

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ARIZONA CHRISTIAN SCHOOL TUITION :

4 ORGANIZATION, :

5 Petitioner : No. 09-987

6 v. :

7 KATHLEEN M. WINN, ET AL. :

8 - - - - - x

9 and

10 - - - - - x

11 GALE GARRIOTT, DIRECTOR, ARIZONA :

12 DEPARTMENT OF REVENUE, :

13 Petitioner : No. 09-991

14 v. :

15 KATHLEEN M. WINN, ET AL. :

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17 Washington, D.C.

18 Wednesday, November 3, 2010

19

20 The above-entitled matter came on for oral
21 argument before the Supreme Court of the United States
22 at 10:03 a.m.

23 APPEARANCES:

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25 Department of Justice, Washington, D.C.; for the

1 United States, as amicus curiae,
2 supporting Petitioners.

3 PAULA S. BICKETT, ESQ., Chief Counsel for Civil Appeals,
4 Phoenix, Arizona; on behalf of Petitioners.

5 PAUL BENDER, ESQ., Phoenix, Arizona; on behalf of
6 Respondents.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	NEAL K. KATYAL, ESQ.	
4	on behalf of the United States, as	
5	amicus curiae, supporting the Petitioners	4
6	ORAL ARGUMENT OF	
7	PAULA S. BICKETT, ESQ.	
8	On behalf of the Petitioners	14
9	ORAL ARGUMENT OF	
10	PAUL BENDER, ESQ.	
11	On behalf of the Respondents	25
12	REBUTTAL ARGUMENT OF	
13	NEAL K. KATYAL, ESQ.	
14	On behalf of the United States, as	
15	amicus curiae, supporting the Petitioners	55
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 09-987, Arizona Christian
5 School Tuition Organization v. Winn, and the related
6 case, Garriott v. Winn.

7 General.

8 ORAL ARGUMENT OF NEAL K. KATYAL

9 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
10 SUPPORTING THE PETITIONERS

11 GENERAL KATYAL: Thank you,
12 Mr. Chief Justice, and may it please the Court:

13 For 13 years, Arizona has permitted private
14 citizens to contribute money to private organizations
15 set up by private individuals and has let those
16 organizations use that money towards scholarships when
17 individuals apply for them. The Ninth Circuit erred
18 first in finding that the taxpayer plaintiffs had
19 standing, and second in striking the program down.

20 On standing, this lawsuit fails each of the
21 three necessary elements. Regarding injury in fact, the
22 key point is this: Not a cent of the Respondents' money
23 goes to fund religion. If you placed an electronic tag
24 to track and monitor each cent that the Respondent
25 plaintiffs pay in tax, not a cent, not a fraction of a

1 cent, would go into any religious school's coffers.

2 JUSTICE SOTOMAYOR: Mr. Katyal, their point
3 is that this tax money does belong to the State that the
4 private individuals are using, because it is money that,
5 even by the new amendment, says either you pay it to the
6 State or you use it for this purpose, but it's the
7 State's money, and it's giving you by its largesse the
8 right to redirect it. That's their argument.

9 GENERAL KATYAL: Right, and --

10 JUSTICE SOTOMAYOR: So it would be the
11 taxpayers' tax dollars being spent on religion, if they
12 could sustain their claim.

13 GENERAL KATYAL: There are two problems with
14 that. One has to do with injury in fact. The other has
15 to do with redressability. With respect to injury in
16 fact, our point is, as you track the taxpayers' dollars,
17 it doesn't actually fund any religious program, unlike
18 the -- unlike Flast and other cases in which this Court
19 has considered taxpayer standing for religion.

20 Their complaint is not that the government
21 is spending money that the taxpayers has been -- money
22 that has been extracted and spent of the taxpayers.
23 Their complaint is that someone else's money is not
24 being extracted and spent enough. And the relevant
25 language in Flast says that for taxpayer standing to

1 occur, that, quote, "his tax money" must be extracted
2 and spent, and here that's not occurring.

3 Now, with respect to the other argument, not
4 injury in fact, but addressability and causation, our
5 point is this: It's speculative as to whether or not
6 that chain of events that you spelled out, Justice
7 Sotomayor, would actually happen. As this Court said in
8 Cuno, for example, when a tax credit is given, sometimes
9 that actually reduces the amount of money the government
10 has to spend. It doesn't increase it. And so that's
11 different than the direct outlay that was at issue in
12 Flast.

13 JUSTICE BREYER: Then is it constitutional
14 if we get a new system? Here's what the system will be:
15 The taxpayers who are religious will be able to check a
16 box, and the check that they send to the IRS -- it's a
17 possible system -- what happens is that that check is
18 cashed by an official, and the cash is given to the
19 local priest to say prayers for the individual who
20 contributed the money. And, in your view, there is no
21 one who could challenge that?

22 GENERAL KATYAL: Well, let me say two things
23 about that. First is: That is not all that different,
24 Justice Breyer, than what we have today with 501(c)(3)
25 deductions.

1 JUSTICE BREYER: The difference is, of
2 course, that in the one case it's a deduction, and in
3 this case you're paying it 100 percent with money that
4 would otherwise go into the coffer.

5 GENERAL KATYAL: That -- that's --

6 JUSTICE BREYER: I understand that. But I'm
7 interested in, conceptually, does the Government think
8 that there is no one who could challenge that?

9 GENERAL KATYAL: I don't think that any
10 taxpayer could challenge that. That is, depending on
11 the hypothetical, Justice Breyer, I'm not sure if the
12 government is specifying which religious organizations
13 might be eligible for the check box. But if the
14 government is doing something that is under-inclusive
15 and only giving tax credits to one set of religious
16 organizations, that's a Texas Monthly problem, where
17 this Court --

18 JUSTICE BREYER: So, if you go back into
19 history, it could have been the case that the -- as long
20 as they were fair to every religion, the first Congress
21 could have funded prayers throughout the nation in
22 churches for anyone to go and pray, and that would not
23 have violated the Establishment Clause, or if it had,
24 nobody could have challenged it.

25 GENERAL KATYAL: No, Justice Breyer. Two

1 things on that. First is: We're only talking about
2 standing, not the merits. And with respect to standing,
3 if the government funded only religious organizations or
4 religious prayer, I do think that other organizations
5 would have standing -- not as a taxpayer, because this
6 Court has been very careful in Flast and in Hein to say
7 there's an extremely narrow exception for taxpayer
8 standing, a narrow exception to Frothingham, but other
9 organizations would have Texas Monthly standing because
10 they're --

11 JUSTICE GINSBURG: General -- counsel, does
12 anyone have standing, in your view, to challenge this
13 scheme?

14 GENERAL KATYAL: The way this scheme is set
15 up, our answer is no. And I think that accords with
16 this Court's general reluctance to confer taxpayer
17 standing in this area.

18 JUSTICE GINSBURG: And if we leave out the
19 fine points that you were discussing, isn't the
20 underlying premise of Flast v. Cohen that the
21 Establishment Clause will be unenforceable unless we
22 recognize taxpayer standing?

23 GENERAL KATYAL: I -- I don't see that,
24 Justice Ginsburg, in Flast. I think Flast is a very
25 narrow exception for when someone's dollars are being

1 taken out of their pocket and spent by the government on
2 religion, and I don't think that's happening here.

3 JUSTICE GINSBURG: If you're right --

4 JUSTICE BREYER: Flast is gone; is that
5 right? Flast is gone. There is no more -- nothing more
6 to Flast, because it just happened that nobody had
7 thought of this system at the time of Flast.

8 GENERAL KATYAL: Justice Breyer --

9 JUSTICE BREYER: If they had, they could
10 have had -- what?

11 GENERAL KATYAL: Justice Breyer, I don't
12 think Flast is gone at all.

13 JUSTICE BREYER: Why?

14 GENERAL KATYAL: -- when there is direct
15 government outlays to spend on religion, like Flast. I
16 mean, that --

17 JUSTICE BREYER: No, but you don't need be,
18 because all you have to do to get around it is to create
19 what we have here.

20 GENERAL KATYAL: Well, I do think that that
21 can get around it -- that can get around it in some
22 circumstances. And, again, those who are under-included
23 in a government program may have standing, not as a
24 taxpayer.

25 But, at the end of the day, Justice Breyer,

1 if that's the result, that's the result for every other
2 clause in the Constitution. Taxpayer standing is the
3 most narrow of exceptions, and --

4 JUSTICE GINSBURG: But it is -- there is a
5 plaintiff -- we have a Bill of Rights, and most
6 provisions have plaintiffs who are hurting, whose free
7 speech is being suppressed, but this one doesn't have.
8 It's in the Constitution like all the others, and I
9 thought, to be candid, that that's what the problem was
10 in *Flast v. Cohen*, and that's what the Court was
11 responding to.

12 GENERAL KATYAL: Well, I don't see that in
13 *Flast*, Justice Ginsburg, but be that as it may, I think
14 this Court in *Valley Forge* was very clear to say that
15 if, at the end of the day, you can't find a plaintiff
16 with standing, that is not an excuse to relax the -- our
17 general requirements of Article III standing.

18 And here, if you granted the plaintiffs
19 standing, what you would be granting is, for the first
20 time, a -- a tax credit which is a complaint about
21 someone else's money not being spent to a high enough
22 level.

23 JUSTICE KAGAN: So if you are right, General
24 Katyal, the Court was without authority to decide *Walz*,
25 *Nyquist*, *Hunt*, *Mueller*, *Hibbs*, this -- this very case,

1 just a few years ago? That the Court was without
2 authority to decide any of those cases, but that somehow
3 nobody on the Court recognized that fact, nor did the SG
4 recognize that fact. The SG participated, I believe, in
5 each of those cases.

6 GENERAL KATYAL: Right. So let me say two
7 things about that.

8 First is, I do think it's very much just
9 like Frothingham, in which Frothingham had to deal with
10 this exact problem. The Court had conferred standing in
11 taxpayer standing case after taxpayer standing case, and
12 then, when it was teed up and presented to the Court as
13 a question about Article III standing, the Court said:
14 No, we shouldn't have granted taxpayer standing in those
15 cases. So my answer to you is yes.

16 Now, I do think that this Court's decision
17 in Hein, I think, reiterated some of the fundamental
18 principles and the limits on Flast. And I think the
19 Court -- the plurality made quite clear that it would go
20 no further than the facts of Flast.

21 And to grant standing here, you have to
22 go -- tremendously depart from what Flast is about: a
23 direct government outlay of funds out of -- taking money
24 out of someone's pocket to fund religion.

25 GENERAL KAGAN: But I --

1 JUSTICE KENNEDY: I just want to make sure I
2 heard your answer to the -- you said the answer is yes.
3 In other words, you agree with Justice Kagan's criticism
4 of those cases, and you said, yes, she's right; those
5 cases were wrongly decided.

6 GENERAL KATYAL: They -- they could have
7 gone out -- the results may have been the same. It just
8 would have been -- would have been on standing instead
9 of the merits. Mueller, for example, upheld the
10 program. So the bottom-line decision would have been
11 the same, but the way in which the Court got there would
12 have been so that there was no tax --

13 JUSTICE KENNEDY: But you would have said
14 there would have been no standing in those cases.

15 GENERAL KATYAL: No taxpayer standing. Now,
16 there may have been other forms of standing, Texas
17 Monthly standing, that could have been alleged to
18 challenge those programs, but yes.

19 JUSTICE GINSBURG: But it wasn't -- it
20 wasn't -- I don't remember whether the Government
21 participated in the Winn case when it came up under the
22 Tax Injunction Act.

23 GENERAL KATYAL: We did, and in the first
24 footnote --

25 JUSTICE GINSBURG: And there wasn't a word

1 from the Government about lack of standing.

2 GENERAL KATYAL: The first footnote in the
3 brief, Justice Ginsburg, acknowledged the fact that
4 standing hadn't been pushed or pressed below. But I
5 acknowledge that, particularly in the wake of Hein,
6 should another case arise, the Government will -- will
7 acknowledge the standing defects and brief them as we
8 are here.

9 Our point on redressability is not simply
10 that the -- that the tax -- that the cost of the program
11 is speculative. It's also that the relief that the
12 plaintiffs are seeking in this case won't redress their
13 problem. That is, if you gave the plaintiffs everything
14 they're asking for, the very same religious schools and
15 the very same religious STOs would continue to be
16 funded. The very same religious STOs would continue to
17 be funded because they would leave in place -- and this
18 was my answer to Justice Breyer -- the tax deduction,
19 the 501(c)(3) tax deduction. And so there would still
20 be government revenue being spent in favor of these
21 religious STOs under their program. It would just be at
22 the level of one-third instead of 100 percent.

23 I don't think that satisfies their problem.
24 I don't think James Madison 's remonstrance would be
25 satisfied if they were -- if Madison were told: Well,

1 you're not going to be taxed three pence; you'll be
2 taxed one pence. The principle is what matters, the
3 principle of Flast.

4 If I could reserve the balance of my time.

5 CHIEF JUSTICE ROBERTS: Thank you, General.
6 Ms. Bickett.

7 ORAL ARGUMENT OF PAULA S. BICKETT

8 ON BEHALF OF THE PETITIONERS

9 MS. BICKETT: Mr. Chief Justice, and may it
10 please the Court:

11 Arizona's tuition tax credit does not
12 violate the Establishment Clause, because it's a neutral
13 law that results in scholarship programs of private
14 choice. It's neutral because, like the tax deduction
15 that the Court upheld in Mueller, it's one of many
16 tax-saving devices, including some 26 other credits that
17 are available to Arizona taxpayers on a neutral basis.

18 JUSTICE KAGAN: Ms. Bickett, could you
19 explain something to me just -- I have been puzzling and
20 puzzling over this scheme. Could you tell me why
21 Arizona adopted this sort of scheme rather than the more
22 typical tuition voucher scheme? In other tuition
23 voucher schemes, the State just gives the -- the voucher
24 or scholarship or what have you. This is so much more
25 complicated and complex and unusual. And it just left

1 me wondering why it was chosen, or what the State thinks
2 the advantages are of it now?

3 MS. BICKETT: Yes, Justice Kagan. One of
4 the things that is true in Arizona that was not true in
5 Ohio is that, under the Arizona Constitution, any direct
6 aid to private schools is prohibited.

7 The other thing about the tax credit program
8 is that it does encourage contributions not only from
9 parents but from the community at large. And this --
10 this then provides money for low-income students,
11 students from low-income families.

12 JUSTICE KENNEDY: Does the record show the
13 extent to which there are donations by people who do not
14 have students?

15 MS. BICKETT: Could you --

16 JUSTICE KENNEDY: Does the -- does the
17 record show the extent to which there are these
18 additional donations that you just referred to?

19 MS. BICKETT: Your Honor, of course, it was
20 at a motion to dismiss phase. What the record shows is
21 that there's some reports that -- studies that have been
22 done that show that there have been some children that
23 have switched from public schools to private schools as
24 a result of the program, that many of the scholarship
25 programs are -- in fact, most of the scholarship

1 programs provide scholarships based on financial need.

2 JUSTICE SCALIA: You haven't -- I don't
3 think you answered his question. The question was, is
4 there anything in the record that shows whether any of
5 the money that's involved here comes not from parents,
6 but rather from others who can contribute to the
7 program?

8 MS. BICKETT: Well, what the record shows is
9 that there have been -- there's a large amount of
10 contributions. There is \$55 million. It doesn't -- we
11 have Arizona Department of Revenue reports that list the
12 number of contributors and who contributes -- or not the
13 individuals who contribute. I -- it doesn't
14 specifically line out who the contributors are, whether
15 they are parents, or whether they are not parents.

16 JUSTICE SCALIA: Well, I suppose if some of
17 the contributions are considerable, like a million
18 dollars, that couldn't be just a parent, right?

19 MS. BICKETT: You're right.

20 JUSTICE SCALIA: Are there contributions of
21 that size?

22 MS. BICKETT: Again, the record doesn't show
23 what the size of the contributions are. It shows the --
24 the number of contributions and the total amount of
25 contributions.

1 CHIEF JUSTICE ROBERTS: You could only
2 get -- if you give a million dollars, you still only get
3 a \$500 tax credit, right?

4 MS. BICKETT: That's correct, Your Honor.

5 The -- the programs are programs of private
6 choice, because any aid that reaches religious schools
7 does so after -- only after at least four levels of
8 private decisionmaking. Arizona sets up the neutral
9 rules for the -- this tax credit, and after that,
10 private individuals and organizations take over. Anyone
11 can form a school tuition organization, and the increase
12 in the number and diversity of school tuition
13 organizations over the 13 years that the tax credit has
14 been in existence demonstrates, in fact, that -- that
15 this is free for everyone to participate in.

16 JUSTICE BREYER: Something that worried me
17 in Zelman is this, and I might get your answer.
18 Probably Arizona spends some billions of dollars on
19 public schools, doesn't it? I don't know what the exact
20 amount is.

21 MS. BICKETT: Yes, Your Honor.

22 JUSTICE BREYER: Well, let's take 30 or
23 40 percent of that and spend it through this program on
24 religious schools. Imagine that happens. At that
25 point, people might get into considerable discussion

1 about what qualifies, when it doesn't qualify, whether
2 it's a valid school, or is it just teaching religion,
3 and what the rules and regulations are. How is Arizona
4 dealing with this problem? By saying there are no
5 regulations, by saying that we're not -- is there a
6 system for dealing with the legitimacy and the
7 circumstances under which a particular religion's
8 schools qualify for this program? Who decides and how?

9 MS. BICKETT: Well, under the tax credit
10 program --

11 JUSTICE BREYER: Yes.

12 MS. BICKETT: -- the schools have to be
13 qualified private schools in order to participate in the
14 -- in the tax credit.

15 JUSTICE BREYER: And that must be a set of
16 regulations and rules.

17 MS. BICKETT: Primarily what it is, is that
18 private schools in Arizona satisfy the compulsory
19 education law as long as they meet the requirements that
20 the public schools have in terms of providing
21 qualitatively the subject matter that the public
22 schools --

23 JUSTICE SCALIA: And those standards have
24 nothing to do with this program. They are standards
25 that any private school, religious or otherwise, must

1 meet in order to satisfy the education requirements of
2 Arizona?

3 MS. BICKETT: That is correct, Your Honor.

4 JUSTICE BREYER: And when do they teach the
5 religious part of their program?

6 MS. BICKETT: Excuse me?

7 JUSTICE BREYER: I mean, when does a private
8 school -- normally the schools -- I mean, I'm not an
9 expert, but what you have to do to be a school is a very
10 complex thing, and you have all kinds of requirements
11 that eat up quite a lot of the day. And I just wonder
12 how the religion part fits in. Has there turned out to
13 be no problem? When do they -- do they teach religion
14 at 6:00 in the morning? Does it matter if the person's
15 qualified? How does the -- I once had a case on this in
16 the First Circuit, and it came out to be surprisingly
17 complex, and I just wondered how -- if there turned out
18 to be any problem at all in Arizona in this area.

19 MS. BICKETT: Justice Breyer, the record
20 doesn't reflect that, and I am not aware of any problem
21 with private schools in Arizona and certainly not that
22 have participated in this tax credit program.

23 JUSTICE KENNEDY: Suppose that an STO --
24 this is a hypothetical case -- discriminated on the
25 basis of race. No Hispanic or no white or no black can

1 receive our money. And suppose there's no Federal
2 statute on it, no State statute prohibiting this. Would
3 there be a constitutional violation, a Federal
4 constitutional violation?

5 MS. BICKETT: If it was -- if it was a
6 private institution --

7 JUSTICE KENNEDY: No, it's an STO.

8 MS. BICKETT: And so that is a private
9 organization.

10 JUSTICE KENNEDY: All right. There are no
11 attributes of State action that would suffice to allow a
12 discriminated person to bring suit, a person who has
13 been discriminated against?

14 MS. BICKETT: As long as there was not a
15 Federal law that applied to the organization --

16 JUSTICE KENNEDY: No, the hypothetical is no
17 Federal statute, no State statute. It's a pure -- it's
18 a State action question, is what I'm asking.

19 MS. BICKETT: And unless the discrimination
20 could be attributed to the State, the State's direction,
21 then --

22 JUSTICE KENNEDY: Well, don't you think a
23 strong argument can be made that it can be attributed to
24 the State. The State has all sorts of rules about what
25 an STO has to be. The State provides the mechanism

1 through -- through the credit for the funding.

2 JUSTICE SOTOMAYOR: Limits the funding.

3 JUSTICE SCALIA: I assume that there's a tax
4 deduction for contributions to churches.

5 MS. BICKETT: Yes, Your Honor.

6 JUSTICE SCALIA: And many churches
7 discriminate on the basis of religion, don't they?

8 MS. BICKETT: Yes, they do.

9 JUSTICE SCALIA: Does that pose a
10 constitutional problem, do you think?

11 MS. BICKETT: No, Your Honor, it doesn't,
12 and --

13 JUSTICE KENNEDY: What about -- what about
14 -- what about the answer to my question?

15 MS. BICKETT: Well, Your Honor, and I --
16 because STOs are 501 --

17 JUSTICE KENNEDY: You're saying the STO --
18 you're saying STOs are sufficiently private so they can
19 do this.

20 MS. BICKETT: Because they are --

21 JUSTICE GINSBURG: There was a case in this
22 Court. The name of it was Bob Jones. It was a private
23 school, and it discriminated on the basis of race. And
24 the question was whether they could have a tax-exempt
25 status so that there could be donations to them. Do you

1 remember --

2 MS. BICKETT: Yes --

3 JUSTICE GINSBURG: -- the outcome of that
4 case?

5 MS. BICKETT: Yes, Your Honor. The -- the
6 Court held that the Department of Revenue could preclude
7 the university from having tax-exempt status because
8 that -- that violated public policy, and, therefore,
9 they were not entitled to 501(c)(3) status. And so too
10 here. All of these organizations are 501(c)(3)
11 organizations, so they would not be able to discriminate
12 based on race.

13 JUSTICE SOTOMAYOR: Who would have --

14 JUSTICE KAGAN: Could I try
15 Justice Kennedy's question in a slightly different way?

16 I'm assuming that you would agree that if
17 this was just a straight tuition voucher program, the
18 State could not give tuition vouchers on the basis of
19 religion, could not say, if you are a Catholic, you
20 don't get these tuition vouchers. But what the State
21 has done here, apparently, is to set up a scheme that
22 uses intermediaries that can make exactly that
23 distinction, that can say, sorry, if you are a Catholic
24 you don't get scholarships out of our STO.

25 And the question is, why should the State be

1 able to do that? If the State can't do it itself in
2 providing tuition vouchers, why should the State be able
3 to set up a system using intermediaries that exist for
4 no other reason than to administer this program that can
5 make those distinctions?

6 MS. BICKETT: Your Honor, the State is not
7 making those decisions. It's private organizations, and
8 anyone can set up a school tuition organization. School
9 tuition organizations that support solely secular
10 schools are in existence, and there has been no problem
11 setting those up. Five of the top 10 STOs do provide
12 scholarships to any -- any school of the parents'
13 choosing --

14 JUSTICE KAGAN: But the plaintiffs
15 contend --

16 MS. BICKETT: The private market --

17 JUSTICE KAGAN: The plaintiffs contend --
18 and this is a motion to dismiss, so we have to accept
19 their contentions as settled -- that there are STOs that
20 make these distinctions that clearly would be
21 impermissible if the State administered the program.
22 These are not pre-existing charitable organizations.
23 They are not pre-existing schools. They're entities
24 that are set up solely for the purpose of administering
25 this program, and yet the State is saying it can make

1 distinctions that the State itself cannot.

2 MS. BICKETT: Your Honor, if I might correct
3 you, the -- there was one school tuition organization
4 that pre-existed the tax credit, and certainly the
5 private schools that participated in these for the most
6 part did exist before this school tuition organization.

7 What this program allows private
8 organizations to do, it allows parents to get together
9 with private schools and form school tuition
10 organizations that then --

11 JUSTICE GINSBURG: But you -- you said there
12 was an STO before this program, but it didn't get the
13 benefit of money from taxpayers that would have gone --
14 that money went to -- to Arizona, not to the STO before
15 this scheme was created.

16 MS. BICKETT: Before this scheme was
17 created, they would have gotten a tax deduction, a
18 Federal tax deduction and a State tax deduction, instead
19 of a tax credit. But the difference -- there is not a
20 significant difference between a tax credit and a tax
21 deduction in terms of constitutionality. The only
22 difference between a tax deduction is that, for purposes
23 of a tax deduction, it depends on -- the value of it
24 depends on the tax bracket of the taxpayer, whereas a
25 tax credit, the value depends -- is -- is equal for all

1 taxpayers that owe taxes. And this Court has never made
2 a distinction between tax credits, on the one hand, or
3 tax exemptions, tax deductions.

4 Under -- under Respondents' theory, any
5 money that the government doesn't take in would then be
6 the equivalent of State money, and that would then
7 undermine 501(c)(3) corporations and all kinds of
8 charitable organizations. What you need to look at
9 in -- when Arizona decided to give a tax credit for this
10 is it was thinking is this a worthy public purpose to
11 not take in certain money that -- that the State would
12 normally be entitled to if they give contributions to
13 that purpose. So, it's not a question -- and that --
14 that type of purpose has been upheld by this Court in
15 Walz, in Hernandez.

16 And there, again -- there is not a basis for
17 distinguishing here between what Arizona is doing and
18 other 501(c)(3) organizations that have for years been
19 able to enjoy the benefits of -- of tax savings, tax
20 benefits, and help give scholarships to religious
21 organizations.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 Mr. Bender.

24 ORAL ARGUMENT OF PAUL BENDER
25 ON BEHALF OF THE RESPONDENTS

1 MR. BENDER: Thank you, Mr. Chief Justice,
2 and may it please the Court:

3 I'd like to start with Mr. Katyal's
4 statement that if we win this case, you don't get any
5 relief because as much money would be -- would go into
6 religious education as goes now. That shows he does not
7 understand our claim.

8 Our claim is not that money is going -- that
9 State money is going to religious schools. Our claim is
10 that State money is being given to the beneficiaries of
11 a State spending program on the basis of religion. It's
12 a claim about discrimination in the distribution of
13 these State funds. It's not --

14 JUSTICE SCALIA: But there -- but there is a
15 discrimination, I gather. The -- the school that seems
16 to get the most money on the list doesn't appear to be a
17 religious school at all. It's -- it's not even
18 discrimination between religion and nonreligion, if you
19 think that that is invalid, which I don't. But it
20 doesn't favor religion at all.

21 MR. BENDER: I didn't say that it favored or
22 disfavored religion. That's not --

23 JUSTICE SCALIA: Then what's your problem
24 under the Establishment Clause?

25 MR. BENDER: The problem is that government

1 benefits in a government benefit program cannot
2 constitutionally be given to the beneficiaries of the
3 program on the basis of their religion.

4 If a -- if a parent comes to one of these
5 religious --

6 JUSTICE SCALIA: You can't -- you can't have
7 a government program that gives out money
8 indiscriminately to certain organizations that, say,
9 provide hospital services, and it would be
10 unconstitutional if that included organizations that
11 were religious organizations, as well as organizations
12 that were not. That would be unconstitutional?

13 MR. BENDER: Let me try to clarify.

14 JUSTICE SCALIA: So you must positively
15 disfavor religion?

16 MR. BENDER: No, you must not. You must
17 give the money to the beneficiaries without taking the
18 beneficiaries' religion into account. Suppose the
19 government set up --

20 CHIEF JUSTICE ROBERTS: How does this take
21 -- how does this take the beneficiaries' religion into
22 account when the program works perfectly -- in exactly
23 the same way if it's a nonreligious school? They don't
24 care whether it's a religious school or not.

25 MR. BENDER: Because the STOs are giving out

1 government funds. The STOs are on the government's
2 behalf distributing tax revenues. Suppose that --

3 CHIEF JUSTICE ROBERTS: No, no. I'm
4 trying -- I don't think that's my-- I hope that wasn't
5 my question. It's how is it discriminating on the basis
6 of religion if the STOs and the government money -- it
7 doesn't care whether it goes to a religious school or
8 not; it's treated the same?

9 MR. BENDER: The STO -- most money is given
10 out by STOs that do care whether it goes to a religious
11 school.

12 CHIEF JUSTICE ROBERTS: The State money
13 going to the STO -- the State doesn't care whether it
14 goes to a religious STO or a secular STO.

15 MR. BENDER: That doesn't matter. If the
16 State's grantee cares, that's unconstitutional.

17 CHIEF JUSTICE ROBERTS: I thought we've held
18 that when you have the decision is made by a private
19 entity whether to use the money to go to a religious
20 school or a nonreligious school, that that doesn't
21 violate the Constitution because the decision is not
22 made by the State; it's made by the private recipient.

23 MR. BENDER: I believe the Court held the
24 opposite in Bowen, where the decision to use the money
25 for religious purposes was made by the grantee, not made

1 by the government. The government program in Bowen was
2 completely religiously neutral. Grantees were given
3 funds to educate adolescents in sexuality. The Court
4 held -- Chief Justice Rehnquist wrote the opinion --
5 that, although the program was constitutional on its
6 face because -- it wasn't unconstitutional because
7 religious organizations could participate as grantees.
8 It would be unconstitutional if those organizations
9 distributed the benefits of the program on the basis of
10 religion.

11 Think about a Head Start program. Suppose
12 the government sets up 50 Head Start programs in a
13 particular community. They're all run by private
14 organizations; some religious, some not.

15 CHIEF JUSTICE ROBERTS: I'm sorry, could we
16 get -- just to get back to Bowen for a moment.

17 MR. BENDER: Yes.

18 CHIEF JUSTICE ROBERTS: The entities that
19 were distributing the funds could be private or
20 religious?

21 MR. BENDER: Same as here, yeah.

22 CHIEF JUSTICE ROBERTS: The entities are not
23 -- in Bowen, were not identified. The recipients of the
24 State funds were -- as here, they weren't identified as
25 religious or not?

1 MR. BENDER: I don't understand. In Bowen,
2 I think the Court held, in the as-applied part of Bowen,
3 that if the grantees were to give out the -- their
4 services on the basis of religion, that would violate
5 the Establishment Clause.

6 JUSTICE SCALIA: Do we know that the schools
7 here do that? There are some religious schools. Do we
8 know that these religious schools do not admit people
9 except of a certain religion?

10 MR. BENDER: Well, I think we do know that,
11 and the complaint alleges that, but that's not the
12 point. The point is not what the religious schools do;
13 the point is what the STOs do. The STOs are government
14 grantees. They are distributing government funds. The
15 Constitution prohibits organizations that distribute
16 government funds as part of a government spending
17 program to do it on the basis of religion.

18 JUSTICE SCALIA: That's a great leap to say
19 that it's government funds, that any money the
20 government doesn't take from me, because it gives me a
21 deduction, is government money. I mean, that's the
22 first leap you make.

23 MR. BENDER: This is money that the
24 government takes from people.

25 JUSTICE SCALIA: This money has never been

1 in the government's coffers. The government has
2 declined to take this money.

3 MR. BENDER: But it's money that's raised by
4 the State's income tax. Every tax-credited dollar is a
5 dollar that has to be paid either to the government as
6 income taxes do or to an STO.

7 JUSTICE SCALIA: Well --

8 JUSTICE KENNEDY: I'll -- I'll give you
9 credit, Mr. Bender. In your brief, you say if you're
10 wrong on that point, that you're folding your tent and
11 leaving. There's -- that there's no standing and that
12 there's no -- no violation. But I must say, I have some
13 difficulty that any money that the government doesn't
14 take from me is still the government's money.

15 MR. BENDER: But it does take it.

16 (Laughter.)

17 JUSTICE KENNEDY: Let me ask you. If -- if
18 you reach a certain age, you can get a -- a card and go
19 to certain restaurants, and they give you 10 percent
20 credit. I think it would be rather offensive for the
21 cashier to say, "and be careful how you spend my money."

22 (Laughter.)

23 JUSTICE KENNEDY: But that's the whole
24 theory of your case.

25 MR. BENDER: The money -- no, it's not. No.

1 With respect, Justice Kennedy, the money that's involved
2 in this case is money that is generated by imposition of
3 the State's income tax, not by non-imposition of it. If
4 there were no State income tax, there would be no tax
5 credit program.

6 JUSTICE ALITO: Would you say the same thing
7 about a tax deduction?

8 MR. BENDER: Would I say what about the tax
9 deduction?

10 JUSTICE ALITO: That it's the government's
11 money?

12 MR. BENDER: No, I wouldn't. I would not
13 because a tax deduction is something --

14 JUSTICE ALITO: Because they were kind
15 enough to give me a tax deduction --

16 MR. BENDER: When you get into --

17 JUSTICE ALITO: Because they are kind enough
18 to give the taxpayer a deduction for certain
19 contributions?

20 MR. BENDER: Because when a taxpayer makes a
21 charitable deduction, that charitable deduction is made
22 from the taxpayer's money. At the time the taxpayer
23 makes that deduction, the taxpayer can do anything he
24 wants with that money.

25 That's not true of this tax credit. At the

1 time this tax credit is taken, the taxpayer owes the
2 government, let's say, \$5,000 in State income taxes.
3 You've got to pay that \$5,000. You can't keep it. It's
4 not your money. You can't keep it. It's not that all
5 of your money is the government's money; it's that this
6 \$5,000 that you owe the government as income taxes is
7 the government's money.

8 JUSTICE ALITO: But why isn't that true of a
9 tax deduction also? And this is a very modest tax
10 credit. The tax deduction that a wealthy person would
11 get by making a contribution to a college or university
12 that has a religious affiliation is much more valuable
13 than this \$500 credit.

14 MR. BENDER: It doesn't turn on whether it's
15 valuable or not. It turns on whether when the taxpayer
16 makes the payment the taxpayer is paying the taxpayer's
17 own money or money the taxpayer owes to the government.
18 When you make a charitable contribution, you're using
19 your own money. That's not money you owe to the
20 government. You don't know how much money you owe to
21 the government until you figure out your taxes.

22 This credit doesn't come into play until you
23 figure out your taxes. And then if you owe the
24 government --

25 JUSTICE ALITO: I completely don't

1 understand that. Somebody does know. It's December
2 31st. They know -- they figure out how much tax they're
3 going to have to pay for that year. They know exactly.
4 They can know exactly what their taxes will be. And it
5 will be X, and if they make a -- a deduction, then it
6 will be X minus Y. What is the difference?

7 MR. BENDER: The difference is -- that -- to
8 me, the broad difference is that the tax deduction is
9 given for charitable contributions. And I think the
10 Court would decide if it faced the question -- I don't
11 think it's ever had to -- that it is constitutional for
12 the government to support private charity. And if the
13 government is going to support private charity by
14 letting you deduct charitable contributions, it can't
15 leave religious charities out of that program. That
16 would violate the Establishment Clause.

17 So if you believe that the charitable
18 deduction in the Federal income tax is a constitutional
19 thing for the government to do, to support private
20 charity by picking up part of the tab -- that's true
21 when there's a deduction -- then you have to give the
22 deduction to people who contribute to religion.

23 So, yes, there is a government support for
24 that private charitable contribution, but it's a
25 charitable contribution.

1 The money in this case is not a charitable
2 contribution. Mr. Katyal says that it's not the
3 government's money. Whose money is it? Is it the
4 taxpayer's money who gives the \$1,000 contribution? No.
5 If you don't take my word for it, look at what the STOs
6 say on their Web sites about this program. One of them
7 says quite frankly: Hey, you can give charity with
8 someone else's money; it's a miracle. Another one says:
9 It won't cost you anything; you can give charity with
10 other people's money.

11 JUSTICE BREYER: See, can I ask you --

12 MR. BENDER: Whose money is it?

13 JUSTICE ALITO: What difference does it make
14 what they say on their Web sites? There's a very
15 important philosophical point here. You think that all
16 the money belongs to the government --

17 MR. BENDER: No.

18 JUSTICE ALITO: -- except to the extent that
19 it deigns to allow private people to keep some of it.

20 MR. BENDER: I do not.

21 JUSTICE ALITO: It doesn't take it by taxes.

22 MR. BENDER: No.

23 JUSTICE ALITO: That's what your whole
24 argument is based on.

25 MR. BENDER: No, it isn't, Justice Alito.

1 My argument is that if the government imposes an income
2 tax, and people owe the government a certain amount of
3 money in income taxes due, that -- and the government
4 says you don't have to pay it to us; you can pay it to
5 an STO -- that that is a payment of government funds.

6 JUSTICE SCALIA: They don't owe it to the
7 government if they have made this contribution. That's
8 the whole point.

9 MR. BENDER: It's not a contribution.

10 JUSTICE SCALIA: They don't owe the tax to
11 the extent that they have given money to one of these
12 institutions. You -- you say -- you posit at the very
13 beginning that you owe a full amount of tax. That's
14 just not true. You don't owe the tax if you've made the
15 \$500 contribution.

16 MR. BENDER: I -- I disagree with that. I
17 think --

18 JUSTICE SCALIA: You owe the tax?

19 MR. BENDER: If you look at the Arizona
20 income tax form, it says: Here's your income. Apply
21 the tax rate to the income. Here are your taxes due.
22 \$5,000. You may pay that in part by giving \$1,000 -- by
23 paying \$1,000 to an STO. You are paying your taxes.
24 When taxpayers take this \$1,000 credit --

25 JUSTICE SCALIA: That's the problem; they

1 have to revise their form.

2 MR. BENDER: No.

3 (Laughter.)

4 JUSTICE SCALIA: So that it's a deduction
5 before the line. This is a major lawsuit?

6 MR. BENDER: This is a government spending
7 program. Is there any doubt about that? The money in
8 this program is not private charitable contributions.

9 JUSTICE BREYER: So you assume that it is
10 a -- I see your argument there.

11 Now, in Zelman, the holding, I would
12 think -- which I was not in agreement with, but it's now
13 law, that a government can have a -- a spending program.
14 And what they did was the government spent money in the
15 form of vouchers to be given to private individuals to
16 use for such education as they wish, that met certain
17 standards, including religious schools.

18 So what's the difference between the program
19 here and the one that was held constitutional in Zelman?

20 MR. BENDER: The difference is that, in
21 Zelman, the money went to the parents without any
22 religious discrimination. Religion was not involved in
23 the distribution of the money to the parents. The
24 parents in Zelman got funds based on their financial
25 need and the fact that their children went to school in

1 Cleveland, which was a failing school district. And the
2 program was to give them -- based on their financial
3 need, was to give them a voucher.

4 In giving the parent a voucher, nobody said
5 to the parent, what's your religion? Nobody said to the
6 parent, are you going to send your child to a religious
7 school? The Court said, as clearly as it could in
8 Zelman, that that would be unconstitutional.

9 JUSTICE BREYER: But who here says to the
10 parent, who is going to the school, what is your
11 religion?

12 MR. BENDER: The STO who gives them the
13 scholarship.

14 JUSTICE BREYER: In other words, the STO
15 gives a scholarship only to Catholics --

16 MR. BENDER: Yes.

17 JUSTICE BREYER: -- to go to Catholic
18 schools, only to Jews to go to Jewish schools?

19 MR. BENDER: Exactly, exactly. Most of the
20 money --

21 JUSTICE SCALIA: But the government money
22 you claim is at issue here is -- is the money that the
23 contributor to the STO has failed to give to the
24 government when it's the government's money.

25 Now, that decision, of whether to give the

1 money to an STO or not, whether to give it to a
2 religiously affiliated STO or a nonaffiliated one, that
3 is in the hands of a private individual, just as the
4 voucher program was.

5 MR. BENDER: That's true.

6 JUSTICE SCALIA: There -- there's no
7 religious discrimination in that choice.

8 MR. BENDER: Let me -- let me put it to you
9 this way, Justice Scalia: Suppose the government in
10 this case gave the money to the STOs directly itself,
11 and the STOs then gave out the scholarships. Would it
12 be constitutional for an STO to say to a parent who
13 comes asking for a scholarship, are you Catholic? If
14 you're not, we won't give you a scholarship --

15 JUSTICE SCALIA: Perhaps not, but you
16 have --

17 MR. BENDER: What's the difference?

18 JUSTICE SCALIA: You have an intervening
19 parent or contributor. And it's that person who is
20 making the decision of whether to give it to a religious
21 or nonreligious organization; it isn't the government
22 making that decision.

23 MR. BENDER: No. It's not a parent, by the
24 way.

25 JUSTICE SCALIA: And that was the same thing

1 in Zelman.

2 MR. BENDER: It's not a parent, by the way,
3 in answer to Justice Kennedy's question before. Parents
4 under this program are not allowed to give contributions
5 for scholarships for their own children. The people who
6 get the -- who can claim the tax credit, the person that
7 gets the scholarship cannot be a dependent of the person
8 who gives the contribution.

9 JUSTICE BREYER: Well, suppose they change
10 one rule, and the rule that the STOs had was this: They
11 said we will give you tuition if you otherwise qualify
12 for your child to go to the school that you wish to go
13 to, and if you are Jewish or you are Protestant and you
14 want to go to St. Joseph's Catholic School, that's
15 absolutely fine; they won't keep you out, and vice
16 versa.

17 Now, in your opinion, that then would be
18 constitutional?

19 MR. BENDER: Yes. We only challenge --

20 JUSTICE BREYER: Yes? The answer is yes?

21 MR. BENDER: Yes. Yes.

22 JUSTICE BREYER: So the only thing you're
23 challenging is the rule that they will not -- the STOs
24 will not give the scholarship to a Protestant to go to a
25 Catholic school.

1 MR. BENDER: What --

2 JUSTICE BREYER: How do we know they would
3 -- that that's the rule?

4 MR. BENDER: We allege that the STOs that
5 give out the majority of the funds -- I think now it's
6 about 70 percent of the funds -- that the STOs that give
7 out a majority of the funds only give the funds to
8 parents who will send their child to a religious
9 school --

10 JUSTICE BREYER: Ah. Ah, but that's --

11 MR. BENDER: -- designated by the STO.

12 JUSTICE BREYER: But that's -- that's
13 different. You were complaining about is they would --
14 look, I'm Jewish; I want my child, let's say, to go to
15 St. Joseph's; and -- so now, do I qualify or not? The
16 only thing --

17 MR. BENDER: That depends on the STO you go
18 to. Some of the STOs --

19 JUSTICE BREYER: Your -- your complaint is
20 only with the STOs that wouldn't let me send the child.

21 MR. BENDER: Exactly.

22 JUSTICE BREYER: We know that they exist
23 because?

24 MR. BENDER: We allege they exist, and no
25 one doubts that.

1 JUSTICE SOTOMAYOR: I'm sorry. I just want
2 to make sure I understand your complaint. You just said
3 to Justice Breyer that your complaint was that the STOs
4 are giving scholarships based on the student's religion.

5 MR. BENDER: Yes.

6 JUSTICE SOTOMAYOR: I thought another part
7 of your complaint was that the STOs were giving just to
8 the religious schools.

9 MR. BENDER: STOs don't give scholarships to
10 religious schools. They give scholarships to parents.
11 The parents are awarded the scholarships, not the
12 schools.

13 JUSTICE SOTOMAYOR: But to attend that
14 school?

15 MR. BENDER: To attend that school, yes.

16 JUSTICE SOTOMAYOR: So the essence of your
17 complaint is that some of the STOs are requiring that
18 the recipient, the recipient child, be of a particular
19 religion?

20 MR. BENDER: That, and some of the STOs are
21 also requiring that, in order to get the scholarship,
22 the parent agree to send the child to a particular
23 religious school.

24 JUSTICE SCALIA: Oh, but that -- that
25 doesn't -- that doesn't get you there. That doesn't get

1 you there, as Justice Breyer's interrogation indicated.

2 JUSTICE KAGAN: But you're saying -- you are
3 saying both, is that right, Mr. Bender? You're saying
4 both of those things?

5 MR. BENDER: Both of them, yes.

6 JUSTICE KAGAN: Yes. Could I ask you: Is
7 there -- do you understand the beneficiaries of this
8 program? Has the State said who the beneficiaries of
9 this program are? Are the beneficiaries of this program
10 the parents, or are the beneficiaries of this program
11 the general taxpayers?

12 MR. BENDER: The beneficiaries of this
13 program are the parents and children. That's what this
14 program is for. The State set up a program to help
15 parents send their children to non-public schools, and
16 to do that, they are going to give them scholarships.
17 Scholarship money is going to be made available.

18 JUSTICE KAGAN: So I would assume, then, if
19 the beneficiaries of the program are the parents, then
20 it's the parents who have to be treated equally --

21 MR. BENDER: That's right.

22 JUSTICE KAGAN: -- without regard to
23 religion.

24 MR. BENDER: Exactly. The parent that --
25 the scholarships -- as Zelman said as clearly as it

1 could, the scholarships have to -- in that case, the
2 vouchers -- have to be available to parents on a
3 religiously neutral basis. The scholarships are not
4 allowed to be made available to parents according to
5 their religion or according to whether they will send
6 their child to a religious school, though both of those
7 kinds of discrimination are going on here. I think
8 there --

9 JUSTICE GINSBURG: Mr. Bender, can I go back
10 to your point -- you were making a distinction between
11 the taxpayer who makes a charitable donation. Well,
12 that taxpayer has the whole universe to spend it on:
13 Buying clothes, on gambling, on this charity, that
14 charity. But your point here is this contributor does
15 not have the universe to pick and is free to pick a
16 charity. This one has -- you either give it to the
17 government or you give it to the STO. That's --

18 MR. BENDER: Exactly. Right. Yes. It's
19 not -- it's not the taxpayers' money. It's confusing
20 because we're talking about two kinds of taxpayers here.
21 We're talking about my clients, who are general
22 taxpayers, whose money is being used to fund this
23 program, and we're talking about the taxpayers who take
24 the tax credit. There are two different kinds of
25 taxpayers.

1 JUSTICE ALITO: So if Arizona had a statute
2 that gave an income tax deduction only to individuals
3 who make charitable contributions to educational
4 institutions, there would be a problem there, because
5 they -- it wasn't a general tax exception for charitable
6 contributions?

7 MR. BENDER: No, Justice Alito. I think it
8 would be constitutional if it said that you get a
9 deduction for making a charitable contribution to an
10 educational organization and that that can include a
11 religious educational organization, because if it
12 didn't, it would be unconstitutional.

13 You can't set up a program that gives you a
14 deduction for giving to educational institutions but not
15 to -- not to a religious organization. That would be
16 unconstitutional. If you're going to support private
17 charity, you have to support religious charity in the
18 same way you support nonreligious charity. But
19 if you're going to have somebody --

20 JUSTICE ALITO: I thought your answer to
21 Justice Ginsberg was the difference between this and the
22 Federal tax deduction for charitable contributions was
23 that the Federal tax deduction is available for a broad
24 range of charities, whereas this is available only for a
25 very narrow range.

1 MR. BENDER: I may have misunderstood her
2 question. I think her question was: At the time the
3 taxpayer makes the charitable contribution that he is
4 going to take a deduction for, the taxpayer could do
5 anything he wants with that money. He could take a
6 vacation. He could give it to a charity. He could --
7 he could buy clothes with it. He could buy food with
8 it. It's a completely open system. Nobody tells the
9 taxpayer what he has to do.

10 In this case, when the taxpayer writes that
11 check to the STO, the taxpayer can't keep that money,
12 can't use it on a vacation, can't use it for buying
13 food, has to either pay it to the State or, with the
14 State's authorization, pay it to an STO.

15 JUSTICE SCALIA: The same thing is true of
16 charitable deductions. When you take a charitable
17 deduction, you -- you don't have the money anymore. You
18 have given it to a charitable organization.

19 Now, you are allowed to give it to a
20 particular religion, a particular church, and there
21 seems to be nothing unconstitutional about that, right?

22 MR. BENDER: Right. We --

23 JUSTICE SCALIA: So what -- what is
24 unconstitutional here about the private -- the private
25 decision to -- to give a benefit to a -- an organization

1 that only supports particular schools and, indeed, only
2 supports people of a particular religion to go to that
3 school? I don't see any difference.

4 MR. BENDER: There's nothing
5 unconstitutional about the taxpayers sending the money
6 to an STO. If STOs did not discriminate on the basis of
7 religion in giving that money out, there would be no
8 unconstitutionality.

9 JUSTICE SCALIA: But churches discriminate
10 on the basis of religion. When I take my charitable
11 deduction to give it to a particular church, that church
12 discriminates on the basis of religion, but that's okay;
13 isn't it?

14 MR. BENDER: If the government said to you,
15 you can pay your taxes -- don't pay your taxes to us,
16 pay them to a church -- and the church gave its benefits
17 only to people of a certain religion, I believe that
18 would be unconstitutional.

19 JUSTICE SCALIA: So it's how the government
20 puts it, the idea? So it really is just that line in --
21 in the tax form that you are concerned about, and the
22 only relief you really need is -- is changing the tax
23 form?

24 MR. BENDER: No, it's the difference between
25 charity and paying your taxes. When you make a

1 charitable contribution, you are making a charitable
2 contribution. It costs you money.

3 In Arizona, if you make a charitable
4 contribution of \$1,000, it costs you \$950 if you're at
5 the maximum tax rate, because the maximum tax rate is
6 5 percent. In Arizona, if you take this tax credit, it
7 costs you nothing. It's not charity. Charity is
8 something -- you give something of your own, I believe.

9 CHIEF JUSTICE ROBERTS: Excuse me. Just to
10 follow on Justice Scalia's question, because I want to
11 make sure you have the answer: If this system were set
12 up exactly as it is now, but Arizona said contributions
13 to STOs are deductible, you'd have no problem?

14 MR. BENDER: Contributions to STOs are
15 deductible from one's income tax?

16 CHIEF JUSTICE ROBERTS: Right.

17 MR. BENDER: And, yes. No, we would not
18 have a problem with that.

19 CHIEF JUSTICE ROBERTS: So the only
20 difference is that Arizona set up this system where you
21 get a tax credit instead of a tax deduction?

22 MR. BENDER: Of course.

23 JUSTICE ALITO: And that would be true if
24 even if the -- if the top marginal rate was 90 percent?

25 MR. BENDER: Yes, it would be true even if

1 the top marginal rate were 90 percent, which is never
2 going to happen in Arizona --

3 (Laughter.)

4 MR. BENDER: -- and I don't think you're
5 going to believe me, but --

6 JUSTICE ALITO: But the Federal rate has
7 been that high --

8 MR. BENDER: It's going in the other
9 direction.

10 JUSTICE ALITO: -- at times.

11 MR. BENDER: Yes, I understand.

12 JUSTICE ALITO: That's what the
13 Establishment Clause turns on? The --

14 MR. BENDER: Yes, because that's still
15 charity. If the top rate is 90 percent, when you give
16 that money, it's your money; you can use it for anything
17 you want. And even if you're in the 90 percent bracket,
18 you are giving some of your own money. You are engaging
19 in charity. And the Constitution, I think, permits the
20 government to subsidize private charity.

21 And if the government's going to subsidize
22 private charity, it can't leave religious charities out.
23 So that's the dividing line. Is the government
24 subsidizing private charity? In this case, the
25 government is not subsidizing private charity because it

1 is not private charity, because the tax --

2 JUSTICE ALITO: If this is -- if this is
3 government money, then why would it be constitutional,
4 in your view, for this scheme to exist if -- for the --
5 if the STOs did not discriminate at all on the basis
6 of religion?

7 MR. BENDER: Because it's perfectly okay to
8 use government money for non-religiously discriminatory
9 purposes. You can get a tax credit for buying a solar
10 water heater. That's a 100 percent tax credit. Now,
11 that's a somewhat different kind of tax credit, because
12 there, when you buy the heater, you get something for
13 the money. It's -- this tax credit is a very strange
14 kind of tax credit. This is a tax credit that is only
15 used to pay your taxes. That's the only function it
16 has.

17 JUSTICE ALITO: If you -- you have STOs that
18 say we will only give -- we will only give scholarships
19 for religious affiliated schools, but we will not
20 discriminate on the basis of the student's religion.

21 MR. BENDER: Right.

22 JUSTICE ALITO: And if this is the
23 government's money, you think that would be -- that
24 would not be an Establishment Clause violation?

25 MR. BENDER: No, no, no. If an STO

1 discriminates either by saying we only give to people of
2 a certain religion or we don't give to people of another
3 religion or by saying we'll only give you a scholarship
4 if you send your kid to a religious school that we
5 designate.

6 JUSTICE SCALIA: I thought you said the
7 opposite earlier. I thought you said the opposite
8 earlier.

9 MR. BENDER: No. I didn't. I hope I didn't.

10 JUSTICE BREYER: Well, if you didn't --

11 JUSTICE SCALIA: I'm sure you did.

12 JUSTICE BREYER: Let's suppose you didn't.

13 MR. BENDER: Thank you for correcting me.

14 JUSTICE BREYER: What's the problem with
15 that? That is to say, suppose that the government gives
16 its money to put CAT scans in hospitals. And it has
17 certain beneficiaries, and one group of beneficiaries is
18 the Association of Catholic Hospitals, another is the
19 Association Of Jewish Hospitals, another is a set of
20 totally secular hospitals. So it gives the tax credits
21 to all three. Now, of course, the Catholic group is
22 going to give it to Catholic hospitals and so forth.
23 What's wrong with that?

24 MR. BENDER: I don't get your hypothetical.
25 If the government --

1 JUSTICE BREYER: What they do is they have
2 government money, just like you claim this is, and they
3 say we are going to give it to some -- to umbrella
4 organizations, like the Association of Catholics,
5 Jewish, or secular hospitals, and we expect them to
6 distribute it. And they will, of course, distribute it
7 to those who are their members. And in some cases,
8 their members are religious organizations, and in some
9 cases, they're not. Now, what's the difference between
10 that and what happens here, leaving the student out of
11 it?

12 MR. BENDER: It depends on who the
13 beneficiaries of the government's program are.

14 JUSTICE BREYER: The beneficiaries of the
15 government -- Catholic hospital -- government CAT scan
16 program will be Catholic hospitals, because they're the
17 ones who belong to the Catholic hospital association.
18 Money will also go to the secular hospital association,
19 as it goes -- would go to a secular STO here. So I
20 don't see that part. That's the last prong we're
21 talking about.

22 MR. BENDER: I'm not clear on your program.
23 If it's a government program to benefit hospitals, that
24 -- the benefits have to go to hospitals on a religiously
25 neutral basis.

1 JUSTICE BREYER: The government says --
2 that's the difference -- the government says -- it does
3 give the money away on a religiously neutral basis. It
4 gives it to hospital associations. It turns out that
5 some of those naturally are supposed to give it to their
6 members, all of whom will be religiously affiliated.

7 MR. BENDER: But the hospitals are the
8 beneficiaries, Justice Breyer. That's the difference.
9 The beneficiaries here are not the STOs; the
10 beneficiaries here are the parents. The STOs are a
11 conduit of government funds to the parents. The parents
12 are the beneficiaries, and the Constitution requires
13 that the benefits of a government spending program go to
14 the beneficiaries on a religiously neutral basis. And
15 so in Zelman, the beneficiaries were the parents, and
16 the vouchers had to go to them --

17 CHIEF JUSTICE ROBERTS: I'm sorry --

18 MR. BENDER: -- on a religiously neutral
19 basis.

20 CHIEF JUSTICE ROBERTS: -- I don't
21 understand the answer to Justice Breyer's question. His
22 question was, you give it to a hospital equivalent of
23 the STO, and then that gives it to hospitals on a
24 religiously discriminatory basis. Why aren't the
25 hospitals the beneficiaries of that program, just as you

1 say the parents are here.

2 MR. BENDER: Well, if the hospitals are the
3 beneficiary of the program, then the hospitals have to
4 get the money on a religiously neutral basis. Suppose
5 the parent --

6 CHIEF JUSTICE ROBERTS: Well, they're the
7 ones who get the CAT scan --

8 MR. BENDER: The analogy would be the
9 patients are the beneficiaries of the program. The
10 government wants to help cancer patients, and so it's
11 going to give money to hospitals to help cancer
12 patients. So it gives money to various hospitals under
13 Justice Breyer's program. If one of those hospitals
14 says we only treat Catholic cancer patients, that's
15 unconstitutional. That's government funds --

16 JUSTICE SCALIA: That's the other issue. We
17 are trying to separate in your argument the issue that
18 some of these organizations are religiously affiliated,
19 from the argument that, moreover, they will only give
20 money to individuals of a particular religion.

21 Now, I understand your argument for the
22 latter, but I must say I don't understand your argument
23 for the former. Not if you accept these other --

24 MR. BENDER: If I go to get a scholarship
25 from an organization and they say where are you going to

1 send your child with this scholarship? And I say I
2 haven't made that decision yet. And they say, well,
3 we'll only give you the scholarship if you send your
4 child to a Jewish school which teaches people how to
5 pray in the way Jewish people pray and has a -- its
6 education is Jewish religious education. That's
7 religious discrimination.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Now, Mr. Katyal, you have 4 minutes
10 remaining.

11 REBUTTAL ARGUMENT OF NEAL K. KATYAL
12 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE
13 SUPPORTING PETITIONERS

14 GENERAL KATYAL: Thank you.

15 My friend said, I think I have this right,
16 "we are talking about my clients whose money is being
17 used to fund this program." That's a nice description
18 of Flast. It is not a description of what's going on
19 here. Flast recognized a special -- well, a special
20 solicitude for taxpayers when money is taken out of
21 their pocket and used to fund religion against their
22 conscience. Here, even if you accept all of this public
23 money discussion that has been happening, not a cent of
24 their money is going to fund --

25 JUSTICE BREYER: But in Flast -- I've looked

1 at it again briefly, and it seemed to use that
2 wonderfully precise word "nexus."

3 (Laughter.)

4 JUSTICE BREYER: And you're quite right that
5 in Flast that was the case. But why isn't it -- given
6 that it's a nexus in Flast, what was in Flast, why isn't
7 it also a nexus where you have this complicated system
8 which is designed to make the ordinary taxpayer pay a
9 little more in this kind of instance, where what you've
10 done is directly subtract from the treasury \$5,000 cash
11 to turn over, in the view of the plaintiffs, to a purely
12 forbidden religious purpose?

13 GENERAL KATYAL: Justice Breyer, two things.
14 First, the relevant language of Flast is at page 106.
15 It's not the nexus test; it's the definition of what the
16 actual taxpayer standing claim is. And it requires
17 that, quote, "his tax money being extracted was" --

18 JUSTICE BREYER: Was that -- was that in
19 that instance in Flast? Does Flast rule out the
20 possibility --

21 GENERAL KATYAL: And that's the general
22 description, Flast says, about how taxpayer standing
23 will go forward. If there's any doubt about that,
24 Valley Forge makes that clear because the dissenters
25 said exactly what you said, which is, look, let's just

1 look to economic effects, and that alone will be enough.
2 And it's just Property Clause, Tax and Spending Clause,
3 it doesn't really matter; it's the bottom line on the
4 treasury. And this Court said no, that isn't the case.

5 JUSTICE KAGAN: General Katyal, Flast could
6 not have meant that it's your particular dollar. There
7 would be no way to know it's your particular dollar, and
8 that would be a silly and fictional thing to say as the
9 plurality opinion in Hein makes clear. What Flast said
10 was that taxpayer dollars, not your dollar, but taxpayer
11 dollars are going to this activity in the same way that
12 it's going to the activity here.

13 GENERAL KATYAL: I disagree on two levels.
14 First is I don't think that's what Flast is. I think
15 Flast is about that micro-fraction of a cent that is
16 coming from your pocket and being used to fund religion.
17 And that's what Madison complained about. It may be
18 very small; it may be 3 pence. But there's a special
19 harm of conscience when it's your money, your
20 hard-earned money, being used to fund a program directly
21 as to which you don't like.

22 JUSTICE KAGAN: Flast talked about a nexus
23 in the way that Justice Breyer said. And here, there's
24 a taxpayer challenging a provision of the tax code,
25 enacted pursuant to the tax and spending power, that --

1 that grants a tax benefit. That's as close a nexus as
2 you are going to get using the language of Flast.

3 GENERAL KATYAL: Again, I think that doesn't
4 deal with the direct injury on the taxpayer, which is
5 the language of Flast. Even if we -- even if you
6 disagree with me, the relief -- the harm here is a lot
7 more speculative, just like Cuno, because you have to
8 posit, in order for the harm to exist to this taxpayer,
9 that tax credits will cost the government money, not
10 save it, that his tax burden will go up as opposed to
11 someone else's tax burden, a corporation and the like,
12 or you have to posit that the government won't cut
13 spending in order to make up the shortfall in revenues
14 that he says is going to exist. You're going to have to
15 do all of those things, none of which you have to do in
16 a Flast situation because it's just a direct outlay of
17 funds.

18 If I could just can spend a moment on
19 Justice Kennedy's question about State action, which, of
20 course, they didn't advance below as the Ninth Circuit
21 said. I think this Court's precedents are quite clear
22 in saying that the fact that the government regulates or
23 funds something doesn't transform it into a State actor.
24 If it did, then all 501(c)(3)'s would become State
25 actors, and that, I think, would be an enormously

1 damaging precedent for this Court to follow. Rather, I
2 think what Blum says is that it requires the performance
3 of a traditional executive prerogative -- traditional
4 government prerogative. And here all the STO is doing
5 is just funding -- it's handing out money. It is doing
6 so on a neutral basis. Anyone can form an STO, and
7 anyone can fund one.

8 CHIEF JUSTICE ROBERTS: Thank you, General,
9 counsel.

10 The case is submitted.

11 (Whereupon, at 11:04 a.m., the case in the
12 above-entitled matter was submitted.)

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A	45:20 48:23 49:6 49:10,12 50:2,17 50:22	Article 10:17 11:13 asking 13:14 20:18 39:13 association 51:18 51:19 52:4,17,18 associations 53:4 assume 21:3 37:9 43:18 assuming 22:16 as-applied 30:2 attend 42:13,15 attributed 20:20,23 attributes 20:11 authority 10:24 11:2 authorization 46:14 available 14:17 43:17 44:2,4 45:23 45:24 awarded 42:11 aware 19:20 a.m 1:22 4:2 59:11	belong 5:3 52:17 belongs 35:16 Bender 2:5 3:10 25:23,24 26:1,21 26:25 27:13,16,25 28:9,15,23 29:17 29:21 30:1,10,23 31:3,9,15,25 32:8 32:12,16,20 33:14 34:7 35:12,17,20 35:22,25 36:9,16 36:19 37:2,6,20 38:12,16,19 39:5,8 39:17,23 40:2,19 40:21 41:1,4,11,17 41:21,24 42:5,9,15 42:20 43:3,5,12,21 43:24 44:9,18 45:7 46:1,22 47:4,14,24 48:14,17,22,25 49:4,8,11,14 50:7 50:21,25 51:9,13 51:24 52:12,22 53:7,18 54:2,8,24 beneficiaries 26:10 27:2,17,18,21 43:7 43:8,9,10,12,19 51:17,17 52:13,14 53:8,9,10,12,14 53:15,25 54:9 beneficiary 54:3 benefit 24:13 27:1 46:25 52:23 58:1 benefits 25:19,20 27:1 29:9 47:16 52:24 53:13 Bickett 2:3 3:7 14:6 14:7,9,18 15:3,15 15:19 16:8,19,22 17:4,21 18:9,12,17 19:3,6,19 20:5,8 20:14,19 21:5,8,11 21:15,20 22:2,5 23:6,16 24:2,16	Bill 10:5 billions 17:18 black 19:25 Blum 59:2 Bob 21:22 bottom 57:3 bottom-line 12:10 Bowen 28:24 29:1 29:16,23 30:1,2 box 6:16 7:13 bracket 24:24 49:17 Breyer 6:13,24 7:1 7:6,11,18,25 9:4,8 9:9,11,13,17,25 13:18 17:16,22 18:11,15 19:4,7,19 35:11 37:9 38:9,14 38:17 40:9,20,22 41:2,10,12,19,22 42:3 51:10,12,14 52:1,14 53:1,8 55:25 56:4,13,18 57:23 Breyer's 43:1 53:21 54:13 brief 13:3,7 31:9 briefly 56:1 bring 20:12 broad 34:8 45:23 burden 58:10,11 buy 46:7,7 50:12 buying 44:13 46:12 50:9
	able 6:15 22:11 23:1 23:2 25:19 above-entitled 1:20 59:12 absolutely 40:15 accept 23:18 54:23 55:22 accords 8:15 account 27:18,22 acknowledge 13:5,7 acknowledged 13:3 Act 12:22 Acting 1:24 action 20:11,18 58:19 activity 57:11,12 actor 58:23 actors 58:25 actual 56:16 additional 15:18 addressability 6:4 administer 23:4 administered 23:21 administering 23:24 admit 30:8 adolescents 29:3 adopted 14:21 advance 58:20 advantages 15:2 affiliated 39:2 50:19 53:6 54:18 affiliation 33:12 age 31:18 ago 11:1 agree 12:3 22:16 42:22 agreement 37:12 Ah 41:10,10 aid 15:6 17:6 AL 1:7,15 Alito 32:6,10,14,17 33:8,25 35:13,18 35:21,23,25 45:1,7	allege 41:4,24 alleged 12:17 alleges 30:11 allow 20:11 35:19 allowed 40:4 44:4 46:19 allows 24:7,8 amendment 5:5 amicus 2:1 3:5,15 4:9 55:12 amount 6:9 16:9,24 17:20 36:2,13 analogy 54:8 answer 8:15 11:15 12:2,2 13:18 17:17 21:14 40:3,20 45:20 48:11 53:21 answered 16:3 anymore 46:17 apparently 22:21 Appeals 2:3 appear 26:16 APPEARANCES 1:23 applied 20:15 apply 4:17 36:20 area 8:17 19:18 argument 1:21 3:2,6 3:9,12 4:3,8 5:8 6:3 14:7 20:23 25:24 35:24 36:1 37:10 54:17,19,21 54:22 55:11 Arizona 1:3,11 2:4,5 4:4,13 14:17,21 15:4,5 16:11 17:8 17:18 18:3,18 19:2 19:18,21 24:14 25:9,17 36:19 45:1 48:3,6,12,20 49:2 Arizona's 14:11	B back 7:18 29:16 44:9 balance 14:4 based 16:1 22:12 35:24 37:24 38:2 42:4 basis 14:17 19:25 21:7,23 22:18 25:16 26:11 27:3 28:5 29:9 30:4,17 44:3 47:6,10,12 50:5,20 52:25 53:3 53:14,19,24 54:4 59:6 beginning 36:13 behalf 2:4,5 3:4,8,11 3:14 4:9 14:8 25:25 28:2 55:12 believe 11:4 28:23 34:17 47:17 48:8 49:5	C C 3:1 4:1 cancer 54:10,11,14 candid 10:9 card 31:18 care 27:24 28:7,10 28:13 careful 8:6 31:21 cares 28:16 case 4:4,6 7:2,3,19

10:25 11:11,11 12:21 13:6,12 19:15,24 21:21 22:4 26:4 31:24 32:2 35:1 39:10 44:1 46:10 49:24 56:5 57:4 59:10,11 cases 5:18 11:2,5,15 12:4,5,14 52:7,9 cash 6:18 56:10 cached 6:18 cashier 31:21 CAT 51:16 52:15 54:7 Catholic 22:19,23 38:17 39:13 40:14 40:25 51:18,21,22 52:15,16,17 54:14 Catholics 38:15 52:4 causation 6:4 cent 4:22,24,25 5:1 55:23 57:15 certain 25:11 27:8 30:9 31:18,19 32:18 36:2 37:16 47:17 51:2,17 certainly 19:21 24:4 chain 6:6 challenge 6:21 7:8 7:10 8:12 12:18 40:19 challenged 7:24 challenging 40:23 57:24 change 40:9 changing 47:22 charitable 23:22 25:8 32:21,21 33:18 34:9,14,17 34:24,25 35:1 37:8 44:11 45:3,5,9,22 46:3,16,16,18 47:10 48:1,1,3	charities 34:15 45:24 49:22 charity 34:12,13,20 35:7,9 44:13,14,16 45:17,17,18 46:6 47:25 48:7,7 49:15 49:19,20,22,24,25 50:1 check 6:15,16,17 7:13 46:11 Chief 2:3 4:3,12 14:5,9 17:1 25:22 26:1 27:20 28:3,12 28:17 29:4,15,18 29:22 48:9,16,19 53:17,20 54:6 55:8 59:8 child 38:6 40:12 41:8,14,20 42:18 42:22 44:6 55:1,4 children 15:22 37:25 40:5 43:13,15 choice 14:14 17:6 39:7 choosing 23:13 chosen 15:1 Christian 1:3 4:4 church 46:20 47:11 47:11,16,16 churches 7:22 21:4 21:6 47:9 Circuit 4:17 19:16 58:20 circumstances 9:22 18:7 citizens 4:14 Civil 2:3 claim 5:12 26:7,8,9 26:12 38:22 40:6 52:2 56:16 clarify 27:13 clause 7:23 8:21 10:2 14:12 26:24 30:5 34:16 49:13	50:24 57:2,2 clear 10:14 11:19 52:22 56:24 57:9 58:21 clearly 23:20 38:7 43:25 Cleveland 38:1 clients 44:21 55:16 close 58:1 clothes 44:13 46:7 code 57:24 coffer 7:4 coffers 5:1 31:1 Cohen 8:20 10:10 college 33:11 come 33:22 comes 16:5 27:4 39:13 coming 57:16 community 15:9 29:13 complained 57:17 complaining 41:13 complaint 5:20,23 10:20 30:11 41:19 42:2,3,7,17 completely 29:2 33:25 46:8 complex 14:25 19:10,17 complicated 14:25 56:7 compulsory 18:18 conceptually 7:7 concerned 47:21 conduit 53:11 confer 8:16 conferred 11:10 confusing 44:19 Congress 7:20 conscience 55:22 57:19 considerable 16:17 17:25	considered 5:19 Constitution 10:2,8 15:5 28:21 30:15 49:19 53:12 constitutional 6:13 20:3,4 21:10 29:5 34:11,18 37:19 39:12 40:18 45:8 50:3 constitutionality 24:21 constitutionally 27:2 contend 23:15,17 contentions 23:19 continue 13:15,16 contribute 4:14 16:6 16:13 34:22 contributed 6:20 contributes 16:12 contribution 33:11 33:18 34:24,25 35:2,4 36:7,9,15 40:8 45:9 46:3 48:1,2,4 contributions 15:8 16:10,17,20,23,24 16:25 21:4 25:12 32:19 34:9,14 37:8 40:4 45:3,6,22 48:12,14 contributor 38:23 39:19 44:14 contributors 16:12 16:14 corporation 58:11 corporations 25:7 correct 17:4 19:3 24:2 correcting 51:13 cost 13:10 35:9 58:9 costs 48:2,4,7 counsel 2:3 8:11 25:22 55:8 59:9	course 7:2 15:19 48:22 51:21 52:6 58:20 Court 1:1,21 4:12 5:18 6:7 7:17 8:6 10:10,14,24 11:1,3 11:10,12,13,19 12:11 14:10,15 21:22 22:6 25:1,14 26:2 28:23 29:3 30:2 34:10 38:7 57:4 59:1 Court's 8:16 11:16 58:21 create 9:18 created 24:15,17 credit 6:8 10:20 14:11 15:7 17:3,9 17:13 18:9,14 19:22 21:1 24:4,19 24:20,25 25:9 31:9 31:20 32:5,25 33:1 33:10,13,22 36:24 40:6 44:24 48:6,21 50:9,10,11,13,14 50:14 credits 7:15 14:16 25:2 51:20 58:9 criticism 12:3 Cuno 6:8 58:7 curiae 2:1 3:5,15 4:9 55:12 cut 58:12
D				
D 4:1 damaging 59:1 day 9:25 10:15 19:11 deal 11:9 58:4 dealing 18:4,6 December 34:1 decide 10:24 11:2 34:10				

decided 12:5 25:9 decides 18:8 decision 11:16 12:10 28:18,21,24 38:25 39:20,22 46:25 55:2 decisionmaking 17:8 decisions 23:7 declined 31:2 deduct 34:14 deductible 48:13,15 deduction 7:2 13:18 13:19 14:14 21:4 24:17,18,18,21,22 24:23 30:21 32:7,9 32:13,15,18,21,21 32:23 33:9,10 34:5 34:8,18,21,22 37:4 45:2,9,14,22,23 46:4,17 47:11 48:21 deductions 6:25 25:3 46:16 defects 13:7 definition 56:15 deigns 35:19 demonstrates 17:14 depart 11:22 Department 1:12,25 16:11 22:6 dependent 40:7 depending 7:10 depends 24:23,24 24:25 41:17 52:12 description 55:17 55:18 56:22 designate 51:5 designated 41:11 designed 56:8 devices 14:16 difference 7:1 24:19 24:20,22 34:6,7,8 35:13 37:18,20	39:17 45:21 47:3 47:24 48:20 52:9 53:2,8 different 6:11,23 22:15 41:13 44:24 50:11 difficulty 31:13 direct 6:11 9:14 11:23 15:5 58:4,16 direction 20:20 49:9 directly 39:10 56:10 57:20 DIRECTOR 1:11 disagree 36:16 57:13 58:6 discriminate 21:7 22:11 47:6,9 50:5 50:20 discriminated 19:24 20:12,13 21:23 discriminates 47:12 51:1 discriminating 28:5 discrimination 20:19 26:12,15,18 37:22 39:7 44:7 55:7 discriminatory 50:8 53:24 discussing 8:19 discussion 17:25 55:23 disfavor 27:15 disfavored 26:22 dismiss 15:20 23:18 dissenters 56:24 distinction 22:23 25:2 44:10 distinctions 23:5,20 24:1 distinguishing 25:17 distribute 30:15 52:6,6 distributed 29:9	distributing 28:2 29:19 30:14 distribution 26:12 37:23 district 38:1 diversity 17:12 dividing 49:23 doing 7:14 25:17 59:4,5 dollar 31:4,5 57:6,7 57:10 dollars 5:11,16 8:25 16:18 17:2,18 57:10,11 donation 44:11 donations 15:13,18 21:25 doubt 37:7 56:23 doubts 41:25 due 36:3,21 D.C 1:17,25	enjoy 25:19 enormously 58:25 entities 23:23 29:18 29:22 entitled 22:9 25:12 entity 28:19 equal 24:25 equally 43:20 equivalent 25:6 53:22 erred 4:17 ESQ 1:24 2:3,5 3:3 3:7,10,13 essence 42:16 Establishment 7:23 8:21 14:12 26:24 30:5 34:16 49:13 50:24 ET 1:7,15 events 6:6 exact 11:10 17:19 exactly 22:22 27:22 34:3,4 38:19,19 41:21 43:24 44:18 48:12 56:25 example 6:8 12:9 exception 8:7,8,25 45:5 exceptions 10:3 excuse 10:16 19:6 48:9 executive 59:3 exemptions 25:3 exist 23:3 24:6 41:22,24 50:4 58:8 58:14 existence 17:14 23:10 expect 52:5 expert 19:9 explain 14:19 extent 15:13,17 35:18 36:11 extracted 5:22,24	6:1 56:17 extremely 8:7	
<hr/> F <hr/>					
	face 29:6 faced 34:10 fact 4:21 5:14,16 6:4 11:3,4 13:3 15:25 17:14 37:25 58:22 facts 11:20 failed 38:23 failing 38:1 fails 4:20 fair 7:20 families 15:11 favor 13:20 26:20 favored 26:21 Federal 20:1,3,15 20:17 24:18 34:18 45:22,23 49:6 fictional 57:8 figure 33:21,23 34:2 financial 16:1 37:24 38:2 find 10:15 finding 4:18 fine 8:19 40:15 first 4:4,18 6:23 7:20 8:1 10:19 11:8 12:23 13:2 19:16 30:22 56:14 57:14 fits 19:12 Five 23:11 Flast 5:18,25 6:12 8:6,20,24,24 9:4,5 9:6,7,12,15 10:10 10:13 11:18,20,22 14:3 55:18,19,25 56:5,6,6,14,19,19 56:22 57:5,9,14,15 57:22 58:2,5,16 folding 31:10 follow 48:10 59:1				

food 46:7,13	7:25 8:11,14,16,23	28:19 31:18 38:17	grantee 28:16,25	51:19,20,22 52:5
footnote 12:24 13:2	9:8,11,14,20 10:12	38:18 40:12,12,14	grantees 29:2,7	52:16,23,24 53:7
forbidden 56:12	10:17,23 11:6,25	40:24 41:14,17	30:3,14	53:23,25 54:2,3,11
Forge 10:14 56:24	12:6,15,23 13:2	44:9 47:2 52:18,19	granting 10:19	54:12,13
form 17:11 24:9	14:5 43:11 44:21	52:24 53:13,16	grants 58:1	Hunt 10:25
36:20 37:1,15	45:5 55:14 56:13	54:24 56:23 58:10	great 30:18	hurting 10:6
47:21,23 59:6	56:21,21 57:5,13	goes 4:23 26:6 28:7	group 51:17,21	hypothetical 7:11
former 54:23	58:3 59:8	28:10,14 52:19		19:24 20:16 51:24
forms 12:16	generated 32:2	going 14:1 26:8,9	H	I
forth 51:22	Ginsberg 45:21	28:13 34:3,13 38:6	hand 25:2	idea 47:20
forward 56:23	Ginsburg 8:11,18	38:10 43:16,17	handing 59:5	identified 29:23,24
four 17:7	8:24 9:3 10:4,13	44:7 45:16,19 46:4	hands 39:3	III 10:17 11:13
fraction 4:25	12:19,25 13:3	49:2,5,8,21 51:22	happen 6:7 49:2	Imagine 17:24
frankly 35:7	21:21 22:3 24:11	52:3 54:11,25	happened 9:6	impermissible 23:21
free 10:6 17:15	44:9	55:18,24 57:11,12	happening 9:2 55:23	important 35:15
44:15	give 17:2 22:18 25:9	58:2,14,14	happens 6:17 17:24	imposes 36:1
friend 55:15	25:12,20 27:17	gotten 24:17	52:10	imposition 32:2
Frothingham 8:8	30:3 31:8,19 32:15	government 5:20	hard-earned 57:20	include 45:10
11:9,9	32:18 34:21 35:7,9	6:9 7:7,12,14 8:3	harm 57:19 58:6,8	included 27:10
full 36:13	38:2,3,23,25 39:1	9:1,15,23 11:23	Head 29:11,12	including 14:16
function 50:15	39:14,20 40:4,11	12:20 13:1,6,20	hear 4:3	37:17
fund 4:23 5:17 11:24	40:24 41:5,6,7	25:5 26:25 27:1,7	heard 12:2	income 31:4,6 32:3
44:22 55:17,21,24	42:9,10 43:16	27:19 28:1,6 29:1	heater 50:10,12	32:4 33:2,6 34:18
57:16,20 59:7	44:16,17 46:6,19	29:1,12 30:13,14	Hein 8:6 11:17 13:5	36:1,3,20,20,21
fundamental 11:17	46:25 47:11 48:8	30:16,16,19,20,21	57:9	45:2 48:15
funded 7:21 8:3	49:15 50:18,18	30:24 31:1,5,13	held 22:6 28:17,23	increase 6:10 17:11
13:16,17	51:1,2,3,22 52:3	33:2,6,17,20,21	29:4 30:2 37:19	indicated 43:1
funding 21:1,2 59:5	53:3,5,22 54:11,19	33:24 34:12,13,19	help 25:20 43:14	indiscriminately
funds 11:23 26:13	55:3	34:23 35:16 36:1,2	54:10,11	27:8
28:1 29:3,19,24	given 6:8,18 26:10	36:3,5,7 37:6,13	Hernandez 25:15	individual 6:19 39:3
30:14,16,19 36:5	27:2 28:9 29:2	37:14 38:21,24	Hey 35:7	individuals 4:15,17
37:24 41:5,6,7,7	34:9 36:11 37:15	39:9,21 44:17	Hibbs 10:25	5:4 16:13 17:10
53:11 54:15 58:17	46:18 56:5	47:14,19 49:20,23	high 10:21 49:7	37:15 45:2 54:20
58:23	gives 14:23 27:7	49:25 50:3,8 51:15	Hispanic 19:25	Injunction 12:22
further 11:20	30:20 35:4 38:12	51:25 52:2,15,15	history 7:19	injury 4:21 5:14,15
	38:15 40:8 45:13	52:23 53:1,2,11,13	holding 37:11	6:4 58:4
G	51:15,20 53:4,23	54:10,15 58:9,12	Honor 15:19 17:4	instance 56:9,19
G 4:1	54:12	58:22 59:4	17:21 19:3 21:5,11	institution 20:6
GALE 1:11	giving 5:7 7:15	government's 28:1	21:15 22:5 23:6	institutions 36:12
gambling 44:13	27:25 36:22 38:4	31:1,14 32:10 33:5	24:2	45:4,14
Garriott 1:11 4:6	42:4,7 45:14 47:7	33:7 35:3 38:24	hope 28:4 51:9	interested 7:7
gather 26:15	49:18	49:21 50:23 52:13	hospital 27:9 52:15	intermediaries
general 1:24 4:7,11	go 5:1 7:4,18,22	grant 11:21	52:17,18 53:4,22	22:22 23:3
5:9,13 6:22 7:5,9	11:19,22 26:5	granted 10:18 11:14	hospitals 51:16,18	

<p>interrogation 43:1 intervening 39:18 invalid 26:19 involved 16:5 32:1 37:22 IRS 6:16 issue 6:11 38:22 54:16,17</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>James 13:24 Jewish 38:18 40:13 41:14 51:19 52:5 55:4,5,6 Jews 38:18 Jones 21:22 Joseph's 40:14 41:15 Justice 1:25 4:3,12 5:2,10 6:6,13,24 7:1,6,11,18,25 8:11,18,24 9:3,4,8 9:9,11,13,17,25 10:4,13,23 12:1,3 12:13,19,25 13:3 13:18 14:5,9,18 15:3,12,16 16:2,16 16:20 17:1,16,22 18:11,15,23 19:4,7 19:19,23 20:7,10 20:16,22 21:2,3,6 21:9,13,17,21 22:3 22:13,14,15 23:14 23:17 24:11 25:22 26:1,14,23 27:6,14 27:20 28:3,12,17 29:4,15,18,22 30:6 30:18,25 31:7,8,17 31:23 32:1,6,10,14 32:17 33:8,25 35:11,13,18,21,23 35:25 36:6,10,18 36:25 37:4,9 38:9 38:14,17,21 39:6,9</p>	<p>39:15,18,25 40:3,9 40:20,22 41:2,10 41:12,19,22 42:1,3 42:6,13,16,24 43:1 43:2,6,18,22 44:9 45:1,7,20,21 46:15 46:23 47:9,19 48:9 48:10,16,19,23 49:6,10,12 50:2,17 50:22 51:6,10,11 51:12,14 52:1,14 53:1,8,17,20,21 54:6,13,16 55:8,25 56:4,13,18 57:5,22 57:23 58:19 59:8</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>K 1:24 3:3,13 4:8 55:11 Kagan 10:23 11:25 14:18 15:3 22:14 23:14,17 43:2,6,18 43:22 57:5,22 Kagan's 12:3 KATHLEEN 1:7,15 Katyal 1:24 3:3,13 4:8,11 5:2,9,13 6:22 7:5,9,25 8:14 8:23 9:8,11,14,20 10:12,24 11:6 12:6 12:15,23 13:2 35:2 55:9,11,14 56:13 56:21 57:5,13 58:3 Katyal's 26:3 keep 33:3,4 35:19 40:15 46:11 Kennedy 12:1,13 15:12,16 19:23 20:7,10,16,22 21:13,17 31:8,17 31:23 32:1 Kennedy's 22:15 40:3 58:19 key 4:22</p>	<p>kid 51:4 kind 32:14,17 50:11 50:14 56:9 kinds 19:10 25:7 44:7,20,24 know 17:19 30:6,8 30:10 33:20 34:1,2 34:3,4 41:2,22 57:7</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>lack 13:1 language 5:25 56:14 58:2,5 large 15:9 16:9 largesse 5:7 Laughter 31:16,22 37:3 49:3 56:3 law 14:13 18:19 20:15 37:13 lawsuit 4:20 37:5 leap 30:18,22 leave 8:18 13:17 34:15 49:22 leaving 31:11 52:10 left 14:25 legitimacy 18:6 letting 34:14 let's 17:22 33:2 41:14 51:12 56:25 level 10:22 13:22 levels 17:7 57:13 limits 11:18 21:2 line 16:14 37:5 47:20 49:23 57:3 list 16:11 26:16 little 56:9 local 6:19 long 7:19 18:19 20:14 look 25:8 35:5 36:19 41:14 56:25 57:1 looked 55:25 lot 19:11 58:6</p>	<p>low-income 15:10 15:11</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>M 1:7,15 Madison 13:24,25 57:17 major 37:5 majority 41:5,7 making 23:7 33:11 39:20,22 44:10 45:9 48:1 marginal 48:24 49:1 market 23:16 matter 1:20 18:21 19:14 28:15 57:3 59:12 matters 14:2 maximum 48:5,5 mean 9:16 19:7,8 30:21 meant 57:6 mechanism 20:25 meet 18:19 19:1 members 52:7,8 53:6 merits 8:2 12:9 met 37:16 micro-fraction 57:15 million 16:10,17 17:2 minus 34:6 minutes 55:9 miracle 35:8 misunderstood 46:1 modest 33:9 moment 29:16 58:18 money 4:14,16,22 5:3,4,7,21,21,23 6:1,9,20 7:3 10:21 11:23 15:10 16:5 20:1 24:13,14 25:5 25:6,11 26:5,8,9</p>	<p>26:10,16 27:7,17 28:6,9,12,19,24 30:19,21,23,25 31:2,3,13,14,21 31:25 32:1,2,11,22 32:24 33:4,5,5,7 33:17,17,19,19,20 35:1,3,3,4,8,10,12 35:16 36:3,11 37:7 37:14,21,23 38:20 38:21,22,24 39:1 39:10 43:17 44:19 44:22 46:5,11,17 47:5,7 48:2 49:16 49:16,18 50:3,8,13 50:23 51:16 52:2 52:18 53:3 54:4,11 54:12,20 55:16,20 55:23,24 56:17 57:19,20 58:9 59:5</p> <p>monitor 4:24 Monthly 7:16 8:9 12:17 morning 4:4 19:14 motion 15:20 23:18 Mueller 10:25 12:9 14:15</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 3:1,1 4:1 name 21:22 narrow 8:7,8,25 10:3 45:25 nation 7:21 naturally 53:5 NEAL 1:24 3:3,13 4:8 55:11 necessary 4:21 need 9:17 16:1 25:8 37:25 38:3 47:22 neutral 14:12,14,17 17:8 29:2 44:3 52:25 53:3,14,18 54:4 59:6</p>
---	---	---	--	---

<p>never 25:1 30:25 49:1 new 5:5 6:14 nexus 56:2,6,7,15 57:22 58:1 nice 55:17 Ninth 4:17 58:20 nonaffiliated 39:2 nonreligion 26:18 nonreligious 27:23 28:20 39:21 45:18 non-imposition 32:3 non-public 43:15 non-religiously 50:8 normally 19:8 25:12 November 1:18 number 16:12,24 17:12 Nyquist 10:25</p> <hr/> <p>O</p> <p>O 3:1 4:1 occur 6:1 occurring 6:2 offensive 31:20 official 6:18 Oh 42:24 Ohio 15:5 okay 47:12 50:7 once 19:15 ones 52:17 54:7 one's 48:15 one-third 13:22 open 46:8 opinion 29:4 40:17 57:9 opposed 58:10 opposite 28:24 51:7 51:7 oral 1:20 3:2,6,9 4:8 14:7 25:24 order 18:13 19:1 42:21 58:8,13 ordinary 56:8</p>	<p>organization 1:4 4:5 17:11 20:9,15 23:8 24:3,6 39:21 45:10 45:11,15 46:18,25 54:25 organizations 4:14 4:16 7:12,16 8:3,4 8:9 17:10,13 22:10 22:11 23:7,9,22 24:8,10 25:8,18,21 27:8,10,11,11 29:7 29:8,14 30:15 52:4 52:8 54:18 outcome 22:3 outlay 6:11 11:23 58:16 outlays 9:15 owe 25:1 33:6,19,20 33:23 36:2,6,10,13 36:14,18 owes 33:1,17</p> <hr/> <p>P</p> <p>P 4:1 page 3:2 56:14 paid 31:5 parent 16:18 27:4 38:4,5,6,10 39:12 39:19,23 40:2 42:22 43:24 54:5 parents 15:9 16:5 16:15,15 23:12 24:8 37:21,23,24 40:3 41:8 42:10,11 43:10,13,15,19,20 44:2,4 53:10,11,11 53:15 54:1 part 19:5,12 24:6 30:2,16 34:20 36:22 42:6 52:20 participate 17:15 18:13 29:7 participated 11:4 12:21 19:22 24:5</p>	<p>particular 18:7 29:13 42:18,22 46:20,20 47:1,2,11 54:20 57:6,7 particularly 13:5 patients 54:9,10,12 54:14 PAUL 2:5 3:10 25:24 PAULA 2:3 3:7 14:7 pay 4:25 5:5 33:3 34:3 36:4,4,22 46:13,14 47:15,15 47:16 50:15 56:8 paying 7:3 33:16 36:23,23 47:25 payment 33:16 36:5 pence 14:1,2 57:18 people 15:13 17:25 30:8,24 34:22 35:19 36:2 40:5 47:2,17 51:1,2 55:4,5 people's 35:10 percent 7:3 13:22 17:23 31:19 41:6 48:6,24 49:1,15,17 50:10 perfectly 27:22 50:7 performance 59:2 permits 49:19 permitted 4:13 person 20:12,12 33:10 39:19 40:6,7 person's 19:14 Petitioner 1:5,13 Petitioners 2:2,4 3:5 3:8,15 4:10 14:8 55:13 phase 15:20 philosophical 35:15 Phoenix 2:4,5 pick 44:15,15 picking 34:20</p>	<p>place 13:17 placed 4:23 plaintiff 10:5,15 plaintiffs 4:18,25 10:6,18 13:12,13 23:14,17 56:11 play 33:22 please 4:12 14:10 26:2 plurality 11:19 57:9 pocket 9:1 11:24 55:21 57:16 point 4:22 5:2,16 6:5 13:9 17:25 30:12 30:12,13 31:10 35:15 36:8 44:10 44:14 points 8:19 policy 22:8 pose 21:9 posit 36:12 58:8,12 positively 27:14 possibility 56:20 possible 6:17 power 57:25 pray 7:22 55:5,5 prayer 8:4 prayers 6:19 7:21 precedent 59:1 precedents 58:21 precise 56:2 preclude 22:6 premise 8:20 prerogative 59:3,4 presented 11:12 pressed 13:4 pre-existed 24:4 pre-existing 23:22 23:23 priest 6:19 Primarily 18:17 principle 14:2,3 principles 11:18 private 4:13,14,15</p>	<p>5:4 14:13 15:6,23 17:5,8,10 18:13,18 18:25 19:7,21 20:6 20:8 21:18,22 23:7 23:16 24:5,7,9 28:18,22 29:13,19 34:12,13,19,24 35:19 37:8,15 39:3 45:16 46:24,24 49:20,22,24,25 50:1 Probably 17:18 problem 7:16 10:9 11:10 13:13,23 18:4 19:13,18,20 21:10 23:10 26:23 26:25 36:25 45:4 48:13,18 51:14 problems 5:13 program 4:19 5:17 9:23 12:10 13:10 13:21 15:7,24 16:7 17:23 18:8,10,24 19:5,22 22:17 23:4 23:21,25 24:7,12 26:11 27:1,3,7,22 29:1,5,9,11 30:17 32:5 34:15 35:6 37:7,8,13,18 38:2 39:4 40:4 43:8,9,9 43:10,13,14,14,19 44:23 45:13 52:13 52:16,22,23 53:13 53:25 54:3,9,13 55:17 57:20 programs 12:18 14:13 15:25 16:1 17:5,5 29:12 prohibited 15:6 prohibiting 20:2 prohibits 30:15 prong 52:20 Property 57:2 Protestant 40:13,24</p>
--	---	---	---	---

provide 16:1 23:11 27:9 provides 15:10 20:25 providing 18:20 23:2 provision 57:24 provisions 10:6 public 15:23 17:19 18:20,21 22:8 25:10 55:22 pure 20:17 purely 56:11 purpose 5:6 23:24 25:10,13,14 56:12 purposes 24:22 28:25 50:9 pursuant 57:25 pushed 13:4 put 39:8 51:16 puts 47:20 puzzling 14:19,20	raised 31:3 range 45:24,25 rate 36:21 48:5,5,24 49:1,6,15 reach 31:18 reaches 17:6 really 47:20,22 57:3 reason 23:4 REBUTTAL 3:12 55:11 receive 20:1 recipient 28:22 42:18,18 recipients 29:23 recognize 8:22 11:4 recognized 11:3 55:19 record 15:12,17,20 16:4,8,22 19:19 redirect 5:8 redress 13:12 redressability 5:15 13:9 reduces 6:9 referred 15:18 reflect 19:20 regard 43:22 Regarding 4:21 regulates 58:22 regulations 18:3,5 18:16 Rehnquist 29:4 reiterated 11:17 related 4:5 relax 10:16 relevant 5:24 56:14 relief 13:11 26:5 47:22 58:6 religion 4:23 5:11 5:19 7:20 9:2,15 11:24 18:2 19:12 19:13 21:7 22:19 26:11,18,20,22 27:3,15,18,21 28:6	29:10 30:4,9,17 34:22 37:22 38:5 38:11 42:4,19 43:23 44:5 46:20 47:2,7,10,12,17 50:6,20 51:2,3 54:20 55:21 57:16 religion's 18:7 religious 5:1,17 6:15 7:12,15 8:3,4 13:14,15,16,21 17:6,24 18:25 19:5 25:20 26:6,9,17 27:5,11,24 28:7,10 28:14,19,25 29:7 29:14,20,25 30:7,8 30:12 33:12 34:15 37:17,22 38:6 39:7 39:20 41:8 42:8,10 42:23 44:6 45:11 45:15,17 49:22 50:19 51:4 52:8 55:6,7 56:12 religiously 29:2 39:2 44:3 52:24 53:3,6 53:14,18,24 54:4 54:18 reluctance 8:16 remaining 55:10 remember 12:20 22:1 remonstrance 13:24 reports 15:21 16:11 requirements 10:17 18:19 19:1,10 requires 53:12 56:16 59:2 requiring 42:17,21 reserve 14:4 respect 5:15 6:3 8:2 32:1 Respondent 4:24 Respondents 2:6 3:11 4:22 25:4,25	responding 10:11 restaurants 31:19 result 10:1,1 15:24 results 12:7 14:13 revenue 1:12 13:20 16:11 22:6 revenues 28:2 58:13 revise 37:1 right 5:8,9 9:3,5 10:23 11:6 12:4 16:18,19 17:3 20:10 43:3,21 44:18 46:21,22 48:16 50:21 55:15 56:4 Rights 10:5 ROBERTS 4:3 14:5 17:1 25:22 27:20 28:3,12,17 29:15 29:18,22 48:9,16 48:19 53:17,20 54:6 55:8 59:8 rule 40:10,10,23 41:3 56:19 rules 17:9 18:3,16 20:24 run 29:13	18:23 21:3,6,9 26:14,23 27:6,14 30:6,18,25 31:7 36:6,10,18,25 37:4 38:21 39:6,9,15,18 39:25 42:24 46:15 46:23 47:9,19 51:6 51:11 54:16 Scalia's 48:10 scan 52:15 54:7 scans 51:16 scheme 8:13,14 14:20,21,22 22:21 24:15,16 50:4 schemes 14:23 scholarship 14:13 14:24 15:24,25 38:13,15 39:13,14 40:7,24 42:21 43:17 51:3 54:24 55:1,3 scholarships 4:16 16:1 22:24 23:12 25:20 39:11 40:5 42:4,9,10,11 43:16 43:25 44:1,3 50:18 school 1:3 4:5 17:11 17:12 18:2,25 19:8 19:9 21:23 23:8,8 23:12 24:3,6,9 26:15,17 27:23,24 28:7,11,20,20 37:25 38:1,7,10 40:12,14,25 41:9 42:14,15,23 44:6 47:3 51:4 55:4 schools 13:14 15:6 15:23,23 17:6,19 17:24 18:8,12,13 18:18,20,22 19:8 19:21 23:10,23 24:5,9 26:9 30:6,7 30:8,12 37:17 38:18,18 42:8,10
<hr/> Q <hr/> qualified 18:13 19:15 qualifies 18:1 qualify 18:1,8 40:11 41:15 qualitatively 18:21 question 11:13 16:3 16:3 20:18 21:14 21:24 22:15,25 25:13 28:5 34:10 40:3 46:2,2 48:10 53:21,22 58:19 quite 11:19 19:11 35:7 56:4 58:21 quote 6:1 56:17				
<hr/> R <hr/> R 4:1 race 19:25 21:23 22:12				

42:12 43:15 47:1 50:19 school's 5:1 second 4:19 secular 23:9 28:14 51:20 52:5,18,19 see 8:23 10:12 35:11 37:10 47:3 52:20 seeking 13:12 send 6:16 38:6 41:8 41:20 42:22 43:15 44:5 51:4 55:1,3 sending 47:5 separate 54:17 services 27:9 30:4 set 4:15 7:15 8:14 18:15 22:21 23:3,8 23:24 27:19 43:14 45:13 48:11,20 51:19 sets 17:8 29:12 setting 23:11 settled 23:19 sexuality 29:3 SG 11:3,4 shortfall 58:13 show 15:12,17,22 16:22 shows 15:20 16:4,8 16:23 26:6 significant 24:20 silly 57:8 simply 13:9 sites 35:6,14 situation 58:16 size 16:21,23 slightly 22:15 small 57:18 solar 50:9 solely 23:9,24 Solicitor 1:24 solicitude 55:20 somebody 34:1	45:19 someone's 8:25 11:24 somewhat 50:11 sorry 22:23 29:15 42:1 53:17 sort 14:21 sorts 20:24 Sotomayor 5:2,10 6:7 21:2 22:13 42:1,6,13,16 special 55:19,19 57:18 specifically 16:14 specifying 7:12 speculative 6:5 13:11 58:7 speech 10:7 spelled 6:6 spend 6:10 9:15 17:23 31:21 44:12 58:18 spending 5:21 26:11 30:16 37:6,13 53:13 57:2,25 58:13 spends 17:18 spent 5:11,22,24 6:2 9:1 10:21 13:20 37:14 St 40:14 41:15 standards 18:23,24 37:17 standing 4:19,20 5:19,25 8:2,2,5,8,9 8:12,17,22 9:23 10:2,16,17,19 11:10,11,11,13,14 11:21 12:8,14,15 12:16,17 13:1,4,7 31:11 56:16,22 start 26:3 29:11,12 State 5:3,6 14:23 15:1 20:2,11,17,18	20:20,24,24,25 22:18,20,25 23:1,2 23:6,21,25 24:1,18 25:6,11 26:9,10,11 26:13 28:12,13,22 29:24 32:4 33:2 43:8,14 46:13 58:19,23,24 statement 26:4 States 1:1,21 2:1 3:4 3:14 4:9 55:12 State's 5:7 20:20 28:16 31:4 32:3 46:14 status 21:25 22:7,9 statute 20:2,2,17,17 45:1 STO 19:23 20:7,25 21:17 22:24 24:12 24:14 28:9,13,14 28:14 31:6 36:5,23 38:12,14,23 39:1,2 39:12 41:11,17 44:17 46:11,14 47:6 50:25 52:19 53:23 59:4,6 STOs 13:15,16,21 21:16,18 23:11,19 27:25 28:1,6,10 30:13,13 35:5 39:10,11 40:10,23 41:4,6,18,20 42:3 42:7,9,17,20 47:6 48:13,14 50:5,17 53:9,10 straight 22:17 strange 50:13 striking 4:19 strong 20:23 student 52:10 students 15:10,11 15:14 student's 42:4 50:20 studies 15:21	subject 18:21 submitted 59:10,12 subsidize 49:20,21 subsidizing 49:24,25 subtract 56:10 suffice 20:11 sufficiently 21:18 suit 20:12 support 23:9 34:12 34:13,19,23 45:16 45:17,18 supporting 2:2 3:5 3:15 4:10 55:13 supports 47:1,2 suppose 16:16 19:23 20:1 27:18 28:2 29:11 39:9 40:9 51:12,15 54:4 supposed 53:5 suppressed 10:7 Supreme 1:1,21 sure 7:11 12:1 42:2 48:11 51:11 surprisingly 19:16 sustain 5:12 switched 15:23 system 6:14,14,17 9:7 18:6 23:3 46:8 48:11,20 56:7 <hr/> T <hr/> T 3:1,1 tab 34:20 tag 4:23 take 17:10,22 25:5 25:11 27:20,21 30:20 31:2,14,15 35:5,21 36:24 44:23 46:4,5,16 47:10 48:6 taken 9:1 33:1 55:20 takes 30:24 talked 57:22 talking 8:1 44:20,21	44:23 52:21 55:16 tax 4:25 5:3,11 6:1,8 7:15 10:20 12:12 12:22 13:10,18,19 14:11,14 15:7 17:3 17:9,13 18:9,14 19:22 21:3 24:4,17 24:18,18,19,20,20 24:22,23,24,25 25:2,3,3,9,19,19 28:2 31:4 32:3,4,4 32:7,8,13,15,25 33:1,9,9,10 34:2,8 34:18 36:2,10,13 36:14,18,20,21 40:6 44:24 45:2,5 45:22,23 47:21,22 48:5,5,6,15,21,21 50:1,9,10,11,13 50:14,14 51:20 56:17 57:2,24,25 58:1,9,10,11 taxed 14:1,2 taxes 25:1 31:6 33:2 33:6,21,23 34:4 35:21 36:3,21,23 47:15,15,25 50:15 taxpayer 4:18 5:19 5:25 7:10 8:5,7,16 8:22 9:24 10:2 11:11,11,14 12:15 24:24 32:18,20,22 32:23 33:1,15,16 33:17 44:11,12 46:3,4,9,10,11 56:8,16,22 57:10 57:10,24 58:4,8 taxpayers 5:11,16 5:21,22 6:15 14:17 24:13 25:1 36:24 43:11 44:19,20,22 44:23,25 47:5 55:20 taxpayer's 32:22
--	---	---	---	---

<p>33:16 35:4 tax-credited 31:4 tax-exempt 21:24 22:7 tax-saving 14:16 teach 19:4,13 teaches 55:4 teaching 18:2 teed 11:12 tell 14:20 tells 46:8 tent 31:10 terms 18:20 24:21 test 56:15 Texas 7:16 8:9 12:16 Thank 4:11 14:5 25:22 26:1 51:13 55:8,14 59:8 theory 25:4 31:24 thing 15:7 19:10 32:6 34:19 39:25 40:22 41:16 46:15 57:8 things 6:22 8:1 11:7 15:4 43:4 56:13 58:15 think 7:7,9 8:4,15 8:24 9:2,12,20 10:13 11:8,16,17 11:18 13:23,24 16:3 20:22 21:10 26:19 28:4 29:11 30:2,10 31:20 34:9 34:11 35:15 36:17 37:12 41:5 44:7 45:7 46:2 49:4,19 50:23 55:15 57:14 57:14 58:3,21,25 59:2 thinking 25:10 thinks 15:1 thought 9:7 10:9 28:17 42:6 45:20</p>	<p>51:6,7 three 4:21 14:1 51:21 time 9:7 10:20 14:4 32:22 33:1 46:2 times 49:10 today 6:24 told 13:25 top 23:11 48:24 49:1 49:15 total 16:24 totally 51:20 track 4:24 5:16 traditional 59:3,3 transform 58:23 treasury 56:10 57:4 treat 54:14 treated 28:8 43:20 tremendously 11:22 true 15:4,4 32:25 33:8 34:20 36:14 39:5 46:15 48:23 48:25 try 22:14 27:13 trying 28:4 54:17 tuition 1:3 4:5 14:11 14:22,22 17:11,12 22:17,18,20 23:2,8 23:9 24:3,6,9 40:11 turn 33:14 56:11 turned 19:12,17 turns 33:15 49:13 53:4 two 5:13 6:22 7:25 11:6 44:20,24 56:13 57:13 type 25:14 typical 14:22</p> <hr/> <p>U</p> <p>umbrella 52:3 unconstitutional 27:10,12 28:16</p>	<p>29:6,8 38:8 45:12 45:16 46:21,24 47:5,18 54:15 unconstitutionality 47:8 underlying 8:20 undermine 25:7 understand 7:6 26:7 30:1 34:1 42:2 43:7 49:11 53:21 54:21,22 under-included 9:22 under-inclusive 7:14 unenforceable 8:21 United 1:1,21 2:1 3:4,14 4:9 55:12 universe 44:12,15 university 22:7 33:11 unusual 14:25 upheld 12:9 14:15 25:14 use 4:16 5:6 28:19 28:24 37:16 46:12 46:12 49:16 50:8 56:1 uses 22:22</p> <hr/> <p>V</p> <p>v 1:6,14 4:5,6 8:20 10:10 vacation 46:6,12 valid 18:2 Valley 10:14 56:24 valuable 33:12,15 value 24:23,25 various 54:12 versa 40:16 vice 40:15 view 6:20 8:12 50:4 56:11 violate 14:12 28:21 30:4 34:16</p>	<p>violated 7:23 22:8 violation 20:3,4 31:12 50:24 voucher 14:22,23 14:23 22:17 38:3,4 39:4 vouchers 22:18,20 23:2 37:15 44:2 53:16</p> <hr/> <p>W</p> <p>wake 13:5 Walz 10:24 25:15 want 12:1 40:14 41:14 42:1 48:10 49:17 wants 32:24 46:5 54:10 Washington 1:17,25 wasn't 12:19,20,25 28:4 29:6 45:5 water 50:10 way 8:14 12:11 22:15 27:23 39:9 39:24 40:2 45:18 55:5 57:7,11,23 wealthy 33:10 Web 35:6,14 Wednesday 1:18 went 24:14 37:21,25 weren't 29:24 we'll 4:3 51:3 55:3 we're 8:1 18:5 44:20 44:21,23 52:20 we've 28:17 white 19:25 win 26:4 Winn 1:7,15 4:5,6 12:21 wish 37:16 40:12 wonder 19:11 wondered 19:17 wonderfully 56:2 wondering 15:1</p>	<p>word 12:25 35:5 56:2 words 12:3 38:14 works 27:22 worried 17:16 worthy 25:10 wouldn't 32:12 41:20 writes 46:10 wrong 31:10 51:23 wrongly 12:5 wrote 29:4</p> <hr/> <p>X</p> <p>x 1:2,8,10,16 34:5,6</p> <hr/> <p>Y</p> <p>Y 34:6 yeah 29:21 year 34:3 years 4:13 11:1 17:13 25:18</p> <hr/> <p>Z</p> <p>Zelman 17:17 37:11 37:19,21,24 38:8 40:1 43:25 53:15</p> <hr/> <p>\$</p> <p>\$1,000 35:4 36:22 36:23,24 48:4 \$5,000 33:2,3,6 36:22 56:10 \$500 17:3 33:13 36:15 \$55 16:10 \$950 48:4</p> <hr/> <p>0</p> <p>09-987 1:5 4:4 09-991 1:13</p> <hr/> <p>1</p> <p>10 23:11 31:19 10:03 1:22 4:2</p>
---	--	---	--	---

100 7:3 13:22 50:10

106 56:14

11:04 59:11

13 4:13 17:13

14 3:8

2

2010 1:18

25 3:11

26 14:16

3

3 1:18 57:18

30 17:22

31st 34:2

4

4 3:5 55:9

40 17:23

5

5 48:6

50 29:12

501 21:16

501(c)(3) 6:24 13:19

22:9,10 25:7,18

501(c)(3)'s 58:24

55 3:15

6

6:00 19:14

7

70 41:6

9

90 48:24 49:1,15,17