No. 23-1453

In the United States Court of Appeals for the Fourth Circuit

DONNA BUETTNER-HARTSOE, ET AL.,

Plaintiffs-Appellees,

v.

BALTIMORE LUTHERAN HIGH SCHOOL ASSOCIATION,

d/b/a CONCORDIA PREPARATORY SCHOOL,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT BALTIMORE

AMICUS CURIAE OF THE INSTITUTE FOR JUSTICE IN SUPPORT OF DEFENDANT-APPELLANT AND SUPPORTING REVERSAL

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1. Is party/amicus a publicly held corporation or other publicly held entity? **NO**

2. Does party/amicus have any parent corporations? **NO**

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? **NO**

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? **NO**

5. Is party a trade association? (amici curiae do not complete this question)? **NOT APPLICABLE**

6. Does this case arise out of a bankruptcy proceeding? **NO**

7. Is this a criminal case in which there was an organizational victim? **NO**

Dated: June 12, 2023

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INTEREST OF AMICUS CURIAE[1]

The Institute for Justice ("IJ") is a national, public-interest law firm and the nation's leading courtroom defender of educational choice programs: programs that provide financial assistance to parents who choose nonpublic schooling options for their children. For over thirty years, when opponents of educational choice have challenged such programs, IJ has stepped in to represent the families who are the program's true beneficiaries.

This appeal concerns whether the economic benefits provided by tax-exempt status under Section 501(c)(3) of the Internal Revenue Code fall within the scope of the statutory phrase "Federal financial assistance" in Title IX. While IJ takes no position on whether Congress could explicitly condition nonprofit status on compliance with Title IX, we believe they have not done so. The district court's ruling—equating tax-exempt status with direct money subsidies—is contrary to well-settled law regarding educational choice programs across the country

[1] All parties have consented to the filing of this amicus brief. No party authored this brief in whole or in part, and no one other than the Institute for Justice, its members, and its counsel contributed funds or other support for the brief.

that are structured around tax credits or exemptions. IJ submits this brief to ensure that this Court is aware of how the district court's ruling conflicts with precedent upholding these and other similarly structured programs.

INTRODUCTION

The conduct alleged in this case is shocking and, as the district court held below, there are several state causes of action under which Defendant-Appellant may be liable if those allegations prove true. But along with allowing those state causes of action to proceed, the district court also issued a remarkable ruling: It held that, for the last half century, every private school organized as a nonprofit under Section 501(c)(3) of the Internal Revenue Code has been subject to Title IX of the Civil Rights Act, and nobody realized it until now.

That conclusion not only sounds unlikely, it is also unsupported by precedent. Indeed, the district court's ruling is based almost entirely on an overreading of a single U.S. Supreme Court case—*Regan v. Taxation with Representation*, 461 U.S. 540 (1983) —a constitutional case that has nothing to do with the meaning of Title IX. That 40-year-old decision did not work an unnoticed revolution in the regulation of

nonprofit organizations, as the district court apparently believed. Whatever conditions the *tax code* may lawfully impose on nonprofit organizations—the only topic at issue in *Regan*—compliance with Title IX is not currently among them.

The consequences of the district court's ruling are profound, and not only for the thousands upon thousands of private schools that now stand exposed to potential civil liability under a regulatory regime they never knowingly submitted to. The ruling below also conflicts with well-settled precedent involving educational choice programs throughout the country, many of which are structured around tax benefits. Time and again, these programs have been upheld against state constitutional challenges specifically because these tax benefits are not—as the district court held—equivalent to direct money subsidies. Accordingly, this Court should reverse the ruling below and hold that, whatever state causes of action Defendant-Appellant may be subject to, Defendant-Appellant's mere status as a 501(c)(3) nonprofit does not subject it to Title IX.

ARGUMENT

I. "Federal financial assistance" under Title IX does not encompass every federal policy that economically benefits an educational institution.

Title IX of the Education Amendments Act of 1972 imposes various regulatory burdens on educational institutions "receiving Federal financial assistance." The question presented in this appeal is whether an educational institution's mere possession of tax-exempt status under section 501(c)(3) of the Internal Revenue Code qualifies as "Federal financial assistance" under the statute.

The district court, in sweeping terms, held that it did. In the court's view, "[t]he tax-exempt status of a private school subjects it to the same requirements of Title IX imposed on any educational institution. [Defendant-Appellant] cannot avail itself of federal tax exemption but not adhere to the mandates of Title IX." *Buettner-Hartsoe v. Baltimore Lutheran High Sch. Ass'n*, No. 1:20-cv-03132-RDB, 2022 WL 2869041, at *3 (D. Md. July 21, 2022).

Central to the district court's conclusion was its equation of "federal tax exemption" with the statutory term "Federal financial assistance." Indeed, equating those two was critical to the decision

below because, here, no cash is changing hands between the federal government and anyone else; neither Defendant-Appellant nor its students receive money from the federal treasury. Rather, Defendant-Appellant receives funds from private parties in the form of tuition payments and charitable contributions. The only thing the federal government has done is refrain from taking a portion of that money away in taxes because, under the tax code as currently structured, that money simply is not owed to the federal government. This, the district court, concluded, falls within the meaning of the statutory phrase "Federal financial assistance."

The district court based that erroneous conclusion almost entirely on an overreading of the U.S. Supreme Court's decision in *Regan v. Taxation with Representation*, 461 U.S. 540 (1983). But *Regan* was not a Title IX case and its holding cannot be stretched so far.

The question in *Regan* was whether Congress, in choosing criteria for tax-exempt status, was required under the First Amendment to extend tax-exempt status to groups that engaged in substantial lobbying. Reasoning that "[a] tax exemption has much the same [economic] effect as a cash grant to the organization of the amount of

tax it would have to pay on its income," the Court held that Congress could condition 501(c)(3) status on a group's abstaining from substantial lobbying because Congress need not "subsidize" lobbying. 461 U.S. at 544. Under the district court's view, the Supreme Court in *Regan* "therefore recognized § 501(c)(3) status as a form of Congressional subsidy *and the equivalent of a cash grant*." 2022 WL 2869041, at *4 (emphasis added).

The district court's holding dramatically overreads *Regan* and imports it into a context—statutory interpretation—that has nothing to do with that decision. To be sure, when Congress exercises its power under the Taxing Clause to decide which groups will be subject to which taxes, it may impose some limited and appropriate eligibility restrictions on nonprofit status. And groups that satisfy those eligibility requirements, will, obviously, be able to keep more of their money than groups that do not, simply because—once a group satisfies those eligibility requirements—the government has no legal right to demand that money from them. But the fact that Congress had the power to draw those eligibility requirements differently does not make non-taxation textually "equivalent" to "Federal financial assistance." Indeed,

Regan itself noted that "[i]n stating that exemptions and deductions, on one hand, are like cash subsidies, on the other, we of course do not mean to assert that they are in all respects identical." 461 U.S. at 544 n.5.

Common sense confirms that the two are different. Twenty dollars tucked into a birthday card and twenty dollars that a mugger declines to demand can both result in one's wallet containing twenty dollars, but that does not make the two equivalent. And that is true even if, under different circumstances, the mugger might have a legal right to that twenty dollars. What matters is not whether one can imagine a circumstance in which the mugger could lawfully demand the money, but rather whether one owes it to him now. And the same is true here. *If* the tax code were structured differently such that Defendant-Appellant owed taxes to the government, and *if* the government, in an act of *noblesse oblige*, declined to demand those taxes, one might say that being relieved of that valid and legally enforceable debt was equivalent to "Federal financial assistance." But under the tax code as it currently exists, Defendant-Appellant simply does not owe the government that money, and one cannot characterize Defendant-

Appellant's legal entitlement to keep money that belongs to it as "Federal financial assistance."

II. The district court's reasoning conflicts with well-settled precedent regarding educational choice programs funded by tax credits.

More recent precedent from the U.S. Supreme Court involving educational choice programs confirms that tax benefits and cash subsidies are not "equivalent." 2022 WL 2869041, at *4. Most notably, in *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011), the Supreme Court considered a legal challenge to an Arizona program that gave tax credits for contributions to school tuition organizations, which then used the contributions to provide scholarships to students attending private schools, including religious schools. The plaintiffs argued that they had standing to challenge the program because the targeted tax breaks were—as the district court held below—equivalent to direct government expenditures. But the Supreme Court rejected that argument, and its reasoning is instructive here.

First, the Supreme Court in *Winn* reiterated, as it held in *Regan*, that "tax credits and governmental expenditures can have similar

economic consequences." *Id.* at 141–42. But it rejected the district court's view that this similarity makes the two "equivalent." 2022 WL 2869041, at *4. That is because, unlike "government funds drawn from general tax revenues," "contributions that lead to charitable tax deductions [or] tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations." 563 U.S. at 144. To hold otherwise "assumes that income should be treated as if it were government property even if it has not come into the tax collector's hands." *Id.* Based on this distinction between tax benefits and direct subsidies, the Supreme Court held that the Plaintiffs in *Winn* lacked standing to challenge the program. *Id.* at 146.

And *Winn* was far from the first Supreme Court decision to observe these relevant distinctions between tax benefits and aid in the form of funds paid from the government treasury. In *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970), for example, the Supreme Court considered and rejected the argument that a state property tax exemption for churches violated the Establishment Clause. Here again, the Court conceded that "[g]ranting tax exemptions to churches necessarily operates to afford *an indirect economic benefit*." *Id.*

at 674–75 (emphasis added). But it directly distinguished this benefit from "a direct money subsidy," which "could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards." *Id.* at 675. Indeed, the Court even stated that "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply *abstains from demanding that the church support the state*." *Id.* (emphasis added).

Together, *Winn* and *Walz* confirm what common sense suggests. When individuals or organizations talk about receiving "Federal financial assistance," they are talking about receiving money appropriated from the treasury. They are not talking about every federal tax policy that, in a different world, could have subjected them to higher taxes than they currently owe.

The district court's contrary conclusion also conflicts with state-court precedent upholding a wide array of educational choice programs that are structured around state tax credits or exemptions specifically to avoid potential state constitutional issues that might arise if they instead took the form of direct public appropriations. Not surprisingly,

state appellate courts have unanimously concurred that the funds schools receive through these programs are not appropriations of public funds. Those rulings include:

- *Kotterman v. Killian*, 972 P.2d 606, 620–21 (Ariz. 1999) (en banc) ("It does not follow, however, that reducing a taxpayer's liability is the equivalent of spending a certain sum of money. . . . [T]his tax credit is not an appropriation of public money.");
- *Magee v. Boyd*, 175 So. 3d 79, 121 (Ala. 2015) ("Traditional definitions of 'appropriations' do not extend to include tax credits.");
- *McCall v. Scott*, 199 So. 3d 359, 370–71 (Fla. Dist. Ct. App. 2016) ("[T]he authorization of tax credits . . . involve[s] no appropriation from the public treasury.");
- *Gaddy v. Ga. Dep't of Revenue*, 802 S.E.2d 225, 230 (Ga. 2017) ("Plaintiffs . . . cannot demonstrate[] that the Program's tax credits represent money appropriated from the state treasury.");
- *Toney v. Bower*, 744 N.E.2d 351, 357 (Ill. App. Ct. 2001) ("[T]he Credit does not constitute an 'appropriation,' as that term is commonly understood."); and
- *Griffith v. Bower*, 747 N.E.2d 423, 426 (Ill. App. Ct. 2001) ("The credit at issue here does not involve any appropriation or use of public funds.");

These rulings are not outliers—they track decisions outside the realm of educational choice programs, which similarly hold that tax benefits are not the equivalent of public funds. Thus, in *State Building & Construction Trades Council v. Duncan*, a California Court of Appeal

rejected a claim that construction companies' receipt of "tax credits provided by the state to facilitate construction of low-income housing" subjected those companies to labor laws that applied to public works projects "paid for in whole or in part out of public funds." 162 Cal. App. 4th 289, 294, 313 (2008). As that court held, "Tax credits are, at best, intangible inducements offered from government, but they are not actual or de facto expenditures by government." *Id.* at 294.[2]

Connecting all these cases is the straightforward notion that "[p]rivate bank accounts cannot be equated with the . . . state treasury." *Winn*, 563 U.S. at 144. Yet the district court's ruling rejects that

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[2] *See also Manzara v. State*, 343 S.W.3d 656, 660 (Mo. 2011) (en banc) ("Expenditures typically occur in government when checks are written by the state treasurer based on appropriations or warrants. No such withdrawal of public funds or such 'expenditure' occurs with the granting of a tax credit."); *Olson v. State*, 742 N.W.2d 681, 685 (Minn. Ct. App. 2007) (concluding that tax credits and tax exemptions are distinguishable from "expenditures of public funds" for purposes of taxpayer standing); *Tax Equity All. for Mass., Inc. v. Comm'r of Revenue*, 516 N.E.2d 152, 155–56 (Mass. 1987) ("The granting of an income tax credit is not an appropriation according to any commonly understood sense of the word. . . . The act of taking less money from a taxpayer because of the grant of a tax credit or a tax deduction is not an appropriation of funds from the State treasury or from anywhere else.").

reasoning and instead treats all money as presumptively belonging to the government unless, in an act of "Federal financial assistance," Congress chooses to let a taxpayer keep some portion of it. Nothing in the text of Title IX or the Supreme Court's precedent requires that result, and this Court should not adopt it here.

CONCLUSION

The district court's ruling that educational institutions are subject to Title IX merely because they are registered as 501(c)(3) organizations was error. This Court should reverse and remand so that Plaintiffs-Appellees may proceed with their remaining state claims.

June 12, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 2,467 words. This brief complies with the type-style requirements because it was prepared using Microsoft Word 2022 in 14-point Century Schoolbook, a proportionally spaced typeface.

Dated: June 12, 2023

/s/ Paul M. Sherman
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CERTICICATE OF SERVICE

I hereby certify that on June 12, 2023, I served a copy of the foregoing *Brief of Amicus Curiae Institute for Justice in Support of Defendant-Appellant and Supporting Reversal* upon the following counsel of record:

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