

Supreme Court, U.S.  
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IN THE  
**Supreme Court of the United States**

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THE UNIVERSITY OF NOTRE DAME,

*Petitioner,*

v.

JOAN LASKOWSKI, ET AL.,

*Respondents.*

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**On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Seventh Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTIONS PRESENTED**

- I. Whether federal taxpayers have standing under *Flast v. Cohen*, 392 U.S. 83 (1968), to seek an injunction ordering a private religious university to pay the Government, the alleged constitutional violator, an amount of money equal to an expired and fully expended government grant, where the past expenditure of that grant allegedly violated the Establishment Clause and the Government does not want the money.
- II. Whether *Flast v. Cohen* should be overruled if the court of appeals' novel theory of taxpayer standing is consistent with that precedent.

### **PARTIES TO THE PROCEEDINGS**

The parties before this Court are petitioner, the University of Notre Dame, and respondents Joan Laskowski and Daniel M. Cook. The Secretary of Education, Margaret Spellings, who was sued in her official capacity as Secretary of the United States Department of Education,<sup>1</sup> is also a party to this action.

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<sup>1</sup> While this matter was pending before the court of appeals, Secretary Spellings was substituted for her predecessor in office, Rod Paige, who was originally named as a defendant. *See* Federal Rule of Appellate Procedure 43(c)(2).

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## PETITION FOR WRIT OF CERTIORARI

The University of Notre Dame respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-26a) is reported at 443 F.3d 930. The order of the court of appeals denying petitions for rehearing and rehearing en banc filed by Notre Dame and the Government and the accompanying order clarifying the original opinion (Pet. App. 1a-3a) are reported at 456 F.3d 702. The opinion of the district court granting defendants' motion for summary judgment on mootness grounds (Pet. App. 27a-31a) is unreported.

### JURISDICTION

The court of appeals entered its judgment on April 13, 2006. The United States Government's and University of Notre Dame's petitions for rehearing were denied on July 26, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2, of the Constitution provides in relevant part:

The judicial Power shall extend to [ ] Cases . . . [and] Controversies.

### STATEMENT

1. The court of appeals erroneously and unjustifiably expanded “the narrow exception that [*Flast v. Cohen*, 392 U.S. 83 (1968)] created to the general rule against taxpayer standing.” *Daimler Chrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1864 (2006) (quoting *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988)). This Court concluded in *Flast* that taxpayers had standing to seek an injunction against specific congressional expenditures in violation of the Establishment Clause because the alleged “injury” was the “extract[ion]

and spen[ding]’ of ‘tax money’ in aid of religion.” *Id.* at 1865 (“[A]n injunction against the spending would of course redress *that* injury, regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally.”). *Flast* was not based on a financial interest in the federal Treasury, and, as such, the status of a federal or state taxpayer has not provided standing in any other situation. *Id.* at 1864-65.

The court of appeals, in contrast, expressly vested taxpayers with a financial interest in the Treasury. The court resurrected an alleged former Establishment Clause violation concerning long ceased expenditures under a statute that expired almost two years ago. The court conceded that “insofar as the money has been spent for forbidden purposes, say to indoctrinate teachers or students in Catholic dogma, that injury *cannot be rectified*.” Pet. App. 5a (emphasis added). Nonetheless, the court concluded that the federal fisc could be replenished and that Plaintiffs had standing to assert a claim in the amount equal to Congress’s expenditure against the past *recipient* of federal funds. Even though Plaintiffs *concededly* have *no* redress against the Government, which allegedly committed this violation, and the court’s “remedy,” in fact, would reward the Government for its allegedly unconstitutional behavior, the court found a live “Case” or “Controversy.”

The court’s misapplication of *Flast* predictably wreaks havoc with this Court’s standing and justiciability doctrines and conflicts with numerous circuit courts. Immediate review is warranted.

2. Established in 1993, the University of Notre Dame’s Alliance for Catholic Education Program (“ACE”) is a graduate education program designed to develop motivated and committed young educators and to meet the needs of some of our country’s most underserved schools. The ACE program spans two calendar years and culminates in its participants receiving a Master of Education degree. S.A. 6,

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¶ 3.<sup>2</sup> During the two summers of the program, ACE students participate in an innovative teacher-training curriculum taught on Notre Dame's campus and teach in "at risk" programs of local public and private schools. During the academic year, ACE participants accept positions as full-time teachers in underprivileged Catholic elementary and secondary schools throughout the country. Most of the schools served are poor, inner-city schools that face a shortage of qualified teachers and qualify for services under Title I of the federal Elementary and Secondary Education Act. The ACE program has been enormously successful, winning numerous awards and accolades for its success in providing high-quality teachers to underserved areas and for the number of its graduates who stay in teaching, which is almost twice the national average.

Notre Dame, having encountered practical constraints prohibiting further expansion of the ACE program, decided to teach other colleges and universities how to replicate the program. *Id.* at 7, ¶ 9. The purpose of the replication program was to assist other institutions in establishing similar programs to train and to produce qualified teachers for underserved communities. Notre Dame, after contacting dozens of colleges and universities, selected four institutions to participate in the replication program: Valparaiso University, Providence College, Loyola Marymount University, and the University of Portland.

Notre Dame sought funding for the initiative from private foundations, pledged its own resources, and relied on the partnering institutions ("partners") to secure their own sources of funding. *Id.* at 7, ¶ 11. Notre Dame also applied for federal funds. The Higher Education Amendments of

<sup>2</sup> Pages from Notre Dame's Supplemental Appendix filed in the court of appeals are herein designated "S.A. \_\_\_\_"; pages from the Government's Separate Appendix are herein noted as "Sep. A. \_\_\_\_."

1998, *inter alia*, noted a need to “improve the quality of the current and future teaching force by improving the preparation of prospective teachers and enhancing professional development activities,” and a need to “recruit highly qualified individuals . . . into the teaching force.” 20 U.S.C. § 1021(a)(2), (4). In 1999, under Title VII of that provision, Congress earmarked \$500,000 in its fiscal year budget to Notre Dame for the replication program.<sup>3</sup> Consolidated Appropriations Act of 1999, Pub. L. No. 106-113, § 309, 113 Stat. 1501, 1501A-261 to 262. The money was earmarked for only secular education projects, 34 C.F.R. § 75.532 (2000), and only four of the 51 institutions that received funding under Section 309 were religiously affiliated. § 309, 113 Stat. at 1501A-261 to 262. Overall, Congress appropriated more than \$1.5 billion for use in higher education. *Id.* at 1501A-252. The grant to Notre Dame represented less than 1/3 of one percent of that amount.

The Department of Education (“Department”) serviced the congressional earmark and invited Notre Dame to apply for the grant funds through the Fund for the Improvement of Postsecondary Education. Sep. A. 1-2. Before the Department awarded the funds, it required Notre Dame to provide detailed documentation for its review to ensure the money would be spent as Congress intended. *Id.* The Department awarded the grant in 2000, subject to federal regulations that prohibited the expenditure of any funds for religious purposes. *See* 34 C.F.R. § 75.532. The grant expired on December 31, 2004.

Notre Dame and the partners were fully aware of and followed the prohibition against using grant funds for

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<sup>3</sup> This amount was subsequently reduced to \$462,500. Sep. A. 16, ¶ 4.

religious purposes.<sup>4</sup> S.A. 9, ¶ 15. The vast majority of the grant was disbursed to and spent by the partners. *Id.* at 9, 10, ¶¶ 15, 20. The partners used the grant primarily to pay a portion of their directors' salaries, with a smaller amount being spent by some for various other secular expenses, such as recruiting, travel, office expenses, and stipends for professional mentors. *Id.* at 8, ¶ 12. Notre Dame itself spent a portion of the funds to pay for secular expenses incurred in replicating the ACE program, such as salaries, office expenses, and travel costs. *Id.* The grant funds were not used for the actual ACE program at Notre Dame.<sup>5</sup> *Id.*

3. In December 2003, over three years after Notre Dame began receiving and disbursing grant funds, Plaintiffs, two alleged federal taxpayers, sued the Secretary of Education ("Secretary"), alleging the grant violated the Establishment Clause. The sole request for relief was an injunction against the Secretary to enjoin her from continuing to pay the grant. Notre Dame was permitted to intervene, but Plaintiffs did not amend their complaint to assert any alternative or additional claims or to seek any relief against Notre Dame.

Plaintiffs took no action to expedite the case, nor did they seek a preliminary injunction. Plaintiffs, instead, twice filed successful motions to extend the deadline to conduct discovery and twice filed successful motions to extend the summary judgment briefing schedule. Consequently, while the case was pending before the district court, Notre Dame

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<sup>4</sup> The Department, after conducting a three-day on-site audit of the grant funds, determined there was no evidence that any federal dollars were spent on religious activities.

<sup>5</sup> The D.C. Circuit, however, has held that federal dollars could be used by participants for certain aspects of Notre Dame's ACE program, notwithstanding the presence of some allegedly religious content in program. *Am. Jewish Cong. v. Corp. for Nat'l & Comty. Serv.*, 399 F.3d 351, 358-59 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1132 (2006).

and the partners spent all federal dollars by December 9, 2004, *id.* at 10, ¶ 20, and the grant expired by its own terms on December 31, 2004. Sep. A. 17, ¶ 5. Because the grant was a one-time-only congressional earmark, now expired, and the entire grant amount had been spent, an alleged ongoing constitutional violation no longer existed.

In January 2005, Notre Dame and the Secretary moved for summary judgment and sought dismissal of Plaintiffs' action as moot. Plaintiffs agreed that their action against the Secretary to enjoin payment of the grant was moot. Plaintiffs, however, propounded, for the first time in their opposition to summary judgment, that the court could enjoin the Secretary to recoup funds from Notre Dame. The district court rejected Plaintiffs' position and dismissed the action as moot. The court held "[b]ecause the challenged Grant appropriation no longer exists, there ordinarily can be no real controversy as to its validity." Pet. App. 29a.

4. In a sharply divided decision, the court of appeals vacated and remanded Plaintiffs' action, concluding that some "meaningful relief" could be provided to them. The majority agreed that "insofar as the money has been spent for forbidden purposes, say to indoctrinate teachers or students in Catholic dogma, that injury cannot be rectified." *Id.* 5a. But, the majority stated, "What can be rectified . . . is the depletion of the federal treasury by the amount of grant. It can be rectified simply by the restoration of the money to the U.S. Treasury." *Id.* 5a-6a.

The majority, however, took issue with Plaintiffs' request for relief. Recognizing that the district court could not enjoin the Secretary to recoup such funds, as such an action is precluded by this Court's opinion in *Heckler v. Chaney*, 470 U.S. 821 (1985), and is "well outside judicial competence," the majority determined Plaintiffs' suggested procedure was "needlessly complex." Pet. App. 7a. The majority thus held that the district court simply could order Notre Dame directly to return an amount of money

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equivalent to the grant to the Treasury. *Id.* This relief was never requested by Plaintiffs, nor had Plaintiffs ever asserted any claims against Notre Dame. The court dismissed these facts out of hand as mere “details” that have no “practical significance.” *Id.* 8a-9a.

Judge Sykes dissented. She stated that the majority’s “newfangled remedy,” which “vest[s] taxpayers with a unique sort of qui tam-like authority to sue private parties for reimbursement of the Treasury when the government is alleged to have committed an Establishment Clause violation, . . . is a dramatic expansion of taxpayer standing.” *Id.* 15a. As Judge Sykes pointed out, taxpayer standing “is not premised upon injuries to the public fisc” as “a taxpayer’s interest in money in the Treasury is too diffuse[] to support standing to sue in federal court.” *Id.* 21a. Once Plaintiffs’ interest in curing the constitutional violation and any available remedy against the Secretary were mooted, so too was Plaintiffs’ case. *Id.* Moreover, Judge Sykes noted that the majority achieved its remedy against Notre Dame by relying on restitution, a “private law equitable doctrine that orders liability and remedies between private individuals based on unjust enrichment.” *Id.* 18a. This substantive claim for relief, Judge Sykes explained, “has no application in a suit by taxpayers raising an Establishment Clause challenge to a congressional appropriation. It certainly cannot operate as the sole basis for standing in an otherwise moot taxpayer suit.” *Id.*

5. By a vote of 6-3 (with two judges recused), the court of appeals denied petitions for rehearing en banc filed by Notre Dame and the Government. Judges Manion, Kanne, and Sykes voted to rehear the case en banc; Judges Ripple and Williams recused themselves.

Two judges, furthermore, apparently voted to deny rehearing en banc not based on the merits of the majority’s decision, but because they concluded this Court’s review is necessary. Judge Easterbrook in concurring in the denial of

rehearing en banc in *Freedom From Religion Foundation, Inc. v. Chao*, another Establishment Clause taxpayer case, specifically referred to this case, noting that the issue of taxpayer standing “is both recurring and difficult” and that there “is considerable force . . . in the standing analysis of Judge Sykes’s dissent.” 447 F.3d 988, 989 (7th Cir.) (Easterbrook, J., concurring), *petition for cert. filed*, 75 U.S.L.W. 3065 (No. 06-157, Aug. 1, 2006). He continued, with reference to this case: “Two divided decisions on related matters that put the judicial and the political branches of the federal government at odds imply the wisdom of further review,” but that the Supreme Court is the appropriate forum to hear these cases. *Id.*; *see also id.* at 988 (Flaum, C.J., concurring in denial of rehearing because Supreme Court review is necessary to clarify the limits of taxpayer standing).

#### REASONS FOR GRANTING THE PETITION

The court of appeals held that a live “Case” or “Controversy” concerning whether the federal government violated the Establishment Clause by providing a teacher-education grant to Notre Dame existed, although the grant expired well before the district court’s decision. The court so held, even though Plaintiffs concededly have no redress against the Government, which allegedly committed this violation, and the “restitutionary” remedy created by the court against Notre Dame would not benefit Plaintiffs, but would only benefit the *Government*, the alleged constitutional violator. Under the court’s expansive and utterly illogical interpretation of *Flast v. Cohen*, 392 U.S. 83 (1968), Article III thus purportedly empowers federal courts to adjudicate cases where plaintiffs are suffering no injury and have no financial stake in a favorable resolution, where the defendant that allegedly violated the Constitution can only benefit financially if the plaintiffs prevail on the merits, and where the only potential “Controversy” is between the Government and the private intervenor concerning whether

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an amount equal to the federal grant should be provided to the federal Treasury.

As simply stating the court's holding reflects, the decision below improperly converts *Flast*'s limited grant of taxpayer standing into an exception to virtually every justiciability requirement of Article III. First, it violates basic mootness requirements because the allegedly unconstitutional spending ceased long ago and federal courts are "not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong." *Spencer v. Kemna*, 523 U.S. 1, 18 (1998). Second, it ignores the "irreducible minimum" of Article III standing—direct injury in fact—by granting standing to plaintiffs who would suffer neither religious nor financial injury if Notre Dame retained the \$500,000 in grant money, rather than providing "restitution" in that amount to the federal government. *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 102-03 (1998). Third, it violates the basic purpose of Article III standing requirements—"defin[ing] the role assigned to the judiciary in a tripartite allocation of power"—by authorizing a "remedy" that intrudes directly into the political branches' plenary control of the federal purse, by allowing plaintiffs to force "reimbursement" to the Treasury that the Treasury does not want or seek. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 481 (1982) (quoting *Flast*, 392 U.S. at 95). Finally, Plaintiffs here do not even satisfy the necessary, although insufficient, threshold requirement of standing—"concrete adverseness" between the parties—because the interests of Plaintiffs and the federal government are now perfectly aligned, since the Government will benefit (at Notre Dame's expense) from a finding of a constitutional violation. *United States v. Freuhauf*, 365 U.S. 146, 157 (1961); see also *Valley Forge*, 454 U.S. at 486.

*Flast*'s narrow exception to the prohibition against federal taxpayer standing in no way authorizes this multi-pronged attack on bedrock Article III principles. As this Court has

repeatedly emphasized, *Flast* does not grant standing to those seeking a “fair and constitutional use of [a federal taxpayer’s] dollar,” in the Establishment Clause context or elsewhere. *Cuno*, 126 S. Ct. at 1862 (quoting *Valley Forge*, 454 U.S. at 476-82). *Flast* certainly does not provide taxpayers with an ongoing equity stake in federal coffers, which somehow authorizes them to pursue a derivative claim on behalf of the Treasury, contrary to the Treasury’s own wishes. Nor does *Flast* suggest that a terminated “Controversy” between a taxpayer and the Government over allegedly unconstitutional expenditures of tax dollars may be revived solely in order to adjudicate whether the recipient of the federal aid should “return” the money.

The court’s erroneous expansion of taxpayer standing further isolates the Seventh Circuit, which had previously extended *Flast* in *Freedom From Religion Foundation v. Chao*, 433 F.3d 989 (7th Cir. 2006), and squarely conflicts with the taxpayer standing and justiciability decisions of this Court and lower courts. The court’s decision also imposes a severe disincentive on religiously-affiliated institutions from receiving public aid, for fear that they may be haled into court many years later to return the long-spent money, solely because a court determines that the public officials making the grant did not impose some unspecified level of “appropriation conditions” on it. Pet. App. 4a (order clarifying original opinion). This Court should grant certiorari to reaffirm the essential elements of a live “Case” or “Controversy” and the boundaries of taxpayer standing.

**A. The Seventh Circuit’s Decision Impermissibly Expands The Limits of Taxpayer Standing To Grant Taxpayers An Interest In The Federal Treasury.**

Here, under black-letter mootness principles, there is no longer a live “Case” or “Controversy” between Plaintiffs and the alleged unconstitutional actor. All of the federal expenditures constituting the allegedly unconstitutional

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religious sponsorship are gone and the five-year grant term has expired. Prospective relief therefore obviously would be improper and, as the court expressly conceded, there is no retroactive monetary remedy available against the Government. Pet. App. 5a. Accordingly, since there is no relief available against the constitutional wrongdoer, there is no live controversy between Plaintiffs and the Government concerning its prior spending. As *Doremus v. Board of Education of Borough of Hawthorne* stated in an Establishment Clause case, “no decision we could render now would protect any rights [plaintiff] may once have had and this Court does not sit to decide arguments after events have put them to rest.” 342 U.S. 429, 433 (1952); see *Spencer*, 523 U.S. at 1-2 (“The parties must continue to have a personal stake in the outcome of the lawsuit.”) (internal quotation marks and citation omitted); *Burke v. Barnes*, 479 U.S. 361, 363 (1987) (“Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case.”) In *Burke*, for example, this Court dismissed as moot plaintiffs’ constitutional challenge to the President’s pocket veto because the vetoed bill had expired on its own terms during the appellate process, even though it was possible that the funds expended in violation of the bill might be recoverable. *Id.*; see also *Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 414 (1972) (*per curiam*) (taxpayer’s Establishment Clause challenge to tax-exemption for certain church property was mooted when the legislature repealed the relevant statute); *Bunting v. Mellen*, 541 U.S. 1019, 1020-21 (2004) (Stevens, J., opinion regarding denial of certiorari) (three-justice opinion acknowledging dispute over the constitutionality of a “supper prayer” was moot where the defendant had retired and thus suffered no direct injury from a decision invalidating the prayer he had sponsored).

The majority opinion sought to avoid these straightforward mootness principles by suggesting that the plaintiff could seek retroactive relief against *Notre Dame*, a

private actor incapable of committing the constitutional wrong, by enjoining it to *provide* money to the alleged constitutional wrongdoer. In so ruling, the court necessarily found that taxpayer plaintiffs have standing not only to enjoin an unconstitutional religious expenditure, but also to force private entities to give money to the Government, to “remedy” the Government’s own Establishment Clause violation. For numerous reasons, it is impermissible to expand *Flast*’s limited authorization for taxpayers to seek “an injunction against the spending” of money in violation of the Establishment Clause into a doctrine which deputizes taxpayers retroactively to seek relief for the Government against third parties who could not violate the constitutional rights of Plaintiffs or anyone else. *Cuno*, 126 S. Ct. at 1865.

1. The “irreducible constitutional minimum of standing” requires “the plaintiff [to] have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized,” and (b) ‘actual or imminent, not “conjectural” or “hypothetical.”” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted). Constitutional standing also requires a plaintiff to establish traceability—“a casual connection between the injury and the conduct”—and redressability—that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Id.* at 560-61 (internal quotation marks omitted). A plaintiff has no standing to assert “harm to his and every citizen’s interest in proper application of the Constitution and laws, and [to] seek[] relief that no more directly and tangibly benefits him than it does the public at large.” *Id.* at 573-74.

Taxpayers universally have been denied standing based on their financial interest in the federal Treasury to challenge an outlay of federal funds. A taxpayer’s interest “in the moneys of the treasury—partly realized from taxation and partly from other sources—is shared with millions of others [and] is comparatively minute and indeterminable,” and the effect of a challenged congressional expenditure on an individual

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citizen's tax burden is too "remote, fluctuating and uncertain" to constitute a cognizable injury for standing purposes. *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923); see also *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 228 (1974) (rejecting taxpayer standing); *United States v. Richardson*, 418 U.S. 166 (1974) (same); *Ex parte Levitt*, 302 U.S. 633 (1937) (same). Any injury from the expenditure of tax dollars "is essentially a matter of public and not of individual concern." *Frothingham*, 262 U.S. at 487.

In *Flast v. Cohen*, 392 U.S. 83, 102 (1968), this Court allowed taxpayers standing to assert a religious injury caused by Congress's expenditure of tax dollars. "The *Flast* Court discerned in the history of the Establishment Clause 'the specific evils feared by [its drafters] that the taxing and spending power would be used to favor one religion over another or to support religion in general.'" *Cuno*, 126 S. Ct. at 1865 (quoting *Flast*, 392 U.S. at 103) (brackets in original). As such, the Court understood that taxpayers had standing to seek an injunction against specific congressional expenditures in violation of the Establishment Clause. "[A]n injunction against the spending would of course redress [the 'extract[ion] and spen[ding]' of 'tax money' in aid of religion], regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally." *Id.* Under *Flast*, "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." *Flast*, 392 U.S. at 102 (emphasis added). The Court has subsequently applied *Flast*'s "narrow exception" with "rigor" and has never found taxpayer standing outside the particular facts of *Flast*. *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988); *Valley Forge*, 454 U.S. at 481. The Court has never concluded in any context that an injury based on "the asserted effect of the allegedly illegal activity on public

revenues” provides taxpayers with standing. *Cuno*, 126 S. Ct. at 1862.

2. While Plaintiffs had standing to *prevent* the expenditure here from being used to sponsor religion, they had no standing to seek relief forcing Notre Dame to provide money to the Government. “[S]tanding is not dispensed in gross,” *Cuno*, 126 S. Ct. at 1868 (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)), so “a plaintiff must demonstrate standing separately for each form of relief sought.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). As this Court recently held in *Cuno*, a plaintiff who, based on his or her status as a taxpayer, establishes an Article III injury and remedy cannot bootstrap an unrelated injury or remedy into their case. “The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established.” 126 S. Ct. at 1868 (quoting *Lewis*, 518 U.S. at 357).

Here, Plaintiffs cannot establish standing to seek the relief invented for them by the court. First, they have suffered no injury related to, or redressable by, the “restitutionary” relief. As the court below conceded, any religious injury such as indoctrination “cannot be rectified.” Pet. App. 5a. If a college to which Notre Dame provided funds used that money to conduct a prayer service, that publicly-sponsored prayer is in no way affected or undone if an amount equivalent to the grant disbursement is now transferred from Notre Dame to the federal Treasury. Rather, as the court also conceded, the only thing “fixed” by its “restitutionary” relief is the “depletion of the federal treasury by the amount of the grant.” *Id.*

But Plaintiffs here have no Article III stake in the federal Treasury or in the purely financial issue of whether Notre Dame should rectify the Treasury’s depletion. As noted above, the injury identified in *Flast* is the First Amendment *religious* injury caused by public sponsorship of religion. *Flast* does not provide some heightened interest in the

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federal fisc in Establishment Clause cases, nor does *Flast* suggest that the taxpayer has some separate, individual interest in the Treasury that could support standing after that religious injury has passed. Consequently, taxpayers have no cognizable interest in, or standing to require, *returning* money to the federal Treasury. The Court has made this clear in a variety of contexts, including in Establishment Clause cases.

In *Valley Forge*, the United States gave away land worth at least \$577,500 to a sectarian religious college. 454 U.S. at 468; *see also id.* at 512 n.19 (noting that “its fair market value was approximately \$1.3 million”) (Brennan, J., dissenting). While the return of this land would have rectified the “depletion of the federal treasury” and would have restored the Government to the *status quo ante*, the Court found that taxpayers had no standing to seek such relief under the Establishment Clause. In doing so, the Court expressly rejected the notion that, under *Flast*, “the standing of a taxpayer is established by his ‘continuing stake . . . in the disposition of the Treasury to which he has contributed his taxes.’” *Id.* at 485 n.20 (quoting *post* at 497 (Brennan, J., dissenting)).

To be sure, the diminution of government resources in *Valley Forge* was caused by action taken under the Property Clause, rather than the Spending Clause. *Id.* at 480. But Plaintiffs’ standing here to challenge *spending* under *Flast* ceased when the spending ceased. Consequently, like the plaintiffs in *Valley Forge*, they must now establish standing to seek *replenishment* of the Treasury to retroactively undo an Establishment Clause violation, by showing that they are injured if the Treasury is not replenished. *Valley Forge*, like all of the other taxpayer standing cases in the Establishment Clause context and elsewhere, establishes that there is no such standing because the failure to enhance federal coffers is not a sufficient Article III injury. Indeed, *Valley Forge* specifically noted that, “[e]ven if respondents had brought their claim within the outer limits of *Flast* . . . they still

would have encountered serious difficulty in establishing that they ‘personally would benefit in a tangible way from the court’s intervention.’” *Id.* at 480 n.17 (quoting *Warth v. Seldin*, 422 U.S. 490, 508 (1975)).

The Court has elsewhere plainly held that, even if a citizen plaintiff has standing to challenge an *ongoing violation*, he or she has no standing to challenge a prior violation if the only potential relief is money to the federal Treasury. In *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 106 (1998), the plaintiff had no standing to challenge past violations of the statute because the only relevant remedy benefited the federal Treasury, even though the private citizen had suffered sufficient “concrete injury in fact” to challenge ongoing violations of a law imposing environmental reporting requirements. *Id.* at 105; *see id.* at 121, 132. Once the violations terminated, the plaintiff had no standing because the monetary relief—civil penalties—could not be “viewed as a sort of compensation or redress” to the private plaintiff because the penalties were not “payable” to it, but to the “United States Treasury.” *Id.* at 106. Since the money in the federal Treasury is the Government’s, a private plaintiff has no personal stake in the controversy and, as *Steel Company* emphasized, “the requirements of a constitutional case or controversy . . . has always been the same: whether a plaintiff would personally benefit in a tangible way from the court’s intervention.” *Id.* at 104 n.5 (internal quotation marks omitted); *see also Diamond v. Charles*, 476 U.S. 54, 66-67 (1986). While a plaintiff might have a strong interest in insuring that “the United States Treasury is not cheated . . . or that the Nation’s laws are faithfully enforced, that physic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.” *Steel Co.*, 523 U.S. at 107; *see also Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (“[T]he Art. III judicial power exists only to redress or otherwise to protect against

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injury to the complaining party.”) (internal quotation marks omitted) (emphasis in original).

Second, “the interest of a taxpayer in the moneys of the federal treasury,” even if cognizable, is plainly not *superior* to that of the Government, and therefore “furnishes no basis” for ordering a monetary transfer to the Treasury that it is not sought by the Government. *Cuno*, 126 S. Ct. at 1862 (internal quotation marks omitted). As this Court has emphasized, “Congress, not this Court or other federal courts, is the custodian of the national purse” and, under basic separation of powers principles, the judiciary should not override the political branches’ decisions on how to best “secur[e] the treasury or the government against financial losses, . . . including requiring reimbursement for injuries . . .” *United States v. Standard Oil Co.*, 332 U.S. 301, 314-15 (1947). Decision-making concerning money coming into the Treasury “is the very epitome of a policy judgment committed to the ‘broad and legitimate discretion’ of lawmakers, which ‘the courts cannot presume either to control or predict.’” *Cuno*, 126 S. Ct. at 1863 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.)).

The court of appeals recognized, under separation of powers principles, that it could not enjoin the Secretary to recoup funds from Notre Dame. Pet. App. 6a-7a (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)). For the same reasons, the court should have concluded that it could not order Notre Dame to provide such funds to the Treasury over the Secretary’s objection. The court itself acknowledged that the “change in the form of relief” from Plaintiffs’ requested injunction against the Secretary to its novel restitution theory “has no practical significance”—indeed, both are equally invasive of the political branches’ prerogatives over federal monies. Pet. App. 9a. Even if taxpayers were analogous to *qui tam* plaintiffs expressly authorized to sue *on behalf of* the Government, such plaintiffs could not bring a claim to

replenish the federal Treasury if the Government ordered otherwise. See *Vt. Agency of Natural Res.*, 529 U.S. at 771.

Third, any potential injury is not redressable because there is no potential relief against the constitutional wrongdoer. This Court repeatedly has set forth the seemingly self-evident proposition that a court cannot adjudicate a claim of illegality against state actors if no remedy can be entered against them, due to sovereign immunity or other reasons. See, e.g., *Green v. Mansour*, 474 U.S. 64, 73 (1985) (“There is a dispute about the lawfulness of respondent’s past actions, but the Eleventh Amendment would prohibit the award of money damages or restitution if that dispute were resolved in favor of petitioners.”). For example, in the venerable decision of *Marye v. Parsons*, 114 U.S. 325 (1885), the Court dismissed a contract action against a State “because there is no remedy by suit to compel the state to pay its debts” and the suit therefore impermissibly “calls for a declaration of an abstract character,” as federal courts do not “sit to determine questions of law *in thesi*.” *Id.* at 328-30; see also *Steel Co.*, 523 U.S. at 104 n.5; *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (“[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.”); *DeFunis v. Odegaard*, 416 U.S. 312, 314 (1974) (case moot where plaintiff was in the final quarter of law school and no decision would affect his graduation).

This Court similarly dismissed a claim against the United States in *Muskrat v. United States*, 219 U.S. 346 (1911). There, although the Government had been designated by statute as a proper defendant, it had no property interest in determining which private citizens should share the tribal lands in question: “the United States . . . has no interest adverse to the claimants. The object is not to assert a property right as against the government, or to demand compensation for alleged wrongs because of action upon its part.” *Id.* at 361. “[J]udgment could not be executed” against the United States, so there was no “case or

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controvers[y] arising between opposing parties” which the Court could properly adjudicate. *Id.* at 362; *see Lord v. Veazie*, 49 U.S. 251, 255 (1850) (“[A]ny attempt . . . to obtain the opinion of the court . . . when there is no real or substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as punishable contempt of court.”).

In short, this Court has never allowed a plaintiff to assert a claim against a State or any defendant where no remedy against the wrongdoer is possible. To do so would allow a plaintiff improperly to assert “an ‘abstract disagree[men]t’ over the constitutionality of [government action].” *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 479 (1990) (citation omitted).

Fourth, the remedy against Notre Dame, far from being “routine,” is unknown to Anglo-American jurisprudence, in either law or equity. Pet. App. 7a. As the court itself noted, “[w]hen a plaintiff seeks monetary relief, he is seeking payment by the defendant to himself, *not to another*,” so the Plaintiffs’ “restitution” for the Government here is “*not . . . monetary relief, in the usual sense.*” *Id.* 8a (emphasis added). While it is possible for a plaintiff to secure restitution from an innocent party if the wrongdoer has transferred money to it, *see id.* 7a, nothing in law or equity allows the plaintiff to seek recovery *for* the wrongdoer.

Undoubtedly the reason that the court’s novel “restitution” relief has never before been entered by a federal court is because it destroys any “adverseness” between the plaintiff “victim” and the wrongdoing defendant. Here, the Government has every financial incentive to acquiesce, expressly or otherwise, in a liability determination in order to enrich itself. An action against such a defendant thus cannot satisfy even the necessary, albeit insufficient, threshold standing requirement—“clear concreteness provided when a question emerges precisely framed and necessary for

decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests.” *Freuhauf*, 365 U.S. at 157; *see also Valley Forge*, 454 U.S. at 486 (discussing “concrete adverseness”); *Lewis*, 518 U.S. at 353 n.3.

The court of appeals further exacerbated the lack of concrete adversity by imposing its own restitutionary remedy against a third party, where Plaintiffs had never requested the relief nor asserted any relief against that third party. Article III requires litigants to press a present “Case” or “Controversy” and requires judges to decide those cases as presented. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 68-69 (1997) (case moot where relief was unavailable under claims asserted in complaint). There is a “long-settled principle that standing cannot be ‘inferred argumentatively from averments in the pleadings,’ but rather must affirmatively appear in the record,” and that “it is the burden of the ‘party who seeks the exercise of jurisdiction in his favor,’ clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.” *Spencer*, 523 U.S. at 10-11 (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990)) (internal quotation marks omitted). Article III does not allow an inventive appellate court to create a dispute by imposing its own remedy, particularly, as here, where the court’s remedy has never been granted in any court. *See, e.g., Harris v. City of Houston*, 151 F.3d 186, 191 (5th Cir. 1998) (“On appeal, [plaintiffs] suggest that we ‘read into’ their complaint additional requests for relief and then . . . proceed in such a fashion. The ‘case and controversy’ requirement of Article III is no mere formality—a nuisance to be brushed away before setting down to the business of constitutional interpretation.”). This is even more obviously true here because, as explained below, the remedy invented by the court significantly alters the dispositive liability question from whether the Government violated the First Amendment to whether the recipient institution can be equitably deemed

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to have reasonably relied on the statutory grant. *See* pp. 23-24, *infra*.

3. Thus, every criteria that this Court has identified for assessing standing—personal injury, redressability, adverseness and properly limiting the judicial role in a tripartite system—counsel strongly against granting taxpayer standing to seek replenishment of the federal Treasury. The court below nonetheless seemed to believe that taxpayers had standing to seek such a remedy because the “tortured opinions” in *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976) (plurality op.), *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (“*Lemon II*”), and *New York v. Cathedral Academy*, 434 U.S. 125 (1977), purportedly established that “there is no *per se* rule that the recipient of the legal funds who have spent them cannot be forced to repay them.” Pet. App. 10a.

Those opinions’ discussion of remedies sheds no light on the antecedent justiciability question of whether taxpayer plaintiffs have standing to force reimbursement. The Court has repeatedly cautioned that opinions which *assume* such jurisdictional prerequisites do not in any way suggest that those requirements have been satisfied. *Steel Co.*, 523 U.S. at 91 (holding “drive-by jurisdictional rulings . . . have no precedential effect”). Moreover, as the dissenting opinion noted, *Cathedral Academy* and *Lemon II* could not have even *presented* the question whether taxpayers have standing to enjoin reimbursement to the public Treasury because the only issue in those cases was whether it was proper to enjoin future payments *by* the State. Pet. App. 24a. Nor did *Cathedral Academy* even involve taxpayer plaintiffs; it involved a declaratory judgment action brought by a religious school seeking reimbursement for expenses involved in state-mandated testing services. 434 U.S. at 125.

A three-justice plurality in *Roemer* did briefly discuss the issue, noting and *rejecting* the taxpayers’ request for reimbursement for prior payments made under a *concededly*

unconstitutional program. 426 U.S. at 767 n.23. The plurality never examined the issue of standing, nor did it imply that providing repayment would somehow cure the substantive violation that allegedly had already occurred or would otherwise prevent a case from being moot. The plurality did conclude, however, that requiring private institutions to repay government funds spent on religious activities would actually undermine Establishment Clause principles: “As for the protection of substantive constitutional rights, the separation of church and state may well be better served by not putting the State of Maryland in the position of a judgment creditor of the appellee colleges.” *Id.* Thus, far from supporting the proposition that an Establishment Clause violation could be cured by the recoupment of funds from private recipients, the three justices in *Roemer* concluded that such a remedy would intensify the constitutional dilemma.<sup>6</sup>

Moreover, the appellate court’s adoption of a “reasonable reliance” test, as purportedly set forth in *Roemer* and *Lemon II*, further demonstrates how far afield the court’s remedy is from the merits of the Establishment Clause claim. The

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<sup>6</sup> The other justification offered by the opinion below was that advisory opinions are necessary to prevent Congress from transferring millions of dollars for expressly religious purposes within two days of enactment, thus purportedly evading judicial review. Pet. App. 6a. But, even if the court of appeals’ far-fetched hypothetical did come about, any such lightning quick congressional grant likely would fall within the exception to mootness for government actions capable of repetition yet evading review. See *Singleton v. Wulff*, 428 U.S. 106, 117-18 (1976). There is no need to badly mangle fundamental elements of taxpayer standing and mootness to resolve a hypothetical that will not occur and already has a ready-made constitutional solution. Indeed, there never has been such a case in the real world, and there never will be given the actual pace at which congressional appropriations are distributed and spent. In all events, this hypothetical does not have any application to this case as the five-year grant provided Plaintiffs ample time to litigate their action.

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court below emphasized that the question on remand is not whether the Government's grant violated the Establishment Clause, but whether the "religious institution reasonably relied, to its detriment, on the grant's being legal." Pet. App. 10a; *see also id.* 1a. This reasonable reliance inquiry turns on a "totality of circumstances" analysis which focuses on whether (1) the grant's unconstitutionality "could be predicted with assurance" in an area where the Court itself "can only dimly perceive the lines of demarcation"; (2) the "general principle that [federal] officials and those with whom they deal are entitled to rely on a presumptively valid . . . statute"; (3) whether the "suit had been filed prior to the time the reliance occurred"; (4) whether the "funds in question . . . have been . . . spent by the colleges" and all the other "practical realities and necessities inescapably involved in reconciling competing interests." *Lemon II*, 411 U.S. at 201, 205, 208 (internal quotation marks omitted); *Roemer*, 426 U.S. at 767 n.23. Consequently, on remand, the constitutionality of the grant itself will be only one subsidiary factor in resolving the dispositive question of the reasonableness of Notre Dame's activity. Indeed, the public aid in *Roemer* was concededly unconstitutional and the aid in *Lemon II* had been found by this Court to be unconstitutional, but the Court found "reasonable reliance" in both cases.

Because the issue of reasonable reliance is dispositive, the court likely will never even reach the merits of Plaintiffs' claims. The most plausible outcome on remand is that Notre Dame will be found to have reasonably relied because it was entitled to assume the constitutionality of a congressional enactment and there is certainly no clear precedent suggesting that *neutral* aid to a higher education institution is unconstitutional. *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality op.); *id.* at 838, 840 (O'Connor, J., concurring in the judgment); *Agostini v. Felton*, 521 U.S. 203, 231 (1997). Accordingly, at the end of the long journey required by the court below, plaintiffs will not even have the

“psychic satisfaction” of a ruling that the grant is unconstitutional and, even if that issue is resolved in passing, it will not be in a “concrete factual context conducive to a realistic appreciation of the consequences of judicial action.” *Valley Forge*, 454 U.S. at 472.

4. In addition to conflicting with this Court’s precedent as described above, the decision below is also at odds with the uniform decisions of the other circuit courts. Every circuit that has addressed the issue has held that exposure to past religious indoctrination is insufficient to establish a present case or controversy. *See, e.g., Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 798 (9th Cir. 1999) (*en banc*) (case was mooted because “the student-plaintiff already has suffered any injury that would result from the alleged forced participation in prayers that were part of the student-plaintiff’s graduation ceremony” and plaintiff had not sought monetary damages); *see also Chaudhuri v. Tennessee*, 130 F.3d 232, 235 (6th Cir. 1997) (claims for injunctive and declaratory relief appeared moot when university changed its policy to include moments of silence rather than prayers); *Adler v. Duval County Sch. Bd.*, 112 F.3d 1475, 1477-78 (11th Cir. 1997) (declaratory and injunctive claims alleging Establishment Clause violations were moot because student-plaintiffs had graduated). Although these cases did not deal with the expiration of a statute, the reasoning is applicable: if a past Establishment Clause violation may be “cured” by dispelling any state endorsement after the fact—either by forcing private actors to repay the State or by the State repudiating the apparent religious content—these cases could not have been moot.

The Seventh Circuit’s opinion also exacerbates a direct circuit split regarding whether a valid “Case” or “Controversy” exists when a court imposes a remedy under Federal Rule of Civil Procedure 54(c) never requested by the Plaintiff to resurrect a moot case. As then-Judge Roberts wrote, “the possible availability of [relief under Rule 54(c)] would not establish standing or defeat mootness objections.”

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*Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1152 n.2 (D.C. Cir. 2004); *see also NAACP v. United States Sugar Corp.*, 84 F.3d 1432, 1438 (D.C. Cir. 1996) (“Rule 54(c) comes into play only after the court determines it has jurisdiction.”) (internal quotation marks omitted). In addition to the D.C. Circuit, the court’s decision conflicts with the First, Second, and Fifth Circuits. *See, e.g., Fox v. Bd. of Trs. of State Univ. of N.Y.*, 42 F.3d 135, 142 (2d Cir. 1994) (eleventh-hour claim for nominal damages, even though available, could not “breathe life into a moribund dispute”) (internal quotation marks omitted); *Harris*, 151 F.3d at 191 (refusing to “read into” the complaint relief not specifically requested); *Thomas R.W. v. Mass. Dep’t of Educ.*, 130 F.3d 477, 480 (1st Cir. 1997) (same). Only the Ninth Circuit, over a strenuous dissent by Judge Kozinski, has adopted a similar interpretation as the Seventh Circuit. *See, e.g., Z Channel Ltd. P’ship v. Home Box Office, Inc.*, 931 F.2d 1338, 1341 (9th Cir. 1991) (holding plaintiff’s claims for declaratory and injunctive relief moot, but holding that Rule 54(c) “allows the district court to award damages if [the plaintiff] proves facts entitling it to relief even though [plaintiff] never requested damages”). Simply put: a court cannot *sua sponte* create a dispute between parties that previously had not existed.

**B. The Questions Presented Are Of Fundamental Importance And Warrant Immediate Review.**

The interrelated questions presented on taxpayer standing and mootness are of fundamental importance, which warrant this Court’s immediate review. *See, e.g., Valley Forge*, 454 U.S. at 470 (granting certiorari “[b]ecause of the unusually broad and novel view of standing to litigate a substantive question”). The court of appeals’ decision will have a chilling effect on private charities and institutions who accept or have accepted federal dollars. These entities now face the unprecedented risk of litigation and the possibility of future repayment of dollars spent long ago. Under the court’s logic, if the Cleveland voucher program assisting

religious schools terminated of its own accord after five years, taxpayers could have brought a suit *after* that termination to seek to force parents to return the allegedly unconstitutionally payments to the municipal treasury. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). And since the “injury” is the failure to *replenish* the Treasury for improper expenditures, that injury is ongoing and such a “restitutionary” suit could be brought at any time. Taxpayers today, for example, could sue the thousands of publishers who received a tax exemption for religious publications held unconstitutional in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). The threat of such challenges is inexplicable and would constitute an unwarranted sea change in constitutional litigation.

More importantly, in granting taxpayers an interest in the federal Treasury superior to the Government and authorizing suits against private plaintiffs for expenditures long ceased, the court of appeals has loosed *Flast* from its constitutional moorings of enjoining impermissible religious sponsorship and has overturned basic justiciability requirements. Standing and mootness, far from technical requirements, are critical structural protections against judicial encroachment on legislative and executive authority. Federal courts “have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional.” *Frothingham*, 262 U.S. at 488. Determining the constitutionality of a federal statute in the absence of an Article III “Case” or “Controversy” is not to “decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority [the courts] plainly do not possess.” *Id.* at 489.

Taxpayer standing has already become dangerously loose in the Seventh Circuit and, if not checked, will become the universal destination for filing taxpayer actions. *See* Brief of Petitioner, *Grace v. Freedom from Religion Foundation, Inc.*, No. 06-157 (filed Aug. 1, 2006) (Solicitor General’s Petition noting that Seventh Circuit threatens to become a

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“universal forum for Establishment Clause challenges . . . . [as] anyone nursing a generalized grievance against the federal executive is likely to be able to locate a like-minded taxpayer residing in the Seventh Circuit.”). Specifically in *Freedom from Religion Foundation v. Chao*, 433 F.3d 989 [pending as *Grace v. Freedom from Religion Foundation*, No. 06-157], the Seventh Circuit held that federal taxpayers could challenge the actions of Executive Branch officials acting pursuant to an Executive Order on Establishment Clause grounds. There, no funds were distributed to non-governmental entities or individuals and the actions were financed only indirectly through general appropriations. *Id.* at 994. As Judge Ripple noted in his dissent, this novel interpretation of standing “makes virtually any executive action subject to taxpayer suit” as “[t]he executive can do nothing without general appropriations from Congress.” *Id.* at 1000. When combined with the court’s decision here, granting taxpayer’s standing to recover previously spent government funds, the court has given taxpayers unlimited authority over the public fisc if an Establishment Clause violation is alleged. Presumably, even if Executive officials ceased and disavowed the actions at issue in *Freedom from Religion*, taxpayers now could seek recoupment of the officials’ salaries and benefits to keep the case alive.

The Seventh Circuit is far outside the boundaries of this Court’s decisions and the decisions of its sister circuits. Granting certiorari in both this matter and *Freedom from Religion* would provide the Court the unique opportunity to examine taxpayer standing in a comprehensive manner and bring clarity to an issue that is “recurring and difficult.” 447 F.3d at 989 (Easterbrook, J., concurring in the denial of rehearing en banc). As Judge Easterbrook specifically noted in his concurrence in denying rehearing on *Freedom from Religion*, both this case and *Freedom from Religion* warrant further review by this Court, as “[o]nly the rule’s proprietors can bring harmony—whether by extension or

contradiction—or decide to tolerate the existing state of affairs.” *Id.* at 989, 990.

At a minimum, certiorari should be granted here, given the breadth of the court of appeals’ decision, and the wide effect this decision will have on the Court’s settled justiciability precedent. *Freedom from Religion* deals with the permissibility of an executive action without a direct expenditure by Congress. While this is an important issue, it will have limited practical effect (and its resolution will provide no direct guidance on the issue presented here). This case, in contrast, involves the broader, core analytical question presented by taxpayer standing: what stake a federal taxpayer has in the federal Treasury. The court’s holding, which rests on a taxpayer’s financial interest, is directly contrary to *Frothingham*, *Doremus*, and *Flast*, improperly injects the judiciary into fiscal matters committed to coordinate branches, and improperly and unfairly imposes the unprecedented risk of repayment of previously spent government funds on thousands of private charitable organizations. Indeed, based largely on this case, a district court in a taxpayer suit has already ordered a religious organization to repay the State of Iowa \$1.5 million that the organization received in return for providing programs in prisons. *See, e.g., Ams. United for Separation of Church & State v. Prison*, 432 F. Supp. 2d 862 (S.D. Iowa 2006).

Only by granting certiorari in this case can the Court answer these difficult questions and have the opportunity to clarify the nature and scope of the taxpayer’s interest in an Establishment Clause case. *Notre Dame*, in addition, has sought review regarding the continuing validity of *Flast*, a question not presented by *Freedom from Religion*. This case, accordingly, provides a better vehicle for the Court to provide comprehensive clarity to the doctrine of taxpayer standing and the only vehicle for the Court to address the fundamental issues plaguing taxpayer standing.

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**C. *Flast v. Cohen* No Longer Has A Valid Constitutional Mooring And Should Be Overruled If It Can Co-Exist With The Court of Appeals' Decision.**

If the court of appeals' decision is consistent with *Flast*, then *Flast* is not grounded on sound constitutional moorings and should be overruled.

*Flast* already stands on an island in providing federal taxpayers standing to enjoin congressional expenditures that allegedly violate the Establishment Clause. No other constitutional provision has warranted such treatment. In granting this preferred status, the opinion appears to have loosened the "injury-in-fact" requirement, emphasized in the Court's more recent standing cases. And, as commentators have suggested, it conflated the merits of the action with the question of standing. See, e.g., CHARLES ALAN WRIGHT, ET AL., FED. PRAC. & PROC. § 3531.10, at 648 (2006 update) ("Only a theory that some constitutional rights deserve greater judicial solicitude than others can account for the *Flast* ruling that unconstitutional spending is an injury sufficient to confer standing with respect to some constitutional trespasses but not others."). As noted by Judge Easterbrook in his concurrence in the denial of rehearing en banc in *Freedom from Religion*, the tension between *Flast* and the Court's subsequent decisions appears "arbitrary" and "illogical." 447 F.3d at 989; see also JAMES WM. MOORE, ET AL., MOORE'S FED. PRAC. § 101.60 (3d ed. 1999) (arguing *Flast* is a "constitutional *non sequitur*").

Moreover, a rule that provides taxpayers a *financial* interest in the federal Treasury in Establishment Clause cases, but not in others, would be particularly illogical and arbitrary. See *Valley Forge*, 454 U.S. at 485 n.20. Only by firmly securing taxpayer standing to this religious injury can the Court's precedent rest on stable ground. Any other rule would eliminate *Flast*'s crucial distinction, and the decisions

set down by this Court in *Valley Forge*, *Cuno*, *Schlesinger*, and *Richardson* could no longer properly distinguish *Flast*.

The Seventh Circuit's interpretation of *Flast* as a financial interest leads to irreconcilable results. As Judge Easterbrook pointed out, "[t]hat no court is willing (yet!) to entertain a suit about a speech that costs \$50,000 to draft, deliver, and distribute through the Government Printing Office—while adjudicating objections to \$500,000 grants that do not cost the plaintiff even 1¢—suggests problems in *Flast*'s underpinning and application." *Freedom from Religion*, 447 F.3d at 990. No logical justification can provide taxpayers standing to seek the financial recovery of funds spent in excess of Congress's power under the Establishment Clause, where there is no taxpayer financial interest in recovering funds spent in excess of other constitutional limitations on the Government's power. *Cf. Cuno*, 126 S. Ct. at 1855-56. Equally illogical, if the taxpayers' interest is financial, would be the requirement that only prior expenditures under the Spending Clause can support standing, as opposed to prior improper distributions of federal assets under the Property Clause. *Cf. Valley Forge*, 454 U.S. at 464-65. If the Court cannot provide a constitutionally justifiable basis for maintaining the doctrine, it should be abandoned and *Flast* overruled.

#### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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