Nos. 09-987, 09-991

In The
Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,

Petitioner,

v.

KATHLEEN M. WINN, et al.,

Respondents.

GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, et al.,

Respondents.

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

RESPONDENTS' MOTION FOR LEAVE TO FILE A POST-ARGUMENT BRIEF AND POST-ARGUMENT BRIEF OF RESPONDENTS

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RESPONDENTS' MOTION FOR LEAVE TO FILE A POST-ARGUMENT BRIEF

On December 6, 2010, the Court granted petitioner Arizona Christian School Tuition Organization's (ACSTO's) motion for leave to file a post-argument brief. That brief was filed for the purpose of correcting allegedly erroneous statements made at oral argument by counsel for the United States and the State. On December 16, Arizona School Choice Trust (ASCT), participating as a respondent supporting petitioners, moved for leave to file its own post-argument brief for the purpose of disagreeing with ACSTO's post-argument brief. Neither ACSTO nor ASCT participated in the oral argument of the case on November 3. The Court has not as yet acted on ASCT's motion. Respondents move for leave to file the attached post-argument brief in order to respond to new matters contained in these two conflicting post-argument filings.

Respectfully submitted,

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RESPONDENTS' POST-ARGUMENT BRIEF

A. RESPONSE TO ACSTO'S POST-ARGUMENT BRIEF

1. *Standing to Sue.* – ACSTO's post-argument brief contends that respondents lack standing to sue because the Arizona tax-credit program in this case, like the tax-deduction program upheld by the Court in *Mueller v. Allen*, 463 U.S. 388 (1983), does not "extract any of their tax dollars to support religion, but rather g[ives] a tax benefit to other taxpayers." ACSTO Post-Argument Brief, 1. ACSTO thus appears to invite the Court to hold that neither state nor federal taxpayers have standing to challenge tax benefit programs that violate the Establishment Clause because such programs unconstitutionally spend tax revenues *before*, rather than *after*, those revenues reach the government's treasury.

If the Court were to adopt ACSTO's proposed rule, the result would be that taxpayers would continue to have standing to challenge state or federal appropriations of government funds that violate the Establishment Clause, but they would not have standing to challenge tax deductions, tax credits, tax exemptions or other tax benefit programs that violate the Clause. ACSTO offers no explanation supporting that completely illogical distinction.

When a government tax-benefit program unconstitutionally diverts tax revenues from *entering* the government's treasury, the effect on its taxpayers,

who are taxed to provide the treasury funds that the government needs in order to meet its governmental obligations, is exactly the same as when the government unconstitutionally appropriates the same amount of tax revenues *from* the treasury. State taxpayers pay taxes to support unconstitutional tax credits just as they do to support unconstitutional appropriations. ACSTO's standing rule would deprive taxpayers of federal-court standing to challenge even the most egregious Establishment Clause violations – dollar-for-dollar state income-tax credits for payments to support an established state religion, for example.

2. *Respondents' Establishment Clause Claim*. – ACSTO's post-argument brief asserts that "there is no evidence in the record that STOs engage in any form of discrimination toward students or their families, including religious discrimination." ACSTO Post Argument Brief, 5. If that assertion were true, respondents' complaint would concededly not state an Establishment Clause claim. The assertion, however, is plainly incorrect.

The factual record in this case consists of the allegations contained in respondents' complaint, which alleges two related, but different, forms of religious discrimination. Respondents allege (1) that Arizona's religious STOs practice discrimination based on *the religion of the scholarship applicant* (or the applicant's parents), and (2) that Arizona's religious STOs

practice discrimination based on *whether the applicant will attend a religious school* of a particular religious denomination. Complaint, ¶¶ 11-13, Petition for Certiorari in 09-987, 119a-120a. As ACSTO surely knows, those allegations must be accepted as true for the purpose of deciding whether respondents' complaint should have been dismissed for failure to state a claim upon which relief can be granted.

In claiming that there is no evidence in the record that Arizona's religious STOs engage in any form of religious discrimination, ACSTO appears to ask the Court simply to ignore respondents' allegation that religious STOs take an applicant's religion into account in making scholarship awards. With regard to respondents' allegation that religious STOs grant scholarships on the condition that students attend religious schools, ACSTO appears to believe that such a practice is religiously neutral, so long as students are not chosen on the basis of their religion.

That belief would be incorrect. The Establishment Clause requires that state-funded vouchers or scholarships be "*available* to participating families on neutral terms, *with no reference to religion*." *Zelman v. Simmons-Harris*, 536 U.S. 637, 653 (2002) (emphasis added). Scholarships awarded on the condition that they must be used at a religious school are obviously not awarded "with no reference to religion." A belief that it is religiously neutral for an STO to award scholarships on the condition that children attend religious schools is equivalent to a belief that it would be racially neutral for an STO to award

scholarships to children on the condition that the parents agree to have their child attend a racially segregated school, so long as the awards are made to children regardless of their own race.

Religious discrimination occurs when students are *selected* to receive scholarships *on the basis* of their religion and it also occurs when children, regardless of their religion, are *required to attend a religious school* in order to receive a scholarship. A program in which state-funded scholarships are awarded on the condition that, in order to receive a scholarship, parents agree to have their child indoctrinated in religious principles to which they do not subscribe, and with which they disagree, is not a program that makes scholarships available "with no reference to religion."

B. RESPONSE TO ASCT'S POST-ARGUMENT BRIEF

ASCT appears to understand, as ACSTO does not, that ACSTO's motion to dismiss must be adjudicated on the basis of respondents', not ACSTO's, factual allegations. ASCT argues, however, that respondents' allegation that STOs "restrict grants to children of specific religious denominations," does "not state a valid claim for relief under the Establishment Clause." ASCT Post-Argument Brief, 1.

ASCT avers that not "a single case . . . remotely suggests that allowing religiously affiliated organizations the freedom to prefer co-religionists offends the

Establishment Clause's command that government 'shall make no law respecting an establishment of religion.'" *Ibid*. ASCT is correct in observing that religious organizations may prefer co-religionists in distributing benefits in situations where those benefits are paid for *with their own money*. This, however, is not such a case. This case involves benefits paid for *entirely with state income-tax revenues*.

The money that Arizona STOs award as scholarships pursuant to the Arizona program challenged in this case does not belong to those STOs. Nor does it belong to the taxpayers who "contribute" it to STOs by paying all or part of the income taxes that they owe to the state to an STO. All of that scholarship money is *state income tax revenue* – revenue raised by the imposition of Arizona's income tax that the state wishes to be used to pay for scholarships to students attending private and religious schools.

Arizona certifies STOs as its agents (or delegates) for the purpose of awarding those tax-revenue-funded scholarships. In doing so, Arizona gives STOs a wide range of discretion in deciding which students will receive scholarships from tax revenues, and in what amounts. It further lets individuals who owe income taxes to the state determine the amount of tax revenues that each STO will be able to award. The presence of that broad discretion, however, does not alter the fact that *all of the money in the Arizona program* – every penny – *is tax revenue that the state legislature, through its enactment of state law, has*

decided should be used for non-public school scholarships. The scholarship money does not belong to the taxpayers who choose to send it to an STO, rather than to the state. They cannot keep it, or do anything with it other than use it to satisfy their state income-tax obligation. The money does not belong to the STOs that award scholarships. They cannot keep it either, or do anything with it other than use it for state-program scholarships.

ASCT and the petitioners (and some of their amici) make the mistake of concluding that, because of all the "private choices" that the state lets taxpayers and STOs make in implementing the state's scholarship program, "contributing" taxpayers and STOs are somehow awarding scholarships from their own funds – funds that they are free to spend on their "co-religionists" and no one else. Taxpayers who take advantage of the choice offered them by the Arizona program, however, are no more spending their own funds than they would be spending their own funds if the state were to authorize them to satisfy their income-tax obligations to the state by paying some of the state's debts, and were to let the taxpayers decide which bills to pay and in what amounts.

When charitable organizations distribute their *own funds* on their *own behalf* for their *own purposes* to classes of beneficiaries *chosen by them*, they are free to direct those funds to their "co-religionists" and to no one else. But when they award scholarships, the cost of which is borne entirely by the state treasury (and, hence, by all of the state's taxpayers), they are

constitutionally required to act on a religiously neutral basis. See, e.g., *Bowen v. Kendrick*, 487 U.S. 589 (1988) and *Community Council v. Jordan*, 102 Ariz. 448 (1967).

Respectfully submitted,

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