in *Winn* that federal and state taxpayers are subject to the same standing test, applying the *Flast* test at length to the state taxpayers before it. *See* 563 U.S. at 138-45. The Court rejected the suggestion that a different analysis should apply, *see id.* at 134-38, ruling that the plaintiff taxpayers "must rely on an exception created in *Flast*," *id.* at 130.

Sunrise argues that *Winn* somehow left open whether *Flast* applies to state taxpayers. But Sunrise points to no language in *Winn* that left any such uncertainty, and there is none. Nor does Sunrise identify any post-*Winn* uncertainty in the lower courts about whether the *Flast* test applies to state taxpayers. The Sixth Circuit's post-*Winn* opinion in this case expressly concluded that "in *Winn* the

Supreme Court held that state-taxpayer standing requires a plaintiff to establish the same two elements required for federal-taxpayer standing." Pet. App. 9. The only cases that Sunrise cites in alleging a "haphazard" approach by the courts of appeals predate *Winn*. *See* Pet. 34.

Sunrise, moreover, only recently arrived at its novel understanding of *Winn*. In the Sixth Circuit, Sunrise argued that the *Flast* test in fact applies to state taxpayers. In one particularly well-phrased heading, Sunrise summarized its position (at least at that time): "State taxpayer standing analysis is identical to the test for federal taxpayer standing." *See* Br. of Appellant Sunrise Children's Services, No. 14-cv-5879 (6th Cir.), Doc. No. 32, p. 19. Sunrise should not be heard to say otherwise now.

B. There Is No Logical Reason to Overrule Prior Precedents and Limit *Flast* to Federal Taxpayers

This Court has consistently held that the Establishment Clause bars governmental support for religion with equal force when the government in question is a State. As Sunrise notes, *Everson v. Board of Education* announced that the Establishment Clause restricts state expenditures in support of religion. 330 U.S. at 11; *see also Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) ("The First Amendment, which the Fourteenth makes applicable to the states...."). And a core rationale for the Establishment Clause — that governmental establishment of religion violates taxpayers' liberty of conscience — originated out of concern for *state* taxes used to finance religious activities. *See Everson*, 330 U.S. at 11 (describing the "dramatic climax in Virginia in 1785-86 when the Virginia legislative body was about to

renew Virginia's tax levy for the support of the established church"); *supra* pp. 17-18.

Sunrise offers no rationale for treating the States differently from the United States with respect to the protections of the Establishment Clause and the *Flast* taxpayer-standing doctrine. Sunrise does not identify a distinction between state and federal taxpayers — much less any principled difference endorsed by this Court. And no principled reason to draw such a distinction exists. There is no need for this Court to review Sunrise's second question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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