

Nos. 09-987, 09-991

---

---

IN THE

**Supreme Court of the United States**

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,  
*Petitioner,*

v.

KATHLEEN M. WINN, ET AL.,  
*Respondents.*

GALE GARRIOTT,  
*Petitioner,*

v.

KATHLEEN M. WINN, ET AL.,  
*Respondents.*

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

**BRIEF FOR AMERICANS UNITED FOR  
SEPARATION OF CHURCH AND STATE, AMERICAN JEWISH  
COMMITTEE, THE ANTI-DEFAMATION LEAGUE, THE BAPTIST  
JOINT COMMITTEE FOR RELIGIOUS LIBERTY, AND THE  
INTERFAITH ALLIANCE FOUNDATION AS  
AMICI CURIAE IN SUPPORT OF RESPONDENTS**

Ayesha N. Khan  
AMERICANS UNITED FOR  
SEPARATION OF CHURCH  
AND STATE  
518 C Street, NE  
Washington, DC 20002  
(202) 466-3234

Kurt Wimmer  
Gregory M. Lipper  
*Counsel of Record*  
Charles Kitcher  
Sarah M. Powell  
COVINGTON & BURLING LLP  
1201 Pennsylvania Avenue, NW  
Washington, DC 20004  
(202) 662-5496  
glipper@cov.com

September 22, 2010

---

---

**Table Of Contents**

Table Of Authorities..... ii

Interest Of Amici Curiae..... 1

Summary Of Argument..... 3

Argument..... 6

I. Tax Expenditures Cause The Same  
Injury To Taxpayers As Do Cash Grants..... 6

    A. The Economic Effect Of Tax Expenditures  
    Is Identical To That Of Direct  
    Appropriations. .... 6

    B. The Court Has Consistently Considered  
    Taxpayers’ Establishment Clause  
    Challenges To Tax Expenditures..... 10

    C. ACSTO’s Theory of Standing Would  
    Insulate From Redress The Very Injuries  
    That The Establishment Clause Was  
    Designed To Prevent..... 15

II. Citizens’ Private Choice Does Not Strip  
The Plaintiffs of Standing. .... 16

    A. There Is A Direct Legislative Nexus  
    Between Section 1089 And The  
    Challenged Subsidy. .... 17

    B. State Taxpayer Standing Is Not Subject  
    To The Legislative-Nexus Requirement..... 18

Conclusion ..... 22

**Table Of Authorities**

**Cases**

<i>Allen v. Wright</i> , 468 U.S. 737 (1984) .....	20–21
<i>Arkansas Writers’ Project, Inc. v. Ragland</i> , 481 U.S. 221 (1987) .....	12
<i>Bob Jones University v. United States</i> , 461 U.S. 574, 591 (1983). .....	15
<i>Bowen v. Kendrick</i> , 487 U.S. 589 (1988) .....	17, 18
<i>Brown Shoe Co. v. United States</i> , 370 U.S. 294, 307 (1962) .....	11
<i>Byrne v. Public Funds for Public Schools of New Jersey</i> , 442 U.S. 907 (1979) .....	11
<i>Committee For Public Education &amp; Religious Liberty v. Nyquist</i> , 413 U.S. 756 (1973) .....	11, 13
<i>DaimlerChrysler Corp. v. Cuno</i> , 126 S. Ct. 36 (2005) (Mem) .....	12
<i>DaimlerChrysler Corp. v. Cuno</i> , 547 U.S. 332 (2006) .....	13, 14

<i>Elrod v. Burns</i> , 427 U.S. 347 (1976) .....	21
<i>Flast v. Cohen</i> , 392 U.S. 83 (1968) .....	4, 15, 18
<i>Hein v. Freedom From Religion Foundation, Inc.</i> , 551 U.S. 587 (2007) .....	5, 14, 18, 19, 20
<i>Hibbs v. Winn</i> , 542 U.S. 88 (2004) .....	10
<i>Huffman v. Pursue, Ltd.</i> , 420 U.S. 592 (1975) .....	21–22
<i>Hunt v. McNair</i> , 413 U.S. 734, 735 (1973) .....	11
<i>Kotterman v. Killian</i> , 972 P.2d 606 (Ariz. 1999) (en banc) .....	10
<i>Laird v. Tatum</i> , 408 U.S. 1 (1972) .....	21
<i>Levin v. Commerce Energy, Inc.</i> , 130 S. Ct. 2323 (2010) .....	10, 14
<i>Mueller v. Allen</i> , 463 U.S. 388 (1983) .....	11, 17
<i>Perkins v. Lukens Steel Co.</i> , 310 U.S. 113 (1940) .....	21

<i>Regan v. Taxation With Representation of Washington</i> , 461 U.S. 540 (1983) .....	12
<i>Rosenberger v. Rector &amp; Visitors of University of Virginia</i> , 515 U.S. 819 (1995) .....	13
<i>South Central Bell Telephone Co. v. Alabama</i> , 526 U.S. 160 (1999) .....	11–12
<i>South Carolina v. Katzenbach</i> , 383 U.S. 301, 324 (1966) .....	21
<i>Texas Monthly, Inc. v. Bullock</i> , 489 U.S. 1 (1989) .....	6
<i>United States v. Gillock</i> , 445 U.S. 360, 370 (1980) .....	21
<i>Walz v. Tax Commission</i> , 397 U.S. 664 (1970) .....	11
<i>Zelman v. Simmons-Harris</i> , 536 U.S. 639 (2002) .....	13, 17
<b>Statutes and Constitutional Provisions</b>	
Ariz. Const. art. IV, § 6(D) .....	20
Ariz. Stat. § 42-1005.....	9
Ariz. Stat. § 43-1089.....	<i>passim</i>

Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974).....	7–8
Fla. Const. art. IV, § 13.....	20
Ky. Const. § 50.....	19–20
Mich. Const. art. V, § 20.....	20
Neb. Const. art. IV, § 7.....	19
Ohio Const. art. II, § 1(a) .....	19
U.S. Const. art. I, § 8, cl. 1 .....	19
U.S. Const. art. I, § 9, cl. 7 .....	19
W. Va. Const. art. VI, § 51 .....	20

### **Other Authorities**

Donna D. Adler, <i>The Internal Revenue Code, The Constitution, and The Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making</i> , 28 Wake Forest L. Rev. 855 (1993).....	7, 9
Edward D. Kleinbard, <i>The Congress Within The Congress: How Tax Expenditures Distort Our Budget and Our Political Process</i> , 36 Ohio N.U. L. Rev. 1 (2010) .....	16

Office of Economic Research & Analysis, Arizona Department of Revenue, <i>The Revenue Impact of Arizona’s Tax Expenditures FY 2008/09</i> (2009). .....	9, 10
Richard D. Pomp, <i>The Disclosure of State Corporate Income Tax Data: Turning the Clock Back to the Future</i> , 22 Cap. U. L. Rev. 373 (1993) .....	9
Daniel N. Shaviro, <i>Rethinking Tax Expenditures and Fiscal Language</i> , 57 Tax L. Rev. 187 (2004) .....	7
Staff of Joint Committee on Taxation, 109th Congress, <i>Estimates of Federal Tax Expenditures for Fiscal Years 2006–2010</i> (Comm. Print 2006) ....	8
Staff of Joint Committee on Taxation, 110th Cong., <i>A Reconsideration of Tax Expenditure Analysis</i> (Comm. Print 2008).....	8
Stanley S. Surrey, <i>Pathways to Tax Reform</i> (1973) .....	7
Bernard Wolfman, <i>Tax Expenditures: From Idea to Ideology</i> , 99 Harv. L. Rev. 491 (1985) (book review) .....	16

### **Interest Of *Amici Curiae***

Americans United for Separation of Church and State (“American United”) is a national, nonsectarian public-interest organization based in Washington, D.C.<sup>1</sup> Its mission is twofold: (1) to advance the free-exercise right of individuals and religious communities to worship as they see fit, and (2) to preserve the separation of church and state as a vital component of democratic government. Americans United has more than 120,000 members and supporters across the country. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus curiae* in many of the Court’s leading church-state cases, including cases featuring Establishment Clause challenges to government funding of religious schools.

American Jewish Committee (“AJC”), a global Jewish advocacy organization with over 175,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews. AJC has always supported the constitutional principle of separation of religion and government and believes that it is improper for the government to fund religious activities.

---

<sup>1</sup> Each party has filed a letter with the Court consenting to the filing of amicus briefs. Pursuant to Rule 37.6, counsel for *amici curiae* states that no party or party’s counsel authored or funded this brief in whole or in part. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.



The Anti-Defamation League (“ADL”) was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States. Today, ADL is one of the world’s leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL’s core beliefs is strict adherence to the separation of church and state. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in America, and to the protection of minority religions and their adherents.

The Baptist Joint Committee for Religious Liberty (“BJC”) is a 74 year-old education and advocacy organization that serves fifteen cooperating Baptist conventions and conferences in the United States, with supporting individuals and congregations throughout the nation. The BJC deals exclusively with religious liberty issues and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans. The BJC believes that while tax expenditures (such as deductions and credits) and government grants may have the same economic effect on the government, and should be treated the same for the purposes of standing, their constitutional impact is not the same. The constitutional question turns on considerations distinct from those that guide the standing inquiry. The BJC has participated as *amicus curiae* in many of the major religious liberty cases before the Supreme Court.

Interfaith Alliance Foundation (“Interfaith Alliance”) celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance has 185,000 members across the country made up of 75 different faith traditions as well as from no faith tradition. As a vital part of its work promoting and protecting a pluralistic democracy, Interfaith Alliance supports people who believe that their religious freedoms have been restricted.

### **Summary Of Argument**

Petitioner Arizona Christian School Tuition Organization (“ACSTO”) advances a theory of taxpayer standing that would enable the legislature to inflict, through tax credits, the very harms that the Establishment Clause is designed to prohibit. Acceptance of ACSTO’s argument would undermine Establishment Clause principles and upend decades of settled jurisprudence.

The Arizona legislature has enacted a law, Ariz. Stat. § 43-1089 (“Section 1089”), that enables Arizona residents to direct part of their tax payments to licensed school tuition organizations that provide scholarships to Arizona students. An overwhelming majority of the resulting scholarships are awarded by religious organizations and support students who attend religious schools. *See Winn Br.* at 9, 12. The plaintiffs allege that Section 1089 violates the Establishment Clause.

The Arizona Department of Revenue does not challenge the plaintiffs’ standing to raise this Establishment Clause claim and instead defends Section 1089 on the merits. *See, e.g.*, Garriott Br. at 17–21. The dissenters in the Court of Appeals likewise did not question the plaintiffs’ standing. *See* ACSTO Pet. App. 83a–110a.

ACSTO, however, contends that the plaintiffs lack standing to challenge Section 1089. It asks the Court to embrace an unprincipled distinction between tax credits and cash grants—a distinction long rejected by federal and state governments, including Arizona. This distinction also contradicts many of the Court’s key Establishment Clause decisions and would preclude taxpayers from challenging even overt attempts to subsidize religion through tax credits.

I. The Court’s decision in *Flast v. Cohen*, 392 U.S. 83 (1968), makes clear that taxpayers have standing to bring Establishment Clause challenges to government outlays. ACSTO claims that, for the purpose of standing, tax expenditures, including tax credits, are functionally different than cash grants. They are not. Governments, federal and state, have long recognized that tax credits and cash grants have virtually identical economic effect. The Arizona Department of Revenue itself classifies Section 1089 as a “tax expenditure.”

To distinguish the two types of spending in the context of standing analysis would call into question numerous cases in which the Court addressed the merits of Establishment Clause challenges to tax

credits and tax deductions without raising any questions about the taxpayers' standing. Such a distinction, moreover, would condition Article III standing on a formality and would prevent taxpayers from challenging even tax credits reserved exclusively for churches or religious schools.

**II.** The role of taxpayers or scholarship organizations under the statutory scheme does not, as ACSTO contends, deprive the plaintiffs of standing to challenge Section 1089. The plaintiffs satisfy the legislative-nexus requirement, identified by the Court in *Flast* and clarified in *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007), because the challenged tax credits are specifically authorized by Section 1089, a legislative enactment. The Court has addressed Establishment Clause challenges notwithstanding the presence of discretion-exercising intermediaries, be they Cabinet Secretaries (*Bowen*) or parents (*Zelman*).

In any event, the legislative-nexus requirement does not apply when the challenge is to a state program. *Flast* and *Hein* involved challenges to federal action, and the rationale set forth in those cases reflects uniquely federal concerns: Congress's exclusive responsibility for taxing and spending, an arrangement from which many states, Arizona included, deviate; and the U.S. Constitution's separation of powers, which does not apply to state governments. The Court need not and should not reach this question, however, as it was not addressed below, has not been briefed here, and is not necessary to resolve the standing inquiry.

In sum, the plaintiffs have standing to raise the important Establishment Clause questions presented by Section 1089, and the Court can and should consider those questions on the merits.

### Argument

#### **I. Tax Expenditures Cause The Same Injury To Taxpayers As Do Cash Grants.**

ACSTO argues that Arizona taxpayers lack standing to challenge Section 1089 because the Arizona legislature funds religious education through tax credits, rather than through cash grants. *See, e.g.*, ACSTO Br. at 15–20. Yet when it comes to Article III standing, there is no relevant distinction between government spending through direct expenditures and government spending through tax expenditures, including tax credits. As the Court has explained in its Establishment Clause cases, “[e]very tax exemption constitutes a subsidy that affects non-qualifying taxpayers.” *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989).

##### *A. The Economic Effect Of Tax Expenditures Is Identical To That Of Direct Appropriations.*

The federal government and state governments—including Arizona—have long recognized that there is no practical difference between a governmental expenditure that takes the form of an outlay and one that takes the form of a tax deduction or tax credit. In each case, the government provides, to a third party, funds that would otherwise go to the treasury. The Court of Appeals thus correctly ex-

plained that “Section 1089 works the same as if the state had given each taxpayer a \$500 check that can only be endorsed over to a STO or returned to the state.” ACSTO Pet. App. 13a.

1. In November 1967, Assistant Secretary of the Treasury for Tax Policy Stanley S. Surrey proposed that the federal government create a “tax expenditure budget” to “report the revenue cost of deliberate departures from accepted concepts of net income . . . through which our tax system does operate to affect the private economy in ways that are usually accomplished by expenditures—in effect to produce an expenditure system described in tax language.” Daniel N. Shaviro, *Rethinking Tax Expenditures and Fiscal Language*, 57 Tax L. Rev. 187, 200 (2004) (quoting Stanley S. Surrey, *Pathways to Tax Reform* 3 (1973)) (quotations and alteration omitted). His proposal became the norm, and the equivalence of direct expenditures and tax expenditures “has become widely accepted in federal tax and spending policy.” Donna D. Adler, *The Internal Revenue Code, The Constitution, and The Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 Wake Forest L. Rev. 855, 861 (1993).

Indeed, since the early 1970s, federal tax law has defined “tax expenditures” as “those *revenue losses* attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability.” Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 3(a)(3), 88

Stat. 297 (1974) (emphasis added). According to the Joint Committee on Taxation, “[s]pecial income tax provisions are referred to as tax expenditures because they may be considered to be analogous to direct outlay programs, and the two can be considered as alternative means of accomplishing similar budget policy objectives.” Staff of Joint Committee on Taxation, 109th Congress, *Estimates of Federal Tax Expenditures for Fiscal Years 2006–2010* 2 (Comm. Print 2006).

Congress recognizes that tax expenditures—including “educational assistance” and “tuition reduction benefits,” *id.* at 4—“are similar to those direct spending programs that are available as entitlements to those who meet the statutory criteria established for the programs.” *Id.* at 2. Thus, “[a]n alternative way to measure tax expenditures is to express the values in terms of an ‘outlay equivalents’—‘the dollar size of a direct spending program that would provide taxpayers with net benefits that would equal what they now receive from a tax expenditure.’” Staff of Joint Committee on Taxation, 110th Cong., *A Reconsideration of Tax Expenditure Analysis* 81 n.175 (Comm. Print 2008).

Experts on state taxation likewise recognize that many “‘subsidy’ or ‘relief’ measures are spending programs implemented through the tax system,” that “they commonly are known as tax expenditures,” and that a tax expenditures “can be viewed as if the taxpayer had actually paid the full amount of tax owed in the absence of the special provision and had simultaneously received a grant equal to the savings

provided by the special provision.” Richard D. Pomp, *The Disclosure of State Corporate Income Tax Data: Turning the Clock Back to the Future*, 22 Cap. U. L. Rev. 373, 452–53 (1993). See also, e.g., Adler, *supra*, at 858 (“In effect, a tax exemption works like a direct grant. It is as if the taxpayer incurred and paid a tax liability, and the government gave the taxpayer a direct subsidy for the same amount.”). In sum, “a tax expenditure is just one of a number of ways of providing governmental assistance.” Pomp, *supra*, at 453.

2. Arizona has embraced the concept of a “tax expenditure” and applied it directly to Section 1089.

For decades, Arizona has defined a “tax expenditure” as “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.” Ariz. Stat. § 42-1005(A)(4). The Director of Arizona’s Department of Revenue is required to “issue a written report to the governor and legislature detailing the approximate costs”—“in lost revenue”—“for all state tax expenditures.” *Id.* Because tax expenditures “result in a loss of tax revenues, thereby reducing the amount of revenues available” to the state, “the fiscal impact of implementing a tax expenditure would be similar to a direct expenditure of state funds.” Office of Econ. Research & Analysis, Ariz. Dep’t of Revenue, *The Revenue Impact of Arizona’s Tax Expenditures FY 2008/09* 1 (2009). Accordingly, the Arizona De-



partment of Revenue states that Section 1089 created a “tax expenditure.” *Id.* at 47.<sup>2</sup>

ACSTO relies on the Arizona Supreme Court’s holding in *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) (en banc), that the challenged program’s tax credits do not constitute “public money,” *id.* at 618, and that their disposition is not a state expenditure. ACSTO Br. at 42. But this holding related not to standing, but to the merits of the plaintiffs’ claim under the Religion Clauses of Arizona’s state constitution. *See id.* at 616–25. As in *Mueller* and *Walz*, the legality of an expenditure on the merits does not strip the plaintiffs of standing to challenge it. Moreover, even if it did, the Arizona Supreme Court’s ruling would not bind this Court on a question of federal constitutional law.

*B. The Court Has Consistently Considered Taxpayers’ Establishment Clause Challenges To Tax Expenditures.*

The Court’s precedents do not support ACSTO’s standing argument. To the contrary, the Court has routinely considered taxpayers’ challenges to tax credits and exemptions—in decisions ranging from *Walz* to *Hunt* to *Nyquist* to *Mueller*—without ever suggesting that the plaintiffs lacked Article III

---

<sup>2</sup> This Court, in describing its analysis of Section 1089 in *Hibbs v. Winn*, 542 U.S. 88 (2004), likewise characterized the challenged credit as a “tax expenditure.” *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2335 (2010).

standing.<sup>3</sup> And the Court has summarily affirmed lower-court decisions holding that the taxpayers had standing to bring Establishment Clause challenges to tax credits. *See, e.g., Byrne v. Pub. Funds for Pub. Sch. of N.J.*, 442 U.S. 907 (1979), *aff'g* 590 F.2d 514, 516 n.3 (3d Cir. 1979) (in challenge to tax credit, “[t]he individual plaintiffs, as taxpayers, have standing under *Flast v. Cohen*”).

ACSTO attempts to dismiss all of these cases on the ground that the Court did not specifically address the plaintiffs’ standing. ACSTO Br. at 13 n.7. But the repeated exercise of jurisdiction suggests that the Court understood that Article III was satisfied. The Court has explained: “While we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed sub silentio, neither should we disregard the implications of an exercise of judicial authority assumed to be proper for over 40 years.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962) (citations omitted). *See also S. Cent. Bell Tel. Co. v. Ala-*

---

<sup>3</sup> *See Walz v. Tax Comm’n*, 397 U.S. 664, 667 (1970) (“appellant’s contention was that the . . . grant of [a tax] exemption to church property indirectly requires [him] to make a contribution to religious bodies”); *Hunt v. McNair*, 413 U.S. 734, 735 (1973) (challenge by “a South Carolina taxpayer” to issuance of tax-exempt bonds for benefit of religious college); *Comm. For Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 762 (1973) (challenge by “residents and taxpayers in New York” to income tax benefits to parents of children attending parochial schools); *Mueller v. Allen*, 463 U.S. 388, 392 (1983) (challenge by “certain Minnesota taxpayers” to state law that provided tax deduction for religious school expenses).

*bama*, 526 U.S. 160, 166 (1999) (refusing to “re-visit . . . a long-established and uniform practice” in the exercise of Article III jurisdiction). The Court can—and does—raise the question of standing on its own. See *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 36 (2005) (Mem) (granting petition for certiorari: “In addition to the questions presented by the petitions, the parties are directed to brief and argue the following question: Whether respondents have standing to challenge Ohio’s investment tax credit.”) (citation omitted). Thus, when the Court reaches the merits of an Establishment Clause case, it is not by accident.

ACSTO’s standing argument also contradicts the Court’s repeated recognition that tax expenditures have the same economic effects as direct subsidies:

- “Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income.” *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 544 (1983).
- “Our opinions have long recognized—in First Amendment contexts as elsewhere—the reality that tax exemptions, credits, and deductions are ‘a form of subsidy that is administered through the tax system’ . . . .” *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 236 (1987) (Scalia, J., dissenting).

- “A tax exemption in many cases is economically and functionally indistinguishable from a direct monetary subsidy. In one instance, the government relieves religious entities (along with others) of a generally applicable tax; in the other, it relieves religious entities (along with others) of some or all of the burden of that tax by returning it in the form of a cash subsidy. Whether the benefit is provided at the front or back end of the taxation process, the financial aid to religious groups is undeniable.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 859–60 (1995) (Thomas, J. concurring).
- Tax exemptions have “much the same effect as [cash grants].” *Zelman v. Simmons-Harris*, 536 U.S. 639, 666 (2002) (O’Connor, J., concurring).

In sum, “[t]he only difference [between cash grants and tax credits] is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State.” *Comm. For Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 791 (1973).

Contrary to ACSTO’s position, ACSTO Br. at 36, the plaintiffs’ standing to bring this Establishment Clause challenge is unaffected by the Court’s decision in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006). The Court in *Cuno* held that the plaintiffs lacked taxpayer standing to challenge a tax credit under the Commerce Clause, but specifically distinguished the Commerce Clause-based challenge from cases in which plaintiffs seek to vindicate their

rights under the Establishment Clause. *See Cuno*, 547 U.S. at 347 (“only the Establishment Clause has supported federal taxpayer suits since *Flast*”) (quotations omitted).

ACSTO also maintains that the plaintiffs lack standing because the “net effect of the tuition tax credit is likely an increase, not a decrease, in revenues.” ACSTO Br. at 36. ACSTO’s prediction notwithstanding, the immediate effect of Section 1089 is to reduce receipts. If “the Arizona tax credit [is] impermissible under the Establishment Clause, only one remedy would redress the plaintiffs’ grievance: invalidation of the credit, which inevitably would increase the State’s tax receipts.” *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2336 (2010).

Even if it were possible that Section 1089 might ultimately increase the state’s revenue, that residual possibility is irrelevant to the standing inquiry here. In *Cuno*, the Court stressed that unlike suits invoking other constitutional provisions, an injunction against the government’s provision of taxpayer funds to support religion redresses the plaintiff’s injury “regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally.” *Cuno*, 547 U.S. at 348–49. And because direct cash grants, no less than tax credits, can also serve as investments that provide states with greater net revenue in future years, ACSTO’s argument would undermine *Flast* itself—a decision that “is correct and should not be called into question.” *Hein*, 551 U.S. at 616 (Kennedy, J., concurring).

*C. ACSTO's Theory Of Standing Would Insulate From Redress The Very Injuries That The Establishment Clause Was Designed To Prevent.*

If the Court were to hold that, for the purpose of standing analysis, tax expenditures differ from cash grants, states could insulate their support of religion from taxpayer challenge merely by employing one government funding mechanism (tax expenditures) over another (cash grants). Under ACSTO's logic, Arizona taxpayers would lack standing to challenge even tax credits reserved for donations to religious schools.

This result cannot be squared with the core purposes of the Establishment Clause. Although the tax credit was not a feature of fiscal policy during the nation's founding, the Court explained in *Flast* that "one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that taxing and spending power would be used to favor one religion over another or to support religion in general." 392 U.S. at 103. The forced contributions that Madison feared, *id.*, are no less real when they result from a tax credit or deduction. Indeed, "[w]hen the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors.'" *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983).

If anything, contemporary fiscal politics suggest that the support of religion through tax credits is

even more prone to abuse than is religious support through cash grants. Like most tax cuts, tax expenditures “are subjected to considerably less congressional and popular scrutiny than are direct appropriations.” Bernard Wolfman, *Tax Expenditures: From Idea to Ideology*, 99 Harv. L. Rev. 491, 493 (1985) (book review). Because they carry fewer political costs than do cash grants, tax expenditures “are now the dominant instruments for implementing new discretionary spending policies.” Edward D. Kleinbard, *The Congress Within The Congress: How Tax Expenditures Distort Our Budget and Our Political Process*, 36 Ohio N.U. L. Rev. 1, 18 (2010). If ACSTO’s position were adopted, then, taxpayers would lack standing even when the use of these “dominant instruments” to advance religion was most flagrant.

## **II. Citizens’ Private Choice Does Not Strip The Plaintiffs Of Standing.**

ACSTO also contends that the presence of private choice—the basis on which the state defends Section 1089 on the merits—severs the nexus between the challenged spending and the Arizona legislature’s enactment, such that the plaintiffs cannot satisfy the legislative-nexus requirement announced in *Flast* and refined in *Hein*. See, e.g. ACSTO Br. at 23–25. Contrary to ACSTO’s contention, however, there is in fact a direct nexus between the legislative enactment, Section 1089, and the challenged subsidy to religion. But even if there were not, the legislative-nexus requirement should not be applied to challenges to state programs, as to which the rationales

underlying the legislative-nexus requirement apply with far less force.

A. *There Is A Direct Legislative Nexus Between Section 1089 And The Challenged Subsidy.*

Private choice notwithstanding, Section 1089 features a clear legislative nexus. The legislative enactment “has provided only two ways for this money to be spent: taxpayers will either give the dollar to the state, or that dollar (or at least 90 percent of it, after allowable STO administrative expenses) *will* end up in scholarships for private school tuition.” ACSTO Pet. App. 14a (emphasis in original). Nothing more is required to confer standing on the plaintiffs.

If private choice severed the requisite nexus, then the Court could not have reached the merits of many of its private-choice cases. *See Zelman*, 536 U.S. at 648–63 (taxpayer Establishment Clause challenge to tuition voucher program where money went to religious institutions through parents); *Mueller v. Allen*, 463 U.S. 388, 399 (1983) (taxpayer Establishment Clause challenge to tax deduction for elementary- and secondary-school expenses).

Intervening decisions by the executive branch likewise do not sever the subsidy’s nexus to the legislature. For instance, in *Bowen*, the taxpayers’ suit was not “any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary.” *Bowen v. Kendrick*, 487 U.S. 589, 619 (1988). To the contrary, “*Flast* it-



self was a suit against the Secretary of HEW, who had been given the authority under the challenged statute to administer the spending program that Congress had created.” *Id.* at 619. Whether made by a cabinet secretary or a scholarship fund, an intervening decision does not break the nexus between the challenged subsidy and the legislature’s enactment.

*B. State Taxpayer Standing Is Not Subject To The Legislative-Nexus Requirement.*

In light of the manifest nexus between the challenged tax expenditure and the Arizona legislature, the Court need not decide the more complex question of whether the legislative-nexus requirement applies in taxpayer challenges to state programs. But even if there were no such legislative nexus here, there are significant reasons to conclude that this requirement applies only to taxpayer challenges to subsidies from the *federal* government.<sup>4</sup>

In *Flast*, the Supreme Court held that to establish standing in an Establishment Clause challenge, “federal taxpayers” must allege an “exercise[] of congressional power under the taxing and spending clause of Art. I § 8 of the Constitution.” 392 U.S. at 102. In *Hein*, then, the taxpayers lacked standing because “they [could] cite no statute whose application they challenge[d].” 551 U.S. at 607 (plurality

---

<sup>4</sup> A fuller discussion of this issue can be found on pages 20–25 in the Brief in Opposition to the Petition in *Brown v. Pedreira*, No. 09-1121.

opinion). This “legislative-nexus requirement” forecloses federal taxpayer standing where a complaint “relies on [the plaintiffs’] taxpayer status as the sole basis for standing to maintain the suit but points to no specific use of Congress’ taxing and spending power.” *Id.* at 616 (Kennedy, J., concurring).

The rationales underlying the legislative-nexus requirement are far weaker when a taxpayer challenges state expenditures.

*First*, federal taxpayers are subject to the legislative-nexus requirement because, under the federal Constitution, Congress is responsible for taxing and spending. *See id.* at 602–03 (plurality). Article I delegates the taxing and spending powers to Congress, U.S. Const. art. I, § 8, cl. 1, and prohibits federal expenditures except under authority granted by Congress, *id.* art. I, § 9, cl. 7. By definition, if there is no legislative nexus, then a challenge to a federal program or practice is to something other than taxation or spending.

In many states, however, the power to tax and spend transcends the legislature, and resides at least in part with the executive branch and even the public at large. In Nebraska, a three-fifths majority of the legislature is necessary to override the budget recommendations of the governor. Neb. Const. art. IV, § 7. In Ohio, the public may adopt or reject any item in any appropriations bill. Ohio Const. art. II, § 1(a). In Kentucky, certain types of taxation or spending must be ratified by popular vote. Ky.

Const. § 50.<sup>5</sup> And in Arizona, the state Constitution authorizes citizens, through initiatives or referenda, to allocate funds to “a specific purpose,” and permits the legislature to override such allocations only with a three-fourths majority. Ariz. Const. art. IV, § 6(D). With the spending power so diffuse in many states—including Arizona—it makes little sense to incorporate the legislative-nexus requirement wholesale to challenges by state taxpayers.

Challenges to state programs also fail to implicate the separation-of-powers concerns that animate the federal legislative-nexus requirement. The Court in *Hein* observed that the legislative-nexus test stems, in part, from respect for the federal separation of powers. See 551 U.S. at 610–612 (plurality opinion); *id.* at 615–18 (Kennedy, J., concurring). The expression of these concerns echoed earlier denials of standing where the judiciary was asked to intervene in the internal operations of the executive branch. See, e.g., *Allen v. Wright*, 468 U.S. 737, 761 (1984) (Article III standing arises from “separation of

---

<sup>5</sup> See also, e.g., Fla. Const. art. IV, § 13 (if necessary to balance the budget, “the governor and cabinet may establish all necessary reductions in the state budget”); Mich. Const. art. V, § 20 (“The governor, with the approval of the appropriating committees of the house and senate, shall reduce expenditures authorized by appropriations whenever it appears that actual revenues for a fiscal period will fall below the revenue estimates on which appropriations for that period were based.”); W. Va. Const. art. VI, § 51 (governor may, with the legislature’s consent, “amend or supplement the budget to correct an oversight, or to provide funds contingent on passage of pending legislation”).

powers” and counsels against suits to “seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties”); *Laird v. Tatum*, 408 U.S. 1, 15 (1972) (no Article III standing where result “would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action”); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 129 (1940) (no standing “to represent the public’s interest in the [Secretary of Labor’s] compliance with the Act”).

The “separation-of-powers principle,” however, “has no applicability to the federal judiciary’s relationship to the States.” *Elrod v. Burns*, 427 U.S. 347, 352 (1976) (plurality opinion). Thus, the Court has not hesitated to entertain challenges, as to states, that would be foreclosed as to the federal government. *See United States v. Gillock*, 445 U.S. 360, 370 (1980) (limits applicable to federal prosecutions of members of Congress did not apply to federal prosecutions of state legislators, in part because those limits arose from federal separation-of-powers); *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) (state could not invoke separation-of-powers doctrine against federal government in challenge to Voting Rights Act).

Accordingly, the limitations that arise in a challenge brought by federal taxpayers are not implicated in a challenge by state taxpayers. Although challenges to state programs do implicate principles of federalism, those principles do not depend on whether a challenged enactment is legislative, executive, or otherwise. *See, e.g., Huffman v. Pursue, Ltd.*,

420 U.S. 592, 603–04 (1975) (“Although [a prior decision addressed] a bill seeking an injunction against state executive officers, rather than against state judicial proceedings, we think that the relevant considerations of federalism are of no less weight in the latter setting.”).

Ultimately, whatever private choice may exist under the statutory scheme, it was the Arizona legislature that made such choice available. Even if a legislative-nexus requirement were to apply to state taxpayers, the plaintiffs have easily satisfied that requirement here.

### **Conclusion**

The taxpayer plaintiffs’ standing to challenge Section 1089 draws on decades of settled jurisprudence. Article III does not prevent the Court from addressing the substantial Establishment Clause issues presented by the plaintiffs’ claim.

Respectfully submitted,

Ayesha N. Khan  
AMERICANS UNITED FOR  
SEPARATION OF CHURCH  
AND STATE  
518 C Street, NE  
Washington, DC 20002  
(202) 466-3234

September 22, 2010

Kurt Wimmer  
Gregory M. Lipper  
*Counsel of Record*  
Charles Kitcher  
Sarah M. Powell  
COVINGTON & BURLING LLP  
1201 Pennsylvania Avenue, NW  
Washington, DC 20004  
(202) 662-5496  
glipper@cov.com