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

REPLY BRIEF FOR PETITIONER ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION

DAVID A. CORTMAN
Counsel of Record
ALLIANCE DEFENSE FUND
1000 Hurricane Shoals Rd., NE
Suite D-600
Lawrenceville, GA 30043
(770) 339-0774
dcortman@telladf.org

BENJAMIN W. BULL
GARY S. MCCALEB
JORDAN W. LORENCE
JEREMY D. TEDESCO
ALLIANCE DEFENSE FUND
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

Counsel for Petitioner ACSTO

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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Abbreviations Key:

ACSTO Br.	Brief for Petitioner ACSTO
ACSTO Pet. App.	Appendix to ACSTO's Petition for Certiorari
ACSTO Supp. Br.	Petitioner ACSTO's Reply to Respondents' Supplemental Brief Regarding a Change in State Law
AHA Br.	Brief *Amici Curiae* of the American Humanist Association, *et al.,* in Support of Respondents
ASCT Pet. App.	Appendix to ASCT's Petition for Certiorari
AUSCS Br.	Brief for Americans United for Separation of Church and State, *et al*., as *Amici Curiae* in Support of Respondents
Cato Br.	Brief of The Cato Institute, *et al.,* as *Amici Curiae* in Support of Petitioners
JA	Joint Appendix
Resp. Br.	Brief for Respondents
State App.	Appendix to State's Brief on the Merits

INTRODUCTION

The facts of this case are straightforward and undisputed. And as Petitioner ACSTO's opening brief shows, they establish that Respondents' lack Article III standing and that the challenged tax credit complies with the Establishment Clause.

Respondents' claims to the contrary are based on multiple mischaracterizations of the record. For example, it is a fact that taxpayers donate their private money to STOs (which must be 501(c)(3) corporations) and then take the tax credit, just as taxpayers take a deduction when they donate to any 501(c)(3) group. But based on their novel theory that a state's decision not to tax is the same as a state's decision to tax and spend, Respondents claim that taxpayers donate "state funds" to STOs.

It is also a fact that the tax credit statute does not levy any tax on anyone. Respondents previously conceded this fact, *see* ACSTO Br. 19-20, and it is too late in the day for them to now ask in their Questions Presented whether "Arizona Taxpayers, whose taxes support all of the costs of the program, have standing in federal court to challenge its constitutionality?" Resp. Br. i. The fact is that Respondents are not taxed even a penny to support this program, and for this reason (among others) they lack standing.

Also undisputed is the fact that an STO cannot send one penny to any private school (religious or secular) unless a parent chooses a school and applies for a scholarship. Respondents completely ignore

this fact by claiming that parental choice is not present in this program. But the fact is that without parents choosing a private school, no money goes anywhere.

Respondents are unable to prevail under the facts as they exist, so they mischaracterize them. They then argue that these "facts" confer Article III standing and prove an Establishment Clause violation under an equally incorrect version of the law. Respondents' efforts to save their case find no support in the record, in the law, or in logic. The Ninth Circuit's decision should be reversed.

REPLY TO RESPONDENTS' PRIMARY FACTUAL DISTORTION

Most of Respondents' factual distortions are addressed within the relevant legal section below. But Petitioner ACSTO addresses Respondents' grandest mischaracterization—that the tax credit is a "government spending program," Resp. Br. 22—in this preliminary section because they base their entire case on it.

The Tax Credit Involves Private Money:

The tax credit statute authorizes taxpayers to take a credit for "voluntary cash contributions" to STOs. State App. 1; A.R.S. § 43-1089(A). In 2009, over 73,000 taxpayers took the credit. State App. 18. Further, "no money ever enters the state's control as a result of this tax credit. Nothing is deposited in the state treasury or other accounts under the management or possession of governmental agencies

or public officials." *Kotterman v. Killian*, 972 P.2d 606, 618 (Ariz. 1999). It is clear, then, that this program involves private, not government, funds. *Id*. Respondents' amici appear to recognize this. AHA Br. 9 ("payments to STOs are made using private checking accounts").

Respondents' "Government Spending" Claim:

Respondents reject this fact, not because it is untrue, but because they must in order to prop up their errant claim that they have Article III standing. Indeed, how could a taxpayer have standing to challenge how other private people spend their own money? Yet this is precisely what Respondents propose.

Their claim to Article III standing is based on the novel theory that a state's failure to collect anything less than 100% of income is the same as the state collecting and spending tax dollars. Resp. Br. 17 (tax policies that "reduce the revenues entering the treasury" are equivalent to the government spending tax revenues). The premise underlying Respondents' position is that an individual's entire income is presumptively government property and becomes his only when the government does *not* exercise its taxation power over all of it. Respondents' theory cannot be limited to tax credits, but rather also applies to every government decision to collect less tax revenues, including: tax deductions; tax

exemptions; income-based tax brackets; non-taxable income; and more.[1]

Respondents argue that a tax credit is the equivalent of an expenditure of government funds, while a deduction is not, because a deduction results in a smaller tax benefit. Resp. Br. 6. But this is no distinction at all under Respondents' theory, since a deduction "reduces[] the revenues entering the treasury," *id.* at 17, just as a tax credit does. Whether the reduction is dollar for dollar or something less, the state's revenue is still "reduced."

Respondents also distinguish between the tax credit and a deduction by claiming that the funds used to make a charitable donation are a taxpayer's private funds, while the funds donated to an STO are state funds. Respondents' argument is based on two fictions. First, they pretend that a taxpayer is "entitled to keep" all the money he otherwise could send to a charity and upon which he could take a deduction. Resp. Br. 6. But this is untrue. If a taxpayer kept this money he would be taxed within the appropriate tax bracket on those funds.

Second, Respondents also pretend that, unlike the money upon which a charitable deduction is taken, the taxpayer taking the credit must either pay the money to an STO or to the state. *Id.* This also is untrue. Taxpayers have a plethora of options

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[1] Petitioner ACSTO has explained previously that, both factually and legally, tax credits, exemptions, and deductions operate the same, in that none of them transfer a taxpayer's money to the benefitted group. ACSTO Br. 18-19.

on how to spend this money. The taxpayer could take advantage of the dozens of other tax credits available under Arizona law by, for instance, donating to organizations that assist the working poor, A.R.S. § 43-1088; installing solar energy devices, § 43-1083; or donating to support public schools, § 43-1089.01, to name a few. They could also donate to any one (or more) of thousands of 501(c)(3) organizations and take a deduction.

Respondents also claim that because the tax credit can now be taken for donations made through April 15 of the year following the taxable year, the credits are the same as "tax payments" to the IRS. Resp. Br. 28. Their argument is mistaken. First, Respondents assume that every taxpayer waits until April 15 to donate to an STO. But there are no facts to prove that this is the case (nor is it likely), and regardless it is not constitutionally relevant.

Second, Respondents state that for the first thirteen years of the program "it was possible to contend that taxpayers who made payments to STOs contributed at least some of their 'own funds' to the program." Resp. Br. 28. Respondents contend, without any explanation, that the new April 15 deadline transforms what were donations of private funds for thirteen years into "tax payments." *Id.* This is a distinction without a difference and is constitutionally irrelevant.

Respondents' Position Has Dangerous Implications:

The drastic nature of Respondents' theory that collecting less revenue equals spending public funds is demonstrated by the questions that bedevil it. For instance, if taxpayers cannot invoke federal jurisdiction to challenge tax deductions for donations to religious 501(c)(3) organizations, as Respondents appear to concede, Resp. Br. 26 (if Petitioners' description of the program as no different than "other tax credit and deduction programs that allow taxpayers to choose to contribute to religious organizations" was "accurate" then "[R]espondents could not invoke federal jurisdiction to claim that [it violated the Establishment Clause]"), then why can they invoke it to challenge a tax credit for the same donation? If reduced revenue equals government spending, then (at the very least) taxpayers can challenge all deductions, credits, and other government programs that encourage charitable giving, not to mention any legislative decision to tax less than 100% of income.

Further, if tax deductions for donations made directly to a religious, 501(c)(3) school do not violate the Establishment Clause, as Respondents likewise concede, Resp. Br. 26, then why is it unconstitutional for those donations to reach the same religious schools by way of a tax credit that adds two additional layers of attenuation (STOs and parents) between the government and the schools benefitted? Respondents' position is that a tax deduction for a donation given directly to a religious 501(c)(3) school

is constitutional, while a donation to a private, 501(c)(3) STO that gives the donated money to the same religious school only with parental direction is unconstitutional.

Finally, if a taxpayer has the choice to donate to a religious or nonreligious school when taking a deduction, why does he lose that choice, and, even worse, why is he compelled to support schools he does not desire to support, when taking a credit for a donation to an STO? Respondents (wrongly) claim that to satisfy the Establishment Clause, all STOs must provide donations to all schools, religious and nonreligious. But this would seem particularly problematic to Respondents (and their *amici*), since it would require the secular/atheist taxpayer's donation (which Respondents wrongly claim is a "tax payment") to support both secular *and religious* schools.

As this discussion aptly shows, Respondents' view of the facts and law would result in a drastic expansion of the law of taxpayer standing, and turn Establishment Clause jurisprudence on its head. This Court should reject it.

ARGUMENT

I. Respondents' Lack Article III Standing.

Respondents provide little (and sometimes no) response to ACSTO's standing arguments. The response that they do provide is based on mischaracterized facts, misstated law, and conjecture about what this Court thought about

standing where the issue was not raised. Their arguments fail to demonstrate Article III standing.

A. Respondents Concede Their "Third-Party" Status, Thereby Also Conceding That They Have Not Suffered A Direct And Personal Injury.

In addressing this Court's previous ruling in *Hibbs v. Winn*, 542 U.S. 88 (2004), regarding the Tax Injunction Act's applicability to this case, Respondents admit that "[b]oth the Tax Injunction Act jurisdictional objection . . . and the lack of standing objection . . . concern the ability of 'third-party' state taxpayers to challenge the constitutionality of a state's treatment of other taxpayers." Resp. Br. 33. Respondents are correct, and they have no standing because of their third-party status.

To establish taxpayer standing in the Establishment Clause context, a plaintiff must prove (among other things) that "*his tax money* is being extracted and spent" to support religion. *Flast v. Cohen*, 392 U.S. 83, 106 (1968) (emphasis added). This aspect is important because it is precisely what creates the link between his status as a taxpayer and the government's (alleged) spending. Without spending "his tax money," there is no link at all. And without the need to prove such a link, as Respondents seek here, any taxpayer can challenge any legislative decision to collect anything less than 100% of available income. If Respondents' theory does not extend *Flast* beyond recognition, nothing does.

Respondents do not even address this essential element of taxpayer standing, and in previous filings in this Court disavowed that their standing is predicated on any tax imposed on them. *See* ACSTO Br. 19-20. Taxpayer-plaintiffs must allege injury "by virtue of [their] liability for taxes," *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 478 (1982), and here Respondents concede that they cannot do so.

Instead of basing their claim to standing on a direct and personal injury that they have suffered, Respondents instead base it on Arizona's "treatment of other taxpayers." Resp. Br. 33. But like the injury rejected in *Valley Forge*, this injury is based on the "claim that the Constitution has been violated, [and] nothing else." 454 U.S. at 485. Respondents' "injury" is one they "suffer[] in some indefinite way in common with people generally," *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952), and thus is insufficient as a matter of law to establish standing.

B. Respondents' Mischaracterization That The Tax Credit Is A Government Spending Program Does Not Create Standing.

Respondents repeatedly claim that the tax credit is a "legislative spending program." Resp. Br. 38. As discussed *supra*, this claim is false factually, legally, and logically, and should not be accepted by the Court.

Respondents must resort to mischaracterizations of the program so that they may argue that they have standing under *Bowen v. Kendrick*, 487 U.S. 589 (1988). But Respondents' reliance on *Bowen* is misplaced. *Bowen* involved the "disbursement of funds pursuant to Congress' taxing and spending powers," *id.* at 619-20, funds which included monies *collected from the plaintiffs in that case.* Thus, the plaintiffs in *Bowen* established that *their tax dollars* had been extracted and spent to support religion, an essential element of taxpayer standing Respondents cannot prove.

Bowen is also distinguishable because, as this Court recently explained, the statute there appropriated government funds and expressly authorized providing those funds to religious organizations. *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 607 (2007). Here, the statute is neutral as to religion, a fact Respondents concede by "abandoning" their facial claim. Further, as discussed in ACSTO's merits brief at 23-25, the tax credit statute neither appropriates nor spends any government funds, but rather provides a credit to taxpayers who donate their own money to 501(c)(3) organizations.

Respondents try to sidestep this critical distinction by arguing that the tax credit has the same fiscal impact (i.e., a reduction in state revenues) as an appropriation and expenditure of tax revenues. Resp. Br. 30-32.[2] But this argument

[2] Respondents rely heavily on Arizona Department of Revenue descriptions of the tax credit statute in making this argument.

misses the mark for at least two reasons. First, Respondents fail to address the speculative nature of their claim that a tax credit "reduces" revenue. As this Court said of the tax credit in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006), "[t]he very point of the tax benefits is to spur economic activity, which in turn *increases* government revenues." Consistent with *Cuno*, studies have shown that the tuition tax credit reaps savings by reducing the costs of public education, to the tune of millions of dollars. *See* ACSTO Br. 31-32.

Second, Respondents' argument that a tax credit has the same "fiscal impact" as an appropriation and expenditure of tax revenues does not serve to create any of their missing requirements for standing: they cannot show that *their tax dollars* are being spent in support of religion, *Flast*, 392 U.S. at 106, nor does a similar fiscal impact create causation or redressability.

C. Speculation Permeates Respondents' Standing Theory.

As discussed in ACSTO's merits brief, Respondents also cannot establish Article III standing because, under their theory of injury (a reduction in state revenues), each prong of the standing test is speculative. And, as a matter of law,

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Resp. Br. 30-32. But Respondents ignore that those same reports treat deductions and credits the same. Moreover, this Court noted in *Mueller v. Allen*, 463 U.S. 388, 401 n.9 (1983), how such reports are not meant to be an exhaustive analysis of the factual or legal implications of a program.

speculation does "not suffice to invoke the federal judicial power." *Eastern Kentucky Welfare Rights Org. v. Simon*, 426 U.S. 26, 44 (1976).

Respondents' response to the speculative nature of their "injury" is to assert that the tax credit program costs those taxpayers not taking the credit "more than $50 million dollars a year." Resp. Br. 30. But this assertion depends on "speculating that elected officials will increase a taxpayer-Plaintiff's tax bill to make up a deficit," and thus does not "suffice[] to support standing." *Cuno*, 547 U.S. at 344.

Respondents also assert that, because this case is at the motion to dismiss stage, this Court must accept as true their allegation that the state's revenues are reduced by the tax credit. Resp. Br. 42. While Respondents are correct that courts typically defer in this context, the rule does not permit Respondents to make factually and legally incorrect assertions to defeat a motion to dismiss. Here, as discussed *supra* and in ACSTO's merits brief at 31-32, Respondents' claim that state revenues are reduced by the tax credit is speculative both factually and legally, and thus is insufficient to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). It is also critical to note that, whether the tax credit results in less, the same, or more revenue, Respondents' complaint still fails to allege facts sufficient to satisfy Article III standing requirements.

While Respondents at least address the speculative nature of their injury, they simply ignore the speculation that dooms their causation and redress arguments. Respondents' theory of causation is speculative, among other reasons, *see* ACSTO Br. 36-37, because it assumes that state lawmakers increased their tax burden in response to a deficit. *Cuno*, 547 U.S. at 344 ("[f]ederal courts may not assume a particular exercise of . . . state fiscal discretion in establishing standing"). Redress is also speculative under such circumstances. *Id.* ("establishing redressability requires speculating that abolishing the challenged credit will redound to the benefit of the taxpayer because legislators will pass along the supposed increased revenue in the form of tax reductions").

Respondents try to bypass *Cuno*'s rejection of their standing theory by arguing that it does not apply here because it was not an Establishment Clause case. Resp. Br. 36. But this just proves that Respondents seek a free pass on Article III's standing requirements. *Valley Forge* already rejected the argument, which underlies Respondents' position here, that "enforcement of the Establishment Clause demands special exceptions from the requirement that a plaintiff allege 'distinct and palpable injury to himself,' . . . that is likely to be redressed if the requested relief is granted.'" 454 U.S. at 488 (citation omitted).

D. Cases Where The Establishment Clause Merits Were Reached But Standing Was Not Discussed Are Not Precedent For Jurisdiction.

Respondents argue that cases in which this Court reached the merits of an Establishment Clause challenge to tax deductions, credits, and exemptions, but did not discuss standing, support a finding of standing here. Resp. Br. 33, 39. They claim that the Court's silence on the jurisdictional issue in these cases "was almost certainly due to the belief that the issue had been settled." *Id*. at 44.

There are at least two problems with this argument. First, as this Court recently and unanimously stated, it "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." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478-79 (2006). Put simply, the Court's silence on jurisdiction is not precedent for jurisdiction. Second, Respondents' contention that parties can divine clear legal rules from this Court's silence has serious practical problems. Indeed, each party would interpret this Court's silence, on any issue, in a favorable way for their case, and there would be no way to prove them wrong. This is precisely what Respondents are doing here.

E. Respondents Do Not Even Address The Important Federalism And Separation Of Powers Considerations Raised By Their Lawsuit.

Respondents nowhere address ACSTO's argument that the principles of federalism and separation of powers favor denying them standing. ACSTO Merits Br. 39-41. Respondents' amici, however, claim that separation of powers does not apply where the federal judiciary reviews the action of a state legislature. AUSCS Br. 21. This cannot be squared with *Cuno*, however, which denied standing where state taxpayers sought review of a state tax credit in federal court in part to avoid "interpose[ing] the federal courts as 'virtually continuing monitors of the wisdom and soundness' of state fiscal administration." 547 U.S. at 346. This is the very concern that animates the separation of powers doctrine. *Allen v. Wright*, 468 U.S. 737, 759-60 (1984).

Respondents' amici further argue that state taxpayers bringing Establishment Clause challenges to state tax policies in federal court should not have to satisfy the "legislative nexus" half of *Flast*'s test. Specifically, they claim that state taxpayers will have difficulty showing that a challenged program is an exercise of the state legislature's taxing and spending power because that power is exercised by more than just the state legislature in many states. AUSCS Br. 19-20. But this is a reason standing should be denied, not a reason half the test should be jettisoned. While this Court has recognized that *Flast* is a narrow exception that has "largely been

confined to its facts," *Hein*, 551 U.S. at 609, Respondents' amici seek to expand it by discarding one of its requirements.

II. Arizona's Tax Credit Does Not Violate The Establishment Clause.

Respondents' approach of twisting the facts to satisfy their erroneous view of the law continues in their discussion of the Establishment Clause merits, as shown below.

A. Respondents Facial And As-Applied Claims Are Indistinguishable.

In their merits brief, Respondents attempt to distinguish their as-applied and facial challenges by claiming that "[i]t was not evident from the text of the original Arizona statute that STOs" could limit scholarships to religious schools. Resp. Br. 11. But Respondents' complaint alleges that the statute, on its face, allows STOs to restrict their scholarships to students attending religious schools. ACSTO Pet. App. 119a. This is consistent with the statute, which expressly allows such limitations, and the majority and dissent in *Kotterman*, both of which found that STOs could limit scholarships to certain schools. *See* ACSTO Br. 48-49. In fact, each aspect of the program that Respondents challenge is contemplated on the face of the statute. Respondents have simply dressed their "abandoned" facial claim in "as-applied" clothing to sidestep *Kotterman*'s holding that the tax credit satisfies *Lemon*.

B. The Tax Credit Serves A Valid Secular Purpose.

Respondents barely discuss whether Arizona's program satisfies the purpose prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and instead assert that it "is not necessary to resolve" the issue. Resp. Br. 51. The Ninth Circuit's analysis of this prong is, in any event, indefensible. The Court determined that the tax credit served a valid secular purpose, ACSTO Pet. App. 18a (purpose was to provide "equal access to a wide range of schooling options for students of every income level by defraying the costs of educational expenses incurred by parents"), but nonetheless found that an improper purpose could be retroactively imputed to the program based on the actions of private parties using the program after its enactment. No case supports such a rule.

Respondents do claim that the tax credit program, unlike the program upheld in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), "is not supported by any strong educational need." Resp. Br. 24. But this ignores that Arizona's public education system is ranked anywhere between 40th and 49th, depending on the subject.[3] While "strong educational need" is not the only test for determining if the tax credit serves a valid secular

[3] These rankings can be derived by using the NAEP data tool located at the National Center for Educational Statistics website. NAEP Data Explorer, nces.ed.gov/nationsreportcard/naepdata/dataset.aspx. The reported scores were used to determine state rankings. In 2009, Arizona ranked 47th in fourth grade mathematics; 49th in fourth grade reading; 40th in eighth grade mathematics; and 41st in eighth grade reading.

purpose, *see* ACSTO Br. 49-53, Arizona's low educational ranking even meets Respondents' incorrectly limited standard. Further, this Court has never held that a state must wait for an educational crisis before advancing educational needs.

C. Respondents' Establishment Clause Claims Are Improperly Based On The Actions Of Private Parties.

"For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987) (emphasis in original). The problem is that Respondents' principal Establishment Clause complaint—that scholarship funds are allegedly concentrated in STOs that award scholarships solely to religious schools—results from "decisions made by Arizona taxpayers making donations to STOs and by the STOs that receive the payments, rather than by the state legislature." Resp. Br. 17-18. And even after these private decisions are made, a parent must select a school and apply for a scholarship before even a penny goes to a private religious (or nonreligious) school.

This program is plainly constitutional under *Zelman*. There, this Court upheld state disbursed government revenues to religious schools where there was one private actor (parents) breaking the circuit between the government and the benefitted

schools. 536 U.S. at 652. Here, there is no government money involved and there are three private actors—taxpayers, nonprofit 501(C)(3) organizations, and parents—who are circuit breakers. There is far more attenuation between the government and the benefitted schools here than in *Zelman*, and thus, even more than in *Zelman*, "the Establishment Clause [is] not implicated." *Id.*

To create an Establishment Clause violation where there is none, Respondents again ignore the facts. Although in the court below they "d[id] not argue that STOs are state actors," ACSTO Pet. App. 21a n.10, they now claim that STOs are "acting on behalf of the state" Resp. Br. 3, and that they are "government actors," *id.* at 58 n.12. Respondents raise arguments related to the recent amendments to § 43-1089 in making this claim. They raised the same arguments in their supplemental brief regarding a change in state law, and Petitioner ACSTO relies primarily on its detailed rebuttal of those arguments made in its reply to that brief.

A few points, however, warrant reiteration. Both before and after the revisions to § 43-1089, one critical fact remained constant: an STO must be a "nonprofit organization in [Arizona] that is exempt or has applied for exemption from federal taxation under section 501(c)(3) of the internal revenue code." State App. 9. Despite their private, nonprofit status under federal law, Respondents claim that Arizona's regulation of STOs, including its requirement that they report on their financial condition, turn them into agents of the state. But the requirements

Arizona places on STOs are indistinguishable from, and less onerous than, the typical requirements placed on nonprofit organizations in Arizona, in other states, and at the federal level. ACSTO Supp. Br. 4-9. As with all other nonprofit organizations, STOs do not become state agents simply because they must satisfy reporting requirements.[4]

D. All Private Choices Involved In A Program Are Constitutionally Relevant.

Respondents claim that only the private choice of parents matter under *Zelman*. Resp. Br. 19-20. But neither *Zelman*, nor any other private choice case, so limits the relevant choice. 536 U.S. at 655 (no endorsement concerns where "aid reaches religious schools solely as a result of the numerous independent decisions of private individuals"); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 488 (1986) (no establishment clause violation where program money "flows to religious institutions . . . only as a result of the genuinely independent and private choices" of program's beneficiaries).

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[4] Likewise, Respondents are wrong that STOs are transformed into state actors because they are established to serve the statutorily-defined purpose of granting educational scholarships. Resp. Br. 3, 27. If this were true, all 501(c)(3) charities would be state actors because corporations seeking federal tax exemption must be established, no different than STOs, to serve one of several purposes set out in 26 U.S.C. § 501(c)(3) (religious, charitable, scientific, testing for public safety, literary, educational, or prevention of cruelty to children or animals, etc).

The relevant private choices are those involved in the particular program under review. Here, private decisions are made by taxpayers, the 501(c)(3) STOs, and parents. These multiple levels of private choice provide significantly more attenuation between the government and the benefitted religious institutions than in any other private choice program upheld by this Court, all of which provided a single layer. *See Zelman*, 536 U.S. at 639; *Zobrest v. Catalina Foothills School District,* 509 U.S. 1, 10 (1993); *Witters*, 474 U.S. at 488; *Mueller*, 463 U.S. at 399.

Respondents' argument that only parental choice matters is based partly on their errant claim that STOs and taxpayers are not beneficiaries of Arizona's tax credit, while parents are. Resp. Br. 58. In addition to being wrong as a matter of fact, Respondents directly contradict themselves in making this claim. Respondents treated STOs and taxpayers as beneficiaries when they wanted to paint a skewed picture of the program in which STOs "get rich" (because they are permitted to keep 10% of donations),[5] and taxpayers get to donate

[5] In making this errant argument about STOs, Respondents also resort to unjustly maligning ACSTO. Respondents complain that ACSTO is "withholding up to 10%" of the donations they receive. Resp. Br. 10. But the law permits a 10% withholding for operating expenses, and, moreover, ACSTO has awarded over 92% of its donations as scholarships (rather than the statutory mandate of 90%) over its lifetime. *See* ACSTO Homepage, *www.acsto.org*. Respondents claim that ACSTO pays "exorbitant salaries" to family and friends. Resp. Br. 10. This is untrue, and the article they cite does not even support this claim. ACSTO does have four employees (fewer than several smaller STOs) which is certainly unsurprising as a 501(c)(3) with a $10 million dollar budget requires several

money "for free."[6] *Id.* at 5, 10. But now, when these arguments do not serve their Establishment Clause purposes, they claim that STOs and taxpayers "are not program beneficiaries." *Id.* at 58. It is also important to note that the same parental choice so critical to a finding of constitutionality in *Zelman* is also present here: no money goes to any private school without a parent choosing that school and applying for a scholarship.

E. Respondents Erroneously Claim That STOs Engage In Religious Discrimination.

It is undisputed that some STOs, like Petitioner ACSTO, support only religious schools; some STOs, like Respondent in support of Petitioners Arizona School Choice Trust, support both religious and

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employees to operate. Further, the salaries ACSTO pays are more than reasonable and comprise under 2% of its annual budget. Respondents claim that there is a lack of emphasis on financial need in awarding scholarships, and that taxpayers allegedly "swap" donations. Resp. Br. 9. But ACSTO's most important factor in awarding scholarships has always been financial need and it has never allowed "swapping." Respondents' accusations and insinuations about ACSTO are mere unsubstantiated distractions.

[6] Respondents claim that donating money to an STO and claiming the credit is not charity because it costs the taxpayer nothing. Resp. Br. 26-27. But the donation does cost the taxpayer money, even if it reduces his tax liability. Further, Respondents' definition of charity is far too cramped, and they cite nothing to support it. Charity is "benevolent goodwill toward or love of humanity; generosity and helpfulness, especially toward the needy . . . ." *Merriam Webster's Collegiate Dictionary* 208 (11th Ed. 2003). Donations to 501(c)(3) corporations, including STOs, certainly fit the bill.

nonreligious schools; and other STOs support only nonreligious schools. ACSTO Br. 5-6. Respondents misrepresent these facts by claiming that STOs which support only religious schools award scholarships "to children . . . on the basis of their religion." Resp. Br. 12. This "discrimination" by STOs, which is a linchpin of Respondents' case, is simply made up.

STOs do not discriminate on the basis of any criteria. They merely associate with private schools of broad stripes, who then decide which students attend. Respondents essentially ask this Court to strike the program because it involves religiously-affiliated institutions, along with nonreligious ones. But this Court has said that a "fixed principle in this field is our consistent rejection of the argument that 'any program which in some manner aids an institution with a religious affiliation' violates the Establishment Clause." *Mueller*, 463 U.S. at 393. And here, government money is not even involved.

F. Respondents Are Wrong That Parents Are Limited In Obtaining Scholarships To Nonreligious Schools.

Respondents also errantly claim that there is not enough scholarship money available for parents seeking scholarships to nonreligious schools. Resp. Br. 52-53.[7] The facts not only do not support this

[7] Respondents' argument here is based partly on their mistaken view that to satisfy the Establishment Clause the program must "guarantee" that a parent can obtain a scholarship. Resp. Br. 52. But no program upheld by this Court ever guaranteed

claim, but actually show that parents seeking a religious education are more likely to encounter this problem.

Consider the fact that, over the life of the program, the percentage of STOs with no religious affiliation has increased. In 1998-99, when reporting started, 6 of 15 STOs (40%) had no religious affiliation (JA 87-88); in 1999-2000, 20 of 34 STOs (60%) had no religious affiliation (*id.*); and in 2008, 30 of 55 (55%) had no religious affiliation, ASCT Pet. App. 223-24. Thus, within just a year of operation, and from that point forward, STOs with no religious affiliation have constituted a majority of the STO market, even though religious private schools constitute 75% of all private schools. *See* Vicki Murray and Ross Groen, *Survey of Arizona Private Schools: Tuition, Testing, and Curricula*, at 1, Jan. 5, 2005, at 1, www.goldwaterinstitute.org/article/1299.

In addition, the percentage of donations to religiously-affiliated STOs has significantly decreased over the life of the program, starting at 94% in 1998, and dropping to 67% in 2009. ACSTO Br. 62. Juxtapose this with the fact that only 19% of private school students in Arizona are enrolled in nonreligious schools. Cato Br. 25. This means that parents seeking a nonreligious education for their child are nearly twice as likely to obtain a

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that a scholarship, or other benefit, would be received. *See Zelman*, 536 U.S. at 646 ("families receive tuition aid only if the number of available scholarships exceeds the number of low-income children who choose to participate").

scholarship as parents seeking a religious education.[8]

G. This Court's Direct Aid Cases Are Inapplicable Here.

Respondents mistakenly rely on this Court's "direct aid" cases, arguing that government funds may not be provided to organizations that are "pervasively sectarian" or that use the funds to "inculcate the views of a particular religious faith." Resp. Br. 55. Respondents allege that STOs fit both descriptions.[9]

The "direct aid" cases are inapplicable here for at least two reasons. First, the tax credit does not involve the disbursement of government funds. Second, this Court "has drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649 (internal citation omitted). In the latter category, in which this case falls, it is

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[8] In addition to being factually inaccurate, it is also critical that Respondents' "limitations" argument is constitutionally irrelevant because the "limits" complained of are products of private choice, and thus not actionable under the Establishment Clause. *See* ACSTO Br. 57-60.

[9] Recent decisions of this Court shed doubt on the continued viability of the "pervasively sectarian" concept. *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) ("hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow") (plurality).

constitutionally irrelevant whether government aid goes to "pervasively sectarian" schools or is used to inculcate religious beliefs because private choice breaks the circuit between government and religion. *See, e.g., Zobrest*, 509 U.S. at 13 (parents' choice to place state funded sign language interpreter in "pervasively sectarian" Roman Catholic high school did not violate Establishment Clause). Respondents are relying on the wrong legal test to evaluate Arizona's program.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

DAVID A. CORTMAN
Counsel of Record
ALLIANCE DEFENSE FUND
1000 Hurricane Shoals Rd, NE, Suite D-600
Lawrenceville, GA 30043
(770) 339-0774
dcortman@telladf.org

BENJAMIN W. BULL
GARY S. MCCALEB
JORDAN W. LORENCE
JEREMY D. TEDESCO
ALLIANCE DEFENSE FUND
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

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