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

PETITIONER GALE GARRIOTT'S REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEF REGARDING A CHANGE IN STATE LAW

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

A. Respondents' Brief Is Not Necessary or Supplemental.

Respondents claim that the purpose of their supplemental brief is to inform the Court of the 2010 amendments to Arizona's private-school-tuition-tax-credit program in A.R.S. § 43-1089 (Section 1089), but they acknowledge that the text of the amendments is reproduced in Petitioner Garriott's brief on the merits. Resp. Supp. Br. at 2. And, contrary to Respondents' assertion that Petitioners summarily dismissed the amendments in a footnote, Petitioner Garriott discussed the amendments in his merits brief. Pet. Garriott's Br. at 2, 4 n.2, 5 n.4, 10-11. Therefore, Respondents did not need to file their brief to inform the Court of the amendments because Petitioners had already provided that information. Further, Respondents will have the opportunity to address the amendments in their merits brief. Therefore, their supplemental brief does not present information "that was not available in time to be included in [Respondents'] brief" as Supreme Court Rule 26.6 requires. Because the brief is not necessary or supplemental, the Court should not consider it.

B. The Section 1089 Amendments Do Not Alter the Need for This Court's Review.

If the Court nevertheless considers Respondents' supplemental brief, it should reject Respondents' suggestion that it incorrectly granted certiorari.

Respondents assert that the Court may wish to reconsider its decision to grant certiorari because "the new legislation strongly confirms the conclusion that the relationship between Arizona and its STOs [school tuition organizations] may warrant Establishment Clause scrutiny of STO religious discrimination." Resp. Supp. Br. at 10. But the Court granted certiorari on this precise issue – that is, whether the lower court erred "in holding that if most taxpayers who contributed to STOs contributed to STOs that awarded scholarships to students attending religious schools, Section 1089 has the purpose and effect of advancing religion." Garriott Pet. at i. Under the amendments to Section 1089, anyone can still form an STO, taxpayers can still decide whether to make a voluntary contribution to the STO of their choice, and STOs can still decide which private schools they will support through scholarship awards. There is no reason to remand to the district court and the court of appeals to assess the impact of the amendments because the district court would be bound by the court of appeals' erroneous Establishment Clause analysis and the court of appeals would affirm based on that faulty analysis.

The same is true with regard to whether Respondents have standing as taxpayers to assert an Establishment Clause challenge to Section 1089 as amended – Section 1089 still provides tax credits for voluntary contributions to nonprofit organizations that award scholarships to children attending private schools, including religious schools. Respondents suggest that the amendments are relevant to the standing question by claiming that the taxpayer contributions to STOs are actually state revenues. Resp. Supp. Br. at 8-9. This argument is no different from the one that the court of appeals erroneously accepted in holding that Respondents had standing. Garriott Pet. App. at 14a ("By structuring the program as a dollar-for-dollar tax credit, the Arizona legislature has effectively created a grant program whereby the state legislature's funding of STOs is mediated through Arizona taxpayers."). Given the ten-year history of this case, Respondents' suggestion that the Court remand this fundamental issue of jurisdiction, instead of deciding it, is absurd.

Normally, when the Court remands matters to the district court to assess the impact of newly enacted legislation after granting certiorari, it vacates the lower court's decision. *See, e.g., Louisiana v. Hays*, 512 U.S. 1230 (1994) (vacating the three-judge district court decision in *Hays v. Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993), and remanding for further consideration in light of a newly enacted Louisiana statute); *Fusari v. Steinberg*, 419 U.S. 379, 390-91 (1975) (vacating the three-judge district court decision and

remanding for reconsideration in light of the intervening changes in Connecticut law). Thus, if the amendments to Section 1089 would have affected the outcome of the court of appeals' decision, the appropriate remedy would be to vacate its earlier decision and remand to the district court to allow Respondents to amend their complaint in light of the statutory amendments. Because the amendments would not have affected the outcome of the court of appeals' decision, the Court should not remand the case without deciding the questions presented.[1]

C. The 2010 Amendments to Section 1089 Improve STOs' Accountability and Transparency; They Do Not Make STOs Agents of the State.

Respondents claim that the 2010 amendments to Section 1089 are relevant to their claim that STOs are the "state's surrogates to distribute government tax revenues." Resp. Supp. Br. at 3. The amendments make STOs more accountable and transparent and

[1] To the extent that the Court has exercised its discretion and has found that it improvidently granted certiorari review, it has done so when the question that it accepted for review was no longer properly before it. *See* Eugene Gressman, Kenneth S. Geller, Stephen M. Shapiro, Timothy S. Bishop & Edward A. Hartnett, *Supreme Court Practice* 359-62 (9th ed. 2007) (listing cases in which the Court has dismissed certiorari as improvidently granted). Here, the amendments to the private-school-tuition-tax credit do not affect the questions that the Petitions presented.

thus further the private-school-tuition-tax credit program's core purpose. The amendments do not change the fundamental characteristics of STOs that make them private organizations that the State regulates rather than state agencies.

As Respondents acknowledge, the Legislature enacted the 2010 amendments to Section 1089 based on a legislative task force's recommendations.[2] Resp. Supp. Br. at 3; *see also* Pet. Garriott's Br. at 10. The task force's purpose was to recommend measures to improve STOs' accountability and transparency. Ariz. H.R. Ad Hoc Comm. on Private School Tuition Tax Credit Review on HB 2664, 49th Leg. 1 (April 29, 2010). Most of the changes that the task force recommended and the Legislature adopted do indeed improve STOs' accountability or transparency or both:[3]

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[2] The earlier enacted amendment to Section 1089 in S.B. 1274 allows a taxpayer who contributes to an STO before April 15 to take the credit either in the year that he or she makes the contribution or in the preceding tax year. 2010 Ariz. Sess. Laws, ch. 188. *See* Garriott Pet. App. 1-4. This amendment does not alter the nature of the tax credit; it simply allows low-income individuals to determine if they can afford to take the credit by permitting them to make a contribution after they are certain of the amount of taxes that they owe.

[3] The requirement in A.R.S. § 43-1089(C) that the Arizona Department of Revenue (Department) adjust the tax credit's amount based on the Consumer Price Index does not further accountability or transparency but it is a practical method of ensuring that inflation does not devalue the credit over time. The requirement is not relevant to the issues presented here.

- **The Certification Requirement.** The requirement in A.R.S. § 43-1603(B)[4] that STOs obtain and retain certification from the Arizona Department of Revenue (Department) ensures that STOs will follow the statutory requirements. The requirements in A.R.S. §§ 43-1602(B) and -1089(A) that the Department maintain a public registry of currently certified STOs, keep the registry up to date, post the registry on its official website, and deny a credit for contributions to STOs that are not certified ensures that taxpayers can find out which STOs are certified and will contribute only to certified STOs.

- **The Regulation of STOs' Expenditures.** Section 1089 has always required that an STO "allocate[ ] at least ninety per cent of its annual revenue for educational scholarships and tuition grants." 1997 Ariz. Sess. Laws, ch. 48, § 2 (defining an STO). The requirement that the Department deny or revoke an STO's certification if it does not comply with this requirement holds STOs accountable if they fail to comply with the statute. The requirement that STOs report the names, job titles, and annual

[4] The Legislature originally codified H.B. 2664 at A.R.S. §§ 43-1501 to -1505 but the legislative council renumbered the provisions as A.R.S. §§ 43-1601 to -1605 as authorized by A.R.S. § 41-1304.02.

salaries of their three highest-paid employees allows taxpayers to evaluate this information when they are deciding whether to contribute to an STO.

- **Scholarship Award Standards.** The requirement in A.R.S. § 43-1603(D)(2) that STOs consider the financial need of their applicants makes STOs more accountable for the standards that they use in awarding scholarships. And the requirement in A.R.S. § 43-1604(7) that STOs report the total dollar amount of scholarships awarded to students in low- and middle-income families allows taxpayers to evaluate this information when choosing to contribute to a particular STO. Under A.R.S. § 43-1603(B), STOs cannot (1) award scholarships based solely on donor recommendations, (2) allow donors to designate student beneficiaries as a condition of any contribution to the STO, or (3) "facilitate, encourage or knowingly permit the exchange of beneficiary student designations." These provisions make STOs accountable if they allow donors to benefit directly or indirectly from their contributions. Moreover, this is consistent with STOs' status as § 501(c)(3) organizations. *See* 26 C.F.R. § 1.501(c)(3)-1(d)(ii) (to meet § 501(c)(3) requirements, an organization must establish that it is not organized or operated for the benefit of private interests).

- **State Supervision of STOs' Compliance with Certification Requirements.** Requiring STOs to be certified would not make them more accountable unless there was a remedy for their failure to comply with the certification requirements. Thus, requiring the Department to give an STO notice of its failure to comply with statutory requirements, A.R.S. § 43-1602(C), and giving the Department the authority to revoke an STO's certification if it fails or refuses to comply after ninety days, A.R.S. § 43-1602(D), makes STOs accountable if they fail to comply with statutory requirements.

- **Audits of STO Operations.** The requirement in A.R.S. § 43-1605 that STOs demonstrate that they are in compliance with the statute's fiscal requirements by having an independent certified public accountant conduct an audit or a financial review and submit the audit or financial review to the Department makes STOs accountable if they fail to meet statutory requirements.

The amendments to Section 1089 do not make STOs state agents because under the amendments, STOs continue to be formed by private individuals as Section 501(c)(3) organizations that determine to whom and under what standards they will award scholarships to designated private schools. The additional state regulation that the amendments impose

on STOs is "no different than, and in many instances less demanding than, the requirements already imposed on STOs as 501(c)(3) nonprofit corporations at both the state and federal level." Pet. Arizona Christian School Tuition Organization's (ACSTO's) Reply to Respondents' Supplemental Brief Regarding a Change in State Law at 5-8 (discussing federal and state requirements imposed on § 501(c)(3) organizations). And, as ACSTO also notes, other state tuition tax credit programs have auditing requirements. *Id.* at 8. Finally, Arizona requires other organizations to be certified as a condition of granting a credit to an individual who contributes to the organization. *See, e.g.,* A.R.S. § 43-1074 (allowing an income-tax credit to certain employees of certain businesses located in enterprise zones provided that the business reports and certifies required information to the Department); A.R.S. § 43-1088 (allowing an income-tax credit to individuals who contribute to charitable organizations that provide services to low-income families or to chronically ill or disabled children if the organization provides the Department with written certification of compliance with statutory criteria).

CONCLUSION

For the foregoing reasons, the Court should disregard Respondents' supplemental brief. Because the 2010 amendments to Section 1089 do not alter the need for this Court's review, it should reject Respondents' suggestion that it incorrectly granted certiorari.

Respectfully submitted,

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