

Nos. 09-987, 09-991

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**In the  
Supreme Court of the United States**

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,  
*Petitioner,*

v.

KATHLEEN M. WINN, et al.,  
*Respondents.*

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GALE GARRIOTT,  
*Petitioner,*

v.

KATHLEEN M. WINN, et al.,  
*Respondents.*

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

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**PETITIONER ARIZONA CHRISTIAN SCHOOL  
TUITION ORGANIZATION'S REPLY TO  
RESPONDENTS' SUPPLEMENTAL BRIEF  
REGARDING A CHANGE IN STATE LAW**

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**Abbreviations Key:**

ACSTO Br.	Brief For Petitioner Arizona Christian School Tuition Organization
ACSTO Pet. App.	Appendix to ACSTO’s Petition for Certiorari
Opp.	Brief in Opposition To Petitions for Certiorari
State App.	Appendix To State’s Brief on the Merits

## INTRODUCTION

Comes now Petitioner Arizona Christian School Tuition Organization (“ACSTO”) and files this supplemental brief in reply to Respondents’ Supplemental Brief Regarding A Change In State Law. In their brief, Respondents highlight recent amendments to the state law at issue in this case, A.R.S. § 43-1089. The State included these amendments in the appendix to its merits brief. State App. 1-17.<sup>1</sup> Those amendments, S.B. 1274 and H.B. 2664, were adopted on April 27, 2010, and May 10, 2010, respectively. *Id.* at 1, 9. S.B. 1274 went into effect on July 27, 2010, and H.B. 2664 does not go into effect until December 31, 2010. *Id.*

Respondents claim that these recent amendments to § 43-1089 impact this litigation, and suggest that this Court remand the case so that they can amend their Complaint to reflect the changes, or so that the lower court can assess their impact on the case. Respondents’ Supp. Br. 10-11. Remand would be fruitless, however, because neither

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<sup>1</sup> Respondents claim that they filed their supplemental brief “to notify the Court of the change in Arizona legislation as promptly as possible after [they] became aware of it.” Respondents’ Br. 3. But the Respondents were aware of the passage of S.B. 1274 at least since June 2, 2010, when they received the proposed list for the Joint Appendix. Further, Respondents’ claim of lack of knowledge regarding S.B. 1274 and H.B. 2664 cannot be squared with the thorough knowledge of the ongoing legislative efforts to amend § 43-1089 Respondents exhibited in their Brief in Opposition. Opp. 9-12. In that brief, they prognosticated (correctly) that S.B. 1274 had “the greatest chance of enactment at the current legislative session.” *Id.*

amendment has any bearing on Respondents' Article III standing to sue. Indeed, Respondents lack taxpayer standing to challenge either the old or new version of § 43-1089.

The recent amendments also do not impact the merits of Respondents' Establishment Clause claims because they do not alter in any way the allegations in their Complaint regarding the alleged unconstitutionality of Arizona's tuition tax credit program. Respondents' supplemental brief should therefore be disregarded by this Court.

## ARGUMENT

### I. Respondents' Brief Is Untimely.

Supreme Court Rule 15.8 states, *inter alia*, that “[a]ny party may file a supplemental brief *at any time while a petition for a writ of certiorari is pending*, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party’s last filing.” S. Ct. Rule 15.8 (emphasis added). Respondents filed their supplemental brief *after* this Court granted the State and ACSTO’s petitions for certiorari. Their brief is therefore untimely and not permitted by this Court’s rules. This Court should disregard it. Respondents have stated that they will address the legislative amendments that will go into effect on December 31, 2010, in their merits brief. Respondents’ Supp. Br. 10. That will be sufficient to advise the Court of the impact Respondents believe they may have.

## II. S.B. 1274 and H.B. 2664 Do Not Impact The Article III Standing Analysis.

S.B. 1274 and H.B. 2664 do not have any bearing on Respondents' inability to establish Article III standing. Their standing argument is predicated solely on the theory that the tax credit reduces State revenues. ACSTO Pet. App. 126a. As discussed in Petitioner ACSTO's merits brief, Respondents' theory of standing suffers from numerous fatal flaws. Nothing in S.B. 1274 and H.B. 2664 impacts or changes any of these flaws in Respondents' theory of standing.

Respondents' mischaracterization of their standing argument, however, warrants a brief rebuttal. They now claim for the first time that they have taxpayer standing because they are "taxpayers who are taxed to fund the scholarship program." Respondents' Supp. Br. 8. Merely stating this does not make it so, factually or legally. As discussed in Petitioner ACSTO's merits brief, the tax credit statute does not impose a tax on the Respondents or any other Arizona taxpayer. ACSTO Br. 23-25. Further, Respondents disclaimed that the tax credit imposed a tax on them when this case was before this Court on the question of the applicability of the Tax Injunction Act. Respondents' Br. 11, S. Ct. Case No. 02-1809, Dec. 19, 2003 (arguing that the Act did not apply because "[c]onstitutional challenges to state tax credits . . . are not suits by taxpayers seeking to postpone or avoid the payment of state taxes"). *See also Hibbs v. Winn*, 542 U.S. 88, 104 (2004) (Respondents' lawsuit is a "[t]hird party suit[]" which does not "seek[] to stop the collection

(or contest the validity) of a tax” imposed on them). Respondents’ arguments contradicting their previous admissions, and this Court’s prior findings, should be disregarded by this Court.<sup>2</sup>

### **III. The Amendments To § 43-1089 Have No Bearing On Respondents’ Establishment Clause Claims.**

S.B. 1274 and H.B. 2664 also do not change or alter in any way the aspects of the tax credit program Respondents attack as unconstitutional. Respondents’ substantive complaints about the program are that it allegedly: 1) allows STOs to limit scholarships to religious schools; 2) results in scholarship funds being concentrated in religiously-affiliated STOs; and 3) prevents parents who desire a secular education for their child from obtaining a scholarship. ACSTO Pet. App. 123a-124a.

The language of S.B. 1274 and H.B. 2664, and Respondents’ descriptions of them, demonstrate that they do not alter or change these aspects of § 43-1089. *See* Respondents’ Supp. Br. 4-8. S.B. 1274 simply permits taxpayers to claim the credit for donations made during the previous tax year if the donation is made on or before April 15 of the following year. This is irrelevant to the issue before the Court.

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<sup>2</sup> It is inappropriate for Respondents to claim that no tax has been imposed on them to avoid imposition of the Tax Injunction Act, only to then reverse their admission in an attempt to prove an Establishment Clause violation.

As to H.B. 2664 (which goes into effect on December 31, 2010), its primary impact will merely be to move, but retain, several pre-existing sections of § 43-1089 to a new section of the Code. It also adds a few new requirements to these pre-existing aspects of the program, including requiring financial audits and/or reviews of STOs. But as with S.B. 1274, none of these changes in the law impacts in any way the aspects of the program to which Respondents object on Establishment Clause grounds. Further, these new requirements are no different than, and in many instances less demanding than, the requirements already imposed on STOs as 501(c)(3) nonprofit corporations at both the state and federal level.<sup>3</sup> With this in mind, following is a brief rebuttal to the arguments Respondents raise regarding H.B. 2664:

### **STO Annual Reports:**

Respondents complain that under H.B. 2664 STOs will have to submit annual reports regarding their scholarship granting activities. Respondents' Supp. Br. 5. But the State has required annual reports containing the very statistics Respondents list since its inception. ACSTO Pet. App. 113a-114a, § 43-1089(F)(2-6). H.B. 2664 requires STOs to report on a few additional aspects of their giving practices (i.e., the number of scholarships awarded to financially needy students, and money being held for future scholarships), but these additional

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<sup>3</sup> STOs must be "exempt from federal taxation under section 501(c)(3) of the internal revenue code." ACSTO Pet. App. 115a, §43-1089(G)(3).

requirements have no bearing on Respondents' constitutional claims.

Respondents also complain that STOs will have to annually report the "names, job titles and annual salaries of the three [] employees who receive the highest annual salaries." Respondents' Supp. Br. 5. But federal law regarding 501(c)(3) corporations already requires STOs to annually report the same, and additional, information for its top five compensated employees. 26 U.S.C. § 6033(b)(6-7); IRS Form 990 at 7. In fact, the annual reports Arizona requires of STOs are similar to, yet less onerous than, the annual reports federal law requires of these same 501(c)(3) corporations. 26 U.S.C. § 6033(b)(1-7) (501(c)(3) corporations must, among other things, annually report their: gross income; expenses; disbursements; assets, liabilities, and net worth; total contributions received; the names and addresses of all substantial contributors; and the names, addresses, and compensation paid to top five compensated employees).

#### **STO Certification:**

Respondents complain that STOs will soon need to apply for and obtain certification from the Department of Revenue. Respondents' Supp. Br. 4. Once again, this has no impact on the aspects of the program Respondents challenge under the Establishment Clause.

Respondents find it particularly problematic that the Department of Revenue will maintain a

registry of certified STOs and will post this registry on its website. *Id.* But Arizona already maintains on its Corporation Commission website a searchable list of nonprofit corporations that have met the state's many requirements to obtain nonprofit status. See [starpas.azcc.gov/scripts/cgiip.exe/WService=wsbroker1/connect.p?app=names-report.p](http://starpas.azcc.gov/scripts/cgiip.exe/WService=wsbroker1/connect.p?app=names-report.p). The STOs currently operating in Arizona, which must be nonprofit, 501(c)(3) corporations, can be found on this website. The only effect this amendment will have is to list a subgroup of Arizona nonprofit corporations on an additional website.

#### **Revoking STO Certification:**

Respondents also stress that under H.B. 2664 the State will have the authority to revoke an STO's certification if it engages in any prohibited activity. Respondents' Supp. Br. 7. Once again, this has no bearing on Respondents' claims of unconstitutionality. But it is also noteworthy that Arizona already has the authority to dissolve, let alone to revoke the certification of, nonprofit organizations authorized to operate in the State. See A.R.S. §§ 10-11420, 10-11421. The State's authority to revoke the certification of STOs pales in comparison to its already existing power to end their existence.

#### **Audits and Financial Reviews of STOs:**

H.B. 2664 requires STOs to conduct either an audit or financial review, depending on the amount of contributions they receive in a fiscal year, at their

own expense. State App. 15-17. While the federal government does not require 501(c)(3) corporations to conduct audits or financial reviews, it does require extensive annual reports regarding many aspects of their financial condition. *See* 26 U.S.C. § 6033(b)(1-7), *supra*. In addition, many states impose similar audit/financial review requirements on nonprofit corporations. *See, e.g.* Ark. Code Ann. § 4-28-403(b)(1); Cal. Gov. Code § 12586(e); Conn. Gen. Stat. Ann. § 21a-190c; Ga. Code Ann. § 43-17-5(b)(4); 225 Ill. Comp. Stat. Ann. 460/4(a); Kan. State. Ann. § 17-1763(c).

The annual financial reviews of STOs called for by H.B. 2664 are not anomalous, but rather are consistent with the annual financial review and reporting requirements that are a common feature of nonprofit life at the federal and state level. More importantly, H.B. 2664's audit/financial review requirement plainly does not alter or change in any way the aspects of the tax credit program to which Respondents object on constitutional grounds.

### **Scholarship Award Guidelines:**

Respondents highlight that H.B. 2664 will require STOs to consider the financial need of applicants, and will prohibit awarding scholarships based solely on donor recommendations or allowing taxpayers to agree to swap donations with another taxpayer to benefit either taxpayer's own dependent. Respondents' Supp. Br. 6.<sup>4</sup>

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<sup>4</sup> A study from 2008 found that the 14 largest STOs (which supported both nonreligious and religious schools) placed

None of these changes address or alter any of the aspects of the tax credit program upon which Respondents base their Establishment Clause claim. They therefore do not impact this Court's consideration of the Respondents' constitutional challenge to A.R.S. § 43-1089.

The thrust of Respondents' argument regarding S.B. 1274 and H.B. 2664 is that they transmute STOs from private into state actors. Respondents' Supp. Br. 9-10. Respondents are mistaken. The above discussion shows that the requirements Arizona places on STOs (whether considering the old or new version of § 43-1089) are indistinguishable from, and in many instances less onerous than, the typical requirements placed on nonprofit organizations in Arizona, in other states, and at the federal level. STOs, like all other nonprofit organizations, retain their private character despite being regulated by, and having to report regarding their financial condition to, state and federal governments.

## CONCLUSION

The passage of S.B. 1274 and H.B. 2664 has no bearing whatsoever on the question of

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strong emphasis on financial need in awarding scholarships. Charles M. North, *Estimating the Savings to Arizona Taxpayers of the Private School Tuition Tax Credit*, at 2, [archive.constantcontact.com/fs035/1011047932616/archive/1102832763902.html](http://archive.constantcontact.com/fs035/1011047932616/archive/1102832763902.html). These STOs, which accounted for over 70% of the available scholarship dollars, *id.*, included Petitioner ACSTO. Further, ACSTO has never knowingly permitted donors to engage in the practices prohibited by H.B. 2664.

Respondents' Article III standing. These amendments likewise leave intact and unchanged the aspects of the tax credit program Respondents challenge under the Establishment Clause. Accordingly, this Court should disregard Respondents' untimely supplemental brief.

Respectfully submitted,

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