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

BRIEF OF *AMICI CURIAE* CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL AND ADVOCATES FOR FAITH AND FREEDOM IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Christian Educators Association International ("CEAI"), founded in 1953, is a professional association for Christian educators in public and private schools. Membership consists of teachers, administrators, and para-professionals, including any person hired by a school district. Additionally, CEAI offers associate membership to parents, pastors, school board members, youth leaders, and others concerned or interested in the education of children. CEAI exists as a resource for encouraging and equipping its members in schools around the country and world. Accordingly, the resolution of this case in favor of Arizona's tax credit school choice program is therefore of great importance to CEAI and its members due to the impact it will have on school choice programs that are developed now and that are to be developed in the future throughout the Nation.

Advocates for Faith and Freedom ("Advocates"), is a California-based non-profit law firm dedicated to protecting traditional family values and religious liberties, including the right of parents to educate their children in accordance with their beliefs. Advocates seeks to ensure that

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[1] This brief is filed with the written consent of all parties. Pursuant to Rule 37.6, *amici curiae* verify that this brief was not authored, either in whole or part, by counsel for either party, nor did any party make a monetary contribution to either the preparation or submission of this brief. *Amici curiae* are non-profit corporations; they issue no stock and have no parent companies.

traditional family values so integral to the fabric of our Nation and society are not unduly altered in contravention of Constitutional principles. Consequently, Advocates has been involved in many cases involving traditional family values and religious liberty around the Nation. The right ultimately implicated in this particular case, the right for parents to educate their children in accordance with their beliefs, is one of the most dearly held rights Americans possess, as well as one of the most fundamental. The resolution of this case in favor of Arizona's tax credit school choice program is therefore of great importance to Advocates due to the impact it will have upon future cases involving school choice that will undoubtedly arise across the country.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents argue that the State of Arizona's school choice tax credit program violates the Establishment Clause of the United States Constitution and that they, on the sole basis of their status as taxpayers, have allegedly suffered injury. The only injury that Respondents allege, however, is a reduction in the state's revenue. This purported injury is both generalized and speculative and therefore cannot confer taxpayer standing under Article III of the United States Constitution. U.S. CONST. art. III, § 2 (requiring "cases" or "controversies" to invoke federal jurisdiction). It is further not likely to be redressed by Respondents' requested remedies.

The Court has unequivocally stated that "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976)) (internal quotation marks omitted). An "essential and unchanging part" of enforcing the Article III "case or controversy" requirement is that the parties to the dispute have standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), especially in cases—as here—in which taxpayers challenge a law that is facially neutral and in which "their own injury is not distinct from that suffered in general by other taxpayers," *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989) (opinion of Kennedy, J.). Therefore, no matter how disagreeable a particular act may be to members of the Court, the Court "must refrain from passing upon the constitutionality of an act . . . unless obliged to do so in the proper performance of [its] judicial function, when the question is raised by a party whose interests entitle them to raise it." *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 598 (2007) (internal citations and quotation marks omitted).

Accordingly, this Court has recognized that it has a constitutional obligation to affirm whether litigants have standing. *See, e.g., DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006). To neglect this duty, to "seek out and strike down any governmental act that [the Court] deem[s] to be repugnant to the Constitution," the Court would

itself commit an independent act in repugnance to the Constitution by acting outside of the scope of its constitutionally granted authority. *Hein*, 551 U.S. at 598; *see also Simon.*, 426 U.S. at 39 ("A federal court cannot ignore [the standing requirement] without overstepping its assigned role in our system of adjudicating only actual cases and controversies.").

The Court additionally has a prudential interest in questioning litigants' standing, especially when, as here, the Respondents' supposed standing is based on injury they have allegedly suffered as taxpayers. In such cases, the Court has emphasized (1) its deference to the relevant branch of government, *see, e.g.*, *Cuno,* 547 U.S. at 345 (acknowledging that state legislatures have "broad discretion" on matters of fiscal policy), and (2) the practical limitations that preclude the Court from resolving every dispute in which taxpayers express displeasure at how their government taxes and spends money, *see, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (recognizing that without rigorous standing requirements, "courts would be called upon to decide abstract questions of wide public significance . . . even though judicial intervention may be unnecessary to protect individual rights").

Appropriately, then, this Court has long held that "the payment of taxes is generally not enough to establish standing to challenge an action taken by the Federal Government." *Hein*, 551 U.S. at 593. For Courts to indiscriminately permit every taxpayer asserting a grievance they have with

regard to governmental spending to bring suit in federal court would invite a host of litigation that would effectively make the Court "monitor[ ] of the wisdom and soundness of [state fiscal] action." *Allen v. Wright*, 468 U.S. 737, 760 (1984) (quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972) (internal quotation marks omitted). The Court's affirmation of the parties' standing is therefore necessary both prudentially and constitutionally.

To this end, the Court therefore "presume[s] that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Cuno*, 547 U.S. at 342 n.3 (2006). Accordingly, the burden of proving Article III standing is on the party asserting federal jurisdiction. *Id.*

With the Court's constitutional and prudential requirements to determine that litigants have standing, with the Court's presumption against federal jurisdiction, and with the burden of establishing standing resting on Respondents, it is readily apparent that the Respondents have failed to establish standing. This is primarily because the Respondents' alleged injury, a reduction in state revenue, is too speculative to confer taxpayer standing. Additionally, even if the alleged injury were cognizable, the enjoinment of Arizona's tax credit program that Respondents seek would not redress Respondents' asserted injuries.

ARGUMENT

I. Generally, Taxpayers Do Not Have Standing to Challenge the Constitutionality of

Legislation Merely on the Basis of Their Status as Taxpayers.

For the reasons cited above, in *Flast v. Cohen*, 392 U.S. 83 (1968), the Court "carved out a narrow exception to the general constitutional prohibition against taxpayer standing." *Hein*, 551 U.S. at 602. In so doing, the Court emphasized that the purpose of confirming litigants' standing was to ensure that "the [injury] will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution." *Flast*, 392 U.S. at 106. To ensure that the newly created exception was sufficiently limited, the Court was careful to create a rigorous two-prong analysis requiring (1) "a logical link between [status as taxpayer] and the type of legislative enactment attacked" and (2) "a nexus between that status and the precise nature of the constitutional infringement alleged." *Id.* at 102. Only once a litigant has established both nexuses will the litigant "have shown a taxpayer's stake in the outcome of the controversy [sufficient to make her] a proper and appropriate party to invoke a federal court's jurisdiction." *Id.*

The same analysis and rationale apply to state taxpayers who challenge state law on the basis of their status as taxpayers. In *ASARCO Inc. v. Kadish*, the Court held that "we have likened state taxpayers to federal taxpayers, and thus we have refused to confer standing upon a state

taxpayer absent a showing of 'direct injury,' pecuniary or otherwise." 490 U.S. at 613–14 (opinion of Kennedy, J.) (citing *Doremus v. Bd. of Educ. of Hawthorne*, 342 U.S. 429, 434 (1952)). Further, in *Cuno*, the Court held that the "rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers." 547 U.S. at 345. That "rationale" includes both the constitutional and prudential limitations on taxpayer standing.

II. The "Irreducible Constitutional Minimum" of Taxpayer Standing Requires Cognizable Injury, Causation, and Redressability—Respondents Have Failed to Meet the "Constitutional Minimum."

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Court set forth the "irreducible constitutional minimum" of standing. As developed in that case, and affirmed in numerous decisions of this Court since, the Court held,

> First, the plaintiff must 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[.] Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant . . . . Third, it must be likely, as opposed to merely

> speculative, that the injury will be redressed by a favorable decision.

Id. at 560–61 (internal citations and quotation marks omitted); *see also Massachusetts v. E.P.A.*, 549 U.S. 497, 517 (2007).

Respondents' alleged injury, a broad assertion that the state will suffer from a reduction in revenue, is neither concrete nor particularized but is by its very nature incurably speculative. Additionally, even if it were a sufficient injury to establish standing, the injunctive and declarative remedies that Respondents seek are not likely to redress Respondents' asserted injuries.

A. Respondents' Alleged Injury Is Neither Concrete nor Particularized but Is Speculative and Generalized.

As a threshold matter, to establish the requisite standing to assert a claim a litigant must first "show that (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (citing *Lujan*, 504 U.S. at 560–61). This requirement is not merely some abstract inquiry, but indeed forms the very basis of that which confers power upon the Court to review the legislative act. Indeed, as the Court stated in *Frothingham v. Mellon*:

> We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. The question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act . . . . The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

Frothingham, decided with *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

In explaining its rationale for the above conclusion, the *Frothingham* Court declared that "the administration [of] any statute[ ] likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of *public* and not of individual concern." *Id.* at 486 (emphasis added). In essence, the Court held that the very contention that state revenue would be negatively affected was a matter of *public* interest and therefore inherently incapable of establishing the particularity requirement of Article III standing.

Moreover, in that same line of reasoning, the *Frothingham* Court stated unambiguously that the impact of tax revenues on taxpayers are "indefinite and constantly changing," in other words, speculative. *Id.* The Court elaborated:

> [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, is comparatively minute and indeterminable, *and the effect upon future taxation, of any payment out of the funds [is] so remote, fluctuating and uncertain, that no basis is afforded for an appeal* . . . . *Id.* at 487 (emphasis added).

Respondents have asserted that they have suffered injury due to a reduction in state revenues, but that assertion is a far cry from the concreteness that Article III requires. To the contrary, according to *Frothingham*, the alleged harm is "indefinite," "constantly changing," "remote," "fluctuating," and "uncertain"—all such descriptions are firm indications of just how inherently speculative and conjectural Respondents' alleged injury is in this case.

Additionally, Respondents themselves concede the inherently speculative nature of their alleged injury. In their Complaint they bemoan the fact that the tax credit program "places no limit on the total amount of State funds that may be diverted to STOs each year [so that] [i]f one million

Arizona taxpayers utilized the STO credit each year, the amount of State income tax revenues annually diverted to STOs would be $500 million." (App. to Pet. Cert 119a.)

Further, Respondents' bare assertion of "reduced revenue" does not in and of itself show that anyone has actually sustained any injury. Such an allegation would require that the Respondents substantiate the supposed loss, at least with some degree of concreteness and persuasiveness. They have not done this. To the contrary, independent studies of the tax credit program are inconclusive as to the program's impact on state revenues. (Pet. Cert 14.) In fact, these "dueling reports" assert diametrically opposed figures, one asserting that the program costs taxpayers millions and the other claiming that it saves taxpayers anywhere from $99.8 to $241.5 million. (*Id.*) In *Simon v. E. Ky. Welfare Rights Org.*, the Court encountered "conflicting evidence" on a degree much less than that in the instant case, yet the Court still ultimately concluded that the complainants' alleged injury was "unadorned speculation." *Simon*, 426 U.S. at 43–44 (Complainants had asserted that tax credits from the IRS were of great importance to charitable hospitals and that therefore denial of them was likely to urge hospitals to comply with obligations to provide full services to the poor, but the respondents argued that nationwide such tax credits were negligible.)

Notably, even if the Court had not already determined that tax revenues are too inherently speculative to establish the requisite injury for Article III standing, the Court should still find that Respondents have failed to show that they *personally* have suffered as a result of their status as taxpayers. In *Warth v. Seldin*, a number of individual residents of a municipality in New York filed a lawsuit challenging a zoning ordinance that they contended prevented them from living inside city limits. In holding that none of the claimants had standing, the Court declared that a "plaintiff still must allege a distinct and palpable injury to himself, even if [the alleged] injury [is] shared by a large class of other possible litigants." *Warth*. 422 U.S. at 501. The Court went on to say that "[p]etitioners must allege and show that they *personally* have been injured, not that injury has been suffered by . . . members of the class to which they belong and which they purport to represent." *Id*. at 502 (emphasis added). Respondents in this case have offered nothing to indicate that they personally have suffered any "distinct and palpable injury" but instead have relied fully on the theory that they have been injured because they are taxpayers in a state that they claim has suffered a reduction in revenue because of the tax credit program.

Similarly, in *Raines v. Byrd*, the Court declared, "We have consistently stressed that a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." *Id*. at 818 (quoting *Allen*, 468 U.S. at 751) (internal

citations omitted). As the previous paragraphs establish, Respondents have not demonstrated a particularized injury. They have simply asserted a reduction in state revenue and have made no effort to extend the alleged reduction in revenue to any particular harm to themselves. Moreover, it is clear from the record that Respondents' Complaint did not, and indeed could not, establish that Respondents had a "personal stake" in the legal challenge.

The Court has stated unequivocally that "unadorned speculation will not suffice to invoke the federal judicial power." *Simon*, 426 U.S. at 44. "Unadorned speculation" is precisely what Respondents have offered. It is clear that Respondents have suffered no cognizable injury and that their interest in bringing the legal challenge is therefore mere "common concern for obedience to law." *L. Singer & Sons v. Union Pac. R. Co.*, 311 U.S. 295, 303 (1940). Such "common concern" falls very short of establishing the type of particularized and concrete injury required to confer Article III taxpayer standing.

B. Even if Respondents' Alleged Injury Were Cognizable, Its Speculative Nature Renders It Not Redressable.

The Court places no small weight on the redressability component of Article III standing. It is for this reason that the Court has declared:

> [W]hen a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is *likely to be redressed* by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation.

Simon, 426 U.S. at 38. Therefore, the "very essence" of the redressability element of Article III standing is that "relief that does not remedy injury suffered cannot bootstrap a plaintiff into federal court." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). As such, this aspect of the tripartite standing requirement is no less important than the other components. In fact, in *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 472 (1983), the Court held that redressability is necessary "to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." Therefore, even if Respondents' alleged injury is judicially cognizable and even if it is "fairly traceable to the challenged action of the defendant," *Lujan*, 504 U.S. at 560, Respondents do not have standing unless the requested relief would actually be likely to remedy the purported injury.

Here, Respondents assert that the injury they have suffered is a reduction in the state's revenue, thereby attempting to satisfy the imminence requirement for showing the requisite injury. In doing so, however, they have effectively conceded that their injury would likely not be redressed by a favorable outcome. This is because the Court has already determined on numerous occasions that allegations of reduced revenue, which necessarily implicate how a legislature spends tax money, are not remedied even if a Court does find that the challenged act is unconstitutional.

For example, in *ASARCO Inc. v. Kadish*, the Court determined that the respondent taxpayers' mere assertion that the challenged state statute "deprived the school trust funds of millions of dollars thereby resulting in unnecessarily higher taxes" was insufficient to establish a redressable injury. The Court expounded:

> Even if the first part of that assertion were correct, . . . it is *pure speculation whether the lawsuit would result in any actual tax relief* for respondents. If they were to prevail, it is conceivable that more money might be devoted to education; but . . . the State might reduce its supplement from the general funds to provide for other programs. The possibility that taxpayers will receive any direct pecuniary relief from this lawsuit is *remote, fluctuating and uncertain*, . . .

> and consequently the claimed injury is not likely to be redressed by a favorable decision."

ASARCO Inc., 490 U.S. at 614 (opinion of Kennedy, J.) (internal citations and quotation marks omitted) (emphasis added).

The Court assigned a similar fate to the respondent teachers' association, which had asserted that the statute's diversion of funds from public schools subjected teachers to "adverse economic impacts." The Court responded by saying:

> [E]ven if . . . respondents prevailed and increased revenues from state leases were available, maybe taxes would be reduced, or maybe the State would reduce support from other sources so that the money available for schools would be unchanged. Even if the State were to devote more money to schools, it does not follow that there would be an increase in teacher salaries or benefits. These policy decisions might be made in different ways by the governing officials . . . . Whether the association's claims of economic injury would be redressed by a favorable decision in this case depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume

> either to control or to predict.

Id. at 614–15 (opinion of Kennedy, J.) (emphasis added).

Simon sheds additional light on the speculative nature of Respondents' alleged injury and the potential for a favorable decision of the court to redress the injury. In *Simon*, the complainants argued that when the IRS broadened favorable tax treatment to include nonprofit hospitals that "refused fully to serve indigents," the complainants were injured because the IRS effectively removed hospitals' incentives to provide services to the poor. *Simon*, 426 U.S. at 33. The Court reasoned that the complainants' alleged injury, which relied on numerous inferences, was "speculative" and that "whether the desired exercise of the court's remedial powers . . . would [redress the alleged injuries]" was "equally speculative." *Id.* at 42–43. Citing numerous variables that made hospitals' conduct with regard to indigent patients uncertain and unpredictable, the Court subsequently held that the complainants lacked standing. *Id.*

Respondents in this case are like the complainants in *ASARCO Inc.* and *Simon*. Respondents allege that the state's granting of tax credits to parents who utilize the school tuition organizations leads to a reduction in state revenues, but they fail to demonstrate that this is in fact true. Further, Respondents contend that the state revenue would somehow buoy up to its appropriate figure (whatever that might be) if the

tax credit program were ended, but they make no showing that an end of the program would actually result in an increase in state revenues. Like the allegations made in *Simon*, Respondents' assertions rest on numerous assumptions and as such are "purely speculative." *Simon*, 426 U.S. at 42.

At best, Respondents can argue that there is some possibility that their alleged injury would be abated if the tax credit program ceased. Perhaps if the state ceased giving tax credits to donors to student tuition organizations the state's revenue would increase, or perhaps not. Perhaps the state would divert the tax credits to some other group of taxpayers, and perhaps that group of taxpayers would contribute less in taxation overall than recipients of the tax credit do now. But, as is readily apparent from the above, whether Respondents would themselves benefit from this Court's granting of declarative and injunctive relief is totally unknown. Establishing a mere possibility that the injury might be redressed is not the same thing as saying that the injury is *likely* to be redressed. In fact, it falls substantially short of it.

CONCLUSION

Because Respondents' alleged injury is inherently speculative and would not be redressed by a favorable outcome, and in consideration of the reasons set forth in ACSTO's Petition for Writ of Certiorari, it is clear that the Respondents lack standing. Consequently, notwithstanding any legitimacy of the merits of Respondents' Establishment Clause claim, a unanimous Court declared in *DaimlerChrysler Corp. v. Cuno*: "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *Cuno*, 547 U.S. at 341.

Respectfully submitted,

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