

Nos. 09-987, 09-991

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**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.*

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

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**BRIEF FOR RESPONDENTS**

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## QUESTIONS PRESENTED

Arizona has enacted a “school-choice” program that provides scholarships to students at religious and other non-public schools. The scholarships are funded by state income-tax revenues. They are awarded by “school tuition organizations” (STOs) that the Arizona Department of Revenue certifies to receive tax revenues and to award program scholarships from those revenues on the state’s behalf. State tax revenues pay for all of the costs of the program, and STOs have no function other than their participation in the program. STOs are monitored by the Department of Revenue, which may withdraw certification and terminate them for failure to comply with the state’s rules. The STOs that award the majority of the program’s scholarships are religious organizations that discriminate on the basis of religion in selecting scholarship recipients, and that require children to enroll in religious schools in order to receive scholarships.

The questions presented are:

1. Does the program, as thus applied, violate the Establishment Clause?
2. Do Arizona taxpayers, whose taxes support all of the costs of the program, have standing in federal court to challenge its constitutionality?

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## **STATEMENT**

### **Introduction**

This case is an Establishment Clause challenge to an Arizona tuition scholarship program. Plaintiffs (respondents in this Court) are Arizona taxpayers. Their challenge is not to the program statute on its face, but to the statute as applied. The program is funded entirely by state income-tax revenues. Program scholarships are awarded by state-certified and supervised school tuition organizations (STOs). STOs obtain all of the funds they award as scholarships from annual payments made to the STOs by some Arizona income-tax payers, who are credited with the full amount of those payments against the income taxes they owe to the state. Respondents' suit is based on their allegation that the STOs that award most of the program scholarships are religious organizations that award scholarships to children on the basis of religion, and that require children to enroll in religious schools in order to receive scholarships. The controlling issue in the case is whether the program should be treated as a private charitable program, as petitioners contend, or as a government spending program subject to the restrictions of the Establishment Clause.

After the decision below, reversing the dismissal of respondents' complaint, and about four weeks before the Court granted the petitions for certiorari, the Arizona Legislature amended the program statute and enacted a new chapter of the Arizona tax code

that comprehensively regulates the STOs that award the program's scholarships. The revised state law heavily involves the state Department of Revenue in the administration of the program, and makes clear, as respondents allege in their complaint, that the program is not in any respect a program of private charitable giving. Some of the statutory revisions have already gone into effect; the remainder will go into effect on January 1, 2011. The changes were not brought to the Court's attention prior to its grant of certiorari.

Petitioners' briefs on the merits, as well as the briefs of their *amici*, pay little or no attention to the changes in Arizona law. Indeed, some of these briefs base their contention that the program is a private charitable program on a statutory provision that has been changed to say that the STOs that award the program scholarships are *not* charitable organizations. Since respondents seek only prospective relief this Statement, and the Argument that follows, are based on the current Arizona statute.

## **1. Arizona's Program**

In the Ohio school-voucher program upheld by the Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), school vouchers were awarded by the state, on the basis of family income, to the parents of poor inner-city children attending public schools in a failed public-school district. The vouchers were in an

amount intended to permit the parents receiving them to transfer their children to a non-public school, or to an out of district public school. The vouchers were funded through legislative appropriations of money from the state treasury. The program statute, like the Arizona statute in this case, was religiously neutral on its face. Despite that facial religious neutrality, however, had *Zelman's* vouchers been awarded according to the religious preferences of the state officials who awarded them, or had they been awarded on the condition that students attend religious schools in order to receive them, the *Zelman* Court would undoubtedly have held that the *Zelman* program, though constitutional on its face, violated the Establishment Clause as applied.

In Arizona, program scholarships are awarded by “school tuition organizations” (STOs) acting on behalf of the state, that are established solely for the purposes of the state program, that are certified and closely supervised by the Department of Revenue, and that are financed entirely by state income-tax revenues. The STOs that award most of the program’s scholarships are religious organizations that award scholarships on the basis of religion. The questions before the Court are whether the program violates the Establishment Clause, and whether respondent taxpayers have standing to make that claim in federal court.

As defined by the current program statute, STOs are non-profit organizations “established to receive contributions from taxpayers for the purposes of

income tax credits” under the program. A.R.S. § 43-1603(A).<sup>1</sup> In order to serve as an STO, an organization must first “apply to the department of revenue for certification as a school tuition organization,” on a form “prescribed and furnished on request by the department.” *Id.* at § 1602(A). The organization must show that it was “established to receive contributions from taxpayers for the purposes of” the program, and that it “meets the requirements prescribed by” the new chapter of the Arizona tax code that the legislature has recently enacted to regulate STOs. *Id.* at §§ 1603(A), 1602(A). The Department of Revenue must maintain and post on its website “a public registry of currently certified school tuition organizations.” *Id.* at § 1602(B). In 2009, there were 53 STOs, including intervenor-petitioner Arizona Christian School Tuition Organization (ACSTO) and intervenor-respondent Arizona School Choice Trust (ASCT). State Br. App. 18 *et seq.*<sup>2</sup> If these organizations wish to continue to serve as Arizona STOs, they must apply for and receive certification from the Department of Revenue in order to be able to do so. A.R.S. § 43-1602(A).

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<sup>1</sup> A.R.S. §§ 43-1601 *et seq.* contain the new Arizona legislation comprehensively regulating STOs. These provisions are reproduced at App. 1 – App. 17 of petitioner Garriott’s brief on the merits. The brief incorrectly identifies the provisions as A.R.S. §§ 43-1501 *et seq.*

<sup>2</sup> “State Br.” citations are to petitioner Garriott’s brief on the merits.

Arizona STOs award scholarships from revenues they receive from what the program statute describes as taxpayer “voluntary cash contributions.” A.R.S. § 43-1089(A). The statute fixes the maximum annual amount of those “contributions” at \$1,000 for a married couple filing a joint return, and \$500 for an individual taxpayer, A.R.S. § 43-1089(A), with an annual upward adjustment based on the metropolitan Phoenix consumer-price index. *Id.* at § 43-1089(C). Downward adjustments are not permitted. *Id.*

These so-called “contributions,” however, are simply tax payments. The taxpayers who make them receive a 100%, dollar-for-dollar, credit for the amount of the payment against their state income-tax liability. The payments cost the taxpayers who make them nothing. They are “voluntary” only in the sense that taxpayers can choose to pay some of their annual state income-tax obligation to a state-certified STO, rather than to the Department of Revenue. Taxpayers are not entitled to keep any portion of these “contributions,” or to do anything with them except to pay their taxes. That the payment to an STO is a tax payment, not private charity, is underscored by the fact that the payment may be made at the same time that the taxpayer files his or her tax return for the year. For example, if a couple’s tax return, when filed on April 15 after the end of the tax year, shows that the couple owes the state \$1,500 in additional income taxes for the year, they may simply write two checks instead of one – a \$1000 check to an STO, and a \$500 check to the Department of Revenue.

The 100% credits that the statute gives to taxpayers for payments to an STO are different in kind from deductions for charitable contributions that taxpayers may claim under federal and state tax codes. To take a deduction for a charitable contribution, a taxpayer must make a payment of his or her own money – money that the taxpayer would be entitled to keep if no contribution were made – and the payment must be made during the tax year for which the deduction is claimed. The tax deduction serves to subsidize the taxpayer’s contribution to some extent, but the taxpayer in all cases makes a substantial contribution of his or her own funds. The payment to an STO for which an Arizona taxpayer may claim a credit, by contrast, is made entirely with money the taxpayer has no right to keep.

An Arizona STO may do only one thing with the tax revenues it receives from taxpayers. It “[m]ust allocate at least ninety per cent of its annual revenue for [the program’s] educational scholarships or tuition grants,” and use the rest to pay salaries and other administrative expenses. A.R.S. § 43-1603(B)(1). STOs may not use this money for any other purpose. All of the scholarship money that an STO awards, all of the salaries paid to the STO’s officers and employees, and all of the other costs of the STO’s administration, are paid for by state income-tax revenues.

Certified STOs must abide by an extensive set of state regulations. These now include the following:

- Each STO must file an annual report with the Department of Revenue stating the amount of tax revenue received from taxpayers that year, the number of taxpayers that paid that revenue to the STO, the number and amount of the scholarships awarded by the STO that year, the schools those scholarship recipients attend, and the dollar amount of scholarships awarded to the students at each of those schools. A.R.S. § 43-1604.
- Each STO must “consider the financial need of applicants” in making scholarship awards, and report each year the amount of scholarships awarded to students whose family incomes make them eligible for the federal school lunch program, and the dollar amount awarded to students whose family incomes are greater than the school-lunch-program eligibility amount, but not more than 185% of that amount. A.R.S. §§ 43-1603(D)(2), 43-1604(7).
- Each STO must annually report the “names, job titles and annual salaries of the three employees who receive the highest annual salaries from the school tuition organization.” A.R.S. § 43-1604(9).
- STOs may not award scholarships “solely on the basis of donor recommendations,” and must not permit “the exchange of beneficiary student designations in violation of [A.R.S.] § 43-1089, subsection F.” A.R.S. § 43-1603(B)

(3)-(4). The text of a statutorily prescribed Notice of these prohibitions must be posted on the STO's website. A.R.S. § 43-1603(C).

- Each STO must arrange for an annual audit or financial review (depending upon the amount of revenue received) of its finances. The audit or review must be conducted by “an independent certified public accountant licensed in this state” “in accordance with generally accepted auditing standards” or “standards for accounting and review services.” The audit or review “must evaluate the organization’s compliance with the fiscal requirements of this article.” Signed copies of the annual audits or reviews must be submitted to the Department of Revenue within five days of their receipt by the STO. A.R.S. § 43-1605.

These rules are mandatory – not advisory; in addition to initially certifying STOs, the Department of Revenue is required to monitor STO compliance with them. The Department “shall send written notice by certified mail to a school tuition organization if the department determines that the [STO] has engaged in” any prohibited activity or practice. A.R.S. § 43-1602(C). STOs have “ninety days to correct the violation.” *Id.* at § 43-1602(D). If an STO fails to comply within that period, the Department may withdraw the STO’s certification, terminating its existence, and require it to refund donations. *Id.* If terminated, an STO may request administrative

review, and the administrative decision is subject to judicial review. *Id.* at § 43-1602(E).

Many of these new statutory regulations address abuses that had been uncovered in the administration of the Arizona program. The requirement that STOs take financial need into account in awarding scholarships addresses the fact that, although the Arizona program was purportedly enacted to give low-income families the opportunity to send their children to non-public schools, only a small percentage of the program's scholarships were actually being used by children transferring from public to non-public schools; the large majority were being awarded to children already in private or religious school. See Carrie Lips Lukas, *The Arizona Scholarship Tax Credit: Providing Choice for Arizona Taxpayers and Students*, Goldwater Institute Policy Report No. 186 (Dec. 11, 2003) 1, 7-10, reproduced in the J.A. 27-82.

The statutory prohibitions placed on awarding scholarships solely on the basis of taxpayer recommendations, and on taxpayers exchanging student beneficiary designations, address the practice of scholarship "swapping." The Arizona statute has always prohibited a taxpayer from "designat[ing] the taxpayer's contribution to the school tuition organization for the direct benefit of any dependent of the taxpayer." A.R.S. § 43-1089(E). Affluent families with children in private or religious schools realized that they could circumvent this prohibition, and lower their tuition costs, by joining with other families to "swap" "contributions." Each family would make a

cost-free \$1,000 payment to an STO, designating the other family's child to receive a scholarship of that amount. *See Schooling Tax-Credit Scrutiny Often Lags*, The Arizona Republic, Phoenix, Ariz., Sept. 21, 2009, 2009 WLNR 18586189; Pat Kossan and Ronald J. Hansen, *Tuition Aid Continues to Elude the Needy*, *Id.* Dec. 13, 2009, <http://www.azcentral.com/news/articles/2009/12/13/20091213sto-outreach1213.html>.

The requirement that STO salaries be reported annually addresses media reports that officers of large STOs, including petitioner ACSTO, were withholding up to 10% of the tax revenues they receive in order to pay themselves, family members, and friends exorbitant salaries. *See Ryan Gabrielson and Michelle Reese, Private School Credits Rife with Abuse*, The Tribune, Mesa, Ariz., Aug. 2, 2009, 2009 WLNR 14919217. For example, petitioner ACSTO's federal tax return Form 990 for 2009 shows that it had \$10.8 million in revenue for that year. It paid its executive director, who is a member of the state legislature and its only paid employee, a salary of \$96,000, paid a corporation that he controls more than \$390,000 as an "affiliate," and paid more than \$200,000 in "office expenses." <http://www2.guidestar.org/organizations/86-0931047/east-valley-christian-school-tuition-organization.aspx#>. In substantially revising the program, the legislature chose to ignore the fact that religious STOs were using the program to distribute state tax revenues on the basis of their religious preferences, and on the condition that parents send their children to designated religious schools in order to receive scholarships.

## **2. Religious STO's Use of the Arizona Program to Support Religious Education**

It was not evident from the text of the original Arizona statute that STOs would be able use state tax revenues to award scholarships that require children to attend religious schools; the language of one statutory provision seemed to preclude that practice. STOs were originally defined as organizations that provide “educational scholarships or tuition grants to children to allow them to attend any qualified school of their parents’ choice.” A.R.S. § 43-1089(G)(3) (1997). (That language now appears in A.R.S. § 43-1603(A)). The next sentence of that provision, however, said that, “to qualify as a school tuition organization, the charitable organization shall provide educational scholarships or tuition grants to students without limiting availability to only students of one school.” (Similar language now appears in A.R.S. § 43-1603(B)(2)). Whether because of this latter provision or for some other reason, the Department of Revenue has, from the inception of the program, permitted religious STOs to choose scholarship recipients on the basis of religion and/or to award scholarships on the condition that students attend religious schools.

Religious organizations in Arizona take full advantage of the opportunity Arizona thus gives them to use the tax-credit program to turn state income-tax revenues into religious-school scholarships. In 1998, the first calendar year of the program’s operation, there were 16 Arizona STOs. The largest was *amicus*

Catholic Tuition Organization of the Diocese of Phoenix, which awarded scholarships usable only at Diocese schools; the second largest was petitioner Arizona Christian School Tuition Organization, which awarded scholarships usable only at Christian schools; and the third largest was the Brophy Community Foundation, which made scholarship awards only to students at two Phoenix single-sex religious secondary schools. Compl. ¶¶ 11-19. These three STOs were the recipients of 85% of the tax-credited payments made to STOs during 1998. *Id.*

The size of the Arizona program has greatly increased since the complaint in this case was filed in 2000. In 2009, there were 53 STOs that collected more than \$50 million in tax revenue from taxpayers. State Br. App. 18. The two largest were petitioner ACSTO and *amicus* Catholic Tuition Organization of the Diocese of Phoenix, which collected more than \$10 million and more than \$9 million respectively. The fifth largest was *amicus* Catholic Tuition Organization for the Diocese of Tucson, and the sixth largest was *amicus* Jewish Tuition Organization. *Id.* at App. 30. These four religious STOs received more than half of the more than \$50 million in tax payments received by all Arizona STOs in 2009. That money will be used to distribute government scholarship aid to children who are chosen by the STOs on the basis of their religion and/or on the condition that they attend a religious school. If required by the school, moreover, these scholarship students must participate in all the religious activities of the religious school they attend.

Arizona’s religious STOs do not hide their practice of using Arizona income taxes to provide revenue for their religious educational programs. They advertise the practice. Their websites, for example, explain that the tax-credit statute was designed to benefit religious education and to tell parishioners and others that they can use the tax-credit program for that purpose, at no cost to themselves. The website of intervenor-petitioner Arizona Christian School Tuition Organization, for example, describes ACSTO’s goal as being “to further Christian education by *effectively implementing the provisions of* [A.R.S. § 43-1089] *for the benefit of Christian school students and their families.*” ACSTO Home Page, <http://acto.org> (last visited Sept. 11, 2010) (emphasis added). The website urges taxpayers “looking for new ways to support Christian education” to do so by “*taking advantage of Arizona’s unique opportunity to receive a dollar-for-dollar credit against their Arizona state income tax.*” *Id.* (emphasis added). The website of the Jewish Federation of Greater Phoenix (JFGP), explains that, “[w]ith Arizona’s scholarship tax credit, you can send children to our community’s Jewish day schools and it won’t cost you a dime!”<sup>3</sup> JFGP Ways to

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<sup>3</sup> JTO’s *amicus* brief in support of certiorari made exactly the opposite assertion. It contended that the court of appeals below “*erred* in suggesting that [a] tax-credit eligible contribution to an STO costs the taxpayer nothing.” Brief for Jewish Tuition Organization et al. as Amicus Curiae in Support of Petitioners, Nos. 09-987, 09-988, 09-991 (Mar. 24, 2009) 12, n.7 (emphasis added).

Give, Jewish Tuition Organization, <http://phoenix.ujcfedweb.org/page.aspx?ID=53899> (last visited Sept. 11, 2010) (emphasis added). The Chabad Tuition Org. (CTO) website asks taxpayers to “imagine giving *Tzedakah [charity] with someone else’s money. . . . Stop Imagining, thanks to Arizona tax laws you can!*” CTO Donation Page, [http://www.chabadaz.com/templates/articlecco\\_cdo/aid/105378/jewish/Arizona-School-Tax-Credit.htm](http://www.chabadaz.com/templates/articlecco_cdo/aid/105378/jewish/Arizona-School-Tax-Credit.htm) (last visited Sept. 11, 2010) (emphasis added). The websites and mailings of most of the other Arizona religious STOs make identical or similar assertions that the Arizona program can be used so that “someone else” – other Arizona taxpayers – will be taxed to pay for the religious education promoted by the STO. *See, e.g.*, Christian Scholarship Foundation Page, <http://www.pcssf.org> (last visited Sept. 11, 2010) (“Would you like to participate in a win-win-win situation? Christian Scholarship Foundation can put you in that situation! You win because *you can take a direct tax credit . . . off your Arizona income taxes by diverting that money to CSF.*”) (emphasis added).

### **3. Proceedings Below**

The complaint in this case was filed in February, 2000. It named the then-Director of the Arizona Department of Revenue as defendant. Respondents alleged that they were Arizona taxpayers and that the Arizona program was diverting state income tax revenues from the state’s general fund in violation of the Establishment Clause. The Director, represented

by Arizona's Attorney General, did not question respondents' standing to sue, but moved to dismiss on the basis of the federal Tax Injunction Act and principles of federal-state comity. The district court granted the motion. *Winn v. Hibbs*, 361 F.Supp. 2d 1117 (D. Ariz. 2005). The court of appeals reversed and remanded, and this Court affirmed. *Hibbs v. Winn*, 542 U.S. 88 (2004). Justice Kennedy's dissenting opinion for four members of the Court contended that the Tax Injunction Act precluded federal jurisdiction in this case. Neither that opinion, however, nor Justice Ginsberg's opinion for the Court, expressed doubt regarding respondents' standing to invoke federal jurisdiction. The state continued not to question respondents' standing, and the United States, which participated in this Court as *amicus* supporting the state, did not suggest any doubt about respondents' standing in either its brief or its oral argument.

On remand, the district court granted motions by petitioner ACSTO and respondent ASCT to intervene as defendants. *Winn*, 361 F.Supp. 2d at 1117. It then granted ASCT's motion to dismiss the complaint for failure to state a claim upon which relief could be granted. *Id.* Unlike the state, the intervenors challenged respondents' standing. The district court assumed, however, "that Plaintiffs have standing."<sup>4</sup>

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<sup>4</sup> The district court also assumed that "the case is not barred by *res judicata*." *Winn*, 361 F.Supp. 2d at 1119. The *res judicata* defense was based on the fact that the Arizona Supreme Court had upheld the facial validity of the Arizona statute shortly after its enactment. See *Kotterman v. Killian*, 193 Ariz. 273 (1999). In *Hibbs*, however, the Court explained

(Continued on following page)

*Id.* at 1119. The district court’s decision to dismiss was based on its description of the Arizona program as one in which STOs use taxpayers’ “voluntary cash contributions to provide scholarships and tuition grants.” *Id.* at 1118. The court explained that it believed that taxpayers using the Arizona tax credit “exercise a choice in how *their money . . .* is spent.” *Id.* at 1121 (emphasis added). Respondents’ complaint, in the court’s view, did not “implicate the Establishment Clause” because taxpayers and STOs make “private choices” about how to use that money. *Id.* at 1122.

The court of appeals reversed. *Winn v. Arizona Christian School Tuition Organization*, 562 F.3d 1002 (9th Cir. 2009). In the court of appeals, the state continued to take the position “that respondents do have standing to make their challenge under this Court’s precedents.” Joint Motion of Petitioner Gale Garriott and the United States for Divided Argument p. 4, filed on Sept. 9, 2010. The contention that respondents lack standing was, however, pressed by the two intervening STOs. *Winn*, 562 F.3d at 1007. The court of appeals rejected that contention because respondents “have alleged that the state has used its taxing and spending power to advance religion in violation of the Establishment Clause.” *Id.* at 1008. The court relied on this Court’s decisions in *Flast v. Cohen*, 392 U.S. 83 (1968), *Bowen v. Kendrick*, 487

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that “*Kotterman*, it is undisputed, has no preclusive effect on the instant *as-applied* challenge to § 43-1089 brought by different plaintiffs.” *Hibbs*, 542 U.S. at 95 (emphasis added).

U.S. 589 (1988), and *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006), which had recognized “‘a narrow exception to the general constitutional prohibition against taxpayer standing.’” *Id.* (quoting *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 602 (2007), discussing *Flast*, 392 U.S. at 102-103). The challenge to the Arizona program fell within that exception because Arizona’s tax credit, “a powerful legislative device for directing money,” constituted a use of Arizona’s taxing and spending power. *Id.* at 1009.

The court rejected the argument that the *Flast* exception was inapplicable because the tax revenue used for scholarships in the Arizona program “does not pass through the state treasury.” *Id.* It explained that, because tax credits reduce the revenues entering the treasury, they constitute “‘a charge made upon the state’” *id.* at 1009 (quoting *Comm. For Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 791 (1973)) – a “‘form of [state] subsidy that is administered through the tax system.’” *Id.* at 1009 (quoting *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 236 (1987) (Scalia, J., dissenting)). If taxpayer standing were to depend on whether state funds were diverted *before* reaching the treasury, rather than spent *after* entering the treasury, the law would be making an “artificial distinction [.]” *Winn*, 562 F.2d at 1009.

The fact that the religiously discriminatory decisions that were the basis of respondents’ Establishment Clause claim were decisions made by Arizona

taxpayers making payments to STOs and by the STOs that receive the payments, rather than by the state legislature, also did not defeat respondents' standing. *Id.* at 1010. The court explained that *Bowen*, for example, had held that “taxpayers have standing to challenge a legislature’s exercise of its taxing and spending power *even when the legislature does not use that power to directly fund religious organizations, but instead uses the power to authorize third parties to fund such organizations.*” *Id.* (emphasis added). Recognition of taxpayer standing in this case was also consistent with the fact that this Court “has repeatedly decided Establishment Clause challenges brought by state taxpayers against state tax credit, tax deduction and tax exemption policies, without ever suggesting that such taxpayers lacked Article III standing.” *Id.*

On the Establishment Clause merits, the court considered both the purpose and effect of the Arizona program. With regard to purpose, it was significant that, although the Arizona program statute could have been interpreted to require STOs to distribute scholarships without reference to religion, “in practice, STOs are permitted to restrict the use of their scholarships to use at certain religious schools.” *Id.* at 1012. If that allegation were proved, it “could belie defendants’ claim that Section 1089 was enacted primarily” for a secular purpose. *Id.* With regard to the effect of the Arizona program, the court explained that respondents allege that many of Arizona’s STOs are religious organizations that “exist to promote the

funding of religious education.” *Id.* at 1013. Taxpayers had “channel[ed] a disproportionate amount of government aid to [these] STOs, which in turn limit their scholarships to use at religious schools.” *Id.* If respondents’ allegations were true, “a reasonable observer could . . . conclude that the aid reaching religious schools under this program ‘carries with it the *imprimatur* of government endorsement.’” *Id.* at 1013-1014 (quoting *Zelman*, 536 U.S. at 655). The court held that respondents should be given the opportunity, on remand, to prove the truth of their allegations. *See id.* at 1007.

The court of appeals specifically addressed the contentions, made here by ACSTO and its *amici*, that the Establishment Clause is not violated by the Arizona program because STOs are “no different from other nonprofit, religious institutions that are funded through tax-deductible contributions;” and because “government aid reaches religious schools only as a result of the genuine and independent choices of private individuals.” *Winn*, 562 F.2d at 1014 (quoting *Zelman*, 536 U.S. at 649). The first of these contentions was incorrect because Arizona’s STO scholarships did not involve “donations of individual wealth” and were not examples of “charitable giving.” *Id.* at 1015. With regard to the contention that the Arizona program was valid because it was a program of numerous private choices, the court of appeals explained that the constitutionally relevant private choice was the private choice of *parents* who receive vouchers “*on neutral terms, with no reference to*

religion,” not the choices of the taxpayers that “contribute” to STOs and of the STOs that use those contributions to award program scholarships. *Id.* at 1017 (quoting *Zelman*, 536 U.S. at 653) (emphasis in original).

There were eight dissents from the denial of petitions for rehearing en banc. *Winn v. Arizona Christian School Tuition Organization*, 586 F.3d 649 (9th Cir. 2009). Judge O’Scannlain’s opinion for the dissenters did not question respondents’ standing to sue. In disagreeing with the panel’s conclusion that respondents’ complaint stated an Establishment Clause claim, the dissent relied on its characterization of the Arizona program as one in which “individuals voluntarily . . . contribute money” to STOs and in which “the state’s involvement stops with authorizing the creation of STOs and making tax credits available” so that the program is thereafter “utterly out of the state’s hands.” *Id.* at 659, 660, 662. As we have explained in describing the revised structure of the Arizona program, that characterization, if arguably correct at the time it was made, is no longer even remotely plausible. On the basis of that characterization, however, the dissent concluded that the Establishment Clause was not violated because the Arizona program “in no way induces, encourages, or promotes private parties to aid religion.” *Id.* at 669.

The court of appeals panel filed an opinion concurring in the Circuit’s decision not to rehear the case en banc. It explained that the dissent “fails to address the crucial difference between the Ohio voucher

program upheld in *Zelman* and the Arizona Department of Revenue's application of Section 1089." *Id.* at 651. *Zelman* established that, in order to comply with the Establishment Clause, a voucher program must be "one that grants *access* to benefits without regard to religion." *Id.* at 652 (emphasis in original). The Arizona program, by contrast, "neither makes scholarships available to parents on a religiously neutral basis nor gives them a true private choice as to where to utilize the scholarships." *Winn*, 586 F.3d at 658.



### **SUMMARY OF ARGUMENT**

The Arizona tuition tax-credit program challenged by respondents in this case is a government spending program, not a program of private charity. The taxpayers who make payments to STOs receive a 100%, dollar-for-dollar, credit for the full amount of those payments toward satisfaction of their state income-tax obligation. They do not engage in charity because the payments cost them nothing. The program's scholarships are funded entirely by state income-tax revenues, the scholarships are all awarded by organizations established solely for that purpose, the costs and expenses of those organizations are entirely paid with state funds, the organizations must be certified by the state Department of Revenue in order to participate in the program, and the Department is required to monitor the finances and activities of the organizations to ensure that they comply with the state's extensive regulations, and

may terminate the existence of the organizations if they do not follow those rules. The financial impact of the program on the state fisc, and therefore on the state's taxpayers, is equivalent in every relevant way to the fiscal impact of a program funded through direct legislative appropriations. Petitioners' arguments that respondents do not have standing to sue, and that the program complies with the Establishment Clause, are based on their mischaracterization of the program as a program of private charity.

Once the character of the Arizona program as a government spending program is understood, it is clear both that respondents have standing as taxpayers to challenge it, and that the program violates the Establishment Clause. In *Flast v. Cohen*, 392 U.S. 83 (1968), this Court recognized a narrow exception to the general doctrine that federal and state taxpayers do not have standing in federal court to challenge the constitutionality of state or federal governmental spending programs. *Flast* holds that taxpayers have standing when they claim that legislatively-authorized government spending programs violate the Establishment Clause. Since *Flast*, this exception has been applied to taxpayer Establishment Clause challenges to "tax expenditure" programs – programs of tax deductions, tax credits, tax exclusions or tax exemptions – as well as to Establishment Clause challenges to direct legislative appropriations.

The Court has adjudicated several important tax-expenditure cases since *Flast* was decided, including its decision in this case four years ago. It has done so

without any doubt being expressed by the Court, by any member of the Court, by any of the state or federal litigants involved in these cases, or by their *amici*, that the taxpayer plaintiffs in the case lacked standing. Litigators and lower federal courts have repeatedly relied on this course of decisions in adjudicating the constitutional merits of state tax-expenditure programs in suits brought by state taxpayers. In the last four years, the Court has twice reaffirmed the *Flast* exception and defined the exception in language that shows that it is applicable to the present case. Respondents do not ask the Court to expand the *Flast* exception in any respect. Petitioners and their *amici*, by contrast, ask the Court to overturn forty years of consistent taxpayer-standing practice in the lower federal courts. No recent change in factual or jurisprudential circumstances – or constitutional doctrine – justifies taking that radical step.

The Arizona program violates the Establishment Clause. In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Court, in upholding an Ohio school-voucher plan, permitted states to spend state funds to pay for religious elementary or secondary school education. It did so because the state financial aid program in that case was supported by extremely strong educational needs, because the program awarded the aid to parents on a completely religiously-neutral basis, and because it gave parents receiving vouchers complete freedom to use them at the school of their choice. The Arizona program does not

satisfy any of these three criteria. It is not supported by any strong educational need; it lacks religious neutrality because the majority of its state-funded scholarships are awarded by religious organizations that decide which children will receive scholarships, and in what amount, on the basis of the child's religion; and it does not offer parents free choice because most of its scholarships require parents to enroll their children at a religious school in order to receive a scholarship.

*Zelman's* requirement that state scholarship aid be awarded to parents and children on a religiously neutral basis is an example of a broader constitutional rule that prohibits state or federal government benefits from being distributed or disbursed to the beneficiaries of governmental benefit programs on the basis of religion, race, or any other form of discrimination which the government is prohibited from practicing. The beneficiaries of the Arizona program are Arizona parents and children – not the taxpayers who pay their taxes to STOs or the STOs that award scholarships from those payments. The fact that “contributing” taxpayers and STOs exercise free choice in Arizona regarding which parents will receive scholarships does not satisfy the constitutional requirement that the program's beneficiaries have access to state-funded scholarships on a religiously neutral basis. Under the Arizona program, parents may be denied state scholarship aid because of their religion, or because they refuse to send their child to a religious school. The Establishment Clause does not

permit government benefits to be restricted in that manner.

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**ARGUMENT**

**I. THE ARIZONA TAX-CREDIT PROGRAM IS A GOVERNMENT SPENDING PROGRAM, FUNDED ENTIRELY BY GOVERNMENT REVENUES AND ADMINISTERED BY ORGANIZATIONS ACTING ON THE STATE'S BEHALF THAT ARE CERTIFIED AND CLOSELY SUPERVISED BY THE STATE DEPARTMENT OF REVENUE. IT IS NOT A PROGRAM OF PRIVATE CHARITY.**

Whether respondent taxpayers have standing to sue in this case and whether, if they do, they have stated a claim that the Arizona program violates the Establishment Clause, depends upon whether the program is considered to be a program of private charity, or a government spending program. Petitioners and their *amici* assert that the program is a program of private charity – a program in which Arizona taxpayers voluntarily contribute money (for which they get an ordinary tax benefit) to charitable organizations, some of which are religious, that use the money to award scholarships to deserving students. As *amicus* United States understands the program, for example, it is one that “merely provides a beneficial tax consequence for private citizens who donate their own funds to STOs of their own choosing.” Brief for United States as Amicus Curiae

Supporting Petitioners Nos. 09-987, 09-991 (Aug. 6, 2010) (“U.S. Br.”). Petitioner ACSTO describes the program as one in which “state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals.” ACSTO Br. 8. Arizona’s Attorney General likens the program to “other tax credit and deduction programs that allow taxpayers to choose to contribute to religious organizations.” State Br. 2. Respondent ASCT, supporting petitioners, describes the program as one containing “multiple layers of true private choice” that “merely encourages taxpayers to donate to privately created charities in order to benefit other people’s children.” ASCT Br. 8-9.

If those were accurate descriptions of the Arizona program, the Establishment Clause would have no bearing on this case, and respondents could not invoke federal jurisdiction to claim that it did. One would wonder what the court of appeals panel could possibly have had in mind in reversing the dismissal of respondents’ complaint.

The Arizona tax-credit program, however, is clearly not a program of private charity. It is a government spending program that distributes state tax revenues in order to serve the state’s purpose of enhancing school-choice opportunities for Arizona parents. To the outside observer, the program may *look* like private charity. Taxpayers write checks to organizations with charitable-sounding names that use the money to give scholarships to children. Charity, however, involves giving something of *your own*, at

some cost to yourself, for a charitable purpose. That does not happen under the Arizona program. When taxpayers write checks to STOs, they are not donating their “own funds;” they are paying their state income taxes. Their choice to pay that money is not voluntary. A check for the amount due in taxes must be written either to the Department of Revenue or to an STO. The program is not funded by private money; it is entirely funded by state income-tax revenues. As religious STOs repeatedly explain on their websites, taxpayers who write checks to religious STOs support religious education “with other people’s money,” not their own. STOs are not charities. They disburse no private contributions or money of their own. They serve one purpose, and one purpose only – to receive and disburse state income-tax revenues to further the state’s policy of promoting parental school-choice.

The Arizona program is a legislatively established state spending program. It is an extremely unusual state spending program, in which the state gives some of its citizens the power to spend the state’s tax revenue to further the religious purposes of themselves and of the STOs to which they pay their taxes. But it is nevertheless a state spending program that must comply with the Establishment Clause.

**A. Taxpayers Who Make “Voluntary Contributions” to STOs Are, in Reality, Paying Taxes that They Owe to the State. They Contribute None of Their Own Funds to the Scholarship Program.**

When originally enacted, it was possible to contend that taxpayers who made payments to STOs contributed at least some of their “own funds” to the program. At that time, taxpayers received a tax credit for their payments to STOs only if the payment were made “during the taxable year.” A.R.S. § 43-1089(A). Taxpayers therefore had to make a payment of their own funds to an STO by the end of a tax year, and would be reimbursed later, when filing their tax return for that year. Arguably therefore, the taxpayer lost the benefit of the interest that the taxpayer otherwise might have earned on that money in the interim.

It is no longer plausible, however, if it ever was, to say that taxpayers make payments to STOs with their own money. Arizona legislation now provides that, if a payment is made to an STO “on or before the fifteenth day of the fourth month following the close of the taxable year” – by April 15 of the next year in most cases – that payment is “considered to have been made on the last day of that taxable year.” *See* A.R.S. § 43-1089(G), State Br. App. 3. A taxpayer thus need never spend a penny of anything that can possibly be described as his or her “own funds” to make a voluntary “cash contribution” to an STO. Unless one believes that tax payments to the IRS are

voluntary “donations” of one’s own funds, it cannot seriously be contended that taxpayer payments to STOs are payments by taxpayers who “donate their own funds to STOs of their own choosing.” They donate *the state’s funds* to STOs of their own choosing.

**B. STOs Are Creatures of the State, Established to Administer a State Spending Program on the State’s Behalf, and Supervised by the State to Make Sure They Do So.**

The original version of the Arizona statute defined STOs as “*charitable organization[s]*.” A.R.S. § 43-1089 (G)(3) (emphasis added). Arizona law, however, now defines STOs as “*nonprofit organization[s]*.” A.R.S. § 43-1602(A) (emphasis added), reproduced at State Br. App. 5. The new definition of an STO is accurate; the prior definition was, at best, seriously misleading. Arizona’s STOs are organizations established solely to serve a state function. They must be certified by the state to distribute state-funded benefits for the state’s purposes according to state rules under the state’s close supervision. That is all that they do. Everything the STOs do is paid for by state income-tax revenues.

**C. The Arizona Program Has the Same Fiscal Impact on Arizona Taxpayers as Do Direct Legislative Appropriations of Funds.**

Petitioner ACSTO rests its conclusion that respondents lack standing as taxpayers on the proposition that “[r]espondents do not allege . . . that the State has extracted and spent their tax dollars under this program.” ACSTO Br. 2. The Arizona program, however, may be cost free for the taxpayers who contribute to it, and cost free as well for the STOs that disburse scholarships, but it is definitely not cost free for the state’s other taxpayers. The program currently costs them more than \$50 million a year. We can cite no better authority for that conclusion than petitioner Arizona Department of Revenue’s official explanation of the effect of the tuition tax credit on the state’s fisc. The Department is required by law each year to

“issue a written report to the governor and legislature detailing the approximate costs in lost revenue for all state tax expenditures in effect at the time of the report. For the purpose of this paragraph, ‘*tax expenditure*’ means any tax provision in state law which exempts, in whole or in part, any persons, income, goods, services or property from the impact of established taxes including deductions, subtractions, exclusions, exemptions, allowances and *credits*.”

A.R.S. § 42-1005(A)(4) (emphasis added).

The Department's Report for 2009 explains the effect of tax credits on Arizona's finances as follows:

Tax expenditures are provisions within the law (exemptions, exclusions, deductions *and credits*) designed to encourage certain kinds of activity or to aid taxpayers in certain categories. Such provisions, when enacted into law, result in a *loss of tax revenues*, thereby reducing the amount of revenues available for state (as well as local) programs. In effect, the *fiscal impact of implementing a tax expenditure would be similar to a direct expenditure of state funds*. This report provides a list of tax expenditures, plus, whenever possible, details the approximate costs of exempting certain types of income, goods, services or property from their respective tax statutes.

The Revenue Impact of Arizona's Tax Expenditures Fiscal Year 2008/09 at 1, *available at* <http://www.azdor.gov/reports/research/taxexpenditures.aspx> (emphasis added).

The Department's Report goes on to explain that "[a] tax credit differs from an exemption, subtraction or deduction in that it directly reduces tax liability, not taxable income. A \$100 deduction, for example, would reduce tax liability by, at most, \$4.54 (\$100 times the maximum tax rate of 4.54%). On the other hand a \$100 credit reduces tax liability by the full \$100." *Id.* at 45. The 2009 Report contains a chart listing the number of claimants of each Arizona tax credit that year, and the amount of the expenditure

of state funds caused by each credit that year. The chart in the 2009 Report states that 76,065 taxpayers claimed the “private school tuition organization credit,” causing the expenditure of \$54.30 million of state funds. *Id.* at 48.

## II. RESPONDENTS HAVE STANDING TO SUE.

### A. For Forty Years, the Court Has Consistently Allowed State Taxpayers to Bring Establishment Clause Challenges to State Tax-Expenditure Programs.

This is not the first time this case has been before the Court. Six years ago, in *Hibbs v. Winn*, 542 U.S. 88 (2004), the Court rejected the state’s claim that there was no federal jurisdiction in this case. In *Hibbs*, the issue was whether respondents’ suit was barred by the federal Tax Injunction Act, 28 U.S.C. § 1341. It is clear from the text of that Act that it precludes state taxpayers from suing in federal court to claim that a state tax levied on *them* is unconstitutional (unless there is no adequate remedy at state law). The question in *Hibbs* was whether the Act also barred federal jurisdiction in a case where state taxpayers – the respondents in this case – claim that tax credits, deductions or exemptions given to *other* taxpayers are unconstitutional. The Court held, five to four, that federal jurisdiction could be invoked in such cases. Four members of the Court believed that the Act was a jurisdictional bar.

Both the Tax Injunction Act jurisdictional objection raised by the state in this case in *Hibbs*, and the lack of standing objection now asserted by ACSTO, concern the ability of “third-party” state taxpayers to challenge the constitutionality of a state’s tax treatment of other taxpayers. In *Hibbs*, the question was whether respondents’ third-party status exempted them from the Tax Injunction Act’s jurisdictional bar. ACSTO now argues that that same status deprives respondents of standing to sue. In light of the close relationship between the two jurisdictional questions, which are essentially mirror images of each other, one would have expected that either the state or the dissenters or *Hibbs* would have raised standing as an alternative basis for dismissing the case. Neither the state or the *Hibbs* dissenters, however, nor the United States, which participated in *Hibbs* as *amicus* supporting the state, mentioned the issue. Nor did the *Hibbs* majority. The failure of any Justice or litigant in *Hibbs* to question whether respondents have standing in this case cannot have been caused by the fact that they all were unaware that Article III contains a standing requirement. That failure, instead, was almost certainly due to the fact that it was clear to everyone involved in the case that state taxpayers have standing in cases like this one.

In *Flast v. Cohen*, 392 U.S. 83 (1968), the Court held, as an exception to the general absence of taxpayer standing to challenge the constitutionality of federal spending programs, that federal taxpayers

had standing to bring an Establishment Clause challenge to the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 241a *et seq.*, 821 *et seq.* The gravamen of plaintiffs' complaint in *Flast* was that federal funds appropriated under the Act were financing religious educational programs at religious schools. The Act established a program of federal financial assistance to local educational agencies in order to support the education of the children of low-income families. It authorized federal payments to be "made to state educational agencies, which pass the payments on in the form of grants to local educational agencies." *Flast*, 392 U.S. at 86. The local agencies, in turn, were to provide educational aid to "private elementary and secondary schools." *Id.* (citations omitted). Plaintiffs' claim was based on their allegation that state and local educational agencies were using the Act to give financial aid to "religious and sectarian schools." *Id.* at 87.

The Court held that the taxpayer plaintiffs in *Flast* had standing because they could "demonstrate the necessary stake as taxpayers in the outcome of the litigation." *Id.* at 102. Standing existed because plaintiffs alleged the unconstitutionality of the exercise "of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution," rather than "an incidental expenditure of tax funds in the administration of an essentially regulatory statute," and because they further alleged that "the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of [that] power

and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.” *Flast*, 392 U.S. at 102-103.

During the four decades between *Flast* and *Hibbs*, the Court decided several important Establishment Clause cases brought by federal and state taxpayer plaintiffs. Some of these involved, as had *Flast*, legislative spending via legislative appropriations. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Bowen v. Kendrick*, 487 U.S. 589 (1988). Others, however, involved, as does the present case, legislative spending through legislatively enacted tax expenditures, such as tax deduction, tax credit and tax exemption programs. See, e.g., *Mueller v. Allen*, 463 U.S. 388 (1983) (tax deduction); *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) (tax deduction and credit); *Walz v. Tax Commission*, 397 U.S. 664 (1970) (tax exemption). None of the parties in those cases, and none of the Court’s opinions in them, questioned the taxpayer plaintiffs’ standing. It seems relevant in this connection that Article III standing issues – including taxpayer standing issues – were a recurring and important feature of the Court’s jurisprudence during this period. See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *U.S. v. Richardson*, 418 U.S. 166 (1974).

The Court has addressed taxpayer standing twice since *Hibbs*. Neither of these decisions creates doubt about respondents’ standing in this case. In

*DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006), the Court held that state taxpayers did not have standing to challenge a state franchise-tax credit as a violation of the Commerce Clause. The dispositive factor was that the taxpayer plaintiffs claimed a violation of the *Commerce Clause*, whereas “‘only the Establishment Clause’ has supported federal taxpayer suits since *Flast*.” *DaimlerChrysler Corp.*, 547 U.S. at 347 (citations omitted). Chief Justice Roberts’ opinion for a unanimous Court reaffirmed that, in Establishment Clause cases, “‘we have consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing.’” *Id.* (quoting *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988)). *DaimlerChrysler* described the *Flast* exception as establishing that “‘a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of’ the Establishment Clause.” *Id.* (quoting *Flast*, 392 U.S. at 105-106).<sup>5</sup>

The second post-*Hibbs* case was *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007). *Hein* was a federal-taxpayer Establishment Clause challenge to White House conferences that plaintiff taxpayers alleged were “designed to promote, and had the effect of promoting, religious community groups

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<sup>5</sup> *DaimlerChrysler* was a state taxpayer challenge, whereas *Flast* was brought by federal taxpayers. The *DaimlerChrysler* opinion explained that “[w]e have likened state taxpayers to federal taxpayers’ for purposes of taxpayer standing.” *Id.* at 345.

over secular ones.” *Hein*, 551 U.S. at 596. *Hein* held that these taxpayers did not have standing. In doing so, all but two members of the Court again adhered to *Flast*. Justices Scalia and Thomas concurred in the result on the ground that *Flast* should be overruled – the first time that any Justice had taken that position since *Flast*. *Id.* at 637. Justice Alito’s plurality opinion, for himself, Chief Justice Roberts and Justice Kennedy rejected standing while stating that “[w]e do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it.” *Id.* at 615 (emphasis added). *Hein*’s four dissenters believed that the *Flast* exception applied. Justice Kennedy’s concurring opinion appeared to summarize the conclusion of the Court as a whole regarding the *Flast* exception: “[T]he result reached in *Flast* is correct and should not be called into question.” *Id.* at 616.

In describing its understanding of the scope of the *Flast* exception, the *Hein* plurality stated, as had the unanimous Court in *DaimlerChrysler*, that the exception applies when a taxpayer plaintiff shows “that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power.” *Id.* at 602 (quoting *Flast*, 392 U.S. at 102-103). The plurality believed that the *Hein* plaintiffs did not satisfy that standard because they did “not challenge any specific congressional action or appropriation; nor [did] they ask the Court to invalidate any congressional . . . program as unconstitutional.” *Id.* at 605. Their challenge was instead a challenge to “discretionary Executive Branch expenditures” that “were not expressly authorized or mandated by any specific

congressional enactment” and thus “not directed at an exercise of congressional power.” *Hein*, 551 U.S. at 608.

**B. The *Flast* Exception Applies to the Present Case.**

Based on *DaimlerChrysler* and *Hein*, and more than forty years of consistent practice, it could hardly be clearer that respondents in this case have *Flast* standing under current law. Respondents allege, as *DaimlerChrysler* requires, that state “[legislative] action under the [state’s] taxing and spending [power] is in derogation of” the Establishment Clause,” *DaimlerChrysler Corp.*, 547 U.S. at 347 (quoting *Flast*, 392 U.S. at 106), and, as the *Hein* plurality would require, “that the challenged enactment exceeds specific constitutional limitations imposed upon the [state or federal government’s] taxing and spending power.” *Hein*, 551 U.S. at 602 (quoting *Flast*, 392 U.S. at 102-103). Respondents rely on the Establishment Clause, as *DaimlerChrysler* requires, and they attack a legislative spending program, not a program of Executive expenditures, as *Hein* requires. With respect to taxpayer standing, standing in the present case is at least as clear as it was in *Mueller, Walz* and *Nyquist*. Standing is also present here on the authority of the Court’s summary affirmance of *Public Funds for Public Schools of New Jersey v. Byrne*, 590 F.2d 514 (3rd Cir.), *aff’d*, 442 U.S. 907 (1979). Taxpayers there challenged a state tax statute that allowed a \$1,000 deduction from gross income for each taxpayer’s child attending an “elementary or secondary

institution not deriving its primary support from public moneys.” *Id.* at 516 (citations omitted). The court of appeals held that “[t]he individual plaintiffs, as taxpayers, have standing under *Flast v. Cohen*.” *Id.* This Court affirmed.

It seems to be conceded by ACSTO, the United States, and the other *amici* that support ACSTO on this issue, that if plaintiffs had standing in *Nyquist*, *Mueller* and *Byrne*, respondents have standing here. Those cases, like this one, were taxpayer Establishment Clause challenges to state statutory tax-expenditure programs in which state financial support for religion was not paid out of the state treasury, where the challenged state statutes were religiously neutral on their face, and where the decision to direct aid to religious uses was made by state taxpayers, not state officials – exactly the facts of the present case.

Neither petitioners nor their *amici* suggest any recent development in the law, or any recent change of jurisprudential or other circumstances, that would call for the reversal of forty years of unbroken practice that has been followed by lower courts as well as this Court. In addition to the decision below in this case, in which all the judges of the Ninth Circuit, including those who dissented from the denial of rehearing en banc, either held or assumed that respondents have standing, see *Public Funds for Public Schools of New Jersey v. Byrne*, 590 F.2d 514 (3rd Cir. 1979); *Warren v. Commissioner*, 302 F.3d 1012 (9th Cir. 2002); *Johnson v. Economic Dev. Corp.*,

241 F.3d 501 (6th Cir. 2001); *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985). Most recently see *Freedom From Religion Foundation, Inc. v. Geithner*, 2010 U.S. Dist. LEXIS 50413 (E.D.Cal. 2010), and the extensive discussion of that case in Michael L. Gompertz, *Lawsuit Challenges Income Tax Preferences for Clergy*, 128 Tax Notes 81 (July 5, 2010). So far as we are aware, there has there been no recent avalanche of frivolous or trivial taxpayer Establishment Clause taxpayer suits challenging tax expenditure programs, nor has there been any disruption of state tax processes indicating a need for the reexamination of a completely settled practice. To deny standing here would reject settled law and practice without any practical or principled need to do so.

Finally, it is also important to note that taxpayer standing in this case is supported by the Court's extensive discussion of taxpayer standing in *Bowen v. Kendrick*, 487 U.S. 589 (1988), which was a legislative appropriation, rather than a tax-expenditure, case. The facts in *Bowen*, and the language of Chief Justice Rehnquist's opinion for the Court there, bear directly on this case. As described by the plurality in *Hein*, *Bowen* "held that the taxpayer-plaintiffs had standing to mount an as-applied challenge to the Adolescent Family Life Act (AFLA), which authorized federal grants to private community service groups including religious organizations." *Hein*, 551 U.S. at 606. The determinative factor regarding taxpayer standing was that AFLA "was 'at heart a program of disbursement

of funds pursuant to Congress' taxing and spending powers,' and that the plaintiffs' claims 'call[ed] into question how the funds authorized by Congress [were] being disbursed pursuant to the AFLA's statutory mandate.'" *Id.* at 607 (quoting *Bowen*, 487 U.S. at 619-620) (first emphasis added). The Arizona program in this case, like the program in *Bowen*, is similarly "a program of disbursement of funds" pursuant to the Arizona legislature's use of its "taxing and spending powers," and respondents here also call into question "how the funds authorized by the legislature" are being "disbursed pursuant to" the Arizona program's "statutory mandate."

**C. The Arguments of ACSTO and Its *Amici* That Respondents Lack *Flast* Standing Are Based On Incorrect Descriptions of the Arizona Program.**

ACSTO's contention that respondents lack standing is based on its characterization of an Arizona STO as "a charitable organization in this state" that "[a]nyone can form," and its repeated assertion that the Arizona program involves "donations" or "contributions" of "private funds" to charity. ACSTO Br. 5. As we have explained, these statements about the Arizona program are all incorrect. ACSTO and some of its *amici* also rely heavily upon the fact that the Arizona statute here is religiously neutral on its face. In *Bowen*, where the funding statute was also religiously neutral on its face, the claim was made that the *Flast* exception was inapplicable because of that

statutory neutrality. The *Bowen* Court did not believe, however, that the fact that “appellees’ claim that AFLA funds are being used improperly by individual grantees is any less a challenge to congressional taxing and spending power” than if the religious uses were evident on the face of the statute. *Bowen*, 487 U.S. at 619. As here, one of the challenges in *Bowen* was to the statute, as applied. That did not deprive the *Bowen* plaintiffs of standing because “AFLA is at heart a program of disbursement of funds pursuant to Congress’ taxing and spending powers and appellees’ claims call into question how the funds authorized by Congress *are being disbursed* pursuant to the AFLA’s statutory mandate.” *Id.* at 619-620 (emphasis added).

In opposing respondents’ standing, ACSTO argues that respondents’ claim that the Arizona program reduces the balance of the state’s general fund is “purely speculative.” ACSTO Br. 9. Whether the balance of the general fund is reduced, of course, is a question regarding which respondents’ allegations must be accepted as true at this preliminary state of the investigation. In addition, ACSTO’s argument is thoroughly rebutted by the Arizona Department of Revenue’s recent report to the governor and the legislature that the Arizona tax-credit program cost the state more than \$50 million in 2009. And Arizona’s Attorney General, who represents the Department in this litigation, not only believes that respondents have standing, but has recently recommended “ending the tuition-tax-credit program for private schools during the economic downturn as [a]

possible way[] to bring in revenue. The tax program that gives a dollar-for-dollar credit of up to \$1,000 for married couples for donations made to private-school scholarships *cost the state \$58 million in 2009.*” Ginger Rough, *Goddard Outlines Plans for Education*, *The Arizona Republic*, Aug. 6, 2010, at B3 (emphasis added).

As its last resort, ACSTO advances the argument that the Arizona program cannot constitute a legislative spending program for purposes of applying *Flast*, because the Arizona Supreme Court has “conclusively determined as a matter of state law . . . that the money generated by the tax credit is private, not state, money.” ACSTO Br. 9 (citing *Kotterman v. Killian*, 193 Ariz. 273 (1999)). As the court of appeals explained, ACSTO Pet. 12a n.8, *Kotterman* determined that the program’s tax credit was not legislative spending *as a matter of state law*. See *Winn*, 562 F.2d at 1010 n.8. The question here is whether the Arizona program is a legislative spending program for the purposes of the standing requirement of Article III of the United States Constitution. Those are not the same questions.

The primary objection made by the United States to respondents’ standing appears to be that *Flast* recognized taxpayer standing to challenge “legislatively mandated grants to religious organizations,” and that the Court has limited *Flast* “to those facts.” U.S. Br. 6-7. The premise of this argument, however, is completely incorrect. The federal statute challenged in *Flast* did *not* “mandate grants to religious

organizations.” It “established a program for financial assistance to local educational agencies for the education of low-income families.” *Flast*, 392 U.S. at 86. The only grants mandated by the *Flast* program were grants “made to state educational agencies, which pass the payments on in the form of grants to local educational agencies.” *Id.* (emphasis added).

It is also wrong to say, as the United States does, that the Court “has *not allowed* taxpayer standing” to challenge tax expenditures since *Flast*, U.S. Br. 7 (emphasis added), but has limited *Flast* so as to permit taxpayers to challenge only expenditures made through legislative appropriations. The Court has “allowed” taxpayer standing in at least four such cases – taxpayer challenges to tax deductions (*Mueller*), credits (*Nyquist* and *Hibbs*) and exemptions (*Walz*). What the United States probably means to say is that Court opinions have never *expressly addressed* taxpayer standing in the tax expenditure cases it has adjudicated on the merits since *Flast*. That is true. The Court’s silence, however, was, as explained above, almost certainly due to the belief that the issue had been settled (a belief that the United States apparently shared when it previously participated in this case as *amicus*). The United States’ other contentions that respondents lack standing are based on its demonstrably incorrect description of the Arizona program as one in which Arizona has “voluntarily forego[ne]” tax collection “from individuals who make private and voluntary donations to STOs” that “do [] not harm respondents.” U.S. Br. 6.

### III. THE ARIZONA PROGRAM VIOLATES THE ESTABLISHMENT CLAUSE.

In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Court permitted a state to use state-funded vouchers to pay tuition for children to enable them to attend non-public, religious and non-religious elementary and secondary schools. It did that in order to permit a state to help poor inner-city children escape a failed public school system that was not able to offer them a minimally adequate education. The state provided financial help directly to parents in the form of school vouchers in a standard amount, and awarded the vouchers according to financial need. The vouchers were distributed with no reference to the parents' or child's religion, and did not depend on whether the child would attend a religious or secular school. Schools participating in the program had to agree not to discriminate on the basis of religion in their acceptance or treatment of their students. *Zelman*, 536 U.S. at 644-647.

Respondents in this case do not ask the Court to overturn *Zelman*, or to modify it in any respect. What respondents ask is that they be permitted to have the district court consider the constitutionality of an Arizona voucher program that could hardly be more different from the program upheld by the Court in *Zelman*. In the *Zelman* program, parents of children in the Cleveland public school district were awarded vouchers "according to financial need." *Id.* at 646. All parents in the same income category were entitled to vouchers in the same statutorily prescribed amount.

In Arizona, by contrast, religious STOs disburse more than \$30 million of Arizona income tax revenues each year to a small percentage of Arizona schoolchildren whom *they choose to support*, and in whatever amounts *they choose to provide*. These religious STOs take a child's religion into account in deciding whether, and in what amount, to award a state-funded scholarship to a child, and they require children to attend a religious school, and to participate in all the religious worship activities required in that school, in order to get a scholarship. In 2009, 27,658 Arizona children, out of 1,012,068 Arizona children attending public school in Arizona, received scholarships under the tax-credit program. State Br. App. 27; Education Bug, Arizona Public School Directory, <http://arizona.educationbug.org/public-schools/> (last visited Sept. 12, 2010).

There is no income-based or any other kind of equality in the Arizona program. All STOs are free to award scholarships from state funds to students chosen by them, according to their standards, from among all the school-age children in Arizona. Religious STOs, which control a majority of the scholarship funds, use religious standards to make those awards. Less than 3% of Arizona school-age children receive Arizona program scholarships each year, and the average annual scholarship has been less than \$2,000 – far less than the average annual tuition at Arizona non-public schools. The Arizona program is not a program, like the program in *Zelman*, that awards state financial aid on a uniform basis to a

statutorily defined educationally or financially needy student population. It is a program in which the majority of state aid is given on the basis of religion to a relatively very few students, most of whom are chosen by religious organizations on a non-uniform basis from among all the school-age children in Arizona. *Zelman* did not approve of that kind of program.

### **A. The Arizona Program Violates *Zelman***

The use of state tax revenues to fund religious education for elementary and secondary school children is in obvious tension with the fundamental Establishment Clause principle that “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions . . . to teach or practice religion,” as well as with the principle that a state “cannot consistently with the [Establishment Clause] of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church.” *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947). Prior to *Zelman*, this principle permitted states to give financial support for the *non*-religious activities of non-public religious elementary and secondary schools, as part of programs to provide state financial aid to both secular and religious institutions on a religiously-neutral basis. In *Everson*, for example, the Court upheld a New Jersey program that reimbursed all parents for the cost of transporting their children to public or private (including religious) schools on public buses.

After *Everson*, the Court upheld religiously-neutral programs that lent books on secular subjects to parochial school students, as well as to students at non-religious schools,<sup>6</sup> reimbursed parochial as well as secular schools for the expense of administering state-prepared examinations on secular subjects,<sup>7</sup> supported construction by colleges, including church-related colleges, of facilities used exclusively for secular educational purposes,<sup>8</sup> as here public school teachers to offer remedial classes in secular subjects at parochial and non-religious schools,<sup>9</sup> and provided computers and other “secular content” teaching aids to parochial and non-religious schools.<sup>10</sup>

Prior to *Zelman*, however, the Court had not permitted states to use tax-raised funds to provide financial aid to religious schools to support the *religious* instructional activities of those schools.<sup>11</sup> The Court insisted that such aid be restricted to non-religious uses. See, e.g., Laurence H. Tribe, *American Constitutional Law*, 1226 (2d ed. 1988): “Where state aid, by its nature, might be used [by religious schools]

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<sup>6</sup> *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968).

<sup>7</sup> *Wolman v. Walter*, 433 U.S. 229 (1977).

<sup>8</sup> *Tilton v. Richardson*, 403 U.S. 672 (1971); *Hunt v. McNair*, 413 U.S. 734 (1973); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976).

<sup>9</sup> *Agostini v. Felton*, 521 U.S. 203 (1997).

<sup>10</sup> *Mitchell v. Helms*, 530 U.S. 793 (2000).

<sup>11</sup> See, e.g., *Levitt v. Comm. for Pub. Educ.*, 413 U.S. 472 (1973).

either for secular or for non-secular purposes, the Court requires mechanisms to ensure that the aid is used for secular purposes alone.” *See also Bowen v. Kendrick*, 487 U.S. 589, 621 (1988) (aid under the federal Adolescent Family Life Act cannot constitutionally be used to fund “specifically religious activit[ies].”) (citations omitted).

State programs that pay all or part of the tuition at religious elementary and secondary schools out of general tax revenues are therefore in danger of conflicting with the basic principle that citizens not be taxed to support the religious education of other people’s children. In *Zelman*, the Court resolved this tension by holding that there a constitutionally significant difference between governmental programs that “provide aid *directly* to religious schools” and indirect aid programs that provide aid “to [*parents*] *who, in turn*, direct the aid to religious schools . . . of their own choosing.” *Zelman*, 536 U.S. at 649 (emphasis added). Chief Justice Rehnquist’s opinion for the Court in *Zelman* explained that, when government provides financial support for sectarian religious instruction by giving tuition aid *to parents on a religiously-neutral basis*, with no strings attached, so that the parents may determine whether to use the aid at a religious or non-religious school, “the circuit between government and religion [*is*] broken, and the Establishment Clause [*is*] not implicated.” *Id.* at 652.

The *Zelman* opinion made clear that the circuit between government and religion is *not* broken,

however, unless the state program is “neutral in all respects toward religion,” and provides parents with “true private choice” in selecting a school at which to use the aid. *Id.* at 653. The program must, in addition, be enacted for a “valid secular purpose.” *Id.* at 649. The *Zelman* program satisfied each of these three requirements. It served the obviously “valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system.” *Id.* at 649. It was neutral in all respects toward religion because the *Zelman* vouchers *were awarded to parents* on the basis of “‘secular criteria that neither favor nor disfavor religion.’” *Id.* at 653 (citations omitted). And since parents were free to use the *Zelman* vouchers toward tuition at any participating public or private school in the Cleveland area, the *Zelman* program was one of “true private choice.” *Id.* at 653.

Arizona’s tax credit program, as applied, plainly does not satisfy two of *Zelman*’s three prongs, and very likely does not satisfy the third. The Court has not clarified, since *Zelman*, how it will apply the requirement that a voucher program serve a valid secular purpose, should that factor become determinative in a case. The program in *Zelman* left no doubts on that score. A program narrowly tailored, as the *Zelman* program was, to permit children of low-income families to obtain an adequate education unavailable to them in a failed public school district, might well survive even the strictest judicial means-ends scrutiny. Petitioners and their *amici* appear to

believe that the lowest level of scrutiny is applicable in determining whether a sufficient secular state purpose exists. Respondents believe that substantially more should be required to justify using state tax revenues to pay for religious education, even when *Zelman*'s two other requirements are satisfied.

It is not necessary to resolve that issue in this case, however, because the Arizona program utterly fails to comply with the other two prongs of the *Zelman* test. As for religious neutrality, even if the Arizona program were designed to serve a compelling secular purpose, it would nevertheless clearly violate the Establishment Clause because of the fact that more than half of its scholarships are awarded to parents and children on the basis of their religion. That pervasive religious discrimination in the distribution of program scholarships violates *Zelman*'s explicit requirement that state-funded tuition benefits be "*available to participating families on neutral terms, with no reference to religion.*" 536 U.S. at 653 (emphasis added). Petitioners argue that it does not matter that the decisions to award most of the Arizona program's scholarships are made on the basis of the scholarship applicant's religion, because the Arizona *statute* is religiously neutral on its face. As *Zelman* makes clear, however, that is not the constitutionally-required neutrality. Government financial aid to education must be *awarded* on a religiously neutral basis. Regardless of the facial religious neutrality of a school-voucher program statute, the Constitution does not permit a program in which

vouchers are disbursed to some parents and not to others, depending upon the parents' or their children's religion.

The Arizona program's lack of religious neutrality in awarding scholarships also causes the program to violate *Zelman's* requirement that parents must have a "genuine and independent" choice about where to use scholarships paid for by state funds. 536 U.S. at 649. The *Zelman* Court held that parental choice was present there because, after receiving a voucher, Cleveland parents could use the voucher at any participating school they chose. *Id.* at 646. The majority of parents who receive scholarships under the Arizona program, however, are not permitted to make that choice.

Some have suggested that this deprivation of parental choice about where to use a scholarship, once it is awarded, does not create a parental-choice problem, because parents remain free to choose, from a broad spectrum of STOs, the STO from which to seek aid. That, however, does not provide parents with a free choice about where to use state aid because it does not guarantee, or even make it likely, that an Arizona parent will receive a program scholarship in the first place. Arizona STOs are not obligated to award a scholarship to a parent just because a parent applies for one; STOs may select scholarship students on any basis they wish, as long as they consider the financial need of applicants. Parents who want their child to attend a particular religious school may locate a religious STO that awards scholarships to that school, but that STO may decide, on

any basis it wishes, including whether the STO believes that the parents have demonstrated a sufficiently strong commitment to the church or temple – not to award a scholarship to those parents at all. Those parents have no free choice about where to use state scholarship aid because the religious STO has decided not to award a scholarship to their child. Parents who would prefer to send their child to a non-religious school may apply for a scholarship at a non-religious STO, but that STO, which has no parishioners it can ask to support its program at no cost to themselves, may well not have sufficient funds to award scholarships to all parents who apply. Non-religious STOs appear to have long waiting lists of applicants, *see Winn*, 586 F.3d at 652, and even if the parents are awarded a scholarship, it may be in an amount far less than would be available from a religious STO, and also less than the parents will need to afford to enroll their child at a non-public school. The Arizona program is one of STO choice, not parental choice.

Petitioners and their *amici* try to obscure the fact that most of the Arizona program's scholarships are awarded by religious organizations on the basis of religion by the mantra that the Arizona program contains a "multitude of private choices." *See* ACSTO Br. 55; State Br. 3 n.1; U.S. Br. 17. By that they presumably mean to refer to the choices that Arizona income-taxpayers have about whether to "contribute" their tax payments to an STO, that taxpayers have about which STO to favor with that payment, that STOs have about which children to

favor with scholarships, and that STOs have about how much state money should be given to each chosen child. That “multitude of private choices,” however, does not include the one choice that *Zelman* and the Establishment Clause require: *parental* choice about where to use a state-funded scholarship awarded to the parents on a religiously-neutral basis.

**B. State Benefit Programs May Not Constitutionally Distribute State-Funded Benefits to Beneficiaries on the Basis of Religion.**

*Zelman*'s requirement of religious neutrality in the award of state-funded scholarships or school vouchers is reflective of a broader principle forbidding the use of religion as a criterion for distributing *any* government benefits in the United States. Arizona's STOs are organizations that receive and disburse government funds to beneficiaries as part of a government benefits program. Before *Zelman* was decided, the court had made clear in *Bowen v. Kendrick*, 487 U.S. 589 (1988), that, if they are grantees of government funds that undertake to distribute those funds to a class of beneficiaries defined by the government, organizations may not select those beneficiaries on the basis of religion, or require beneficiaries to participate in religious activity in order to obtain the state program's benefits.

In *Bowen*, the Court addressed the constitutionality of the federal Adolescent Family Life Act (AFLA), a federal statutory program that authorized federal financial grants to private, non-profit, grantee organizations that were to use those funds to provide counseling and education services to adolescents regarding teenage sexuality and pregnancy. The statute, which was religiously neutral on its face, provided that organizations “with institutional ties to religious denominations” might participate in the program as service-providing grantees. *Bowen*, 487 U.S. at 597. Federal taxpayers challenged the statute, both on its face and as applied. The facial challenge was based on the fact that the statute allowed religious organizations to participate in the program as program grantees. The as-applied challenge was based on plaintiffs’ allegations that religious-organization grantees had used AFLA grants to “inculcate the views of a particular religious faith.” *Id.* at 621.

The Court denied the facial challenge in *Bowen*, holding that the statute was not invalid simply because it permitted religious organizations to be program grantees. *Id.* at 618. But the Court then held that AFLA *would* be unconstitutional *as applied* if those religious grantees either were “institutions that are ‘pervasively sectarian,’” or were institutions that used the federal funds “to inculcate the views of a particular religious faith.” *Id.* at 610, 621. Arizona’s religious STOs fit both of these descriptions. They are pervasively sectarian, because all they do is give

scholarships to religious schools of a particular religious denomination. They use state funds to inculcate the views of their particular faith because they restrict the scholarships they award to students of their own faith, and require the students to attend a religious school of that faith in order to obtain a scholarship.

*Bowen* thus holds that, while religious organizations are free to use their own funds to further their religious objectives, they are not free, as government grantees in a government benefit program, to use governmental funds for that purpose. *See also, e.g.*, 42 U.S.C. § 604a(g) (“[A] religious organization shall not discriminate against an individual in regard to rendering assistance funded under any program . . . on the basis of religion, a religious belief, or refusal to actively participate in a religious practice”); Exec. Order No. 13279, Equal Protection for the Laws for Faith-Based and Community Organizations, 67 Fed. Reg. 77141, 77142 (Dec. 12, 2002) § 2(d) (Organizations providing “services supported in whole or in part with Federal financial assistance . . . should not be allowed to discriminate against current or prospective program beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice.”).

The non-discrimination principle recognized in *Bowen* applies not only to federal programs, but also to state programs, like the one in this case, that distribute state financial assistance to beneficiaries through organizations that act as conduits of these funds. A state that chose to use tax revenues to feed

homeless people, for example, might choose to do that through grants to non-profit organizations that would agree to use government funds to purchase and distribute the food. The Constitution would not prohibit religious organizations from being included among the organizations through which the government aid would be delivered. No one would seriously argue, however, that a religious organization acting as a grantee or conduit of that state aid could employ a policy of distributing the food paid for by the state grant only to homeless people of a particular religious faith, or only on the condition that needy people agree to participate in religious activities in order to receive that food. *See, e.g., Community Council v. Jordan*, 102 Ariz. 448, 456 (1967) (upholding the facial constitutionality of a homeless assistance program that used religiously oriented grantees to furnish the assistance, but noting that “participation in a specific religion is not a requirement to obtaining aid” and that, if it were, “this would immediately raise the question of religious preference at the expense of the state and render [the program] unconstitutional”). And, as *Bowen* holds, the Establishment Clause is not satisfied because there may be a variety of grantees offering state-funded assistance. *None* of those grantees may discriminate on the basis of religion in distributing government benefits. Unconstitutional religious discrimination by one grantee is not cured by religious discrimination practiced by other grantees.

In arguing that Arizona STOs are free to engage in religious discrimination in the distribution of state

financial aid to parents and children, petitioners appear to be misled by their incorrect identification of the role that STOs play in the Arizona program. STOs are not program beneficiaries. They do not play the role in the Arizona scheme that parents and children played in the *Zelman* program. They receive state funds that the state legislature has decided should be used to pay tuition for children attending non-public schools. The legislature has left it up to individual income-tax payers to decide, by paying part of their taxes to an STO, how many dollars of state tax revenues will be used for the state-funded scholarships, but the scholarships are nevertheless unquestionably funded by income-tax revenues, not by the “contributing” taxpayers’ own money. Those taxpayers, and the STOs to whom they contribute, are not the program’s beneficiaries; the parents and children who receive scholarships are the beneficiaries of the program. In *Zelman*, state funds were used to pay for religious education, but only after the *beneficiaries* of the program – the parents of low-income Cleveland school children – received the funds and decided how to use them in that way. It would clearly have been unconstitutional if the decisions about *which* parents were to be beneficiaries, were to be made on the basis of religion before the benefits reached the parents.<sup>12</sup>

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<sup>12</sup> The Arizona program can also be understood, with the same result, as a program in which Arizona’s STOs function as “government actors,” who are themselves subject to the  
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Establishment Clause. See *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 378 (1995). (“We have held once, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), and said many times, that actions of private entities can sometimes be regarded as governmental action for constitutional purposes.”). In holding Amtrak to be a government actor for purposes of the application of the First Amendment, Justice Scalia’s opinion for the Court explained:

That Government-created and-controlled corporations are (for many purposes at least) part of the Government itself has a strong basis, not merely in past practice and understanding, but in reason itself. It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form. On that thesis, *Plessy v. Ferguson*, 163 U.S. 537 (1896), can be resurrected by the simple device of having the State of Louisiana operate segregated trains through a state-owned Amtrak. In *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*, 353 U.S. 230 (1957) (*per curiam*), we held that Girard College, which had been built and maintained pursuant to a privately erected trust, was nevertheless a governmental actor for constitutional purposes because it was operated and controlled by a board of state appointees, which was itself a state agency. *Id.*, at 231. Amtrak seems to us an *a fortiori* case.

*Lebron*, 513 U.S. at 397.

The relationship between the government of Arizona and Arizona’s STOs is obviously different from the relationship between the United States and Amtrak in *Lebron*. There are, for one thing, more than 50 STOs, while there was only one Amtrak. But it is doubtful that the *Lebron* Court would have held that a state could certify 50 different taxicab companies, each related to the state in the same way that Amtrak is related to the United States, and permit half of those 50 companies to serve only black or only white riders, or to choose fares on the basis of religion.

**CONCLUSION**

The decision of the court of appeals remanding the case for further proceedings should be affirmed.

Respectfully submitted,

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