

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 Writs Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit**

**MOTION FOR LEAVE TO FILE RESPONSE
AND RESPONSE TO POST-ARGUMENT BRIEF
FOR THE PETITIONER ARIZONA CHRISTIAN
SCHOOL OF TUITION ORGANIZATION**

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**MOTION FOR LEAVE TO FILE
RESPONSE TO POST-ARGUMENT BRIEF
FOR PETITIONER ARIZONA CHRISTIAN
SCHOOL TUITION ORGANIZATION**

Respondents in Support of Petitioners, Glenn Dennard, et al., move, pursuant to S. Ct. Rule 21(b), for leave to file the accompanying response to the post-argument brief filed by Petitioner Arizona Christian School Tuition Organization (ACSTO).

This response is necessary because Petitioner's brief suggests that resolution of this case depends on record evidence of whether school tuition organizations award scholarships based on the religion of the applicant. ACSTO Post-Argument Br. 5. Respondents in Support of Petitioners disagree with that suggestion. Even accepting as true the allegation that school tuition organizations award scholarships based on the religion of the applicant, there is no Establishment Clause violation in this case.

Respectfully submitted,

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**RESPONSE TO POST-ARGUMENT BRIEF
FOR THE PETITIONER ARIZONA CHRISTIAN
SCHOOL TUITION ORGANIZATION**

The Respondents in Support of Petitioners, Glenn Dennard, et al., agree with the points made in the post-argument brief submitted by Petitioner Arizona Christian School Tuition Organization (ACSTO), but they file this response to emphasize that, notwithstanding the specific questions addressed by ACSTO in its post-argument brief, allowing school tuition organizations to award scholarships to co-religionists is entirely consistent with the Establishment Clause.



ARGUMENT

Petitioner ACSTO states that “there is no evidence in the record that [school tuition organizations] engage in any form of discrimination toward students or their families, including religious discrimination. [School tuition organizations] simply affiliate with like-minded schools . . . and provide scholarships to students who deserve to attend those schools, regardless of their religious beliefs.” ACSTO Post-Argument Br. 5. Petitioner ACSTO also states that: No school tuition organization “awards scholarships based on the religion of the application.” *Id.* Respondents in Support of Petitioners believe these statements are factually correct. However, because this case is before the Court on a motion to dismiss, we must accept as true the Winn Respondents’ allegation that school tuition organizations restrict grants to children of

specific religious denominations. But even accepting that assertion as true, the Winn Respondents do not state a valid claim for relief under the Establishment Clause.

First, in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), this Court held that the Establishment Clause is not offended when religious organizations make employment decisions based on religion. In *Hernandez v. Commissioner*, 490 U.S. 680 (1989), this Court upheld 26 U.S.C. § 170, permitting charitable deductions to religious organizations and churches, even though they are permitted to prefer co-religionists both when hiring staff and when delivering aid or resources to the community. Respondents in Support of Petitioners are not aware of a single case—and the Winn Respondents cite none—that remotely suggests that allowing religiously affiliated organizations the freedom to prefer co-religionists offends the Establishment Clause’s command that government “shall make no law respecting an establishment of religion.”

School tuition organizations are private, nonprofit organizations—not government actors—and they enjoy substantial discretion in awarding scholarships, both under state law and § 501(c)(3) of the federal tax code. Nonreligious school tuition organizations can and do offer scholarships on a selective or “discriminatory” basis. For example, there are several school tuition organizations that serve only Montessori schools and provide scholarships only to families seeking Montessori education. The state neither

encourages nor discourages such pedagogical “discrimination,” but rather remains appropriately neutral, just as it does towards religion. *See Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970) (holding that the Establishment Clause allows “benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference”).

Thus, Jewish tuition organizations may permissibly award scholarships only to Jewish schools or only to Jewish children. And Catholic tuition organizations may permissibly award scholarships only to Catholic schools or only to Catholic children. Allowing religious school tuition organizations the freedom to prefer co-religionists is not government endorsement of religion, it is—at most—government accommodation of religion. *See Amos*, 483 U.S. at 349 (O’Connor, J., concurring) (“the objective observer should perceive the Government action as an accommodation of the exercise of religion rather than as a Government endorsement of religion”).

Second, any ruling by this Court that called into question the ability of religious organizations to prefer co-religionists would jeopardize the constitutionality of other types of tax benefits, such as the charitable deductions for contributions to churches upheld in *Hernandez* and the exemption for religious organizations and churches from property taxation upheld in *Walz*. Such a ruling could also run afoul of the Free Exercise Clause. *See Amos*, 483 U.S. at 341-42 (Brennan, J., concurring) (“‘believers . . . exercise their religion through religious organizations, and these organizations must be protected by the Free Exercise

Clause’”) (quoting Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981)).

CONCLUSION

Even assuming that school tuition organizations award scholarships to children of particular religious denominations, the Winn Respondents have failed to state a claim upon which relief can be granted. The Establishment Clause does not prevent the government from even-handedly authorizing private, non-profit scholarship organizations to serve a variety of discrete and diverse constituencies, including both religious and nonreligious groups.

Respectfully submitted,

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