

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

**REPLY TO RESPONDENTS' SUPPLEMENTAL
BRIEF REGARDING A CHANGE IN STATE LAW**

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TABLE OF CONTENTS

	Page
REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEF REGARDING A CHANGE IN STATE LAW	1
ARGUMENT	1
CONCLUSION.....	6

TABLE OF AUTHORITIES

Page

CASES

Hibbs v. Winn, 542 U.S. 88 (2004)5
Levin v. Commerce Energy, Inc., 130 S. Ct.
2323 (2010).....5

STATE STATUTES

Ariz. Rev. Stat. Ann. § 43-1089(G)(3).....1, 3, 4
Ariz. Rev. Stat. Ann. § 43-15024
Ariz. Rev. Stat. Ann. § 43-1502(A)3
Ariz. Rev. Stat. Ann. § 43-1503(B)(1)4
Ariz. Rev. Stat. Ann. § 43-1503(B)(2)3

FEDERAL STATUTES

26 U.S.C. § 501(c)(3)3

OTHER PUBLICATIONS

Arizona State Legislature Bill Status Overview,
[http://www.azleg.gov/FormatDocument.asp?in
Doc=/legtext/49leg/2r/bills/hb2664o.asp](http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/49leg/2r/bills/hb2664o.asp).....2

**REPLY TO RESPONDENTS' SUPPLEMENTAL
BRIEF REGARDING A CHANGE IN STATE LAW**

The Respondents, Kathleen M. Winn, et al., filed a supplemental brief suggesting that the Arizona Legislature's recent irrelevant amendments to the challenged Scholarship Tax Credit Program, currently codified at Ariz. Rev. Stat. Ann. (A.R.S.) § 43-1089 and reproduced at Garriott Pet. App. 117a-120a,¹ which Petitioners timely brought to the Court's attention, are cause to remand the case to the District Court. Respondents' Supplemental Brief Regarding A Change In State Law (hereafter "Respondents' Supplemental Br.") 11. Respondents' contentions are meritless for three reasons. First, the amendments do not affect the constitutional issues Respondents raise in their Complaint. Second, the amendments do not answer the question whether Respondents have standing as taxpayers to raise their claims in the first instance. Finally, and most importantly, Respondents did not identify a single way in which the amendments impact or change the issues upon which the Court granted certiorari.

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ARGUMENT

Respondents' supplemental brief identifies irrelevant legislative amendments to the challenged

¹ Reference is to Petitioner Garriott's Appendix in support of the Petition for Writ of Certiorari.

Scholarship Tax Credit Program and incorrectly insinuates that Petitioners improperly withheld information from the Court.

As an initial matter, Petitioners' merits briefs gave timely notice concerning the fact and substance of the legislative amendments contained in House Bill 2664. The legislature passed House Bill 2664 on April 28, 2010, but the Governor did not sign that bill until May 10, 2010—seven days after Petitioners filed their reply briefs regarding whether the Court should grant certiorari. *Arizona State Legislature Bill Status Overview*, <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/49leg/2r/bills/hb2664o.asp> (last visited Aug. 23, 2010). The Governor had signed Senate Bill 1274 before the reply briefs were filed, but Respondents themselves informed this Court about that bill and raised no concerns that it would impact their constitutional claims. Respondents' Br. in Opp'n 12. Despite Respondents' claimed lack of knowledge regarding House Bill 2664, which was introduced on February 8, 2010 in substantially the same form as finally passed, *Arizona State Legislative Bill Status Overview*, *supra*, their opposition brief said they were monitoring the various legislative proposals to amend the program and never claimed any of the pending bills would impact their claims—to the contrary they claimed no "relevant" legislation had been introduced. Respondents' Br. in Opp'n 11-12 ("No relevant legislation had resulted at the time this brief was written. The 'reform' proposal that seems to have the greatest chance of enactment at the current legislative session

[is Senate Bill 1274]. . .”). In addition to the fact that Respondents’ supplemental brief contradicts their opposition brief, their proposal to remand this case to the District Court deserves to be rejected for three reasons.

First, the legislative amendments do not change the way the program operates and therefore do not change the constitutional questions raised by Respondents’ Complaint. The amendments did not change the way School Tuition Organizations are created or the fundamental nature of how they operate. School Tuition Organizations must still be founded by private individuals as charitable organizations pursuant to 26 U.S.C. § 501(c)(3). *Compare* A.R.S. § 43-1089(G)(3) Garriott Pet. App. 120a *with* A.R.S. § 43-1502(A) (effective Dec. 31, 2010) Parents’ Br. App. 6a.² Anyone may still form a School Tuition Organization that funds all private schools, or a subset of private schools, so long as they do so “without limiting availability to students of one school.” *Compare* A.R.S. § 43-1089(G)(3) Garriott Pet. App. 120a *with* A.R.S. § 43-1503(B)(2) (effective Dec. 31, 2010) Parents’ Br. App. 10a. School Tuition Organizations have always been required to dedicate ninety percent of their revenues to fund scholarships for children to attend private schools, which means they

² “Parents’ Br. App.” refers to the brief and appendix filed by parents Glenn Dennard and Luis Moscoso and the Arizona School Choice Trust as Respondents in Support of Petitioners pursuant to Sup. Ct. R. 12.6.

have always been required to be organized “solely” to raise money for private school scholarships. *Compare* A.R.S. § 43-1089(G)(3) Garriott Pet. App. 120a *with* A.R.S. § 43-1503(B)(1) (effective Dec. 31, 2010) Parents’ Br. 9a. Thus, nothing about the amendments change any parties’ argument regarding whether or not the Scholarship Tax Credit Program is a program of genuine private charity.

The recent legislative amendments merely clarify that the Arizona Department of Revenue has the authority to inform taxpayers which School Tuition Organizations satisfy these criteria and provide the Department a ministerial method of doing so by requiring School Tuition Organizations to file paperwork certifying their compliance with the statutory requirements.³ A.R.S. § 43-1502 (effective Dec. 31, 2010); Parents’ Br. App. 6a-9a.

Second, even if the legislative amendments did have some arguable bearing on the Establishment

³ Respondents further assert that School Tuition Organizations are newly required to report various types of information to the Department of Revenue. Respondents’ Supplemental Br. 5. However, the reporting requirements Respondents list, except for the requirements to report certain salary information and recipient income levels, were part of the program when the petitions for certiorari were filed. A.R.S. § 43-1089(F) Garriott Pet. App. 118a-119a (requiring School Tuition Organizations to report the number and amount of contributions they receive each year; the number and amount of scholarships they award each year; and the number and amount of scholarships awarded according to the schools the students attend).

Clause issues, which they do not, the amendments certainly have no impact on whether the Respondents have standing as taxpayers to raise their claims. The amendments do not change the fact that Respondents are still “third parties’ whose own tax liability” is not implicated by the tax credit. *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2326 (2010) (discussing Respondents in *this* case while distinguishing *Levin* from this Court’s prior decision in *this* case, *Hibbs v. Winn*, 542 U.S. 88 (2004)). Whether a taxpayer whose own tax liability is so far removed from the challenged program has suffered the requisite injury under the Establishment Clause is a threshold question at the heart of the Arizona Christian School Tuition Organization’s petition. Br. Pet’r Ariz. Christian Sch. Tuition Org. 15 (Respondents “do not allege that Arizona is extracting *their money* in support of religion, which is a necessary predicate to any taxpayer injury in the Establishment Clause context”).

Third, and most importantly, Respondents’ supplemental brief in no way explains why the recent legislative amendments make any difference regarding this Court’s decision to grant certiorari in this case. The Respondents admit in their brief that the Ninth Circuit’s holding is premised on the panel’s view that School Tuition Organizations essentially function as agents of the state when awarding scholarships. Respondents’ Supplemental Br. 9. Respondents then assert that the “new legislation strongly confirms the [Ninth Circuit’s] conclusion. . . .” *Id.* at 10. But Respondents fail to explain how the fact that

Arizona has marginally increased its regulations in any way changes the Ninth Circuit's analysis. Indeed, they argue that the amendments *reinforce* that analysis. Advancing an argument that recent legislative amendments actually strengthen their case in an attempt to urge this Court to reverse its decision granting certiorari is legally and logically inconsistent.

CONCLUSION

Glenn Dennard, Luis Moscoso, and the Arizona School Choice Trust, along with Petitioners, timely notified this Court of the recent legislative amendments discussed in Respondents' supplemental brief. The amendments are primarily ministerial in nature and do not change the way the Scholarship Tax Credit Program or School Tuition Organizations operate. The amendments therefore do not affect any of the issues raised by the petitions. The Court should disregard Respondents' supplemental brief.

Respectfully submitted,

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