No. 15-1021

In The Supreme Court of the United States

SUNRISE CHILDREN'S SERVICES, INC.,

Petitioner,

v.

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

Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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This case provides the optimal opportunity to reconsider this Court's taxpayer standing exception for Establishment Clause cases. *Flast v. Cohen*, 392 U.S. 83 (1968) is inconsistent with this Court's Article III standing jurisprudence and has been so constricted and clouded in recent years that it no longer serves as an effective caveat to the general prohibition on taxpayer standing. It no longer deserves *stare decisis* deference. The Court should grant the Petition and consider whether it should overrule *Flast* and reembrace the taxpayer standing rule of *Frothingham v. Mellon*, 262 U.S. 447 (1923). Alternatively, if the Court desires to preserve what little remains of *Flast*, it should grant review to expressly analyze and decide whether the basis for that decision, which involved the right of federal taxpayers to challenge Congressional spending acts in federal court, should be expanded to State taxpayers challenging State legislative spending acts.

The Taxpayer Respondents' Brief in Opposition (the "Response") should not dissuade the Court from granting the Petition. The Response's treatment of *Flast* ignores the obvious narrowing effects of *DaimlerChrysler v. Cuno*, 547 U.S. 332 (2006); *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007); and *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011), sidesteps this Court's overt criticism of *Flast*, and omits any mention of Article III's requirements – the starting (and ending)

point for any sound discussion of standing. Establishment Clause rights are important, and can be vindicated in many ways. An unworkable and unintelligible taxpayer standing exception is unnecessary.

The Response incorrectly asserts that this Court has previously decided whether *Flast*'s two-part "nexus" test applies to State taxpayer standing. It has not. Taxpayer Respondents overstate the significance of two 1970s decisions that, at best, briefly note the assumption of State taxpayer standing in Establishment Clause cases; and, they simply misstate the effect of *Winn*, which entertained a party's assertion that the *Flast* test applied, but rejected that test as inapplicable on its own terms – and thus had no occasion to decide the second question presented here. The compelling, universal issues at the heart of this suit – Article III jurisdiction, federalism, public funding of critical social services providers, and taxpayer rights – should be promptly addressed. The Petition should be granted.

A. The Court should overrule *Flast*.

The underpinnings of *Flast* have been steadily weakened since 1968 – and, when the weight of this Court's subsequent Article III standing cases and serial criticism over decades is brought to bear, can no longer support continued deference. A fresh look is required.

1. *Flast* has not yet been overruled. But the flexible, prudential approach to standing that led to the *Flast* exception has been expressly rejected, *see Lewis*

v. Casey, 518 U.S. 343, 353 n.3 (1996) (repudiating *Flast*'s limited conception of standing based "solely" on adversarial context and form), and the potential application of *Flast* has been repeatedly limited, *see, e.g.*, *U.S. v. Richardson*, 418 U.S. 166 (1974); *Schlesinger v. Reservists Cmte.*, 418 U.S. 208 (1974); *Valley Forge Christian College v. Am. United for Separation of Church and State*, 454 U.S. 464 (1982); *Bowen v. Kendrick*, 487 U.S. 569 (1988); *Cuno*, *Hein*, *Winn*; *see also* Petition at 14-27. This progression has rewritten *Flast*'s boundaries to the point of ineffectiveness. *Winn*, 563 U.S. at 148 (Kagan, J., dissenting) (characterizing decision as the "effective end of taxpayer standing"). There is no "heartland" (Response at 14) left in *Flast* to uphold.

2. The Response lauds *Flast* for promoting good public policy, but does not even try to square that decision with Article III standing requirements. Taxpayer Respondents claim *Flast* is "logical" (Response, p. 13), "essential" (id.), "efficient" (p. 19), "highly practical," (p. 21) and helps child litigants and taxpayers initiate litigation (p. 19). But none of these supposed qualities – which would be true of any number of theories of expanded standing – make *Flast*'s two-part "nexus" test *constitutional*. In fact, *Flast*'s test relies on an erroneous, *sui generis* conception of a plaintiff's "injury" that cannot be harmonized with this Court's prior *or* subsequent standing cases. To establish constitutional standing, a plaintiff must demonstrate (1) a concrete and particularized injury-in-fact that is (2) fairly traceable to the defendant's alleged unlawful conduct and

(3) likely to be redressed by a favorable decision. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In *Frothingham* and *Doremus v. Board of Education*, 342 U.S. 429 (1952), the Court correctly rejected claims of taxpayer standing because the plaintiffs had not demonstrated any direct injuries. 262 U.S. at 486-88; 342 U.S. at 433-34. Both cases indicate that the "injury-in-fact" requirement of standing is met only where a taxpayer plaintiff can demonstrate that he personally suffers a tangible financial detriment as a result of the challenged law. *Id*. In those two cases, the Court rightly rejected the taxpayers' claims of standing because those claims raised only generalized grievances shared in common with the general public that could not be redressed through judicial relief.

In *Flast*, the Court determined that taxpayers *qua* taxpayers can have standing to sue, despite *Frothingham*. It did so by inventing a special "stake" for plaintiffs who experienced psychological discomfort as a result of the spending of "their" tax funds in violation of the Establishment Clause. 329 U.S. at 102-03. The Court "deemed" to equate this psychic injury with direct, financial injury-in-fact under certain circumstances, outlined in *Flast*'s much-discussed two-prong test. *Id*. Left unexplained, however, was why the nature of the *defendant's* actions matters if standing is constitutionally a *plaintiff*-oriented showing.

These and other criticisms were made, of course, at the time *Flast* was decided. *Flast*, 392 U.S. at 122 (Harlan, J., dissenting). More recently, Justice Scalia cited this misconceptualization of "injury" among other

logical deficiencies of *Flast*. *Hein*, 551 U.S. at 620 (Scalia, J., concurring) ("It has often been pointed out, and never refuted, that the criteria in *Flast*'s two-part test are entirely unrelated to the purported goal of ensuring that the plaintiff has a sufficient 'stake in the outcome of the controversy[.]'") (citations omitted).

The *Flast* Court, moreover, did not explain how or why this special "psychic injury" only occurs in Establishment Clause cases, or why it only qualifies for the quantum leap to Article III-injury-status when perpetrated by an express Congressional act of spending, as opposed to the myriad of other ways the federal government can use its resources.

Unless a dispute before a federal court constitutes an Article III "case or controversy," it cannot proceed, no matter how expedient. The Court should consider whether *Flast* is inconsistent with bedrock standing jurisprudence.

3. *Flast*'s reputation as a "jurisprudential disaster," *Hein*, 551 U.S. at 637 (Scalia, J., concurring) is bolstered, if not entrenched, by its implementation in the court below. In *Pedreira v. Ky. Baptist Homes for Children, Inc.*, the Sixth Circuit ostensibly applied *Flast*'s "nexus" test with respect to Taxpayer Respondents' dual statuses as federal and State taxpayers. 579 F.3d 722, 728-33 (6th Cir. 2009) (*Pedreira I*). The dual funding sources for the Kentucky Respondents' executive branch contracts targeted by Taxpayer Respondents were indistinguishable: Congress granted lump-sum appropriations to the Commonwealth of Kentucky, and

the Kentucky General Assembly granted lump-sum appropriations (including State and federal pass-through dollars) to the Kentucky Respondents. *Id*.

The Sixth Circuit, however, reached two opposing conclusions in its dual *Flast* "nexus" analyses. Congress's lump-sum appropriations, the *Pedreira I* panel explained, were "too attenuated" from the Kentucky Respondents' alleged Establishment Clause violations to form a sufficient nexus. *Id*. at 731. Yet – even though the General Assembly's lump-sum appropriations to the Kentucky Respondents were not alleged to perpetrate any Establishment Clause violation, and contained no language reflecting the General Assembly intended the funds to be spent on the Kentucky Respondents' discretionary service contracts with Petitioner – the *Pedreira I* panel nevertheless found that a "nexus" existed between Kentucky and the alleged Establishment Clause violations based on several unconnected, non-spending acts of the General Assembly. *Id*. at 732-33.

The Sixth Circuit's understanding of "nexus," like that of the Taxpayer Respondents here, simply ignores what that term means after *Hein*. After *Hein*, taxpayer standing may only be premised on a Congressional act of spending that expressly authorizes or mandates a result that violates the Establishment Clause. *Hein*, 551 U.S. 608-09.

Flast standing cannot be premised on legislative activities – like those identified on pages two through four of the Response – that are not challenged on the merits. It matters not, for example, that the General

Assembly "specifically directed state funds to Sunrise facilities" (Response at 3) years after litigation began, because those legislative acts are not claimed to violate the Establishment Clause. The alleged Establishment Clause violation must be one and the same as the predicate legislative spending act. "Legislative awareness" is a totally inadequate and amorphous substitute for this rigorous "nexus" expressly required by *Hein*.[1] *See* Kentucky Respondents' Brief in Support of Petitioner at 22-27.

The Sixth Circuit's schizophrenic application of *Flast*, which it later reaffirmed in *Pedreira v. Sunrise Children's Servs.*, 802 F.3d 865 (6th Cir. 2015) (*Pedreira II*) and is left unexplained here by Taxpayer Respondents, should serve as yet another alarm. Whatever social good might come from more litigants having standing to sue, even worse public policy effects result from illogical or inconsistent grants of standing. Here, because of lax enforcement of Article III, over sixteen years (and counting) of publicly funded litigation have been required to address a general political grievance over a discretionary State executive branch policy.

4. Overruling *Flast* would not render the Establishment Clause unenforceable, and would have the effect of putting taxpayers in exactly the same position

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[1] Taxpayer Respondents all but admit that they are advocating a "legislative awareness" standard for state taxpayer standing. Response at 2 (asserting that this case "demonstrates a close nexus between legislative action and the Commonwealth's funding of Sunrise," in part, because there is "*extensive legislative knowledge* of payment to Sunrise" (emphasis added)).

they currently possess with regard to every other constitutional right. In this matter alone, there are many potential plaintiffs who would enjoy conventional standing, including former residents of Sunrise facilities, or current Sunrise residents (through their parent or guardian).[2] Taxpayers can avail themselves of their respective State courts to challenge alleged Establishment Clause violations. And any citizen may participate in the political process to influence government spending policies carried out by the legislative and executive branches, which have the same duty as this Court to comply with the Constitution. The Establishment Clause is not entitled to a privileged place in constitutional litigation, especially in today's pluriform, increasingly secular America.

B. The Court should not expand *Flast* to State taxpayer standing.

If this Court will not consider overruling *Flast*, it should grant review to expressly consider whether *Flast* should be expanded to State taxpayer suits. *Flast* was a federal taxpayer case addressing Congressional spending acts.

1. The Response strains to reframe this question as an attempt to upend settled law. (Response at 22-24). This Court, however, has never expressly decided

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[2] Indeed, earlier in this litigation the parents ("Jane and James Doe") of a former Sunrise resident named "John Doe" were party plaintiffs. *See* Am. Complaint, App. 168. The "Does" later chose to voluntarily dismiss their claims.

whether *Flast* applies to State taxpayer Establishment Clause challenges. In *Meek v. Pittinger*, 421 U.S. 249, 356 n.5 (1975), the Court noted that the district court had "properly concluded" that three individual State taxpayers had standing, citing *Flast*; but the district court had summarily found as much without any analysis, *see Meek v. Pittinger*, 374 F. Supp. 639, 646-47 (E.D. Pa. 1974), and *Meek* has not been cited by this Court in support of that point. Similarly, in *School District v. Ball*, 473 U.S. 373, 380 n.5, the Court briefly noted that the State taxpayer plaintiffs had standing, citing *Flast*, but conducted no analysis, and premised its conclusion on several 1970s decisions assuming jurisdiction that were later expressly repudiated as valid standing precedents in *Winn*. *See Winn*, 563 U.S. at 144 ("The conclusion that the *Flast* exception is inapplicable at first may seem in tension with several earlier cases, all addressing Establishment Clause issues and decided after *Flast* . . . [b]ut those cases do not mention standing and so are not contrary to the decision reached here."); *id*. at 156 (Kagan, J., dissenting) (observing that cases rejected by Court had been basis for standing conclusion in *Ball*). Indeed, if *Meek* or *Ball* were as definitive as Taxpayer Respondents claim, they surely would have been cited by *Cuno* and *Winn*.

2. *Winn*'s application of the *Flast* "nexus" test to State taxpayers did not decide this question, either. There, Arizona taxpayers argued that their Establishment Clause claims met *Flast*'s test, thus yielding taxpayer standing. The Court determined, however, that the tax credit program at issue did not constitute the

type of Article I, Section 8 spending action that satisfied *Flast*, and thus could not serve as a basis for standing. 563 U.S. at 141-42. As in *Cuno*, 547 U.S. at 347-49, the Court never had to reach the issue of whether *Flast*'s Article III standing exception applies to State taxpayers because the facts of the case made such a determination unnecessary. *See, e.g.*, *U.S. v. Raines*, 362 U.S. 17, 21 (1960) (Court's established practice is "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.") (citations omitted). Indeed, *Winn* expressly warns against the sort of inferences on which Taxpayer Respondents' arguments are based. 563 U.S. at 145 ("The Court would risk error if it relied on [standing] assumptions that have gone unstated and unexamined."). The applicability of *Flast* to State taxpayers is now ripe for direct consideration.

3. *Everson v. Board of Education*, 330 U.S. 1 (1947) incorporated the Establishment Clause – a provision of the Constitution limiting the power of the federal Congress – to the States. The Court cannot assume, however, that *Everson*'s analysis lends itself to any taxpayer standing question; in fact, taxpayer standing did not exist in any context under *Frothingham* and *Doremus* at the time *Everson* was decided. *Flast* itself speaks only to violations of the federal Constitution by a Congressional act under the Taxing and Spending Clause of Article I, Section 8. Limiting the *Flast* exception to federal taxpayers would be completely consistent with how that exception was policed in *Cuno*, *Hein*, and *Winn*, and would protect principles

of federalism by encouraging State taxpayer actions challenging State legislative appropriations to be heard and decided in State courts, where they belong. This Court should not hesitate to grant certiorari and ensure the enormous power of the federal judiciary is wielded consistent with Article III and its precedents.

Respectfully submitted,

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April 28, 2016