In The Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, et al.,
Petitioners,

v.

KATHLEEN M. WINN, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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February 18, 2010

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QUESTIONS PRESENTED

1. Do Respondents lack taxpayer standing because they do not allege, nor can they, that the Arizona Tuition Tax Credit involves the expenditure or appropriation of state funds?

2. Is the Respondents' alleged injury—which is solely based on the theory that Arizona's tax credit reduces the state's revenue—too speculative to confer taxpayer standing, especially when considering that the credit reduces the state's financial burden for providing public education and is likely the catalyst for new sources of state income?

3. Given that the Arizona Supreme Court has authoritatively determined, under state law, that the money donated to tuition granting organizations under Arizona's tax credit is private, not state, money, can the Respondents establish taxpayer standing to challenge the decisions of private taxpayers as to where they donate their private money?

PARTIES TO THE PROCEEDING

Petitioners are Gale Garriott, in his official capacity as Director of the Arizona Department of Revenue, Arizona School Choice Trust, Luis Moscoso, Glenn Dennard, and Arizona Christian School Tuition Organization.

Respondents are Kathleen M. Winn, Maurice Wolfthal, and Lynn Hoffman.

CORPORATE DISCLOSURE STATEMENT

Petitioners Arizona Christian School Tuition Organization and Arizona School Choice Trust do not have parent companies and are not publicly held.

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DECISIONS BELOW

The district court's ruling granting Arizona School Choice Trust's motion to dismiss is reported at 361 F. Supp. 2d 1117 and reprinted in Appendix (App.) at App. 44a-59a. The Ninth Circuit panel opinion is reported at 562 F.3d 1002 and reprinted in App. 1a-43a. The order denying the petitions for rehearing en banc, and the accompanying opinions concurring and dissenting from the order, appear at 586 F.3d 649 and are reprinted in App. 62a-110a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its decision on April 21, 2009. The Ninth Circuit denied the petitions for rehearing en banc on October 21, 2009. On January 15, 2010, Petitioners obtained an extension of time, up and until February 18, 2010, to file petitions for writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

A.R.S. § 43-1089, which is the statute creating the tuition tax credit program at issue in this case, is too lengthy to include herein. Pursuant to Rule 10(1)(f), the full text of this statute is set out in the appendix at App. 112a-115a.

STATEMENT OF THE CASE

A. Factual Background

The facts material to the questions presented are simple and straightforward. In 1997, the Arizona Legislature enacted Ariz. Rev. Stat. § 43-1089, which allows Arizona taxpayers to donate private funds to a "school tuition organization" ("STO") of their choice. § 43-1089(A), App. 112a. The taxpayer may then claim a dollar-for-dollar credit on their state income tax for the amount donated, which is capped at $500 for individual filers and $1000 for married couples filing a joint return. §§ 43-1089(A)(1)-(3), App. 112a.

STOs are private, charitable, tax-exempt corporations. § 43-1089(G)(3), App. 115a. Anyone can form an STO. App. 85a. STOs are mandated by statute to donate a minimum of ninety percent of their income to children who attend private schools. § 43-1089(G)(2)-(3), App. 114a-115a. Any STO may provide scholarships to students to attend any school, and the only limitation is that they cannot provide scholarships to students of only one school. § 43-1089(G)(3), App. 115a. Parents are responsible for deciding which school their child attends, and applying for a scholarship from an appropriate STO. App. 86a.

Under Arizona's tax credit program, the private choices of taxpayers, the STOs, and parents direct tuition funds to students. App. 52a-53a. The taxpayer chooses to donate or not, and if he donates, to which STO. App. 52a. The privately formed, non-profit STOs raise money to award scholarships to schools of their choice. App. 52a-53a. Each parent is responsible for deciding which school his or her child attends, and which STO to apply to for a scholarship. App. 52a.

Finally, the Arizona Supreme Court, in *Kotterman v. Killian*, 972 P.2d 606, 618 (Ariz. 1999), *cert. denied,* 528 U.S. 921 (1999), authoritatively determined, as a matter of state law, that the funds generated by Arizona's tax credit are private money to which the state has no legal claim.

B. Procedural Background

Respondents filed this lawsuit in Arizona Federal District Court on February 15, 2000. The Complaint alleged that Arizona's tuition tax credit violated the Establishment Clause of the United States Constitution both on its face and as applied. App. 118a.[1]

The district court dismissed the Complaint pursuant to the Tax Injunction Act, 28 U.S.C. § 1341. The Ninth Circuit reversed that judgment. *Winn v. Killian*, 307 F.3d 1011 (9th Cir. 2002). This

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[1] At oral argument before the Ninth Circuit, the Respondents abandoned their facial challenge. App. 7a n.5.

Court affirmed that decision. *Hibbs v. Winn*, 542 U.S. 88 (2004).

Upon remand, the district court granted intervention to ACSTO, ASCT, and two parents whose children receive tax credit funded scholarships. The intervenors filed motions to dismiss the Complaint, and the State Defendant filed a motion for judgment on the pleadings. Taken together, the various filings argued that the Complaint should be dismissed because the Respondents lacked standing; the Respondents' Complaint failed to state an Establishment Clause claim upon which relief could be granted; and the Respondents' claims were decided by the Arizona Supreme Court in *Kotterman*, and thus barred by res judicata. On March 24, 2004, the district court granted ASCT, et al.'s motion to dismiss, holding that Respondents' Complaint failed to state a claim under the Establishment Clause because the tax credit was a program of true private choice in which money reached religious schools by way of "multiple layers of private choice." App. 52a. The Respondents timely appealed on April 22, 2005.

On April 21, 2009, the Ninth Circuit reversed the district court's dismissal, and remanded the case so the Respondents could pursue their as-applied challenge to Arizona's tax credit program. ACSTO, ASCT, et al., and the State Defendant filed timely petitions for rehearing en banc on May 14, 2009. The Ninth Circuit denied rehearing en banc on October 21, 2009. Judge O'Scannlain, writing for seven other judges, dissented from the denial of rehearing en

banc. Judge O'Scannlain stressed the national significance of the panel's decision, stating that it "casts a pall over comparable educational tax-credit schemes in states across the nation and could derail legislative efforts in four states within our circuit to create similar programs." App. 84a. Judge O'Scannlain concluded that the panel's decision "jeopardize[s] the educational opportunities of hundreds of thousands of children nationwide." App. 84a.

REASONS FOR GRANTING THE WRIT

Petitioner ACSTO concurs with the petitions for certiorari of the State Defendant and of Arizona School Choice Trust, *et al.*, and urges this Court to grant certiorari for the reasons stated therein.

Rather than reiterating the Establishment Clause arguments amply and aptly presented by ASCT and the State, ACSTO submits a separate petition urging the Court to grant certiorari for an additional reason not addressed in the State's or ASCT's petitions: that the Ninth Circuit erred in finding that the Respondent satisfied the requirements of taxpayer standing. The petition should be granted to address this issue, in addition to the Establishment Clause issues raised by the State and ASCT, because the Ninth Circuit's holding regarding the important federal question of taxpayer standing conflicts with decisions of this Court and of the Arizona Supreme Court in several ways.

First, the Ninth Circuit's finding of taxpayer standing conflicts with decisions of this Court holding that to establish taxpayer standing in the context of an Establishment Clause challenge, a plaintiff must allege "the very 'extract[ion] and spend[ing]' of 'tax money' in aid of religion." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 348 (2006) (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)). Respondents do not make any such allegation here, nor could they, since Arizona's tax credit program does not levy a tax or appropriate any money. It simply allows private citizens to donate their money to a charitable organization that grants tuition scholarships. The Ninth Circuit's holding that a taxpayer has standing to bring a federal lawsuit challenging private individuals' decisions on how to donate their own money directly conflicts with this Court's decisions, warranting review and reversal by this Court.

Second, the Ninth Circuit's finding of taxpayer standing conflicts with decisions of this Court stating that Article III standing requires an injury that is actual and concrete, not speculative or conjectural. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Respondents predicate their standing solely on the theory that Arizona's tax credit reduces the state's revenue. The problem with Respondents' theory is that their injury is inherently subjective and speculative. The impact of Arizona's tax credit on Arizona's tax revenue defies calculation. While the tax credit results in millions of dollars flowing to STOs in order to fund scholarships for private education each year, it also saves the

state millions of dollars each year by reducing the state's financial outlays for public education. It also likely creates new sources of tax income. The Ninth Circuit's finding that Respondents have standing marks an unwarranted expansion of Article III standing into the realm of speculative injuries, in direct conflict with decisions of this Court. Review and reversal by this Court is therefore warranted.

Third, the Ninth Circuit's opinion conflicts with this Court's frequent holding that federal courts are bound by authoritative interpretations of state law by a state's highest court. In finding that Respondents have taxpayer standing, the Ninth Circuit disregarded the Arizona Supreme Court's holding in *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) that, under Arizona state law, the funds flowing to school tuition organizations are private monies. Rather than follow this holding, the Ninth Circuit supplanted it with its own view that Arizona's tax credit involves the allocation of state funds. The Ninth Circuit's opinion thus directly conflicts with decisions of the Arizona Supreme Court and this Court, and review and reversal by this Court is warranted.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT REGARDING THE ALLEGATIONS NECESSARY TO CONFER TAXPAYER STANDING.

This Court's decision in *Flast v. Cohen*, 392 U.S. 83 (1968), created an exception in certain types of Establishment Clause cases to the general rule that

"state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers." *DaimlerChrysler Corporation v. Cuno*, 547 U.S. 332, 346 (2007). Recent decisions of this Court have stressed that "the *Flast* exception has a 'narrow application in our precedent,' that only 'slightly lowered' the bar on taxpayer standing, and that must be applied with 'rigor.'" *Hein v. Freedom From Religion Foundation*, 551 U.S. 587, 609 (2007) (citations omitted).

Under *Hein*, *Flast* and *DaimlerChrysler*, to establish standing a taxpayer-plaintiff must show that the state has extracted taxes from them, or has appropriated and spent public monies, to fund a program that allegedly violates the Establishment Clause. For example, in *Hein*, the Court held that the plaintiffs lacked standing to challenge the use of tax money by the Executive Branch of the federal government to pay for religious conferences and speeches. 551 U.S. at 605. The plaintiffs in *Hein* argued for a broad interpretation of *Flast*, stating that *Flast* confers standing where "any 'expenditure of government funds in violation of the Establishment Clause'" is challenged. *Id.* at 603. But this Court rejected this interpretation, instead holding that only "expenditures . . . made pursuant to an express congressional mandate and a specific congressional appropriation" satisfied *Flast*'s standing requirements. *Id. Accord DaimlerChrysler*, 547 U.S. at 348 (observing that the taxpayer injury that satisfies standing in Establishment Clause cases is "the very 'extract[ion] and spend[ing]' of 'tax

money' in aid of religion" (quoting *Flast*, 392 U.S. at 106)).

In fact, as far back as 1952, this Court held that a taxpayer challenging a practice under the Establishment Clause must allege "a good-faith pocketbook action" in which there is a "direct dollars-and-cents injury." *Doremus v. Board of Ed. of Borough of Hawthorne*, 342 U.S. 429, 434 (1952). This requires a taxpayer-plaintiff to show "a measurable appropriation or disbursement of [public] funds occasioned solely by the activities complained of." *Id.* The taxpayer-plaintiff in *Doremus* lacked standing because he could not show that any tax funds had been spent on the school's practice of having the Bible read at the beginning of each school day. In rejecting plaintiff's standing, the Court said that he, like Respondents here, was seeking to litigate a "grievance [that] is not a direct dollars-and-cents injury but is a religious difference." *Id.*

Respondents lack taxpayer standing here for the same reason this Court rejected standing in *Hein* and *Doremus*. Nowhere in the Complaint do Respondents allege, nor could they, that taxpayer funds have been extracted from them, or otherwise appropriated, and spent, to implement Arizona's tuition tax credit program.[2] Indeed, the challenged

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[2] In fact, as discussed in § III, *infra*, the Arizona Supreme Court decided in *Kotterman*, 972 P.2d at 618, that the money that flows to STOs as a result of Arizona's tax credit is private, not public, money. This holding, with which the Ninth Circuit's

program does not levy any tax upon the Respondents, nor does it appropriate public funds, to be used to support religious education. Rather, it offers taxpayers the choice of taking a tax credit so they may voluntarily donate their money to support charitable organizations of their choosing. How much money, and to which STOs and students it goes, are decisions made by private taxpayers and parents, not by the legislature.

Put simply, any effect upon Arizona's tax revenues (and Respondents' claims regarding the alleged effect are entirely speculative and thus insufficient to confer standing, *see* § II, *infra*), results solely from individual taxpayers making private, independent choices to avail themselves of tax credits. The legislature has appropriated no sum of money to fund its program, nor taxed the Respondents to support it. Respondents therefore lack taxpayer standing under this Court's precedent, and the Ninth Circuit's finding to the contrary is in conflict with that precedent.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT STATING THAT A SPECULATIVE AND CONJECTURAL INJURY CANNOT CONFER ARTICLE III STANDING.

In their Complaint, Respondents expressly admit that their taxpayer standing argument is not based on the traditional and required "tax and spend"

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decision directly conflicts, forecloses any argument that the tax credit diverts state tax funds to religious schools.

injury. Rather, Respondents predicate their standing argument solely on the theory that Arizona's tax credit program diminishes the State's revenues. App. 126a ("Plaintiffs and other Arizona taxpayers have been and will continue to be irreparably harmed by the diminution of the state general fund through the tax credit program described above"). In addition to conflicting with the requirements of *Hein*, *Flast*, *Doremus*, and *DaimlerChrysler* set out *supra*, the Ninth Circuit's acceptance of Respondents' standing theory also conflicts with this Court's decisions regarding the prerequisites for Article III standing.

Article III requires a taxpayer-plaintiff to demonstrate a "concrete and particularized" injury, that is "actual or imminent," not "conjectural or hypothetical." *DaimlerChrysler*, 547 U.S. at 344. *See also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 480 n.17 (1982) (noting that "any connection between the challenged property transfer and respondents' tax burden is at best speculative and at worst nonexistent"). A mere grievance that the taxpayer "suffers in some indefinite way in common with people generally" is insufficient. *DaimlerChrysler*, 547 U.S. at 344.

The plaintiffs in *DaimlerChrysler* challenged a state tax credit provided to the DaimlerChrysler corporation to induce it to keep a manufacturing plant within the State. *Id.* at 337-38. Like the Respondents here, the plaintiffs in *DaimlerChrysler* based their standing to sue on the alleged reduced State and city revenue that resulted from the tax

credit. *Id.* at 339. The *DaimlerChrysler* plaintiffs' standing argument is indistinguishable from Respondents' argument, as they also claimed that the tax credit "'depletes the funds of the State of Ohio to which the Plaintiffs contribute through their tax payments' and thus 'diminish[es] the total funds available for lawful uses and impos[es] disproportionate burdens on' them." *Id.* at 342-43 (quoting plaintiffs' brief on appeal).

DaimlerChrysler identified two ways in which the plaintiffs claimed "reduced revenue" injury was speculative in nature, and thus insufficient to establish Article III standing. First, it was pure speculation how the challenged tax credit would impact the State treasury. As this Court said, "[I]t is unclear that tax breaks of the sort at issue here do in fact deplete the treasury: The very point of the tax benefits is to spur economic activity, which in turn *increases* government revenues." *Id.* at 344.

The same logic undermines Respondents' "reduced revenue" injury here. Like the tax credit involved in *DaimlerChrysler*, the economic impact of Arizona's tuition tax credit on the State treasury requires too much conjecture and hypothesizing to support Article III standing. Indeed, this Court has recognized that state programs aimed at increasing educational choice by making private school more affordable likely decrease a state's tax burden: "By educating a substantial number of students [private] schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers." *Mueller v. Allen*, 463 U.S. 388, 395 (1983).

In addition to reducing the State's financial burden in providing public education, the tax credits at issue here, like the credits in *DaimlerChrysler*, also likely create other sources of state revenue. For example, Arizona's tax credit likely has increased the number of teaching, administrative, and management positions open at already existing private schools, and also has likely led to the establishment of new private schools in the State. This increase in economic activity correlates to numerous new sources of tax revenues for the State. Put simply, the Respondents' claim that the tax credit diminishes the state treasury is purely speculative and thus is too hypothetical and remote of an "injury" to confer Article III standing.

In finding that Respondents had standing, the Ninth Circuit made the same mistake as Respondents: it only looked at one side of the ledger. The Ninth Circuit stressed that taxpayer donations to STOs had increased significantly since the program's inception, noting that in its first year (1998) Respondents' alleged that taxpayer's claimed $1.8 million in credits while in 2007 the Arizona Department of Revenue reported that taxpayers claimed $54 million in credits. App. 11a-12a n.7. But as *Daimler Chrysler* makes clear, Respondents' "reduced revenue" theory of standing cannot be evaluated by focusing myopically on the credits taken. The other side of the ledger—made up of, *inter alia*, tax savings from reduced public education costs and new sources of tax income created by the program—must also be taken into account.

And, of course, whether tax revenues have actually decreased as a result of the tuition tax credit program is a highly subjective matter, depending largely on how one analyzes the available financial data. For instance, Respondents rely on a Goldwater Institute study of the Arizona tax credit to argue that the credit results in a loss of revenue to the State. Carrie Lukas, *The Arizona Scholarship Tax Credit: Providing Choice for Arizona Taxpayers and Students*, Goldwater Institute Policy Report # 186, Dec. 11, 2003, http://www.goldwaterinstitute.org/article/1204. However, a 2008 study of the program found that "the Private School Tuition Tax Credit saves Arizona taxpayers somewhere from $99.8 to $241.5 million due to students enrolling in private rather than public school," while taxpayer donations amounted to only $55.3 million dollars. Charles M. North, *Estimating the Savings to Arizona Taxpayers of the Private School Tuition Tax Credit*, at 1, http://archive.constantcontact.com/fs035/1011047932616/archive/1102832763902.html. These dueling studies regarding the impact of the tax credit on Arizona's revenue highlight the inherent uncertainty and subjectivity in Respondents' "reduced revenue" standing theory, and it simply cannot confer Article III standing.

DaimlerChrysler provided a second reason why the plaintiffs' alleged injury in that case was "conjectural and hypothetical" which is also applicable here. This Court explained that plaintiffs' alleged injury depended "on how legislators respond to a reduction in revenue, if that is the consequence of the credit." 547 U.S. at 344. The Court expounded:

> Establishing injury requires speculating that elected officials will increase a taxpayer-plaintiff's tax bill to make up a deficit; establishing redressability requires speculating that abolishing the challenged credit will redound to the benefit of the taxpayer because legislators will pass along the supposed increased revenue in the form of tax reductions. Neither sort of speculation suffices to support standing.

Id. (emphasis added). Here, the Plaintiffs have not even alleged that their tax burden has increased as a result of Arizona's tax credit. Even if they did, that allegation would not support standing because their alleged tax increase would be no more than pure speculation regarding the impact of Arizona's tuition tax credit on the State treasury.

Further, as the above quote highlights, Respondents likewise have a problem with the redressability prong of Article III standing. Like the plaintiffs in *DaimlerChrysler*, the Respondents seek to have the tax credit they are challenging enjoined. However, *DaimlerChrysler* points out several reasons why such an injunction would not have provided plaintiffs redress in that case. First, since the "very point of tax benefits is to spur economic activity, which in turn *increases* government revenues," it was not clear that an injunction would remedy the alleged depletion of tax revenue. *Id.* at 344. Second, the Court stated it was pure speculation to assume that abolishing the tax credit

would result in the State passing the supposed increased revenue on to taxpayers in the form of tax reductions. *Id.* The same fatal flaws exist as to Respondents' claim that an injunction against Arizona's tax credit will redress their alleged injury.

III. THE NINTH CIRCUIT'S CONCLUSION THAT THE TAX CREDIT FUNDS ARE PUBLIC FUNDS CONFLICTS WITH DECISIONS OF THE ARIZONA SUPREME COURT AND THIS COURT.

This Court has long held that "state courts are the ultimate expositors of state law" and that federal courts are therefore "bound by their constructions except in extreme circumstances." *Mullaney v. Wilbur,* 421 U.S. 684, 691 (1975). *Accord Cunningham v. California,* 549 U.S. 270, 306 n.8 (2007) ("California Supreme Court's exposition of California law is authoritative and binding on this Court"); *Wainwright v. Goode,* 464 U.S. 78, 84 (1983) (*per curiam*) ("[T]he views of the State's highest court with respect to state law are binding on the federal courts"); *Ring v. Arizona,* 536 U.S. 584, 603 (2002) (recognizing the Arizona Supreme Court's construction of Arizona sentencing law as authoritative).

This line of case law is applicable here because determining whether Respondents can establish taxpayer standing depends on whether the money flowing to the beneficiaries of Arizona's tax credit is private or public money. This is a question of state law on which the Arizona Supreme Court has authoritatively spoken: the funds that flow to STOs

and ultimately to children in the form of tuition scholarships, is private, not public, money. As the *Kotterman* court said:

> [N]o money *ever* enters the state's control as a result of this tax credit. Nothing is deposited in the state treasury or other accounts under the management or possession of governmental agencies or public officials. Thus, under any common understanding of the words, we are not here dealing with "public money."

972 P.2d at 618.

Kotterman involved a challenge to the same tax credit program that is at issue here based on the federal Establishment Clause and the Arizona Constitution's Religion Clauses. The *Kotterman* Court's holding that the money contributed to STOs is private money was central to its holding that the program did not violate either the federal or state constitutions. Further, this holding constitutes an authoritative interpretation of state law regarding the nature of the funds generated by Arizona's tax credit. The Ninth Circuit's opinion directly conflicts with *Kotterman*, and with the rule that a state supreme court's interpretation of state law is binding on federal courts, by supplanting *Kotterman*'s interpretation of Arizona law with its view that Arizona's tax credit "'channel[]s . . . [state] assistance' to private organizations." App. 12a.

Importantly, the *Kotterman* decision rejects each of the Ninth Circuit's findings supporting its contrary view that the money involved here is public money. For example, the Ninth Circuit found that the tax credits allowed under Arizona's program are public money because they are deducted after tax liability has been calculated:

> Tax credits are deducted *after* taxpayers' tax liability has been calculated, thereby giving taxpayers dollar-for-dollar "credits" against their state taxes for sums paid to STOs. Tax credits therefore operate differently from tax deductions; whereas tax deductions allow taxpayers only to reduce their income subject to taxation, tax credits allow individuals to make payments to a third party *in satisfaction of* their assessed tax burden.

App. 11a.

The *Kotterman* court directly addresses and rejects this view:

> For us to agree that a tax credit constitutes public money would require a finding that state ownership springs into existence at the point where taxable income is first determined, if not before. . . . We believe that such a conclusion is both artificial and premature. It is far more reasonable to

> say that funds remain in the taxpayer's ownership *at least* until final calculation of the amount actually owed to the government, and upon which the state has a legal claim.

972 P.2d at 618.

The Ninth Circuit also supported its finding that Arizona's tax credit involves public money by claiming that if the money is not donated to an STO it would otherwise be state revenue. App. 14a ("[T]he state legislature has provided only two ways for this money to be spent: taxpayers will either give the dollar to the state, or that dollar . . . *will* end up in scholarships for private school tuition"). Again, *Kotterman* rejected this line of reasoning:

> Petitioners suggest . . . that because taxpayer money could enter the treasury if it were not excluded by way of the tax credit, the state effectively controls and exerts quasi-ownership over it. This expansive interpretation is fraught with problems. Indeed, under such reasoning all taxpayer income could be viewed as belonging to the state because it is subject to taxation by the legislature.

972 P.2d at 618.

Finally, the Ninth Circuit stated that the tax credit operates "as if the state had given each taxpayer a $500 dollar check that can only be

endorsed over to a STO or returned to the state." App. 13a. The quotes from *Kotterman* above directly contradict this finding. Likewise, *Kotterman* rejected the view that "reducing a taxpayer's liability is the equivalent of spending a certain sum of money." 972 P.2d at 620.

The Ninth Circuit asserts that *Kotterman* "has no bearing on [its] analysis of plaintiffs' standing in federal court" because *Kotterman* dealt with whether the tax credit "constitute[s] an 'appropriation of public money' within the meaning of" Arizona's Religion Clauses. App. 12a n.8. But *Kotterman* is not so limited. Indeed, *Kotterman*'s holding that tax credits constitute private money draws from several Arizona cases unrelated to the State constitution's Religion Clauses. *See Kotterman*, 972 P.2d at 617 (relying upon cases dealing with state employee retirement benefits, payments by university regents, and contracts between state agencies and tribal government). Further, *Kotterman*'s adoption of the view that tax credits are not public money because "funds remain in the taxpayer's ownership *at least* until final calculation of the amount actually owed to the government," *id.* at 618, demonstrates that, under Arizona law, tax credits generally (and the tuition tax credits involved here, specifically) are private, not public, money. Additionally, the Ninth Circuit is simply incorrect that the tax credit funds morph between public and private depending on what legal question is being analyzed. The funds are either public or private under Arizona law, and *Kotterman* authoritatively decided that the tax credit funds are private.

Kotterman is an authoritative interpretation of state law regarding the nature of the funds generated by Arizona's tax credit program and is binding on the federal courts. Further, its holding that these funds are private defeats Respondents' standing to sue. No public money is involved, so Respondents are unable to allege the required injury: the extracting and spending of public tax dollars in aid of religion. *See* § I, *supra*. The Ninth Circuit's holding that Respondents have taxpayer standing is predicated on its holding that the tax credit funds constitute public funds. This holding is in direct conflict with the Arizona Supreme Court's interpretation of state law, and with this Court's precedent stating that federal courts are bound by such determinations.

CONCLUSION

For the foregoing reasons, and for the reasons specified in ASCT and the State Defendant's petitions, Petitioner ACSTO respectfully requests that this Court grant review.

Respectfully submitted,

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