

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,
Petitioner,

v.

KATHLEEN M. WINN, et al.,
Respondents.

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

**MOTION TO FILE POST-ARGUMENT BRIEF
AND POST-ARGUMENT
BRIEF FOR THE PETITIONER**

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**MOTION FOR LEAVE TO FILE POST-
ARGUMENT BRIEF**

Pursuant to S. Ct. Rule 21(b), Petitioner Arizona Christian School Tuition Organization respectfully moves for leave to file the accompanying post-argument brief. This brief is necessary because during oral argument in this case, the Justices posed several questions to either counsel for the United States, or counsel for the Arizona Department of Revenue, that Petitioner ACSTO, had it participated in oral argument, would have answered differently. Petitioner ACSTO believes the accompanying post-argument brief, which briefly sets out its view of the answers to these questions, would assist the Court in rendering a decision on the Article III standing and Establishment Clause merits issues involved in this appeal.

For the foregoing reasons, the motion for leave to file the accompanying post-argument brief should be granted.

Respectfully submitted,

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TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE POST-
ARGUMENT BRIEF i

TABLE OF AUTHORITIES iii

PETITIONER’S POST-ARGUMENT BRIEF 1

TABLE OF AUTHORITIES

Cases:

<i>Bob Jones University v. U.S.</i> , 461 U.S. 574 (1983).....	6
<i>Committee For Public Education and Religious Liberty v. Nyquist</i> , 413 U.S. 756 (1973).....	1, 3
<i>DaimlerChrysler Corp. v. Cuno</i> , 547 U.S. 332 (2006).....	3
<i>Domino’s Pizza, Inc. v. McDonald</i> , 546 U.S. 470 (2006).....	2
<i>Flast v. Cohen</i> , 392 U.S. 83 (1968).....	1-2
<i>Hibbs v. Winn</i> , 542 U.S. 88 (2004).....	1
<i>Hunt v. McNair</i> , 413 U.S. 734 (1973).....	1, 3
<i>Kotterman v. Killian</i> , 972 P.2d 606 (Ariz. 1999)	4
<i>Mueller v. Allen</i> , 463 U.S. 388 (1983).....	1, 3
<i>Walz v. Tax Commission</i> , 397 U.S. 664 (1970).....	1

PETITIONER'S POST-ARGUMENT BRIEF

During oral argument in this case the Solicitor General of the United States and counsel for the Arizona Department of Revenue provided answers to several questions to which Petitioner Arizona Christian School Tuition Organization would have responded differently. Given the bearing of the matters inquired into on Plaintiffs' Article III standing and the constitutionality of Arizona's tuition tax credit program, Petitioner ACSTO briefly sets out below its responses to these questions.

First, Justices Kagan and Kennedy asked counsel for the United States whether the Court was without authority to decide *Walz v. Tax Commission*, 397 U.S. 664 (1970), *Committee For Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), *Hunt v. McNair*, 413 U.S. 734 (1973), *Mueller v. Allen*, 463 U.S. 388 (1983), and *Hibbs v. Winn*, 542 U.S. 88 (2004). Oral Argument Transcript (Tr.) 10-12. General Katyal answered that there would be "no taxpayer standing" in any of the above cases. Tr. 12.

Petitioner ACSTO agrees that the plaintiffs lacked taxpayer standing in *Mueller*, since there the plaintiffs brought a challenge in federal court to a tax deduction which did not extract any of their tax dollars to support religion, but rather gave a tax benefit to other taxpayers who made educational expenditures that qualified for the deduction. Under *Flast v. Cohen*, the taxpayer-plaintiffs lacked standing in *Mueller* because they were not complaining about the extraction and expenditure of

their tax dollars. 392 U.S. 83, 106 (1968) (“The taxpayer’s allegation in such cases would be that *his tax money* is being extracted and spent”) (emphasis added). The plaintiffs in *Mueller* therefore had not suffered the personal, direct, and concrete injury necessary to support Article III standing. Plaintiffs lack standing to challenge Arizona’s tax credit for the same reason, *see* ACSTO Merits Br. at 15-20, among many others.

Of course, ACSTO also agrees with General Katyal that this Court could have disposed of the instant case in *Hibbs* on account of the Plaintiffs’ lack of standing. As General Katyal correctly noted at oral argument, however, standing had not been raised or addressed at that point in the case. Tr. 12. Petitioner ACSTO, the party primarily responsible for asserting the standing defense throughout the case, was not granted intervention until after this Court’s decision in *Hibbs*. The issue of Plaintiffs’ Article III standing was simply not before the Court in *Hibbs*, and its failure to reach that issue is not precedent for the question of whether Plaintiffs have standing. *Domino’s Pizza, Inc. v. McDonald*, 546 U.S. 470, 478-79 (2006) (noting that this 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”) (internal quotation marks and citation omitted). Likewise, this Court’s assumption of jurisdiction in *Mueller*, without deciding the jurisdictional issue, is not precedent for jurisdiction.

A ruling by this Court that taxpayer standing is absent here would not necessarily, however, require a holding that there was not Article III standing to decide the remaining cases listed by Justices Kagan and Kennedy. *Hunt* involved the state fisc directly: the plaintiffs challenged government revenue bonds issued to a religious college. Under the bond program, the college borrowed money from the State to finance a construction project, and the State owned title to the project until the college repaid the bonds in full. *Hunt*, 413 U.S. at 738 & 745 n.7. Further, the action was brought in state court by state taxpayers. *Walz*, also brought in state court, 397 U.S. at 666, involved municipal taxpayer standing, which this Court has held is not governed by the general bar against federal and state taxpayer suits. See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 349 (2006) (noting that the “peculiar relation of the corporate taxpayer to the corporation’ . . . distinguish[es] such a case from the general bar on taxpayer suits”) (citation omitted). Finally, in *Nyquist*, the state provided direct money grants to nonpublic schools, and tuition assistance grants (in the form of tuition reimbursements and tax credits) to parents with children attending nonpublic schools. 413 U.S. at 762-63. Such matters squarely implicate the standing exception recognized in *Flast*. While one aspect of the funding in *Nyquist* involved tax credits, this Court has observed that the credits provided there were not based on the amount actually spent by the taxpayer, unlike the program here, and were therefore “thinly disguised ‘tax benefits,’ actually amounting to tuition grants.” *Mueller*, 463 U.S. at 394.

Thus, Petitioner ACSTO's position is that standing was lacking in *Mueller*, as it is here, but not necessarily in the other cases mentioned at oral argument.

The second question that Petitioner ACSTO would have answered differently is whether anyone would have standing to challenge Arizona's tuition tax credit, a question posed by Justice Ginsburg. Tr. 8. General Katyal stated that the United States' "answer is no," and that denying standing here "accords with this Court's general reluctance to confer taxpayer standing in this area." *Id.*

While ACSTO concurs that taxpayers like the Plaintiffs—who are suing based solely on their status as taxpayers and whose money is not being extracted and spent to support religion—lack standing to challenge this program, it does not follow that no one would have standing to challenge this program. The Establishment Clause would not be "unenforceable" without taxpayer standing here. *Id.* For example, a secular school tuition organization would have Article III standing to challenge the Arizona Department of Revenue over a denial of its ability to participate on equal terms in the tax credit program. Also, a taxpayer who donated to a secular STO yet was denied a credit would have Article III standing to challenge the denial. Further, taxpayers can (and did, *see Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999)), challenge this program in state court where Article III's limits do not apply. In sum, plaintiffs who actually suffered a cognizable injury, not based solely upon their status as taxpayers,

could challenge this program in federal court and, even as taxpayers, could sue in state court.

The third question involved Justice Kennedy's hypothetical regarding an STO that discriminates based on race, and whether such discrimination would violate the federal constitution. Tr. 19. There are several important responses to this question.

First, the tax credit statute itself bars race discrimination by STOs. State App. 4.

Second, and importantly, there is no evidence in the record that STOs engage in any form of discrimination toward students or their families, including religious discrimination. STOs simply affiliate with like-minded schools (be they secular, religious, or those catering to American Indians, the homeless, special needs, etc.), and provide scholarships to students who desire to attend those schools, regardless of their religious beliefs. No STO awards scholarships based on the religion of the applicant. In fact, parents choose which school their child will attend, then apply for a scholarship. Not a dime can be sent by any STO to any school without a parent first choosing that school and applying for a scholarship. Respondents conceded that they have no qualms with the private schools themselves (Tr. at 29, ll. 16-17), and before private schools make enrollment decisions, taxpayers, STOs, and parents exercise their private choices.

Third, if race discrimination was not barred by the statute and an STO actually engaged in such

discrimination, the Internal Revenue Service could deny the STO 501(c)(3) status, pursuant to *Bob Jones University v. U.S.*, 461 U.S. 574 (1983). The organization would then no longer qualify as an STO, since the tax credit statute requires that such organizations have 501(c)(3) status. State App. 9.

Finally, the 501(c)(3) STOs are not state actors simply because they are regulated by the State. Arizona's regulations and financial reporting requirements for STOs are no different, and are even less onerous, than the regulations imposed on 501(c)(3) corporations by the federal government, other states, and Arizona. ACSTO Supp. Br. 4-9. Such regulations do not convert 501(c)(3) corporations into state actors. In fact, far less onerous government regulations are imposed on 501(c)(3) corporations than on financial and insurance institutions, just to name a few. These institutions do not become state actors, despite their extremely heavy regulation by federal and state governments, and neither do the far less regulated 501(c)(3) corporations at issue here.

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