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 PETITIONER ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION

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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 causes them a personal, concrete, and particularized injury?

2. Is the Respondents' alleged injury—which is solely based on the theory that Arizona's Tuition 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 a catalyst for new sources of state income?

3. Given that the Arizona Supreme Court has authoritatively determined under state law, and consistent with federal law, that the money donated to tuition granting organizations under Arizona's Tuition 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?

4. Does Arizona's Tuition Tax Credit satisfy the Establishment Clause because it is a neutral program under which funds flow to religious schools solely based on multiple layers of private choice?

PARTIES TO THE PROCEEDING

Petitioners are: 1) Arizona Christian School Tuition Organization ("ACSTO"), a School Tuition Organization granted intervention in this case, and 2) Gale Garriott, in his official capacity as Director of the Arizona Department of Revenue. Respondents in support of petitioners are Arizona School Choice Trust ("ASCT"), a school tuition organization, and Luis Moscoso, and Glenn Dennard, two parents whose children have received scholarships from ASCT. These parties were also granted intervention.

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

CORPORATE DISCLOSURE STATEMENT

Petitioner Arizona Christian School Tuition Organization does not have parent companies and is not publicly held.

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APPENDIX:

[1] These excerpts are from a transcription of the full Ninth Circuit oral argument, which is available at: www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000001243.

TABLE OF AUTHORITIES

***Cases*:**

***Statutes*:**

Other Authorities:

Abbreviations Key:

ACSTO App.	Appendix To ACSTO's Brief on the Merits
ACSTO Pet. App.	Appendix to ACSTO's Petition for Certiorari
ASCT Pet.	ASCT's Petition for Writ of Certiorari
ASCT Pet. App.	Appendix to ASCT's Petition for Certiorari
Cato Pet. Br.	Amicus Brief of The Cato Institute, *et al.,* In Support Of Petitioners
JA	Joint Appendix
Opp.	Brief in Opposition To Petitions for Certiorari
State App.	Appendix To State's Brief on the Merits

DECISIONS BELOW

The district court's ruling dismissing Respondents' complaint for failure to state a claim is reported at 361 F. Supp. 2d 1117 and reprinted in ACSTO Pet. App. 44a-59a. The Ninth Circuit panel opinion is reported at 562 F.3d 1002 and reprinted in ACSTO Pet. 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 ACSTO Pet. App. 62a-110a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its decision on April 21, 2009, and denied timely petitions for rehearing en banc on October 21, 2009. Petitioners obtained an extension of time to file petitions for writ of certiorari, and timely filed petitions on February 18, 2010. This Court granted ACSTO's and the State's petitions on May 24, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Article III, § 2 of the United States Constitution is set out in ACSTO App. 1a. The First Amendment to the United States Constitution is set out in ACSTO Pet. App. 111a. The full text of A.R.S. § 43-1089, the tuition tax credit statute, is set out in ACSTO Pet. App. 112a-115a.

INTRODUCTION

Respondents in this case—Arizona taxpayers—attack an Arizona tax credit program that they believe violates the Establishment Clause of the First Amendment. The threshold question is whether they have Article III standing.

Crucially, Respondents do not allege, and have disclaimed, that the State has extracted and spent *their tax dollars* under this program. This is a necessary, but certainly not the sole, prerequisite to any claim of taxpayer "injury" in the Establishment Clause context. *See Doremus v. Bd. of Educ.*, 342 U.S. 429, 433-34 (1952) (no "direct pecuniary injury" where taxpayers could not allege that "they are, will, or possibly can be out of pocket because of" state statute mandating Bible reading in public schools); *Flast v. Cohen*, 392 U.S. 83, 106 (1968) ("The taxpayer's allegation in such cases would be that *his tax money* is being extracted and spent" (emphasis added)). Respondents' "injury" is nothing more than a policy disagreement with the Arizona legislature, a classic "generalized grievance" insufficient to confer Article III standing.

Respondents' standing theory suffers from additional fatal flaws: 1) their claimed injury (a "reduction" in state revenue "caused" by a tax credit) is speculative; 2) the tax credit does not appropriate any money or levy a tax; 3) there is no causal connection between their claimed injury and the complained of government action; and, 4) it is speculative that the relief they seek would provide them redress.

Respondents would bypass these many holes in their standing theory simply by claiming that "[u]nder *Flast* . . . state and federal taxpayers have federal court standing, *by virtue of their taxpayer status alone*, to challenge statutory spending programs alleged to violate the Establishment Clause." Appellants' Supp. Br. 5, 9th Cir. Case No. 05-15754, Dkt. No. 52 (emphasis added). But this Court recently held 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 Corp. v. Cuno*, 547 U.S. 332, 346 (2006). This Court's cases require much more than taxpayers with strong feelings about the separation between church and state to confer standing, which is all we have here.

Respondents' position that they have standing ignores every taxpayer standing case decided both before and after *Flast*, and requires expanding *Flast* well beyond its narrow holding. The Ninth Circuit plainly erred in finding that they have standing.

STATEMENT OF THE CASE

A. Statement of Facts[2]

Arizona is a national leader in school choice. It offers free public schools, and requires school districts to open their enrollment to students living outside the district without charging tuition. A.R.S. § 15-816.01(A). It provides a free charter school

[2] The facts material to the questions presented are not in dispute. ACSTO Pet. App. 88a n.7.

system, which was established to "provide additional academic choices for parents and pupils." A.R.S. § 15-181.[3] It also provides a "virtual academy," which offers an online, free public education. *See* Arizona Virtual Academy, www.k12.com/azva/. It gives parents the option of educating their children at home, pursuant to a permissive homeschooling policy. A.R.S. §§ 15-802, 15-803, 15-745. And the program challenged here, the private school tuition tax credit, "bring[s] private institutions into the mix of educational alternatives open to the people of [Arizona]." *Kotterman v. Killian*, 972 P.2d 606, 611 (Ariz. 1999).

Notably, Arizona law provides for dozens of tax credits, all of which "operat[e] in the same general way." *Id*. at 613. They include, among others, credits for: donations to organizations that assist the working poor, which includes many religious institutions, A.R.S. § 43-1088; motion picture production costs, § 43-1075; expenses incurred in installing solar energy devices, § 43-1083; donations of real property to a school district for a school site, § 43-1089.02; expenses incurred in purchasing pollution control equipment, § 43-1081; people who earn a low income, § 43-1073; and fees or contributions to support public school extracurricular activities, § 43-1089.01.

[3] The current list of over 600 charter schools can be accessed at www.ade.state.az.us/charterschools/search/sitelist.asp.

In 1997, the Arizona Legislature enacted A.R.S. § 43-1089,[4] the tuition tax credit challenged herein. The credit allows Arizona taxpayers to donate private funds to a "school tuition organization" ("STO") of their choice. § 43-1089(A), ACSTO Pet. App. 112a. The taxpayer may then claim a 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), ACSTO Pet. App. 112a. Taxpayers are not permitted to designate their dependent as the beneficiary of their contribution. § 1089(E), ACSTO Pet. App. 113a.

STOs must be "a charitable organization in this state that is exempt from federal taxation under § 501(c)(3) of the internal revenue code." § 43-1089(G)(3), ACSTO Pet. App. 115a. Anyone can form an STO. ACSTO Pet. 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), ACSTO Pet. 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), ACSTO Pet. App. 115a. Similar to any 501(c)(3) organization, STOs may support private religious schools, private nonreligious schools, or both. Many

[4] Several changes to the tax credit recently occurred. State App. 1-17. None of these changes impact the substantive constitutional questions raised in this appeal.

current STOs exclusively serve nonreligious schools.[5] In 2008, there were 55 STOs, 30 of which had no obvious religious affiliation. ASCT Pet. App. 223-24. These STOs dispensed scholarships to over 28,000 students at over 370 private schools. *Id.* at 208-09.

Under Arizona's tax credit program, the private choices of taxpayers, the STOs, and parents direct scholarship funds to students. ACSTO Pet. App. 52a-53a. The taxpayer chooses to donate or not, and if he donates, to which STO. *Id.* at 52a. The privately formed, 501(c)(3) STOs raise money to award scholarships to private schools. *Id.* at 52a-53a. Each parent is responsible for deciding which school his or her child attends, and to which STO to apply to for a scholarship. *Id.*

Not only are the funding choices private, the funds involved are private as well, as determined authoritatively by the Arizona Supreme Court. *Kotterman*, 972 P.2d at 618. That court also held that the tax credit was facially constitutional under the federal Establishment Clause. *Id.* at 616. This Court denied certiorari. 528 U.S. 921 (1999).

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[5] According to STO websites, and data obtained from the Arizona Department of Revenue regarding which schools STOs provide scholarships to, at least eight STOs limit their scholarships to students attending nonreligious schools: Arizona Independent Schools Scholarship Foundation, Schools with Heart Foundation, Arizona Waldorf Scholarship Fund, Tempe Montessori's Parents Organization, Dynamite Montessori Foundation, Life Development Institute Education Foundation, Just Friends of Education, and Montessori Centre School Tuition Organization. State App. 30-31.

B. Course of Proceedings

Respondents sued in Arizona federal District Court on February 15, 2000. Their complaint alleged that the tax credit violated the Establishment Clause of the United States Constitution both on its face (a claim subsequently abandoned) and as applied. ACSTO Pet. App. 118a. The district court dismissed the complaint pursuant to the Tax Injunction Act, 28 U.S.C. § 1341. The Ninth Circuit reversed. *Winn v. Killian*, 307 F.3d 1011 (9th Cir. 2002). This Court affirmed. *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. On March 25, 2005, the district court granted ASCT's motion to dismiss, holding that Respondents' complaint failed to state an Establishment Clause claim. ACSTO Pet. App. 58a.

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 Respondents could pursue their as-applied challenge to the tax credit. The court noted that Respondents' "only allegation of injury from the allegedly unconstitutional operation of the [tax credit statute] arises from their status as Arizona taxpayers," yet

held that "they have standing under Article III." ACSTO Pet. App. 9a-10a.

ACSTO, ASCT, and the State Defendant filed timely petitions for rehearing en banc on May 14, 2009. The Ninth Circuit denied these petitions on October 21, 2009. Judge O'Scannlain, writing for seven other judges, dissented from the denial of rehearing en banc. He found that the tax credit program was fully consistent with *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002): because "The government does not direct any aid to any religious school. Nor does the government encourage, promote, or otherwise incentivize private actors to direct aid to religious schools. Rather, 'state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals.'" ACSTO Pet. App. 83a-84a (citation omitted).

SUMMARY OF THE ARGUMENT

To establish Article III standing, a plaintiff must demonstrate: a personal, concrete, and particularized injury; a causal link between the injury and the conduct complained of; and the likelihood that a favorable decision will redress the injury. Respondents (hereinafter "Taxpayer-Plaintiffs") fail each of these requirements.

Taxpayer-Plaintiffs do not allege, and expressly disclaim, one of several necessary prerequisites for taxpayers to satisfy Article III in the Establishment Clause context: that *their tax dollars* are being extracted and spent to support religion.

Taxpayer-Plaintiffs claimed "injury" also fails because it is not concrete or particularized, but rather is based on the alleged "right" to a government that complies with the Constitution. Such generalized grievances are not sufficient to confer Article III standing.

Taxpayer-Plaintiffs also are not challenging the appropriation of a certain sum of money, or the levy of a tax, that supports the tax credit program. Rather, they are challenging the individual decisions of thousands of taxpayers to make donations and take the credit.

Taxpayer-Plaintiffs' only alleged "injuries"—that the tax credit "reduces" state revenues and that this "reduction" increases their tax burden—are purely speculative. Tax credits often increase, rather than decrease, state revenues. And claiming that one's taxes are increased because of an alleged reduction in state revenues is merely speculation about how state lawmakers will respond to a revenue reduction. Speculation permeates every aspect of Taxpayer-Plaintiffs' reduced revenue theory of standing, which is the antithesis of proving a concrete injury, causation, or redressability.

Further, Taxpayer-Plaintiffs lack Article III standing because *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), conclusively determined as a matter of state law (and consistent with federal law) that the money generated by the tax credit is private, not state, money. Article III's role in preserving federalism and separation of powers is respected by

giving due deference to the Arizona Supreme Court's interpretation of its own state laws.

In addition to failing to establish the requirements of Article III standing, Taxpayer-Plaintiffs' complaint also fails to state an Establishment Clause claim under *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The tax credit serves the purpose of providing access to a broad array of educational choices by defraying parents' educational costs. Such a purpose plainly satisfies *Lemon*'s secular purpose prong. *Mueller v. Allen*, 463 U.S. 388 (1983).

The tax credit is also a facially-neutral program that benefits a broad range of beneficiaries defined without reference to religion. Scholarships are awarded under the program based on the multiple private choices of taxpayers, 501(c)(3) organizations, and parents. Such a program is not readily subject to Establishment Clause challenge. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

The district court correctly dismissed this case. The Ninth Circuit's decision to the contrary should be reversed.

ARGUMENT

For Taxpayer-Plaintiffs to prevail would require a drastic expansion in the law. Unable to satisfy any of the requirements for Article III standing set out in this Court's cases, they instead seek to expand the narrow exception to the general bar against taxpayer

suits set out in *Flast v. Cohen*, 392 U.S. 83 (1968). No such expansion is warranted here.

On the merits, Taxpayer-Plaintiffs admit the tax credit operates based on private choice. This private choice program in no way violates the Establishment Clause. This Court should reverse.

I. Taxpayer-Plaintiffs Lack Standing.

This Court has often observed that "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 598 (2007) (citation omitted). This "case or controversy" requirement, so essential to preserving federalism and separation of powers, is enforced by Article III's standing doctrine. *Cuno*, 547 U.S. at 342.

To establish Article III standing, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id.* (citation omitted). These three requirements—personal injury, causation, and redressability—are "indispensable part[s] of [a] plaintiff's case." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

This case involves the question of taxpayer standing, and it is "old and familiar ground" that Article III prevents federal taxpayers from bringing lawsuits challenging a specific expenditure of federal funds based solely on their status as taxpayers.

ASARCO Inc. v. Kadish, 490 U.S. 605, 613 (1989). Federal taxpayers are barred from bringing such claims "because a taxpayer's 'interest in the moneys of the Treasury . . . is shared with millions of others, is comparatively minute and indeterminable; and the effect upon future taxation, of any payments out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for [judicial intervention].'" *Id.* (quoting *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923)). This same "rationale . . . applies with undiminished force to state taxpayers," *Cuno*, 547 U.S. at 345, which is the type of challenge involved here.

Flast v. Cohen, 392 U.S. 83 (1968), created an exceedingly narrow exception that allows federal taxpayer suits under highly limited and specific circumstances in the Establishment Clause context.[6] Under *Flast*'s "nexus" test, a taxpayer must first establish a "logical link" between his taxpayer status and the "legislative enactment attacked." *Id.* at 102. This requires the taxpayer to challenge the expenditure of *his* funds pursuant to the

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[6] *United States v. Richardson*, 418 U.S. 166, 173-74 (1974) (emphasizing the "narrowness of [*Flast*'s] holding" and that it only "slightly lowered" the bar on taxpayer lawsuits); *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 481 (1982) (stressing the "rigor with which the *Flast* exception to the *Frothingham* principle ought to be applied"); *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988) (*Flast* created a "narrow exception"); *Cuno*, 547 U.S. at 348 (*Flast* has "a narrow application in our precedent"); *Hein*, 551 U.S. at 609 (noting that "in the four decades since its creation, the *Flast* precedent has largely been confined to its facts").

Constitution's taxing and spending clause. *Id.* Second, a "taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." *Id.* This requires the taxpayer to demonstrate that Congress is exceeding a specific constitutional limitation on its powers. *Id.*

As set out below, in addition to Taxpayer-Plaintiffs' complaint failing to allege facts sufficient to establish any of Article III's standing requirements, their theory of standing also fails under every taxpayer standing decision before and after *Flast*, as well as under *Flast*'s "nexus" test. Indeed, *Flast* would have to be extended well beyond its modest holding for standing to be found here. Taxpayer-Plaintiffs therefore lack standing.[7]

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[7] Taxpayer-Plaintiffs addressed the standing argument raised in ACSTO's Petition for Certiorari in a short footnote in their Brief in Opposition. Opp. 14 n.4. Their response was that they have standing because this Court has ruled on the merits of Establishment Clause challenges to tax deductions, exemptions, and credits, citing *Mueller v. Allen*, 63 U.S. 388 (1983), *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), and *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). But standing was not raised or addressed in these cases. And it is well-settled that the Court's exercise of jurisdiction does not establish precedent that the Court had jurisdiction. *United States v. Los Angeles Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("Even as to our own judicial power or jurisdiction, this Court has followed the lead of Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio"). It is also worth noting that in at least three cases prior to *Frothingham v. Mellon*, 262 U.S. 447 (1923), "the Court accepted jurisdiction in taxpayer suits without passing directly on the standing question." *Flast*, 392

A. The Taxpayer-Plaintiffs Have Not Suffered A Personal, Concrete, Or Particularized Injury, But Rather Allege A Mere Generalized Grievance That Is Purely Speculative.

The standing doctrine is concerned with whether the plaintiff has "a personal stake in the outcome of the controversy." *Flast*, 392 U.S. at 99. The "injury" component of the standing test assures a "personal stake" by requiring the plaintiff to show he "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct." *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) (citation omitted). Accordingly, the requisite injury must be "concrete and particularized," and may not be "conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (citations omitted).

A "concrete" injury is "indispensible" because it "enables a complainant authoritatively to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-221 (1974). Similarly, a "particularized" injury requires a showing that the injury "affect[s] the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 561 n.1.

U.S. at 92 n.5. Yet the Court had no problem in *Frothingham* holding—after the question was properly presented—that plaintiffs did not have taxpayer standing, and establishing the general rule barring lawsuits based on taxpayer "injuries."

For the taxpayer-plaintiff in the Establishment Clause context, proving a "concrete and particularized" injury requires proof that he "has sustained or is immediately in danger of sustaining" a "direct pecuniary injury," not an injury that "he suffers in some indefinite way in common with people generally." *Doremus*, 342 U.S. at 434. Taxpayer-Plaintiffs here fail this test for several reasons. First, they do not allege that Arizona is extracting and spending *their money* in support of religion, which is a necessary predicate to any taxpayer "injury" in the Establishment Clause context. Second, their injury is not distinct from the general public as a whole, but rather is the oft-rejected generalized grievance of the "right" to have a government that acts in conformity with the Constitution. Third, they are not challenging the levy of a tax or the appropriation of any sum of tax money. Finally, the only injury they do allege—a "reduction" in State revenues—is entirely conjectural (and likely incorrect), and is thus inadequate to confer standing.

1. Taxpayer-Plaintiffs Do Not Allege, And Expressly Disclaim, That The Government Is Extracting And Spending Their Tax Money In Support Of Religion.

This Court has consistently stated that the necessary starting point for taxpayer-plaintiffs claiming Establishment Clause violations is to allege the extracting and spending *of the taxpayer's money* to support religion. *Hein*, 551 U.S. at 599 (taxpayer standing claims based on notion that "*having paid*

lawfully collected taxes into the Federal Treasury at some point, they have a continuing, legally cognizable interest in ensuring that those funds are not used by the Government in a way that violates the Constitution" (emphasis added)); *Cuno*, 547 U.S. at 347 (describing the necessary injury as "the right not to 'contribute three pence . . . for the support of any one [religious] establishment'"); *Valley Forge*, 454 U.S. at 478 (a taxpayer must allege injury "by virtue *of his liability for taxes*" (emphasis added)). While this Court has "consistently held that this type of interest is too generalized and attenuated to support Article III standing" by itself, *Hein*, 551 U.S. at 599, such an allegation is nonetheless a necessary predicate of any claimed taxpayer "injury."

Doremus illustrates this requirement. There, the plaintiff challenged a New Jersey requirement that teachers read five verses from the Old Testament at the beginning of each public-school day. The *Doremus* Court stated that to establish standing the taxpayer-plaintiffs needed to allege a "good-faith pocketbook action." 342 U.S. at 434. They failed because they gave "[n]o information . . . as to what kind of taxes [they] paid . . . and *there is no averment* that the Bible reading increases any tax they do pay or *that as taxpayers they are, will or possibly can be out of pocket because of it*." *Id*. at 433 (emphasis added). The plaintiffs' failure to identify a "direct dollars-and-cents injury" *that affected their pocketbook* doomed their standing. *Id*. at 434.

Stating that its decision was consistent with *Doremus*, the *Flast* Court likewise held that the

necessary predicate of its "nexus" test was that *the taxpayer-plaintiff's money* was extracted and spent in support of religion: "*The taxpayers' allegation in such cases would be that his tax money is being extracted and spent* in violation of specific constitutional protections against such abuses of legislative power." 392 U.S. at 102, 105-106 (emphasis added).

In sum, taxpayer standing cases focus on the personal injury to the taxpayer—which is the extraction and spending of *his* money in support of religion[8]—not on whether the State is "losing" money (which is a highly speculative claim here). But what do Taxpayer-Plaintiffs allege? Nothing as to their own pocketbooks, but instead that the state is losing money. ACSTO Pet. 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"). Taxpayer-Plaintiffs are focusing on the wrong pocketbook, and they cannot prove that the state's pocketbook is actually short any money. *See* § I.A.5.a.

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[8] Even this necessary aspect of a claim of taxpayer standing is in considerable tension with Article III's requirement that an injury be personal, concrete, and particularized. As the plurality noted in *Hein*, "[i]n light of the size of the federal budget, it is a complete fiction to argue that an unconstitutional federal expenditure causes an individual federal taxpayer any measurable economic harm." 551 U.S. at 593. Such an allegation is much more akin to the "generalized grievance" rejected in *Valley Forge*, 454 U.S. at 482-83.

From the standpoint of personal pocketbook injury, the tax credit here operates similarly to a tax exemption: it does not extract and spend a taxpayer's money, but rather gives benefits to third parties.[9] In *Walz v. Tax Commission*, 397 U.S. 664, 675 (1970), this Court held that tax exemptions to churches do not transfer public funds out of the treasury: "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." Justice Brennan further explained this important distinction in his concurrence in *Walz*:

> Tax exemptions and general subsidies . . . are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise *and uses resources exacted from taxpayers as a whole*. An exemption, on the other hand, involves no such transfer.

Id. at 690 (Brennan, J., concurring) (emphasis added) (citation omitted). *See also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 43 (1989) ("We have not treated [tax exemptions and subsidies] as

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[9] There is no meaningful distinction, for constitutional purposes, between tax credits, deductions, and exemptions. Each is a "legitimate tool[] by which government can ameliorate the tax burden while implementing social and economic goals." *Kotterman*, 972 P.2d at 613.

equivalent, however, in the Establishment Clause context, and with good reason. 'In the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches. In the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions'") (Scalia, J., dissenting) (citation omitted). Put simply, a tax credit, like an exemption, is not a personal pocketbook injury because the taxpayer is not being compelled to give *his* tax money in support of religion. Accordingly, Taxpayer-Plaintiffs have suffered no personal injury.

Indeed, their standing to sue is foreclosed because nowhere in their complaint do they allege that Arizona is extracting their tax dollars and spending them to support religion. Taxpayer-Plaintiffs here are no different than the plaintiffs in *Doremus*, who could not prove any "direct pecuniary injury," but rather only that they suffered "in some indefinite way in common with people generally." 342 U.S. at 434. Such generalized grievances are neither concrete nor particularized, and thus are insufficient to support Article III standing. *See* § I.A.2., *infra*.

Further, Taxpayer-Plaintiffs cannot show the requisite personal harm because they have specifically disclaimed that the tax credit imposes any tax on them. When this case previously came before this Court regarding whether the Tax Injunction Act barred their claim, Taxpayer-Plaintiffs argued that the Act was inapplicable

because they were not complaining about any tax *imposed on them*:

> The Act was meant to prevent state taxpayers from using the federal courts to prevent the state from imposing or collecting taxes from them. Constitutional challenges to state tax credits, deductions and similar tax benefits, however, are not suits by taxpayers seeking to postpone or avoid the payment of state taxes. Such suits thus do not seek to "enjoin, suspend or restrain" the "assessment, levy or collection" of taxes.

Respondents' Br. 11, S. Ct. Case No. 02-1809, Dec. 19, 2003. This Court agreed, noting that Taxpayer-Plaintiffs' lawsuit is a "[t]hird party suit" which does not "seek[] to stop the collection (or contest the validity) of a tax" imposed on them. *Hibbs v. Winn*, 542 U.S. 88, 104 (2004). Like the taxpayer-plaintiffs whose standing this Court rejected in *Doremus*, Taxpayer-Plaintiffs seek to litigate a "grievance [that] is not a direct dollars-and-cents injury but is a religious difference." 342 U.S. at 434.

2. Taxpayer-Plaintiffs' Injury Is Neither Concrete Nor Particularized, But Rather Is A Generalized Grievance Insufficient To Confer Standing.

Article III does not extend to "generalized grievances," like Taxpayer-Plaintiffs' claimed injury here, which are based on the personal "right" to have

the government obey (one's view of) the Constitution. *Valley Forge*, 454 U.S. at 482-83 ("This Court repeatedly has rejected claims of standing predicated on 'the right . . . to require that the Government be administered according to law" (quoting *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922)); *Schlesinger*, 418 U.S. at 217 (interest in "nonobservance of the [Constitution]" affects "only the generalized interest of all citizens" and therefore "is an abstract injury" insufficient to satisfy Article III).

Valley Forge rejected a taxpayer "injury" in the Establishment Clause context as a generalized grievance. Although the taxpayer-plaintiffs in *Valley Forge* alleged the improper use of *their* tax dollars, 454 U.S. at 469, this Court nonetheless concluded that their complaint asserted a generalized grievance:

> Plaintiffs have no reason to expect, nor perhaps do they care about, any personal tax saving that might result should they prevail. The crux of the interest at stake, the plaintiffs argue, is found in the Establishment Clause, not in the supposed loss of money as such. As a matter of primary identity, therefore, the plaintiffs are not so much taxpayers as separationists . . . .

Id. at 482 (citation omitted). Taxpayer-Plaintiffs are no different. They disclaim that the tax credit extracts and spends their money on religion, and their allegations of "reduced" revenue are pure speculation, *see* § I.A.5., *infra*. They are, like the

plaintiffs in *Valley Forge*, separationists who allege nothing more than a desire to see the government obey what they think the Establishment Clause commands.

Finding such allegations indistinguishable from the claims of "citizen standing" rejected in *Schlesinger* and *Richardson*, the Court in *Valley Forge* held that:

> The complaint in this case shares a common deficiency with those in *Schlesinger* and *Richardson*. Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III . . . .

454 U.S. at 485. The harm claimed under such circumstances is "plainly undifferentiated and 'common to all members of the public,'" and thus is not a concrete harm that affects a plaintiff in a personal and individual way. *Richardson*, 418 U.S. at 177 (citation omitted).

Plainly, a finding that Article III is satisfied here would directly conflict with *Richardson*, *Schlesinger*,

and *Valley Forge*'s holdings that generalized grievances are not cognizable Article III injuries.

3. Arizona's Tuition Tax Credit Appropriates No Sum Of Tax Money And Levies No Tax To Implement The Scholarship Program.

Taxpayer-Plaintiffs also fail to satisfy Article III's injury requirement because the tax credit neither appropriates any sum of money, nor imposes any tax. *Hein* and *Flast* require such allegations. *Hein*, 551 U.S. at 603 (only "expenditures . . . made pursuant to an express congressional mandate and a specific congressional appropriation" satisfy *Flast*'s standing requirements); *Flast*, 392 U.S. at 102 (challenge must be to appropriation or disbursement of tax funds by Congress pursuant to the taxing and spending clause of Art. I, § 8).

In *Hein*, this Court held that taxpayers lacked standing to maintain an Establishment Clause challenge to the Executive Branch's expenditure of taxpayer funds on religious speeches and conferences. *Hein*, 551 U.S. at 605. The funds at issue were general appropriations that the Executive Branch spent within its broad discretion. *Id*. The plurality held that *Flast*'s requirement of a "'logical nexus' between taxpayer status 'and the type of legislative enactment attacked'" was lacking because "the expenditures that [plaintiffs] challenge[d] were not expressly authorized or mandated by any specific constitutional enactment." *Id*. at 608-09.

If the requisite injury was missing in *Hein*, then it is certainly missing here. In *Hein*, standing was rejected even though the plaintiffs challenged appropriations of tax money, albeit general ones. Here, by contrast, the tuition tax credit involves no appropriation of tax money at all. Further, Taxpayer-Plaintiffs' standing argument fails at an even more fundamental level because the monies STOs use in disbursing scholarships derive from thousands of private choices of individual taxpayers to voluntarily contribute money to STOs. If the taxpayers in *Hein* lacked standing to challenge the Executive Branch's use of general appropriations (in which the taxpayer's tax payments were commingled) to support religious activities, then the Taxpayer-Plaintiffs here plainly lack standing to challenge thousands of private person's (rather than the government's) decisions on how to use their own (rather than the Taxpayer-Plaintiffs') money.[10]

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[10] This discussion highlights the Ninth Circuit's error in relying on *Bowen v. Kendrick*, 487 U.S. 589 (1988) to find that the Taxpayer-Plaintiffs have standing. ACSTO Pet. App. 14a-15a. In *Bowen*, the taxpayers had standing because the statute under attack "expressly authorized and appropriated specific funds for grant-making," and "expressly contemplated that some of those moneys might go to projects involving religious groups." *Hein*, 551 U.S. at 607. Here, the tax credit statute does not appropriate any funds at all. Further, *Bowen* involved the allegedly unlawful expenditure of federal monies *which included the taxpayer-plaintiffs' funds*. Thus, the *Bowen* plaintiffs established a necessary and predicate harm underlying claims of taxpayer "injury" in the Establishment Clause context. *See* § I.A.1., *supra*. Here, unlike in *Bowen*, Taxpayer-Plaintiffs do not claim that their tax dollars are being extracted and spent.

Doremus too is illustrative. There, the Court denied taxpayer standing because the plaintiffs' complaint contained "no allegation that [the mandated Bible reading] is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school." *Doremus*, 342 U.S. at 433. The Court distinguished the "justiciable controversy in *Everson v. Board of Education*, 330 U.S. 1 [(1947)]," because the plaintiff there "showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of. This complaint does not." *Id.* at 434.

The same is true of Taxpayer-Plaintiffs' complaint. Nowhere does it allege that the State has appropriated or disbursed any sum of tax dollars to fund the tuition tax credit program. In its review of the identical program, the Arizona Supreme Court unequivocally held that "this tax credit is not an appropriation of public money," and that "no tax has been laid here." *Kotterman*, 972 P.2d at 621. *See also Cuno*, 547 U.S. at 347 (questioning whether a state tax credit "is analogous to an exercise of congressional power under Article I, § 8"). These holes sunk plaintiff's theory of taxpayer standing in *Doremus*, and they likewise sink Taxpayer-Plaintiffs' theory of standing here.

4. Decisions By Thousands Of Taxpayers To Donate Their Money And Take The Credit Is Not An "Appropriation" Of Money.

In an attempt to squeeze their case within *Flast*'s narrow exception, Taxpayer-Plaintiffs speculate in their complaint that the tax credit reduces State revenues, and that this "reduction" is the equivalent of an appropriation of tax monies. ACSTO Pet. App. 119a. In addition to the conjectural nature of this "injury," *see* § I.A.5., *infra*, there are at least three other problems with it. First, speculating that State revenues are reduced because third parties take tax credits for voluntary contributions to nonprofit organizations simply does not implicate Taxpayer-Plaintiffs' tax payments. Thus, they cannot even allege a necessary predicate harm underlying taxpayer "injuries," let alone satisfy the other prerequisites of Article III standing.

Second, the Arizona Supreme Court rightly rejected the argument that the alleged "reduction" of state revenues that occurs as a result of the tax credit "has the same effect as an appropriation." *Kotterman*, 972 P.2d at 620. Indeed, it strains credulity to say that the individual and private decisions of thousands of taxpayers to take a tax credit are the equivalent of an appropriation of money by the state legislature.

Third, *Kotterman* rightly rejected the related argument that the tax credit levies a tax:

> We cannot say that the legislature has somehow imposed a tax by declining to collect potential revenue from its citizens. Nor does this credit amount to the laying of a tax by causing an increase in the tax liability of those not taking advantage of it. . . . [I]f we were to conclude that this credit amounts to the laying of a tax, we would be hard pressed to identify the citizens on whom it is assessed.

Id. at 621.

In sum, Taxpayer-Plaintiffs are in the same position as the plaintiffs in *Doremus*. They have not alleged, nor can they, that the tax credit program "is supported by any separate tax," or "paid for from any particular appropriation." *Doremus*, 342 U.S. at 433. Thus, they simply cannot meet this Court's requirement as set out in *Doremus*, *Hein*, and *Fla*st, that they challenge a specific appropriation of tax money (in which their money is commingled) that supports an allegedly unconstitutional program. They therefore lack Article III standing.

5. Taxpayer-Plaintiffs' "Reduced Revenue" Theory Of Standing Is Speculative And Thus Cannot Confer Standing.

"Prior decisions of this Court establish that unadorned speculation will not suffice to invoke the federal judicial power." *Eastern Kentucky Welfare Rights Org. v. Simon*, 426 U.S. 26, 44 (1976).

Taxpayer-Plaintiffs' theory, that they are "irreparably harmed by the diminution of the state general fund through the tax credit program," ACSTO Pet. App. 126a, is based on nothing more than "unadorned speculation," and thus fails to satisfy Article III.

a. It Is Pure Speculation That The Tax Credit Results In Decreased Revenue For The State.

This Court's decision in *Cuno, supra*, demonstrates the speculative nature of Taxpayer-Plaintiffs' "reduced" revenue theory of standing. In *Cuno*, the taxpayer-plaintiffs challenged a state tax credit provided to the DaimlerChrysler corporation to induce it to expand a manufacturing plant within the State. 547 U.S. at 337. The injury claimed by the taxpayers in *Cuno* is indistinguishable from the injury claimed here. They 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 . . . ." *Id.* at 343 (citation omitted).

Cuno rejected the plaintiffs' reduced revenue injury because it was pure speculation how the tax credit would impact the state treasury. As this Court observed, "[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.

Similarly, the economic impact of the tuition tax credit on Arizona's revenues is too speculative to support Article III standing. As this Court has observed, state programs aimed at expanding educational choice by making private schools 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*, 463 U.S. at 395.

There are myriad tax savings implicated by the tuition tax credit program. For starters, the State expends approximately $9,500 per pupil at its public schools. Cato Pet. Br. 15. In addition to this savings on expenditures, there are also additional savings for each student who switches from public to private school as a result of the program. For instance, a study Taxpayer-Plaintiffs rely on to claim the credit has reduced State revenues explains that the tax credit likely decreases the State's costs in hiring new teachers, building new school buildings, and buying additional equipment because fewer students are attending public schools. JA 55. The same study also highlights a 2002 National Education Association study on school modernization that found that "Arizona faces an estimated $5.7 billion cost for school modernization, including $4.7 billion for infrastructure and $921 million for technology needs." *Id.* The study concludes that Arizona will likely be relieved of some of this $5.7 billion public

school modernization expense because of the tax credit.[11] *Id*.

In addition to reducing the state's tax burden in the many ways noted above, the tuition tax credit also likely increases the sources of state tax revenues in many ways. These include, *inter alia*: 1) an increase in the number of teaching, administrative, and management positions at already existing private schools; 2) the expansion of already existing private schools to accommodate additional students generated by the program; and 3) the establishment of new private schools in the State.

In finding that the Taxpayer-Plaintiffs had standing based on their novel "reduced revenue" theory of standing, the Ninth Circuit committed the same error as the *Cuno* plaintiffs: it looked at only one side of the ledger. The Ninth Circuit relied on Taxpayer-Plaintiffs' allegations that taxpayers had increased their giving under the program from $1.8 million in its first year of operation (1998) to $54 million in 2007. ACSTO Pet. App. 11a-12a n.7. But as *Cuno* stresses, Taxpayer-Plaintiffs' "reduced revenue" theory cannot be evaluated by myopically

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[11] In concluding that the tax credit led to a reduction in state revenues, the study writers did not account for the additional tax savings in being relieved of even a small portion of the substantial modernization costs faced by the State. JA 55. The study also did not account for the many additional cost savings resulting from the tax credit, nor for the many increases in sources of state revenues, but erroneously relied only on the public education per pupil cost in calculating the financial impact of the tax credit. *Id*. at 54-55.

focusing on the credits taken. The tax savings and new sources of tax revenue mentioned above count as well.

Highlighting the purely speculative nature of Taxpayer-Plaintiffs' alleged injury are numerous studies that have come to different conclusions regarding the short-term tax revenue impact of the tuition tax credit.[12] A 2001 Cato Institute study found that "although Arizona lost $13.7 million in 1999, we find that, once savings are taken into account, the credit was revenue neutral" and that over time "[t]he cost of the credit is likely to be significantly less than the savings that result from student transfers." Carrie Lips and Jennifer Jacoby, *The Arizona Scholarship Tax Credit: Giving Parents Choices, Saving Taxpayers Money*, Cato Institute Policy Analysis No. 414, Sept. 17, 2001, at 1, www.cato.org/pubs/pas/pa414.pdf. The study Taxpayer-Plaintiffs rely on found that the State likely lost revenue in the short term, but that "it is probable that future savings will fully offset the revenue loss, eventually saving taxpayers money." JA 28. A more recent study concludes that in 2008 the tax credit "save[d] Arizona taxpayers somewhere from $99.8 to $241.5 million due to students enrolling in private rather than public schools," while taxpayers claimed only $55.3 million in credits. Charles M. North, *Estimating the Savings to Arizona Taxpayers of the Private School Tuition Tax Credit*, at 1, archive.constantcontact.com/fs035/1011

[12] Regardless of the alleged short-term claims, each study highlighted herein agrees on the long-term savings of the tax credit.

047932616/archive/1102832763902.html. These studies' varying calculations regarding the short term financial impact demonstrate that Taxpayer-Plaintiffs' alleged injury is highly subjective, and depends largely on how one analyzes the available financial data.[13] The concrete injury required by Article III simply cannot be grounded on rampant speculation. Nor can it be satisfied by Taxpayer-Plaintiffs' cherry-picking facts within a study that, upon closer examination, does not even support their "reduced revenue" theory.

b. It Is Pure Speculation That Taxpayer-Plaintiffs' Tax Burden Has Increased As A Result Of The Tuition Tax Credit.

Cuno also rejected as too speculative the claimed injury that the plaintiffs "local and state tax burdens were increased" as a result of the "reduction" in state revenues occasioned by the tax credit at issue there. 547 U.S. at 338. *Cuno*'s rejection of this theory of injury is directly applicable here, as Taxpayer-Plaintiffs claim that they and other taxpayers bear

[13] In *Mueller*, this Court declined to let fluctuating statistical information control the constitutionality of neutral programs of private choice. 463 U.S. at 401. The same rationale applies to the question of standing. Indeed, the uncertainty that inheres in such an approach to evaluating Establishment Clause claims, *see id.* ("we [cannot] perceive principled standards by which such statistical evidence might be evaluated"), plainly also undermines claims of standing. Such an approach would lead to the absurd result that a plaintiff could have standing some of the time, but not all the time, to challenge the same program, depending on what a snapshot of the statistics show.

the burden of the alleged "reduction" in Arizona's revenues. Appellants' Resp. to Pets. for Reh'g En Banc 3, 9th Cir. Case No. 05-15754, Dkt. No. 87 (claiming that the reduction of state revenue occasioned by the tax credit is "borne entirely by the State treasury and thus by other taxpayers").

As *Cuno* explains, such an injury is conjectural because it depends "on how legislators respond to a reduction in revenue, if that is the consequence of the credit." 547 U.S. at 344. Under such circumstances, "[e]stablishing injury requires speculating that elected officials will increase a taxpayer-plaintiff's tax bill to make up a deficit." *Id*. *Cuno* concluded that this is precisely the "sort of speculation" that does not "suffice[] to support standing." *Id*.

This Court has rejected similar "injuries" in other cases. In *ASARCO*, taxpayers challenged an Arizona statute that permitted school trust lands (which were granted to the state by the federal government for the purpose of funding public education) to be leased for less than the appraised value, allegedly contravening federal law and the Arizona Constitution. 490 U.S. at 614. The plaintiffs claimed that the statute reduced the state funds available for public education, resulting in higher taxes for them. *Id*. This Court found that the plaintiffs had not suffered a cognizable injury because, even if it were true that the state's acts had depleted the trust fund, "it is pure speculation whether the lawsuit would result in any actual tax relief for respondents." *Id*.

The Arizona Supreme Court's ruling in *Kotterman* also highlight the speculative nature of Taxpayer-Plaintiffs' injuries. First, regarding their notion that the credit increases taxes of third parties, the court found that the credit does not "amount to the laying of a tax by causing an increase in the tax liability of those not taking advantage of it." 972 P.2d at 621. In addition, the court noted the speculation in this theory: "[I]f we were to conclude that this credit amounts to the laying of a tax, we would be hard pressed to identify the citizens on whom it is assessed." *Id.* Speculation is the *sine qua non* of Taxpayer-Plaintiffs' claimed injury.

6. Taxpayer-Plaintiffs Are Seeking An Unprecedented Rule That Would Give Taxpayers Alleging Establishment Clause Violations A Free Pass On Proving An Article III Injury.

Taxpayer-Plaintiffs claim the glaring holes in their standing theory outlined above are irrelevant because *Flast* gives them standing "by virtue of their taxpayer status alone." *See* Appellants' Supp. Br. 5, *supra*. In addition to being a gross overstatement of *Flast*'s narrow exception to the bar on taxpayer suits, it also flies in the face of this Court's precedent both before and since *Flast*, ranging from *Frothingham* to *Hein*. *See supra*.

Importantly, *Valley Forge* rejects the notion on which Taxpayer-Plaintiffs' claimed injury is predicated, i.e., that "enforcement of the Establishment Clause demands special exceptions from the requirement that a plaintiff allege 'distinct

and palpable injury to himself,' . . . that is likely to be redressed if the requested relief is granted.'" 454 U.S. at 488 (citation omitted). This Court said that the "norm of conduct" set by the Establishment Clause is no more or less "fundamental" than those set by other constitutional provisions. *Id.* at 484. Accordingly, the Court refused a "sliding scale" rule of standing "under which the Art. III burdens diminish as the 'importance' of the claim on the merits increases." *Id.* This is precisely the rule Taxpayer-Plaintiffs seek here.

This is illustrated perfectly by Taxpayer-Plaintiffs' insistence that they have standing even though the precise injury they claim—"reduced" state revenue resulting from a tax credit—has been rejected by this Court as speculative. *See supra*. Their position is that while all other taxpayer-plaintiffs must prove a concrete injury, simply because they are alleging Establishment Clause violations they get a free pass. Such an approach directly conflicts with nearly a century of this Court's precedent, is expressly rejected by *Valley Forge*, and would result in an unwarranted expansion of Article III standing into the realm of speculative injuries (of course, only for Establishment Clause plaintiffs). Taxpayer-Plaintiffs' desire for a free pass on Article III's injury requirement must be rejected.

B. The Taxpayer-Plaintiffs Cannot Establish That Their "Injury" Is Fairly Traceable To The State's Allegedly Unlawful Conduct.

In addition to failing Article III's injury requirement, their standing theory also fails the second prong of the standing test: that "there must be a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. Considering the lack of a cognizable injury here, *see supra*, the answer to the question of whether such a "causal connection" exists must be "No."

Taxpayer-Plaintiffs' primary injury—the alleged "reduction" of State revenues—fails the causation prong because, as discussed *supra*, there is simply no way for Taxpayer-Plaintiffs to establish that State revenues have *actually* decreased. Here, as with many other tax-saving mechanisms (credits, exemptions, deductions, etc.), the net effect of the tuition tax credit is likely an increase, not a decrease, in revenues. *Cuno*, 547 U.S. at 344.

Similarly, Taxpayer-Plaintiffs also cannot establish causation in relation to the only personal (yet wildly speculative, *see supra*) pecuniary injury they could conceivably claim: that their tax burden has increased as a result of the tax credit. As this Court explained in *Cuno*, proving causation under such circumstances requires the federal courts to presume that state lawmakers will react to a "reduction" in revenue by increasing its citizens' tax burdens. 547 U.S. at 344. But "[f]ederal courts may not assume a particular exercise of . . . state fiscal

discretion in establishing standing; a party seeking federal jurisdiction cannot rely on such '[s]peculative inferences . . . to connect [his] injury to the challenged actions of [the defendant].'" *Id.* at 346 (citation omitted).

Causation is also lacking because the actions Taxpayer-Plaintiffs complain of are taken by independent third party taxpayers, not the government. As this Court explained in *Lujan*, Article III poses an even higher hurdle when "[t]he existence of one or more of the essential elements of standing 'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.'" 504 U.S. at 562 (citation omitted). Here, thousands of unfettered choices by individual taxpayers to donate money to 501(c)(3) organizations and take the credit break the chain of causation between injury and government action.

C. The Taxpayer-Plaintiffs Cannot Establish That Their "Injury" Will Likely Be Redressed By A Favorable Decision.

As with the injury and causation prongs of the Article III standing test, Taxpayer-Plaintiffs also fail the redressability prong. Under this prong, the plaintiff must show that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (citation omitted).

Taxpayer-Plaintiffs ability to establish the redressability prong of Article III standing hinges entirely on whether they can prove that their two claimed injuries—a "reduction" in revenues that in turn increases their tax burden——can be redressed by a favorable decision.[14] As to the speculative "reduced revenue" injury, Taxpayer-Plaintiffs simply cannot establish that a favorable decision will provide them redress. As the discussion *supra* demonstrates, enjoining the tax credit is just as (if not more) likely to decrease the State's revenues, as to increase them.

And as to any claim that the tax credit has increased their tax burden, *Cuno* answers why such an injury is not redressable. There, the taxpayer-plaintiffs theorized that enjoining the objectionable tax credit would benefit them because state legislators would react to the alleged tax savings by reducing their tax burden. 547 U.S. at 344. Redress was lacking under such circumstances because "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." *Id.* Such speculation, this Court concluded, does not "suffice[] to support standing." *Id.* *ASARCO* is to the same effect. 490 U.S. at 614

[14] Because Taxpayer-Plaintiffs do not (and cannot) claim that "three pence" of *their* money is being spent in support of religion under the tax credit program, an "injunction against the spending," *Cuno*, 547 U.S. at 347-48, will not "personally [] benefit [them] in a tangible way," *Valley Forge*, 454 U.S. at 480 n.17.

(claim that reduced revenues resulted in higher tax burden rejected because "it is pure speculation whether the lawsuit would result in any actual tax relief for respondents" and thus the "claimed injury is not 'likely to be redressed by a favorable decision'"). Plainly, any claim by the Taxpayer-Plaintiffs here that the tuition tax credit increases their individual tax burden is foreclosed by *Cuno* and *ASARCO*.

D. Article III's Purpose Of Preserving Federalism And Separation Of Powers Is Respected By Denying Standing To Taxpayer-Plaintiffs.

Article III and its standing requirements, as noted *supra*, serve an important role in preserving federalism and the separation of powers.[15] As this Court said in *Valley Forge*, Article III serves the purpose of "limit[ing] the federal judicial power 'to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.'" 454 U.S. at 472 (quoting *Flast*, 392 U.S. at 97). These important considerations provide further support for denying Taxpayer-Plaintiffs' standing here.

Importantly, in both *Cuno* and *ASARCO*, this Court explained that a taxpayer who insists that the

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[15] Of course, this case most strongly implicates Article III's federalism concerns, since it involves the federal judiciary's review of a State legislative enactment, and even more, because that enactment involves state budgetary matters.

government dispose of any revenue it may receive as a result of his lawsuit in a manner that benefits him runs headlong into important federalism and separation of powers considerations. "[T]he decision of how to allocate any such savings is the very epitome of a policy judgment committed to the 'broad and legitimate discretion' of lawmakers, which 'the courts cannot presume either to control or to predict.'" *Cuno*, 547 U.S. at 345 (quoting *ASARCO*, 490 U.S. at 615); *see also ASARCO*, 490 U.S. at 614-615 (courts are "unable to evaluate with any assurance the 'likelihood' that decisions will be made a certain way by policymaking officials").

What Taxpayer-Plaintiffs propose is an unwarranted interjecting of taxpayers, and concomitantly the federal courts, into state budgetary decisions, an area typically left to the broad and legitimate discretion of state officials. This Court admonished against such an approach in *Cuno*:

> [B]ecause state budgets frequently contain an array of tax and spending provisions, any number of which may be challenged on a variety of bases, affording state taxpayers standing to press such challenges simply because their tax burden gives them an interest in the state treasury would interpose the federal courts as "'virtually continuing monitors of the wisdom and soundness'" of state fiscal administration, contrary to the more

> modest role Article III envisions for federal courts.

547 U.S. at 346 (citation omitted).

This Court "has refused to establish a constitutional rule that would require or allow 'permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.'" *Hein*, 551 U.S. at 617 (Kennedy, J., concurring) (citation omitted). The instant case provides no occasion to contravene this rule.

E. The Arizona Supreme Court's Decision That The Funds Generated By The Tax Credit Are Private, Not Public, Funds Supports The Denial Of Standing To Taxpayer-Plaintiffs.

Article III's role in preserving federalism and the separation of powers is particularly relevant to the instant challenge because in *Kotterman* the Arizona Supreme Court authoritatively interpreted the tax credit statute involved here. It is well settled that the Arizona high court's interpretation of the state's tax laws are binding on the federal courts. *See Mullaney v. Wilbur,* 421 U.S. 684, 691 (1975) ("state courts are the ultimate expositors of state law" and federal courts are therefore "bound by their constructions except in extreme circumstances").

Kotterman has particular importance here because its holding that the funds generated by the

tax credit are private, not public, monies, 972 P.2d at 618, directly impacts the question of Taxpayer-Plaintiffs' Article III standing. Indeed, this case presents the epitome of a "federal constitutional issue[] [that is] likely to turn on questions of state tax law," *California v. Grace Brethren Church*, 457 U.S. 393, 410 (1982), and here the answer to the critical state law question—the nature of tax credit funds—is supplied by *Kotterman*.

The Arizona Supreme Court unequivocally held that the funds STOs use in dispensing tuition scholarships are private money:

> [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."

Kotterman, 972 P.2d at 618. This holding demonstrates that no matter what "injury" Taxpayer-Plaintiffs assert, that "injury" does not involve state money and thus cannot confer Article III standing.[16]

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[16] The fact that the *Kotterman* court reached the merits of whether the tuition tax credit violated the federal Establishment Clause is of no moment as it relates to Article III standing. It is well-settled that "Article III do[es] not apply to state courts," and that therefore "the state courts are not bound by the limitations of a case or controversy or other

The Ninth Circuit erred by not following *Kotterman*'s authoritative interpretation of state law in deciding the Article III standing issue. Rather than denying standing because the tax credit involves purely private monies, the court instead supplanted *Kotterman*'s interpretation of Arizona law with its view that the tax credit "'channel[s] . . . [state] assistance' to private organizations," and accordingly held that Taxpayer-Plaintiffs had Article III standing. ACSTO Pet. App. 12a.

In addition to the direct conflict between *Kotterman* and the Ninth Circuit's holdings regarding the nature of tax credit funds, *Kotterman* also rejects each of the premises upon which the Ninth Circuit's holding rests. For example, the Ninth Circuit found that credits taken are public money because they are deducted after tax liability has been calculated. ACSTO Pet. App. 11a. *Kotterman* rejected this:

> 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

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federal rules of justiciability even when they address issues of federal law." *ASARCO*, 490 U.S. at 617.

> to the government, and upon which the state has a legal claim.

972 P.2d at 618.

The Ninth Circuit also found that the tax credit involves state money because "the 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." ACSTO Pet. App. 14a. *Kotterman* rejected this:

> 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's view 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," ACSTO Pet. App. 13a, is rejected by *Kotterman*'s holding that "reducing a taxpayer's liability is [not] the equivalent of [the state] spending a certain sum of money," 972 P.2d at 620. *Accord Walz*, 397 U.S. at

667, 675 (rejecting plaintiff's claim that "grant of an exemption to church property indirectly requires [him] to make a contribution to religious bodies" and instead holding that the tax exemption "is not sponsorship since the government does not transfer part of its revenue to churches").

The Ninth Circuit's rationale regarding why *Kotterman*'s private funds holding is irrelevant to the Article III standing analysis is unavailing. In a short footnote, the court states that *Kotterman* involved only the narrow question of whether the tax credit "constitute[s] an 'appropriation of public money' within the meaning of" Arizona's Religion Clauses, and thus "has no bearing on our analysis of plaintiffs' standing in federal court." ACSTO Pet. App. 12a n.8. But *Kotterman* is scarcely so limited. First, it expressly ruled that the tax credit does not violate the federal Establishment Clause. *See Kotterman*, 972 P.2d at 611-16. Second, its private funds holding applies even beyond the context of the religion clauses. *See id.* at 617 (basing its private funds holding on cases dealing with state employee retirement benefits, payments by university regents, and contracts between state agencies and tribal government). Further, *Kotterman* adopted the view that tax credits are not public money based on the rationale that "funds remain in the taxpayer's ownership *at least* until final calculation of the amount actually owed to the government." *Id.* at 618.

The question of the nature of the tax credit funds is one of state tax law, the interpretation of which

falls ultimately within the province of the Arizona Supreme Court. And in *Kotterman*, Arizona's high court held that those funds are private. The "state court[] [is] due more respect than" the Ninth Circuit gives it. *Hibbs*, 542 U.S. at 113 (Kennedy, J., dissenting). Indeed, as shown *supra*, this Court's precedent, and Article III's vital role in preserving the separation of powers and federalism, demand it.

II. The Taxpayer-Plaintiffs' Complaint Fails To State A Claim Under The Establishment Clause.

In addition to erring in holding that the Taxpayer-Plaintiffs have Article III standing, the Ninth Circuit also erred in finding that their complaint sufficiently pled an Establishment Clause violation.[17]

The Establishment Clause "prevents a state from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." *Zelman*, 536 U.S. at 648-49 (citation omitted). As discussed below, the tax credit challenged here easily satisfies this test because it is a neutral program based on multiple levels of private choices.

As the Ninth Circuit noted, Taxpayer-Plaintiffs readily admit this: "Plaintiffs do not contest that [the

[17] The Ninth Circuit further erred by applying the "no set of facts" motion to dismiss standard set out in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *see* ACSTO Pet. App. 9a, which this Court recently abrogated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

tax credit] is neutral with respect to the taxpayers who direct money to STOs, or that any of the program's aid that reaches a STO does so only as a result of the genuine and independent choice of an Arizona taxpayer." ACSTO Pet. App. 32a.

What Taxpayer-Plaintiffs propose, then, is to turn the Establishment Clause on its head. While that Clause permits governments to devise programs that operate on the principle of private choice so that the "circuit between government and religion [is] broken," *Zelman*, 536 U.S. at 652—which Arizona has plainly done here—Taxpayer-Plaintiffs would hold Arizona liable for an Establishment Clause violation based on these very same private choices. They conceded this at oral argument before the Ninth Circuit:

> JUDGE NELSON: But isn't this really a neutral program with multiple layers of private choice ultimately?
> MR. BENDER: Definitely.
> JUDGE NELSON: All right.
> MR. BENDER: And it's those multiple layers that make it unconstitutional.

ACSTO App. 5a.

Taxpayer-Plaintiffs thus seek to bind Arizona in the ultimate catch-22. Under their proposed rule, to comply with the Establishment Clause is to violate it. The Ninth Circuit's acceptance of Taxpayer-Plaintiffs tortured view of the Establishment Clause should be rejected.

Another critical point must be highlighted at the outset. In *Kotterman*, the Arizona Supreme Court held that the tax credit satisfies *Lemon*'s purpose and effect prongs. *See Kotterman*, 972 P.2d at 610-16. Taxpayer-Plaintiffs try to avoid these holdings by "abandoning" their facial challenge and pursuing only an "as-applied" challenge. Opp. 15 ("The present case . . . is an *as-applied* challenge, not to the statute's text, but to the program as it actually operates").[18] But the program as it operates is no different from what it contemplates facially.

Taxpayer-Plainitffs' theory is that the *Kotterman* court was unaware that the tax credit statute, in operation, would allow STOs to limit scholarships to select schools, so its facial constitutionality holding is irrelevant. The problem with this theory is that the tax credit statute allows STOs to restrict scholarships *on its face*, stating that an STO must "provide educational scholarships or tuition grants to students without limiting availability to only students of one school." A.R.S. § 43-1089(G)(3), ACSTO Pet. App. 115a. Obviously, an STO could give scholarships to just two schools and satisfy the statute. The *Kotterman* majority and dissent were fully aware of this fact. 972 P.2d at 614 (under the tax credit statute STOs "may not limit grants to students of only one [qualified school]"); *id*. at 630 (the statute does not "prevent an STO from directing all of its grant money to schools that restrict enrollment or education to adherents of a particular

[18] Counsel for Taxpayer-Plaintiffs twice stated at oral argument before the Ninth Circuit that they abandoned their facial challenge. ACSTO App. 6a-7a.

religion or sect") (Feldman, J., dissenting). Even Taxpayer-Plaintiffs' complaint alleges that the tax credit statute, on its face, allows two schools to create an STO to serve just those schools. ACSTO Pet. App. 125a.

Thus, Taxpayer-Plaintiffs' "as-applied" argument is no different from its abandoned facial claim. Indeed, the "as-applied" facts Taxpayer-Plaintiffs allege that they need an opportunity to prove are admitted by the parties, and are the same as those contemplated on the face of the statute and in their complaint. Thus, *Kotterman*'s holding that the tax credit satisfies the *Lemon* test cannot be so easily dismissed. The Ninth Circuit erred in finding that Taxpayer-Plaintiffs' recasting of their facial challenge as an as-applied challenge excused its ignoring of *Kotterman*. ACSTO Pet. App. 7a n.3.

A. The Tuition Tax Credit Serves A Valid Secular Purpose.

A government's asserted secular purpose for enacting a law "will generally get deference." *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 864 (2005). No less than three courts—the Arizona Supreme Court, the district court below, and even the Ninth Circuit—have determined that the tax credit statute serves a secular purpose.

The Arizona Supreme Court found the secular purpose prong satisfied because the tuition tax credit was part of the state's broader goal to expand "the mix of educational alternatives open to the people of

this state." *Kotterman*, 972 P.2d at 611. The court noted that contemporaneous with expanding access to private schools through the tax credit, the state had also enacted statutes requiring public schools to offer open enrollment without charging tuition and establishing charter schools. *Id*. The district court likewise found that the tax credit statute "on its face does not mention religion but is instead part of a secular state policy to maximize parents' choices as to where they send their children to school." ACSTO Pet. App. 50a.

Consistent with these two courts, the Ninth Circuit held that "[t]he legislative history of Section 1089 shows that its primary sponsor's concern in introducing the bill was providing equal access to a wide range of schooling options for students of every income level by defraying the costs of educational expenses incurred by parents." ACSTO Pet. App. 18a. The panel should have stopped its inquiry into *Lemon*'s purpose prong with this finding, as this Court has held an indistinguishable purpose sufficient to satisfy that prong. *See Mueller*, 463 U.S. at 395 ("A state's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable"). Its failure to do so was caused by at least two errors, which are discussed below.

1. *McCreary* Does Not Support The Lack Of Deference The Ninth Circuit Gave To Arizona's Claimed Secular Purpose.

The Ninth Circuit noted the rule that a government's asserted secular purpose should receive judicial deference, and then provided none. ACSTO Pet. App. 19a. This lack of deference was not warranted. As *McCreary County* explains, the deference rule is only suspended in those highly "*unusual cases* where the claim [is] an apparent sham." 545 U.S. at 865 (emphasis added). Such "unusual cases" (which consists of only four cases since *Lemon* was decided), involve circumstances in which it was "a commonsense conclusion that a religious objective permeated the government's action." *Id.* at 863.

This is plainly not such a case. Taxpayer-Plaintiffs concede this in their complaint by failing to allege that the tax credit serves any religious purpose (let alone one that is "ostensible and predominant," *id.* at 860), or that the State's asserted secular purpose is a sham. This failure ends the purpose prong analysis in the motion to dismiss context.

2. The Purpose Prong Is Analyzed Based On The Actions Of The Government, Not Of Private Third Parties.

The Ninth Circuit found that Taxpayer-Plaintiffs could prove that the legislature's secular purpose is a sham because the tax credit, in practice, allows

taxpayers to donate money to STOs that support only religious schools. ACSTO Pet. App. 19a. But the problem for the Ninth Circuit is that the tax credit is *implemented by private parties*, and it is axiomatic that only government action may violate the Establishment Clause.

This case involves a clear line between government and private action. The State's involvement ends with the enactment of the statute authorizing tax credits for donations to 501(c)(3) organizations that dispense scholarships. ACSTO Pet. App. 86a (O'Scannlain, J., dissenting from denial of rehearing en banc). From there, private parties—taxpayers, the 501(c)(3) STOs, and parents—take over. *Id.* Any "concentration" of funds in religiously-affiliated STOs,[19] and the decisions of STOs to support religious schools, nonreligious schools,[20] or both, are products of private choice. As the Ninth Circuit rightly said of STOs, they are not "state actors" and thus their "conduct, in itself, [cannot] support an Establishment Clause Claim." ACSTO Pet. App. 21a n.10. The same is true of taxpayers.

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[19] As noted *infra*, the alleged "concentration" of funds in religiously-affiliated STOs has dropped from the claimed amount of 94% in 1998 to 67% in 2009. *See* § II.B.3. This is a far cry from the 96% of voucher funds flowing to religious schools in *Zelman*, which this Court found irrelevant to the constitutionality of the program. 536 U.S. at 658.

[20] The Ninth Circuit narrowly focuses on religiously-affiliated STOs, but as noted in the Statement of Facts, *supra*, at least 8 STOs grant scholarships to students attending only private, nonreligious schools, and there are many more that serve both religious and nonreligious schools.

Nonetheless, what the Ninth Circuit proposes is a rule that would find a law invalid under the purpose prong so long as the plaintiff can prove that the government knew (or even had an inkling) that private parties would utilize a neutrally available benefit program to advance their personal religious aims. ACSTO Pet. App. 80a (invalid purpose could be found based on evidence "concerning what the legislature *actually* knew about how the [tax credit statute] would likely operate"). If that were the law, this Court would have to overrule *Walz v. Tax Commission*, 397 U.S. 664 (1970), since the tax exemption challenged there provided a benefit that the government knew churches would use to advance their religious purposes. And "tax deductions for charitable contributions, including donations made directly to churches, religiously-affiliated schools and institutions," would likewise be imperiled. *Kotterman*, 972 P.2d at 618. Even *Zelman* and *Mueller* would have failed because the government undoubtedly could have forecast that a high concentration of the benefits made available in those cases would flow to religious schools given the "preponderance of religiously-affiliated private schools" in their respective markets. *Zelman*, 536 U.S. at 656-57. The Ninth Circuit plainly erred.

B. The Tuition Tax Credit Does Not Have The Primary Effect Of Advancing, Nor Does It Impermissibly Endorse, Religion.

Under *Zelman*, a government program satisfies *Lemon*'s effects prong if it is a "neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous

independent decisions of private individuals." 536 U.S. at 655. The tax credit is such a program. *See Kotterman*, 972 P.2d at 616 (tax credit satisfies the effects test because it "aids a 'broad spectrum of citizens,' allows a wide range of private choices, and does not have the primary effect of either advancing or inhibiting religion") (citations omitted). Thus, it fully satisfies *Zelman* and this Court's other "private choice" decisions. *Mueller*, *supra*; *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

Indeed, the tax credit bears all the hallmarks of a program that is "not readily subject to an Establishment Clause challenge." *Zobrest*, 509 U.S. at 8. Such programs must benefit a broad range of beneficiaries that are "defined without reference to religion." *Id.* Here, as the district court observed, the tax credit statute "on its face does not mention religion." ACSTO Pet. App. 50a.

Further, the beneficiaries of the tax credit are far broader than the beneficiaries this Court has previously found sufficient. The vouchers in *Zelman* were available to "any parent of a school-age child who resides in the Cleveland City School District." 536 U.S. at 653. The tax deduction for education expenses in *Mueller* was available to parents of children in public and private schools. 463 U.S. at 397. This Court held both sufficient. Here, the tax credit is open to *every* taxpayer in the state, regardless of whether they have children in school.

The last hallmark of *Zelman*-like constitutional programs is that the funds which flow to religious institutions must do so based on "numerous independent decisions of private individuals." *Zelman*, 536 U.S. at 655. This is precisely how the tax credit works. As the district court below held:

> The Tuition Tax Credit allows for the private formation of non-profit STOs to raise money for the schools of their choice. Then, taxpayers, if they elect to invoke the tax credit at all, donate to the STO of their choice. Finally, parents choose the school that they want their child to attend and apply for aid from an STO which grants scholarships to that school.

ACSTO Pet. App. 52a-53a. Moreover, these private decisions are "completely devoid of state intervention or direction." *Kotterman*, 972 P.2d at 614. Arizona's tax credit is plainly a program of private choice.

Taxpayer-Plaintiffs do not dispute any of this. They have abandoned their facial claim, and concede that the program involves multiple layers of private choice. *See supra*. Once again, what they seek is to condemn the tax credit based on the very private choices this Court has lauded as a means of compliance with the Establishment Clause.

The Ninth Circuit erred in several ways in accepting Taxpayer-Plaintiffs' novel thesis, as discussed below. But its most fundamental error was failing to recognize that "[f]or a law to have

forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987) (emphasis in original). Here, each aspect of the program the Ninth Circuit identifies as a likely violation of the Establishment Clause is a product of private choice.

1. The State Is Not Coercing Parents To Choose Religious Over Secular Education.

Whether Arizona is coercing parents into sending their children to religious schools is "answered by evaluating *all* options [Arizona] provides . . . schoolchildren." *Zelman*, 536 U.S. at 656. This Court rejected claims of coercion in *Zelman* because Cleveland children enjoyed a wide range of educational choices, including: remaining in public school; obtaining a scholarship and attending a private school (religious or nonreligious); enrolling in a community school; or enrolling in a magnet school. *Id.* at 655.

Arizona provides a similar, if not greater, array of education choices. It maintains a "multi-dimensional educational system," *Kotterman*, 972 P.2d at 616, which, as discussed in the Statement of Facts, *supra*, includes: attending a traditional public school, which under law must have open enrollment and may not charge tuition; attending any one of a broad array of charter schools, which are non-tuition charging public schools; attending a "virtual

academy," which offers an online public education; being educated at home, pursuant to a permissive homeschooling policy; and attending a private school (religious or nonreligious, perhaps with, and perhaps without, tuition aid). If there was no coercion in *Zelman*, there is certainly no coercion here.

2. The Tax Credit Does Not Limit Parents' Educational Choices.

The tax credit does not limit parental choice; it increases it. Under the tax credit: all taxpayers, regardless of their desire to support religious education, nonreligious education, or both, may take the credit; any person, group of persons, or coalition of schools may form an STO to benefit any two or more schools, regardless of whether the schools are religious, secular, or a combination of the two; and any parent can seek a scholarship to any school of their choice.

The Ninth Circuit found that the tax credit limits parental choices because taxpayers deciding to send their donations to religiously-affiliated STOs "deprive . . . parents . . . of 'genuinely independent and private choices' to direct the program aid to secular schools." ACSTO Pet. App. 22a. But in addition to these conclusions being factually untrue,[21] they are also irrelevant since taxpayers

[21] This claim that parents are hampered in being able to obtain scholarship money to pay for tuition at nonreligious private schools is not borne out by the (constitutionally irrelevant) statistics regarding the program's operation. For example, the Ninth Circuit highlighted the fact that ASCT (which distributes scholarships to students attending both religious

(like STOs and parents) are private actors whose conduct does not violate the Establishment Clause.

The Ninth Circuit wrongly relied on *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), to transmute the private actions of taxpayers into government conduct. ACSTO Pet. App. 37a-38a. *Larkin* involved a state statute that granted churches governmental veto authority over "whether a particular applicant will be granted a liquor license." 459 U.S. at 125. But STOs do not veto anyone's choices; they facilitate them. Moreover, allowing every taxpayer to claim a credit for donations to 501(c)(3) organizations is not at all comparable to the "fusion of governmental and religious functions" struck down in *Larkin*. *Id.* at 126. If providing tax benefits to individuals who make donations to religious organizations fuses

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and nonreligious schools) had a 700 student waiting list in 2004 to support this claim. ACSTO Pet. App. 31a n.15. What the Court failed to take account of is that ASCT provided scholarships to students attending 125 private schools in 2004, *and that 123 of these schools were religiously-affiliated*. ASCT's Br. 4, 9th Cir. Case No. 05-15754, Dkt. No. 18. This fact leads to the corollary conclusion that 98% of these students were waiting to attend a religious school of their parents' choice. The Ninth Circuit's assumption that those on the wait list were unable to obtain a scholarship for a secular private school is entirely unwarranted. In addition, it is noteworthy that in 2008 100 of the 373 private schools that received scholarship funds from STOs were not obviously religiously-affiliated. ASCT Pet. App. 209, 227-34. And in 2009, five of the top ten STOs in terms of donations received were not religiously-affiliated. State App. 30-31. Taxpayer-Plaintiffs' claims that the tax credit limits parental freedom to access nonreligious private schools are made up out of whole cloth.

government and religion in the same impermissible way that the state and church was fused in *Larkin*, then the long-standing practice of providing tax benefits to religious organizations and to those who make donations to them is unconstitutional. Indeed, the Ninth Circuit's approach would require this Court to overrule *Walz*.

Further, the Ninth Circuit's pitting of taxpayers against parents makes no sense because taxpayers and parents are often *the same people*: many taxpayers are parents and (presumably) all parents are taxpayers. And as the district court rightly held, "nothing prevents taxpayers from increasing their contributions to existing STOs which provide scholarships to secular private schools or from forming new STOs themselves for that same purpose." ACSTO Pet. App. 55a.

While there is no limiting of parental choice here, it is important to note that this Court upheld the voucher program in *Zelman* despite "limits" on parental choice. There, the program allowed all private schools located within the failing school district to participate, along with public schools in adjacent districts. 536 U.S. at 645. In practice, 46 of 56 participating private schools were religiously-affiliated, and no public schools participated. *Id.* at 656. In operation, 96% of students participating in the program attended religious schools. *Id.* at 658. The dissent argued that the concentration of students in religious schools resulted from a lack of genuine choice. *Id.* at 707 ("There is . . . no way to interpret the 96.6% of current voucher money going

to religious schools as reflecting a free and genuine choice by the families that apply for vouchers") (Souter, J., dissenting). Despite the "limits" on parental choice in *Zelman*, this Court upheld the voucher program. No "limits" exist here, let alone those identified by the dissent in *Zelman*. And here, parents have more freedom to use Arizona's program in support of secular education than the parents in *Zelman*. The Ninth Circuit erred in finding the tax credit limits parental choice.

3. The Tax Credit Does Not Create Financial Incentives Skewed In Favor Of Religious Schools.

The tax credit does not create any "'financial incentive[s]' that 'ske[w]' the program toward religious schools." *Zelman*, 536 U.S. at 653-54 (citation omitted). The Ninth Circuit's holding to the contrary is based on its finding that "[t]he vast majority of the scholarship money under the program—over 85 percent as of the time of plaintiffs' complaint—is available only for use at religious schools." ACSTO Pet. App. 30a. This is clear error for several reasons. First, the alleged concentration of funds in religiously-affiliated STOs is driven by the private choices of taxpayers, parents, and STOs, and thus is irrelevant to the Establishment Clause question.

Second, the Ninth Circuit ignored that Arizona's "multi-dimensional educational system," *Kotterman*, 972 P.2d at 616, does not favor religious schools. As the district court properly found, tuition scholarships paid by STOs typically do not cover the full cost of

private school tuition, such that parents must copay a portion of that tuition. ACSTO Pet. App. 53a. In contrast, Arizona students can attend public schools and charter schools for free. *Id.* In addition to a free public education, Arizona also provides a tax credit that *further* incentivizes parents to select public schools, by allowing them to take a credit of up to $200 for extracurricular activity expenses. A.R.S. § 43-1089.01.[22] These are greater disincentives than existed in *Zelman*. 536 U.S. at 654 (sole disincentive was that parents must copay a portion of private school tuition while their child could attend public school options free of charge). While *Zelman* held that these features were "not necessary to [the voucher program's] constitutionality," they nonetheless "dispel[led] the claim that the program 'creates . . . financial incentive[s] for parents to choose a sectarian school.'" *Id.* (citation omitted). The same is true here.

Third, the Ninth Circuit's reliance on statistics regarding how the program is used runs headlong

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[22] Notably, the public school tuition tax credit is claimed by far more taxpayers than the private school tax credit. For example, in 2009, over 239,000 taxpayers claimed the public school credit, *see* 2009 Public School Report, at 1, www.azdor.gov/Portals/0/Reports/2009-Public-School-Contributions.pdf, compared to just over 73,000 taxpayers who claimed the private school credit, State App. 18. Further, while the public school credit sets a lower cap ($200) than the private school credit ($500 single, $1,000 married), the amount of total dollars claimed under that credit has largely kept pace with the private school credit. In 2009, taxpayers claimed approximately $42 million under the public school credit, *see* 2009 Public School Report, *supra*, at 1, and approximately $50 million under the private school credit, State App. 18.

into this Court's repeated admonition that such statistics are irrelevant in judging the constitutionality of a facially neutral program. *Mueller*, 463 U.S. at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law").

This admonition is once again proven true here. For example, Taxpayer-Plaintiffs' complaint alleged that in 1998 94% of scholarship funds were concentrated in religiously-affiliated STOs. ACSTO Pet. App. 120a. This number has decreased steadily since then: in 2003 it was 82%, Brief of Appellants 12, 9th Cir. Case No. 05-15754, Dkt. No. 8; in 2004 it was 79%, *id.*; in 2008 it was 68%, ASCT Pet. App. 223-24; and in 2009 it dropped again to 67%, State App. 30-31. At what point will this number be acceptable to Taxpayer-Plaintiffs? When it dips below 65%? 50%? Perhaps lower? Similarly, Taxpayer-Plaintiffs' alleged that in 1998 each of the top three STOs in terms of donations received were religiously-affiliated. ACSTO Pet. App. 121a. But in 2009, five out of the top ten STOs receiving the largest number of donations had no religious affiliation. State App. 30-31.

The year-to-year, indeed day-to-day, changes in how private parties utilize the tax credit program are simply not relevant to the constitutional analysis.

4. No Religious "Discrimination" Occurs; And The Decision Regarding Which Students Attend Which Schools Takes Place Four Levels Down In The Chain Of Private Choice.

In their opposition to the petitions for certiorari, Taxpayer-Plaintiffs claim that the tuition scholarships funded by donations taken pursuant to the tax credit are disbursed in a religiously discriminatory manner. Opp. 15. This claim misses the mark for several reasons. First, to the extent Taxpayer-Plaintiffs are claiming that STOs discriminate on the basis of religion, they are wrong. There is no evidence in the record that any STO requires applicants to be of a particular religious faith as a condition to receiving a scholarship.

Second, STOs do not discriminate; they merely choose which private schools they will support. It is the school that decides who can enroll.[23]

Finally, the decision by a private religious school regarding admission occurs *at least four levels down the private choice ladder*. First, private individuals or groups decide to form an STO; second, taxpayers choose to send a donation to the STO of their choice; third, parents decide on a private school for their

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[23] Even Taxpayer-Plaintiffs' assumption that most religious schools discriminate on the basis of religion is wrong. *See* Vicki Murray and Ross Groen, *Survey of Arizona Private Schools: Tuition, Testing, and Curricula*, at 1, Jan. 5, 2005, at 1, www.goldwaterinstitute.org/article/1299 (83% of private religious schools in Arizona "do not require religious affiliation for admission").

child and request a scholarship from the appropriate STO; and fourth, the selected school decides whether to admit the student. As with all other aspects of the program to which Taxpayer-Plaintiffs complain, the admission decisions that occur here are far too removed from the government to be actionable under the Establishment Clause.

5. A Reasonable Observer Would Not Perceive That The Tax Credit Endorses Religion.

The endorsement test, under which a "reasonable observer" who is "deemed aware of the history and context" of the program being challenged determines whether it conveys a message of government endorsement of religion, *Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001), is easily satisfied here. As this Court said in *Zelman*,

> [W]e have repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement.

536 U.S. at 654-55.

Charged with the knowledge outlined above, the reasonable observer would view the tax credit as a "neutral program of private choice," and would thus

conclude that it does not endorse religion. The Ninth Circuit plainly erred in holding to the contrary. ACSTO Pet. App. 43a.

CONCLUSION

Taxpayer-Plaintiffs ignore nearly a century of taxpayer standing precedent and seek an unprecedented expansion of *Flast*'s narrow exception to the bar on taxpayer lawsuits so they may attack a tax credit program that scrupulously complies with the Establishment Clause. The Ninth Circuit plainly erred in allowing their lawsuit to move forward. This Court should reverse the Ninth Circuit's judgment, and remand with instructions to dismiss Taxpayer-Plaintiffs' complaint.

Respectfully submitted,

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July 30, 2010

APPENDIX

APPENDIX TABLE OF CONTENTS

U.S. Const. art. III § 2, cl. 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KATHLEEN M. WINN, an Arizona taxpayer; DIANE WOLFTHAL, Arizona taxpayer; MAURICE WOLFTHAL, an Arizona taxpayer; LYNN HOFFMAN, an Arizona taxpayer, Plaintiffs-Appellants,,	)	
v.	)	No. 05-15754
ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION; ARIZONA SCHOOL CHOICE TRUST; LUIS MOSCOSO; GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue; GLENN DENNARD, Defendants-Appellees.	)	

TRANSCRIPTION OF ORAL ARGUMENT
January 24, 2008

Before: HONORABLE DOROTHY W. NELSON,
HONORABLE STEPHEN REINHARDT,
HONORABLE RAYMOND C. FISHER,
Circuit Judges

PREPARED FOR: JEREMY D. TEDESCO

PREPARED BY:
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[4] MR. BENDER: Thank you, Judge Reinhardt.

And may it please the Court, this case does not involve a program of private charity. If it did, we would not be here.

This case involves a State program that uses state tax revenues to achieve a State purpose of funding scholarships, subsidizing tuition payments at nonpublic schools in Arizona.

The money that is used in this program is money paid for by all the taxpayers of Arizona in the same way as all the taxpayers of Ohio paid for the program in Zelman, because it's money that is essentially taken out of the general fund.

JUDGE NELSON: But isn't this really a neutral program with multiple layers of private choice ultimately?

MR. BENDER: Definitely.

JUDGE NELSON: All right.

MR. BENDER: And it's those multiple layers that make it unconstitutional.

The State here, unlike the state in Zelman, which chose correctly to distribute the scholarships itself and did that on a nondiscriminatory basis to parents and then let the parents use the scholarships wherever they wanted to, for some reason Arizona has

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[16] applies here when there isn't the same kind of educational crisis as there was in Zelman, Supreme Court hasn't decided that yet, but if you think that that's true, then it would be all right to use STOs that don't discriminate on the basis of religion.

JUDGE REINHARDT: Which STOs are you attacking in this suit? I assume the ones that only give to religious

MR. BENDER: Yes.

JUDGE REINHARDT: -- institutions.

MR. BENDER: Right.

JUDGE REINHARDT: Any others?

MR. BENDER: Any ones that discriminate on the basis of religion by either only giving to religious schools or by only giving to people of a certain religion. It's those STOs that we're attacking. The Arizona School Choice Trust, if we were to win this case on that ground, would be permitted to operate.

But, Judge Nelson, it's true that in theory anybody can set up an STO, but put yourself in the position of a parent. You would like your child to go to a nonsectarian school. You can't go to the Catholic STO in Phoenix, which is the largest of all STOs. You can't go to the Arizona Christian Tuition Organization because they only give you a scholarship to do that. So you go to

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[49] MR. BENDER: Thank you, Judge Reinhardt.

You correctly understand our position. It is an as-applied challenge, and we do not challenge the Arizona School Choice Trust's administering this program. We only challenge the administration of it by religion-specific STOs.

The key in Zelman is it's the recipient of the aid that the government wants to distribute that has to make the choice.

JUDGE REINHARDT: So essentially although -- you -- aside from your point that that was an emergency situation and maybe that rule didn't apply, if the Zelman rule did apply, the comparable implementation of it here would be for the State to give money directly to the parents who could then choose to go to any school they want, and under Zelman that would be permissible?

MR. BENDER: Absolutely right. Yes.

JUDGE REINHARDT: But the State didn't want to give the money to the parents. It set up these intermediaries which funnel the money to the church schools.

MR. BENDER: Right.

JUDGE NELSON: But the parent can't get the money without the parent applying to the STO; isn't that correct?

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[53] I hereby certify that the foregoing pages are a true and correct transcription of the Oral Argument, as preserved on CDRom, transcribed to the best of my skill and ability.

/s/_____
Kimberly Portik, RMR, CRR