

JUN 7 - 2010

No. 09-1295

In the Supreme Court of the United States

J. MICHAEL BROWN, *et al.*,
Petitioners / Cross-Respondents,
v.

ALICIA PEDREIRA, *et al.*,
Respondents / Cross-Petitioners.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

REPLY BRIEF FOR CROSS-PETITIONERS

DAVID B. BERGMAN
ELIZABETH LEISE
ALICIA A. W. TRUMAN
JOSHUA P. WILSON
ARNOLD & PORTER LLP

STEVEN R. SHAPIRO
JAMES D. ESSEKS
DANIEL MACH
ROSE SAXE
ACLU FOUNDATION

WILLIAM E. SHARP
ACLU OF KENTUCKY
FOUNDATION, INC.

AYESHA N. KHAN
ALEX J. LUCHENITSER*
**Counsel of Record*
AMERICANS UNITED FOR
SEPARATION OF CHURCH
AND STATE
518 C St. NE
Washington, DC 20002
(202) 466-3234
luchenitser@au.org

VICKI L. BUBA
OLDFATHER LAW FIRM
MURRAY R. GARNICK

Counsel for Respondents / Cross-Petitioners

Blank Page

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	ii
I. The Defendants’ arguments on the merits confirm the overlap between the panel’s alternative holding on state-taxpayer standing and the panel’s ruling on federal- taxpayer standing	1
II. No federal defendant is required when taxpayers challenge a State’s misuse of federal funds	3
CONCLUSION	5

TABLE OF AUTHORITIES

	Page(s)	
CASES		
<i>Arizona Christian School Tuition</i>		
<i>Organization v. Winn</i> , Nos. 09-987, 09-991 (cert. granted May 24, 2010)	5	
<i>Bowen v. Kendrick</i> ,		
487 U.S. 589 (1988)	2	
<i>Flast v. Cohen</i> , 392 U.S. 83, 87 (1968)		2
<i>Georgia Association of Retarded Citizens v.</i>		
<i>McDaniel</i> , 855 F.2d 805 (11th Cir. 1988)	4	
<i>In re Walters</i> , 868 F.2d 665 (4th Cir. 1989)		4
<i>NAACP v. Medical Center, Inc.</i> , 599 F.2d 1247 (3d Cir. 1979)		4
<i>School District v. Ball</i> , 473 U.S. 373 (1985)		3, 4
 STATUTES AND RULES		
28 U.S.C. 2403		4
42 U.S.C. 604a		2, 3
Fed. R. Civ. P. 5.1		4

**REPLY BRIEF IN SUPPORT OF
CONDITIONAL CROSS-PETITION**

- I. The Defendants' arguments on the merits confirm the overlap between the panel's alternative holding on state-taxpayer standing and the panel's ruling on federal-taxpayer standing.**

Most of the Defendants' Response Brief is devoted to arguing the merits of whether the Taxpayers have standing as federal taxpayers. The Defendants' arguments echo those that they raise in attacking the panel's alternative holding that the Taxpayers met the "legislative nexus" test as state taxpayers, further demonstrating that any analysis of the panel's alternative holding would necessarily affect the Taxpayers' federal-taxpayer standing.

For example, in their Petition, the Defendants contend that the Taxpayers lack state-taxpayer standing to challenge the state funding of Baptist Homes because Kentucky statutes do not *require* unconstitutional provision of state funds to religious organizations. Pet. 22-23, 26. Similarly, in their Response Brief, the Defendants attack the Taxpayers' federal-taxpayer standing by contending that the Title IV-E and SSI programs do not *mandate* unconstitutional spending, and that the Charitable Choice statute does not *require* state funding of religious groups and prohibits such groups from using public funds for religious worship,

instruction, or proselytization. Resp. to Cross-Pet. 17-18, 21-23.¹

The Defendants also argue in their Petition that the Taxpayers lack state-taxpayer standing because Kentucky executive-branch officials exercise discretion over the spending of state funds. Pet. 26-27. Likewise, the Defendants argue in their Response Brief that federal-taxpayer standing fails because Kentucky officials exercise discretion over how they spend federal funds, because Kentucky officials allegedly exercised that discretion to contract with Baptist Homes prior to enactment of the Charitable Choice statute, and because the Charitable Choice statute grants States discretion not to provide *state* funds to religious organizations. Resp. to Cross-Pet. 15-16, 18-19.²

¹ As explained in the Taxpayers' Brief in Opposition, the Defendants are wrong on this point. Opp. to Pet. 28-29. And in any event, the Charitable Choice statute effectively mandates that States fund religious organizations. See 42 U.S.C. 604a(b)-(c), (i). That Baptist Homes may be using federal funds in a manner contrary to the statute does not defeat standing, for in *Flast v. Cohen* standing was upheld even though the taxpayer plaintiffs contended that the spending they challenged was prohibited by the authorizing statute. 392 U.S. 83, 87 (1968); see also *Bowen v. Kendrick*, 487 U.S. 589, 614-615 (1988) (upholding standing even though religious use of federal funds was contrary to intent of authorizing statute).

² Again, as the Taxpayers previously explained (Opp. to Pet. 29), *Bowen* made clear that standing lies to challenge discretionary executive-branch allocations of legislatively authorized funding. 487 U.S. at 618-620. Moreover, the Defendants have not pointed to any record evidence that

In sum, in addition to lacking substantive merit, the arguments in the Defendants' Response Brief bolster the Taxpayers' point that because the panel's alternative holding on state-taxpayer standing and the panel's holding on federal-taxpayer standing raise the same issues, the Court should review the latter holding if it reviews the former.

II. No federal defendant is required when taxpayers challenge a State's misuse of federal funds.

The Defendants' Response Brief does make one argument that is wholly unrelated to the Defendants' arguments against state-taxpayer standing: that a federal defendant must be named in a challenge to the use of federal funds. Resp. to Cross-Pet. 10-15. This contention, however, is a red herring supported by neither case law nor logic.

The Defendants cite no cases that hold that taxpayers must name a federal defendant when contesting a State's use of federal funds, and the case law in fact is to the contrary. In *School District v. Ball*, 473 U.S. 373, 380 n.5 (1985), affg *Americans United for Separation of Church & State v. School District*, 718 F.2d 1389, 1390-91 (6th Cir. 1983), affg 546 F. Supp. 1071, 1074-77 (W.D. Mich. 1982), and overruled in part on other grounds by *Agostini v. Felton*, 521 U.S. 203 (1997), a group of taxpayers

Kentucky began funding Baptist Homes before the Charitable Choice statute was enacted, and even if this were the case, the statute may well have affected the decisions of Kentucky officials to continue the funding. Finally, the provision in the Charitable Choice statute that grants States discretion to refuse to provide *state* funds to religious organizations does not extend to *federal* funds. See 42 U.S.C. 604a(k).

challenged a school district's use of federal, state, and local funds to support the provision of certain instruction in religious schools, without naming any federal defendants. This Court, citing both federal-taxpayer and state-taxpayer cases, upheld the taxpayers' standing, without casting any aspersions on the taxpayers' right to challenge the federal funding. 473 U.S. at 380 n.5. See also *NAACP v. Medical Center, Inc.*, 599 F.2d 1247, 1254 n.27, 1259 n.49 (3d Cir. 1979) (holding that no federal defendants were necessary in lawsuit challenging discrimination by private party that was unlawfully supported by federal funds).

Indeed, a federal statute and a federal rule explicitly authorize challenges to the constitutionality of federal statutes without the presence of any federal defendant. 28 U.S.C. 2403(a) and Federal Rule of Civil Procedure 5.1(a)-(b) require courts and parties to notify the Attorney General if a lawsuit places into question the constitutionality of a federal statute and no federal agency or official is a party. The Attorney General is allowed but not required to intervene (28 U.S.C. 2403(a); Fed. R. Civ. P. 5.1(c)), and so the lawsuit can proceed without federal participation. Moreover, failure to give the notice does not forfeit any constitutional claim or defense. Fed. R. Civ. P. 5.1(d); accord, *e.g.*, *In re Walters*, 868 F.2d 665, 671 n.4 (4th Cir. 1989); *Georgia Association of Retarded Citizens v. McDaniel*, 855 F.2d 805, 810 n.3 (11th Cir. 1988).

Nor is there support in logic or policy for the Defendants' argument that a federal defendant is necessary here. The Taxpayers do not challenge any federal statute facially, but instead challenge how state officials — by funding Baptist Homes — have

applied federal statutes intended to aid children and a federal statute that promotes funding of religious organizations. The constitutional violations committed by the state officials can be remedied simply by prohibiting them from funding Baptist Homes. No relief against any federal official — such as an order prohibiting federal agencies from providing funding to Kentucky — is needed here. The Defendants' proposal that state taxpayers be allowed to challenge a state's use of federal funds only when they name a federal defendant would unnecessarily complicate litigation, force plaintiffs to seek relief broader than what is needed to remedy a violation, and force federal officials to spend valuable time and resources defending lawsuits that can easily proceed without them.

CONCLUSION

The Defendants' Petition should be denied. But if it is granted, the Court should also grant the Taxpayers' Conditional Cross-Petition. Alternatively, if the Court elects to hold the Petition until after deciding *Arizona Christian School Tuition Organization v. Winn*, Nos. 09-987, 09-991 (cert. granted May 24, 2010) — a case cited in Defendants' Reply Brief (at 13) that also presents taxpayer-standing issues — the Court should likewise hold the Cross-Petition.

Respectfully submitted.

DAVID B. BERGMAN	AYESHA N. KHAN
ELIZABETH LEISE	ALEX J. LUCHENITSER*
ALICIA A.W. TRUMAN	<i>*Counsel of Record</i>
JOSHUA P. WILSON	<i>Americans United for</i>
<i>Arnold & Porter LLP</i>	<i>Separation of Church</i>
<i>555 12th St., N.W.</i>	<i>and State</i>
<i>Washington, DC 20004</i>	<i>518 C St. NE</i>
<i>(202) 942-5000</i>	<i>Washington, DC 20002</i>
	<i>(202) 466-3234</i>
	<i>luchenitser@au.org</i>
WILLIAM E. SHARP	STEVEN R. SHAPIRO
<i>ACLU of Kentucky</i>	JAMES D. ESSEKS
<i>Foundation, Inc.</i>	ROSE SAXE
<i>315 Guthrie Street</i>	<i>American Civil Liberties</i>
<i>Suite 300</i>	<i>Union Foundation</i>
<i>Louisville, KY 40202</i>	<i>125 Broad Street</i>
<i>(502) 581-9746</i>	<i>18th Floor</i>
	<i>New York, NY 10004</i>
	<i>(212) 549-2627</i>
VICKI L. BUBA	DANIEL MACH
<i>Oldfather Law Firm</i>	<i>American Civil Liberties</i>
<i>1330 South Third Street</i>	<i>Union Foundation</i>
<i>Louisville, KY 40208</i>	<i>915 15th Street, NW</i>
<i>(502) 637-7200</i>	<i>Washington, DC 20005</i>
	<i>(202) 548-6604</i>
MURRAY R. GARNICK	
<i>101 Constitution N.W.</i>	
<i>Washington, DC 20001</i>	
<i>(202) 354-1578</i>	

Counsel for Respondents / Cross-Petitioners

JUNE 7, 2010
