Nos. 09-987, 09-991

IN THE
Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,
Petitioner,

v.

KATHLEEN M. WINN, ET AL.,
Respondents.

GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue,
Petitioner,

v.

KATHLEEN M. WINN, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
JAMES M. HENDERSON, SR.
WALTER M. WEBER
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Avenue, N.E.
Washington, DC 20002
sekulow@aclj.org
(202) 546-8890

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have appeared frequently before the Court as counsel for parties or for amici.

ACLJ attorneys often contend with arguments based upon misreadings of the Establishment Clause of the First Amendment. *See*, *e.g.*, *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) (rejecting invocation of Establishment Clause as justification for viewpoint-based discrimination against private religious speech). Unduly lax standing rules under the Establishment Clause facilitate misuse of that Clause to attack legitimate government programs that, like the tuition tax credits in this case, make important benefits available in a religion-neutral manner. Moreover, allowing special lax taxpayer standing rules *only* for Establishment Clause claims warps the legal playing field: programs that neutrally *include* religiously oriented participants are subject to taxpayer challenge, while programs that *exclude* religion, in favor of monochromatic secularity, are immune from taxpayer suits.

The ACLJ therefore strongly believes in the need

---

[1] The parties to this case have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

for this Court to police the proper boundaries of Article III standing in Establishment Clause litigation.

This Court explained in *Hein v. Freedom From Religion Foundation*, 551 U.S. 587 (2007), that the standing exception created in *Flast v. Cohen,* 392 U.S. 83 (1968), is to be narrowly construed. In the present case, the Ninth Circuit has, contrary to this Court's directions, doubly expanded the *Flast* exception; first, to let taxpayers sue, not for a legislative expenditure, but for a mere failure to tax, i.e., by conferral of a tax credit; and second -- contrary to *Hein* -- to let taxpayers challenge, not a legislative appropriation, but rather the administration of that program. This Court should decline the invitation to expand *Flast*, reverse the Ninth Circuit, and remand with instructions to dismiss for want of standing.

SUMMARY OF ARGUMENT

If this Court reaches the merits, it should reject respondents' Establishment Clause challenge to the Arizona tuition tax credit. Respondents concede the program's facial constitutionality. Their challenge to the statute "as applied" must fail because the "application" in question -- the placing of school eligibility limits on scholarships -- is imposed by private actors. Hence, the as-applied challenge fails for want of state action.

This Court should not even reach the merits, however, because respondents lack Article III standing to bring this case.

Respondents assert standing as state taxpayers, invoking this Court's decision in *Flast v. Cohen*, 392 U.S. 83 (1968). *Flast*, however, created a narrow exception to the general and well-established rule that taxpayer standing is insufficient to invoke federal jurisdiction. This Court has never endorsed an expansion of that exception. Yet for respondents to prevail would require not one but two extensions of *Flast*.

First, *Flast* only allowed a challenge to expenditures, while this case involves not an expenditure, but a nonrefundable tax credit -- a decision not to tax. Second, *Flast* only allowed challenges to *legislative* expenditures, while this case involves the *administration* of funds, a matter this Court has held to fall outside the scope of *Flast*.

To confer standing upon respondents here would fly in the face of this Court's repeated refusal to extend the narrow *Flast* exception. Given the doctrinally questionable status of *Flast*, in light of this Court's subsequent cases, *Flast* is no candidate for such an expansion.

ARGUMENT

I. THE DECISION BELOW IS MANIFESTLY WRONG ON THE MERITS.

On the merits, this is a straightforward case. Respondents concede the facial constitutionality of

Arizona's tax credit program,[2] under which donors to student tuition organizations (STOs) get a state tax credit, and the STOs in turn provide scholarships to students, including students who attend private religious schools.

All that remains, then, is respondents' challenge to the program *as applied,* focusing upon the fact that some STOs limit their scholarships to students attending religious schools. Opp. at 15, 21. That challenge can be understood in two ways, both of which plainly fail.

First, the as-applied challenge could be understood as attacking particular STOs and their decisions to limit the universe of scholarship recipients. *See* ACSTO Br. at 7a (transcript of excerpts of oral argument in Ninth Circuit) (Mr. Bender for challengers: "We only challenge the administration of it by religion-specific STOs"); Opp. at 15 ("The features of the program's operation that are the primary bases of respondents' challenge [are] the award of scholarships that can be used only in religious schools . . ., the effect of [those award choices], and the failure of the program to achieve its purported secular objectives"); *id*. at 21 (decision below is "based on the allegations that the majority of Arizona's scholarships are *awarded* to parents on the basis of religion . . . that those awards *require* parents to send their children to

[2] This concession, made in oral argument before the Ninth Circuit, appears at approximately minute 49 of the argument recording as posted on the Ninth Circuit's website. *See also* ACSTO Br. at 7a (transcript excerpt). Respondents repeated the concession before this Court. Opp. at 15.

religious schools, and that the Arizona program [fails] its purported, non-religious purposes") (emphasis in original). But the decision of private STOs, like the decision of donors who choose to support them, are all *private* actions which the Establishment Clause does not restrict. The lack of state action thus dooms an as-applied challenge attacking the decisions of STOs and taxpayers.

Second, the as-applied challenge could be understood as attacking the absence of a statutory provision requiring all STOs to include students who attend nonreligious schools. Such an absence, however, is an assertion that the text of the statute is defectively incomplete; that sort of claim is incompatible with respondents' disavowal of any facial challenge. *See* Opp. at 15 ("the present case . . . is an *as applied* challenge, *not to the statute's text*, but to the program as it actually operates") (emphasis added in part).[3]

In sum, if this Court reaches the merits, it should reverse the Ninth Circuit in short order.

---

[3] If respondents' argument is that Arizona must *administratively* require all STOs to award scholarships at both religious and nonreligious schools, this is just another way of saying that the statute, standing alone (i.e., without remedial administrative steps), is defectively incomplete on its face.

If respondents' argument is that the pertinent statute should or must be *construed* to bar STOs from limiting their scholarship recipients (whether to religious or to nonreligious schools -- the freedom of STOs operates in both directions), then respondents should be seeking declaratory relief from the state supreme court, the only judicial body competent to construe the statute definitively. *But cf.* ACSTO Br. at 48-49 (suggesting such a statutory construction is precluded).

But the decision below also fails for an important, threshold jurisdictional reason, namely, lack of standing.

II. THE DECISION BELOW MUST BE REVERSED FOR RESPONDENTS' LACK OF TAXPAYER STANDING.

The general rule is that being a taxpayer does not by itself suffice to confer Article III standing to challenge federal government actions. *Frothingham v. Mellon*, 262 U.S. 447 (1923). The same rule applies to state taxpayers challenging state government actions. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345 (2006). Respondents -- who rely exclusively upon state taxpayer status for their standing -- do not fit into any exception that would bestow standing here. In particular, the narrow exception recognized in *Flast v. Cohen*, 392 U.S. 83 (1968), for certain claims brought under the Establishment Clause, does not cover and should not be expanded to cover respondents' claims.

A. *Flast* Created a Narrow Exception to the General Rule That Being a Taxpayer Is Insufficient for Article III Standing.

In *Frothingham*, this Court ruled that federal taxpayer status is insufficient to confer standing to challenge government action. 262 U.S. at 486-88. While the *Flast* decision subsequently opened up an exception for certain Establishment Clause claims, this Court has countenanced no other exception to the rule of *Frothingham*. On the contrary, this Court has repeatedly rejected such pleas of federal taxpayer standing. *See United States v. Richardson*, 418 U.S.

166 (1974) (no taxpayer standing to sue under Statement and Account Clause); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (no taxpayer standing to sue under Incompatibility Clause); *Cuno*, 547 U.S. at 347-49 (no taxpayer standing to sue under Commerce Clause). *See also Hein v. Freedom From Religion Found.*, 551 U.S. 587, 599 (2007) (plurality) ("We have consistently held that . . . the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to . . . Article III standing") (quoted text reordered). Importantly, even in the context of Establishment Clause claims, this Court has refused to expand *Flast* beyond the contours of that case. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982) (no taxpayer standing to bring Establishment Clause challenge to exercise of federal power under Property Clause, as opposed to Taxing and Spending Clause); *Hein* (no taxpayer standing to bring Establishment Clause claim in absence of challenge to specific legislative appropriation).

In short, the *Flast* exception is quite narrow. *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988) (*Flast* created a "narrow exception . . . to the general rule against taxpayer standing"); *Cuno*, 547 U.S. at 348 (*Flast* has a "narrow application in our precedent"). Indeed, "the *Flast* exception has largely been confined to its facts . . . . In effect, we have . . . limited the expansion of federal taxpayer . . . standing . . . to an outer boundary drawn by the results in *Flast*." *Hein*,

551 U.S. at 609-10 (plurality) (editing marks and citations omitted).

B. The *Flast* Exception Should Not Be Expanded to Authorize Taxpayer Challenges to Tax Credits or to the Administration of Tax Credits.

To create Article III standing for respondents in this case would require at least a two-step expansion of the narrow *Flast* exception. This Court should decline that invitation and adhere to its practice of limiting *Flast* to its facts.

1. This Case Involves Nonrefundable Tax Credits, Not Appropriations.

Respondents would first extend *Flast* from expenditures and appropriations to nonrefundable tax credits. This Court has never done so.

As *Cuno* illustrates, the general rule against taxpayer standing presumptively applies to tax credits. *See* 547 U.S. at 342 (challenge was to "franchise tax credit"). Notably, the *Cuno* Court left open the question whether tax credits even count as expenditures in the first place for purposes of the *Flast* exception. *Id*. at 347 ("Quite apart from whether the franchise tax credit is analogous to an exercise of congressional power under Art. I, § 8, plaintiffs' reliance upon *Flast* is misguided*")*. In fact, neither *Flast* nor *Bowen v. Kendrick* -- the only cases in which this Court has upheld taxpayer standing under *Flast* -- involved tax credits.

To be sure, this Court has entertained *on the merits* at least one Establishment Clause challenge (in part) to tax credits that presumably rested on taxpayer standing. *See Committee for Public Educ. & Religious Liberty v. Nyquist,* 413 U.S. 756 (1973).[4] *See also Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (Establishment Clause challenge by payer of property tax to city's conferral of tax *exemptions*); *Mueller v. Allen*, 463 U.S. 388 (1983) (Establishment Clause challenge by taxpayers to tax *deductions*). But this Court did not address standing in any of these cases. The mere exercise of jurisdiction is not precedent for the existence of jurisdiction. "'The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions -- even on jurisdictional issues -- are not binding in future cases that directly raise the questions.' *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (citations omitted)." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478-79 (2006).

Certainly a *refundable* tax credit -- i.e., one pursuant to which, if the credit exceeds the taxpayer's tax liability, the government disburses the balance to the taxpayer -- will entail expenditures. But a *nonrefundable* tax credit -- as is at issue here, *see* ACSTO Pet. App. 112a-113a (setting forth statute)

---

[4] *Nyquist* was not solely a taxpayer challenge to tax credits. The case involved a challenge by taxpayers *and parents* to tax credits *and direct money grants*. 413 U.S. at 762. This Court did not address standing.

(excess credit may only be carried forward, and only for five years) -- involves no government outlay of money. And while a tax credit does represent a government *declining* to take private funds into government coffers, that characterization has no logical stopping point. If a tax credit is deemed an "expenditure," then so presumably are deductions and exemptions, by which the government also declines to tax as far as it theoretically could. *But see Walz*, 397 U.S. at 675 ("The grant of a tax exemption . . . does not transfer [government] revenue . . . but simply abstains from demanding [support]"). The reduction or repeal of a tax (such as the death tax) would likewise be an "expenditure" under this theory. In fact, the failure to adopt a tax in the first place (such as a head tax on attendees at assemblies) would be an "expenditure" as well. In each case, the government decides as a policy matter what to tax, and what tax breaks to offer. That does not make all such decisions "expenditures" within the meaning of the *Flast* exception.

In a system where all money and property belongs to the state, and private citizens retain use of that money and property only by government indulgence, it might conceivably make sense to treat a reduction in tax as an expenditure. But the United States is not such a system.

This Court should reject the proposed expansion of *Flast* from expenditures to tax credits.

2. This Case Involves Administration of a Program, Not a Specific Legislative Enactment.

The *Hein* case clarified that the *Flast* exception does not apply to executive administration of funds, as opposed to specific legislative appropriation (as in *Flast)* or particular, express legislative authorization of expenditures (as in *Bowen v. Kendrick*[5]). Here respondents challenge, not the statutory program itself, but its administration. Opp. at 15. Hence, conferring standing on respondents would require expanding *Flast* in a second way that would require overruling *Hein*. Again, this Court should reject the invitation to enlarge the *Flast* exception, especially in a manner already rejected by this Court.

C. The *Flast* Precedent Is a Particularly Unsuitable Candidate for Expansion.

As this Court has ruled, the narrow *Flast* exception should not be expanded beyond its facts. *Flast*'s highly problematic status as a precedent reinforces the wisdom of this course of restraint.

---

[5] As explained in *Hein*, the statute challenged in *Bowen v. Kendrick* expressly contemplated religious involvement. *Hein* distinguished *Bowen* on that basis. 551 U.S. at 606-07 & n.6 (plurality). *Bowen* is distinguishable here on the same grounds. The Arizona tax credit statute makes no mention of religious recipients. ACSTO Pet. App. 115a (setting forth statute) (defining STOs without reference to religion).

1. The *Flast* Rule Is Illogical on its Own Terms.

First of all, the *Flast* decision is not logically coherent.

The *Flast* Court declared that it would recognize an exception to *Frothingham* when taxpayers could demonstrate "the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements." *Flast*, 392 U.S. at 102.

> The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, 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.

392 U.S. at 102-03.

But as Justice Harlan pointed out in dissent, the two-part test set forth in *Flast* is "not in any sense a measurement of any plaintiff's interest in the outcome of any suit." *Id.* at 121 (Harlan, J., dissenting). As Justice Harlan explained regarding the first prong of the *Flast* test -- the requirement that the attack be upon a direct expenditure, not just an incidental outlay -- "it surely cannot matter to a taxpayer *qua* taxpayer whether an unconstitutional expenditure is used to hire the services of regulatory personnel or is distributed . . . as grants-in-aid." *Id.* at 123. The taxpayer's "interest as taxpayer arises, if at all, from the fact of an unlawful expenditure, and not as a consequence of the expenditure's form." *Id.* Justice Harlan perceived the second *Flast* prong -- the requirement that the claim arise under a specific limitation on the spending power -- as similarly irrelevant. *Id.* "The intensity of a plaintiff's interest in a suit is not measured, even obliquely, by the fact that the constitutional provision under which he claims is, or is not, a 'specific limitation' upon Congress' spending powers." *Id.* As Justice Harlan noted, a plaintiff's interest in the suit does not "vary according to the constitutional provision under which he states his claim." *Id.* at 124.

In sum, *Flast*'s rule does not even follow from its own premises. Furthermore, as demonstrated below, *Flast*'s legal analysis has fared poorly in the test of time.

2. This Court Has Rebutted Each of the Arguments the *Flast* Court Relied upon to Confer Standing.

The propositions the *Flast* opinion offered to support its exception to the usual standing doctrine have been thoroughly undermined by this Court's later decisions, leaving *Flast* with no doctrinal legs to stand on.

a. This Court Has Expressly Rejected *Flast's* Core Premise.

While the two-part *Flast* test purported to give specific meaning to taxpayer standing doctrine, the lynchpin of the *Flast* Court's analysis came earlier in the opinion. In considering the jurisprudential foundation of Article III standing, the *Flast* Court opined that "the question of standing is related *only* to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." 392 U.S. at 101 (emphasis added). Referencing this precise passage nearly thirty years later, this Court expressly *rejected* the *Flast* approach. "This would perhaps have seemed like good law at the time of *Flast*, but *our later opinions have made it explicitly clear that Flast erred* in assuming that the assurance of 'serious and adversarial treatment' was the only value protected by standing." *Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996) (emphasis added). "The requirements of Art. III are not satisfied merely because a party requests a court of the United States

to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process." *Valley Forge*, 454 U.S. at 471.

Thus, this Court has already expressly jettisoned the cornerstone of the *Flast* structure.

b. The Particular Confusion *Flast* Perceived over Constitutional Requirements No Longer Exists.

The *Flast* Court, while acknowledging the *Frothingham* rule against taxpayer standing, professed "confusion" over the difference between the strict requirements of Article III and merely prudential "policy considerations" governing limitations on standing. *Flast*, 392 U.S. at 92-94. *Cf. also id*. at 95-97 (finding uncertainty in meaning and scope of doctrine of justiciability in general); *id*. at 98-99 (describing standing doctrine as complex and vague). The relevant "confusion" no longer exists. After frankly acknowledging that the distinction between constitutional and prudential elements of standing "has not always been clear," *Valley Forge*, 454 U.S. at 471 (citing *Flast*), this Court noted that a subsequent "line of decisions, however, has resolved that ambiguity," at least regarding the "irreducible minimum" requirements of Article III, *Valley Forge*, 454 U.S. at 472.

Thus, it is now well settled that to bring a claim in federal court, a plaintiff must satisfy the "irreducible

constitutional minimum" of standing, namely, by demonstrating the following three elements:

(1) an "injury in fact" that is "concrete" and "actual or imminent";

(2) a "fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant"; and,

(3) "redressability -- a substantial likelihood that the requested relief will remedy the alleged injury in fact."

Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 771 (2000) (internal quotation marks, editing marks, and citations omitted); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998).[6]

It is now abundantly clear that the want of standing for a federal taxpayer claim flows not from

---

[6] This Court made clear in *Steel Company* that standing cannot rest upon the fact that a plaintiff "will be gratified by seeing [a defendant] punished for its infraction and that the punishment will deter the risk of future harm." *Id*. at 106-07. To accept such reasoning "would make the redressibility requirement vanish." *Id*. at 107. With respect to the plaintiff's gratification, "psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Id*. As for deterrence, every adverse ruling will deter a defendant. A "generalized interest in deterrence . . . is insufficient for purposes of Article III." *Id*. at 108-09.

The *Steel Company* Court also held that the mere prospect of an award of costs and attorney fees cannot generate standing. *Id*. at 107-08.

any mere policy choices, but rather from a fundamental constitutional inadequacy. A federal taxpayer claim lacks the necessary elements of a concrete personal injury (as opposed to the same undifferentiated "injury" all citizens and taxpayers suffer from illegal government action[7]), traceability (federal tax funds being emptied into a general treasury from which appropriations are drawn[8]), and redressability (since a successful suit would yield neither a tax refund nor any real likelihood of a reduction in the taxpayer's tax bills[9]). "Article III

---

[7] We have consistently held that a plaintiff raising only a generally available grievance about government -- claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large -- does not state an Article III case or controversy.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74 (1992). *See generally id*. at 574-76 (discussing cases). *Accord Cuno*, 597 U.S. at 344 ("standing has been rejected in [taxpayer] cases because the alleged injury is not concrete and particularized . . . but instead a grievance the taxpayer suffers in some indefinite way in common with people generally . . . . In addition, the injury is not actual or imminent, but instead conjectural or hypothetical") (internal quotation marks and citations omitted); *Hein*, 551 U.S. at 600 (plurality) ("the interests of the taxpayer are, in essence, the interests of the public at large").

[8] *Hein*, 551 U.S. at 614 (plurality).

[9] "It is pure speculation whether the lawsuit would result in any actual relief for respondents." *Cuno*, 547 U.S. at 344 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 614 (1989) (plurality (continued...)

requires a demonstration of redressable injury that is *not* satisfied by a claim that tax moneys have been spent unlawfully." *Valley Forge*, 454 U.S. at 484 n.20 (emphasis added). *Accord Richardson*; *Schlesinger*; *Cuno*.

c. *Flast* Improperly Disregarded Separation of Powers Concerns.

The *Flast* Court opined that the question of standing to sue "does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated." 392 U.S. at 100-01.

That proposition is simply no longer tenable. As this Court has repeatedly held, the standing requirements of Article III play a vital role in maintaining the proper separation of powers between the Congress, the Executive, and the Judiciary. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992); *Lewis v. Casey*, 518 U.S. at 349; *Cuno*, 547 U.S. at 341. "The . . . constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers." *Steel Co.*, 523 U.S. at 101. Indeed, this Court has already expressly declared that "*Flast* erred" when it "failed to recognize that this doctrine has a separation-of-powers component . . . ."

---

[9] (...continued)
opinion of Kennedy, J.)).

Lewis, 518 U.S. at 353 n.3. *Accord Hein*, 551 U.S. at 611 (plurality) (*Flast* "gave too little weight to [separation-of-powers] concerns").

d. *Flast's* Reliance on Hypothetical Worst Cases Does Not Support Standing.

The *Flast* Court expressed concern that if taxpayers did not *ipso facto* have standing to bring Establishment Clause claims, then taxpayers could not sue "even if Congress engaged in such palpably unconstitutional conduct as providing funds for the construction of churches for particular sects." 392 U.S. at 98 n.17. But this Court has since held that such a concern is legally irrelevant.

The hypothetical downside of a lack of taxpayer standing is by no means unique to Establishment Clause claims. Little imagination is needed to conjure up nightmarish hypothetical violations of the Statement and Account Clause and the Incompatibility Clause, for example, yet there is no taxpayer standing to challenge such violations, *see Richardson*; *Schlesinger*. One could likewise theorize infringements of a host of other constitutional provisions, such as the Title of Nobility Clause (U.S. Const. art. I, § 9, cl. 8), for which a taxpayer lawsuit might be the only realistic means of bringing the violations to court. But "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger*, 418 U.S. at 227. *Accord Valley Forge*, 454 U.S. at 489 (quoting same

language in denying standing to bring Establishment Clause claim). "Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts." *Richardson*, 418 U.S. at 179.

"In the unlikely event" that a worst-case scenario materialized, "Congress could quickly step in." *Hein,* 551 U.S. at 614 (plurality). Moreover, worst case scenarios have a way of generating political consequences. As this Court observed in *Richardson*, "[s]low, cumbersome, and unresponsive" as that system "may be thought at times," "the political forum" and "the polls" remain available for the pursuit of redress. 418 U.S. at 179.

Furthermore, to disallow taxpayer standing is not to disallow other routes to standing. STOs, for example, could sue if the state were improperly to deny tax credit eligibility to certain STOs. And if the state were improperly to obstruct the formation of STOs desired by certain parents, either those parents, *as parents*, or the would-be STOs, would likely have standing.

e. *Flast* Erred by Conferring Uniquely Privileged Status on Establishment Clause Claims.

The *Flast* Court perceived significance in its view that "one of the specific evils" feared by the drafters of the Establishment Clause "was that the taxing and

spending power would be used to favor one religion over another." 392 U.S. at 103. This observation, however, goes to the scope of the Establishment Clause *on the merits*, not to the availability of taxpayer standing. As the Court has since observed, "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right." *Lujan*, 504 U.S. at 576. And as *Valley Forge* held, litigants' "claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." 454 U.S. at 487 (footnote omitted).

More recently, in *Cuno*, this Court distinguished *Flast* and referred to its "narrow application in our precedent," 547 U.S. at 348. This Court accurately described *Flast* as having "understood the 'injury' alleged in Establishment Clause challenges to federal spending to be the very 'extraction and spending' of 'tax money' in aid of religion . . . ." 547 U.S. at 348. *See Flast*, 392 U.S. at 106. While *Flast*'s description of the relevant injury served to distinguish *Flast* from *Cuno* (and from the present case), it underscores *Flast*'s incompatibility with this Court's standing doctrine. For while *Flast*'s redefinition of the "injury" may suffice to clear the *redressability* hurdle ("an injunction against the spending would of course redress *that* injury," *Cuno*, 547 U.S. at 348 (emphasis in original)), the injury as defined in *Flast* clearly fails the Article III requirements for a cognizable *injury*. Such an injury is insufficient because that injury is

"shared with all members of the public." *Richardson*, 418 U.S. at 178 (internal quotation marks and citation omitted). *Accord Lujan*, 504 U.S. at 573-74 ("generally available grievance about government" is insufficient for standing); *Valley Forge*, 454 U.S. at 483 ("assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning").

* * *

Respondents' assertion of standing depends not just on *Flast*, but on an *expansion* of *Flast*. Yet *Flast* has been problematic from the start. In the years since *Flast*, this Court has knocked out every single rationale underpinning that decision. *Flast* causes unfairness by privileging only separationist taxpayer lawsuits. *Flast* creates inconsistency with the rest of Article III case law. On top of all that, *Flast* licenses a limited *violation* of Article III and a *violation* of the separation of powers under the Constitution. (The injury, traceability, and redressibility elements of standing are not mere prudential rules but constitutional requirements.) *Flast* is thus pre-eminently an example of a precedent that does *not* warrant expansion.

Assuming this Court does not overrule *Flast* altogether, *see Hein*, 551 U.S. at 614 (plurality) ("the present case does not require us to reconsider that

precedent"), this Court should at the very least reject respondents' invitation to expand *Flast*.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Colby M. May
James M. Henderson, Sr.
Walter M. Weber
American Center for Law & Justice
201 Maryland Avenue, N.E.
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org

Counsel for Amicus Curiae

August 6, 2010