

Nos. 09-987 & 09-991

IN THE
Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,
Petitioner,

v.

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

GALE GARRIOTT,
Petitioner,

v.

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

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

**Brief of *Amici Curiae* National School Boards
Association, Arizona School Boards Association,
American Association of School Administrators,
National Education Association, and Arizona
Education Association In Support of Respondents**

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**STATEMENT OF INTEREST
OF AMICI CURIAE¹**

Amici curiae are a group of associations dedicated to the improvement of public education in America. *Amici* also have a longstanding interest in implementing effective state and local educational policies in accordance with constitutional requirements, including the Establishment Clause.

The National School Boards Association (“NSBA”) is a federation of state associations of school boards from throughout the United States, the Hawai‘i State Board of Education, and the board of education of the U.S. Virgin Islands. NSBA represents over 95,000 of the Nation’s school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 46.5 million public school students—which is approximately 90 percent of the elementary and secondary students in the nation.

The Arizona School Boards Association (“ASBA”) is one of the state members of NSBA. It is a non-profit corporation providing assistance to the more than 240 Arizona school boards that are its

¹ Pursuant to Sup. Ct. R. 37.3(a) counsel for *amici* states that the parties have consented to the filing of this brief. Pursuant to Sup. Ct. R. 37.6, counsel for *amici* states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

members. ASBA serves 95 percent of Arizona's public school districts, and those districts serve over 1.12 million children.

The American Association of School Administrators ("AASA"), founded in 1865, is the professional association of over 14,000 local school system leaders across America. AASA members range from chief executive officers, superintendents and senior level school administrators to cabinet members, professors and aspiring school system leaders. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children.

The National Education Association ("NEA") is a nationwide employee organization with more than 3.2 million members, the majority of whom are employed as teachers by public school districts, colleges, and universities.

The Arizona Education Association ("AEA") represents more than 30,000 public school educators and education support professionals throughout Arizona. AEA members include teachers, counselors, speech pathologists, and student teachers.

NSBA and the other *amici* regularly represent their members' interests before Congress and federal and state courts and each has participated as *amicus curiae* in cases before this Court involving issues of importance to educators. *See, e.g., Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788 (2009);

Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484 (2009); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Morse v. Frederick*, 551 U.S. 393 (2007); *Arlington Cent. Sch. Dist. Board of Educ. v. Murphy*, 548 U.S. 291 (2006); *Schaffer v. Weast*, 546 U.S. 49 (2005); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Board of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237 (1991).

The *amici* are concerned about the Arizona tuition tax credit program (the “Arizona program”) because it undermines both important Establishment Clause principles and public education in Arizona. The harm this program does to public education and the degree to which it violates the Constitution go far beyond voucher programs of the type narrowly approved by this Court in *Zelman*, 536 U.S. 639. Indeed, the program is in many respects far worse than other voucher and tuition tax credit plans adopted by other states since *Zelman*.

Amici strongly believe that any educational voucher or tax credit program must, at a minimum, be religiously neutral. Like the program approved in *Zelman*, it must not have the purpose or effect of advancing religion, but rather must serve an important educational purpose. Second, it must provide public financial support to religiously-affiliated schools only through genuine and

independent parental choice. The Arizona system meets neither of these minimum criteria.

INTRODUCTION

This Court has long recognized “the importance of [public] education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child.” *Plyler v. Doe*, 457 U.S. 202, 221 (1982). “[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all” and “has a fundamental role in maintaining the fabric of our society.” *Id.*

The vast majority of students in America—and in Arizona—are educated in public schools. More than one million K-12 students attend public schools in Arizona. Less than 10 percent of that number, somewhere between 50,000-75,000 students, attend private schools. Less than 30,000 of those private school students participate in the State-funded, private-school scholarship program at issue in this case.

In recent decades, a number of school reform efforts across the country have sought to improve education, including public education, by fostering open competition between public and private schools. Whatever the merit or effectiveness of such school choice plans, the Arizona program at issue here simply is not one of them.

Some of the school choice plans implemented in recent decades have raised Establishment Clause concerns because they allow for the participation of religiously affiliated schools along with secular private and public schools. In *Zelman*, 536 U.S. 639 (2002), this Court addressed these issues and decided that not all such programs violate the Establishment Clause. As a result, the Court upheld a school choice plan that awarded vouchers to low-income parents of children in failing inner-city schools.

Zelman, however, also established the minimum criteria that such a plan must meet to be consistent with the Establishment Clause. The Arizona program does not come close to satisfying these criteria. Unlike some other school choice programs, the Arizona program does not provide free choice among public, secular private and religiously-affiliated schools, and does not assist low-income or educationally disadvantaged students. Moreover, the program skews program benefits toward private, religious schools by allowing religiously-affiliated STOs and schools to discriminate on the basis of religion. The effect of the Arizona program, in turn, is to benefit religious STOs and religious schools and harm public education.

For these reasons, and as discussed more fully below, the Arizona program violates the Establishment Clause, and the decision below should be affirmed.

SUMMARY OF ARGUMENT

The Arizona program serves no important educational purpose. The program's ostensible secular educational purpose—increasing choice—is a sham. The program does not target low-income students, at-risk students, or students in low-performing public schools. Indeed, most of the students participating in the program *already attended* private schools before receiving scholarships. In addition, most interested students in public schools cannot participate because the scholarships are too small to give public-school parents the financial support necessary to transfer their child to a private school. More importantly, participation may be made contingent not only on a student's willingness to attend a religious school, but also on adherence to the beliefs that school seeks to inculcate.

Under the minimum standards set forth by this Court in *Zelman*, the Arizona program is strongly skewed toward religious schools and thus violates the Establishment Clause for several reasons. To begin with, parents do not have a genuine opportunity to choose the school at which the aid distributed under the program is spent. Indeed, public schools are not even among the choices offered. Second, under the program, STOs may—and many openly do—select both schools and scholarship recipients based on religious criteria. Finally,

schools, as well, can deny admission to scholarship recipients on the basis of religion.

As a result, the Arizona program has the primary effect not of increasing choice, but of advancing religion. The program has not had the effect of increasing access to private schools; its main outcomes have been to publicly fund religiously affiliated STOs and religious schools, and to reduce the tuition bills of parents most of whom *already have chosen* to send their child to a religious school.

At the same time, the program harms public education in Arizona. It directly siphons off a growing amount of State tax revenue, bolstering the funding for—and driving up the tuition of—private schools, at the same time that Arizona cuts funding for its public schools.

Therefore, the decision below should be affirmed, and Respondents should be allowed to try their case. *Zelman* should not be expanded to protect the Arizona program. Rather, the Court should reaffirm the minimum requirements of *Zelman*. This will preserve important Establishment Clause principles and improve education in Arizona. It also will not undermine efforts to improve education through appropriate and constitutional school choice measures in Arizona or in other states.

ARGUMENT

The Arizona program violates the longstanding principle that the government “cannot consistently with the Establishment Clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches tenets and faith of any church.” *Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 16 (1947). It also conflicts with this Court’s long and sustained recognition of the importance of public education. *See Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

In *Zelman* this Court addressed one of a growing number of school choice plans that have been designed in part to supplement public schools’ efforts to educate a broad spectrum of students and to improve these schools through healthy competition. *Zelman* reiterated the general principle that public funding of religious instruction is prohibited, and concluded that a plan could satisfy the Establishment Clause only if the program served an important secular purpose, was religiously neutral, and authorized the government aid to be distributed according to the free choice of parents about what schools their children should attend. 536 U.S. at 652.

None of the *Zelman* factors is present here. The Arizona program does not serve any important educational purpose. It does not give parents genuine free choice. And it is not religiously neutral.

To the contrary, the program has the dual ill effects of promoting religiously affiliated schools and undermining public education.

I. ARIZONA’S TUITION TAX CREDIT PROGRAM SERVES NO IMPORTANT EDUCATIONAL PURPOSE.

The Arizona program purportedly was designed to “provid[e] access to a broad array of educational choices by defraying parents’ educational costs.” Pet. Br. 10. It obviously fails to do this. The program does not provide genuine, independent choice to parents, and it does not enhance access to private schools for low-income or disadvantaged families.

To the contrary, the Arizona program lacks the basic features shared by plans that this Court previously has found acceptable and by other school choice plans adopted in other states since *Zelman*. The Arizona program thus is transparently an “ingenious plan[] for channeling state aid to sectarian schools,” see *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 785 (1973), and its ostensible secular purpose is “a sham, * * * merely secondary to [its] religious objective.” See *McCreary Cnty. v. Am. Civil Liberties Union of Kentucky*, 545 U.S. 844, 862 (2005) (secular purpose inquiry is not a “pushover, and any claimed secular purpose is not adequate”).

A. The Arizona Program Is Not a True School Choice Plan.

The Arizona program does not provide true school choice. As explained hereinafter and in Respondents' brief, the Arizona program categorically excludes public schools and bears none of the other hallmarks of "true choice" emphasized in this Court's previous decisions. Even worse, it expressly allows STOs and religious schools to practice religious discrimination. *See* Parts II.B-C *infra*; *see also Zelman*, 536 U.S. at 655; *Mueller v. Allen*, 463 U.S. 388, 391 (1983); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 488 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993).

In contrast, most other school choice plans adopted since this Court's decision in *Zelman* allow much broader parental choice. For example, Florida's Tax Credit Scholarship program does not permit its three, secular STOs to "restrict or reserve scholarships for use at a particular private school." Fla. Stat. Ann. § 1002.395(6)(g) (West 2010). Rhode Island's Business Entity Scholarship Tax prohibits taxpayers from designating their donations toward a particular school. *See* R.I. Gen. Laws Ann. § 44-62-2 (West 2009), *amended by* 2010 R.I. Pub. Laws 10-239. And, under Iowa's scholarship program, STOs must permit students "to attend a qualified school of

their parents' choice." Iowa Code Ann. § 422.11S (West 2010) (emphasis added). *See Zelman*, 536 U.S. at 646 (“[w]here tuition aid is spent depends *solely* upon where parents who receive tuition aid choose to enroll their child”) (emphasis added).

B. The Arizona Program Does Not Increase Educational Options for Students.

The Arizona program also does not increase educational options for students by improving access to private schools for the State's neediest families. If, as its proponents claim, the Arizona program were actually designed to “provid[e] access to a broad array of educational choices,” Pet. Br. 10, the program would target—and its implementation would benefit—those students who have the fewest educational choices available to them or at least those who do not already have the option of attending a private school. The Arizona program does not. Neither low-income families nor at-risk students benefit from the program.

Only seven out of 55 STOs use financial need as a primary factor in determining which students receive scholarships. *See Tax Credit Sponsor's Vision Unrealized*, East Valley Tribune, June 15, 2010, http://www.eastvalleytribune.com/special_reports/rigged_privilege/article_2caa9671-aaad-5992-9d46-2594a9ee6b3c.html. Nor does the program require STOs to consider the quality of students' public

school options or give any special consideration to students with physical, mental and emotional challenges, or limited English proficiency.² See Ariz. Rev. Stat. Ann. § 43-1089.

Moreover, because the program does not specify the size of the scholarships that must be awarded, the scholarships tend to be too small to cover a student's tuition at most private schools, effectively excluding most low-income students. Scholarship sizes have ranged from an average of \$554 in 1998 to an average of \$1,889 in 2009. See Arizona Department of Revenue, Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2009 (Apr. 21, 2010) [hereinafter "2009 Ariz. Dep't of Revenue Report of Donations to STOs"]. Yet tuition at Arizona's private schools can range from \$5,000 to \$20,000. See Ronald J. Hansen & Pat Kossan, *Tuition Aid*

² As explained in Respondents' Supplemental Brief Regarding a Change in State Law, in April and May 2010, Arizona enacted two statutes (S.B. 1274 and H.B. 2664) that amend the Tuition Tax Credit program. The amendments, effective July 1, 2011, require STOs to take students' financial need into account when awarding scholarships. Merely *considering* financial need, however, does not in any way guarantee that scholarships will be *awarded* on the basis of need. Moreover, because the program still permits religious discrimination, the mere consideration of need does not alter the program's real purpose to provide public funds to religious schools.

Continues to Elude Needy, Ariz. Republic, Dec. 13, 2009,
<http://www.azcentral.com/news/articles/2009/12/13/20091213sto-outreach1213.html>. Moreover, the availability of scholarships under the Arizona program has actually encouraged private schools to *increase* their tuition. See *Schools Teach Parents How to Skirt the Law*, East Valley Tribune, June 15, 2010,
http://www.eastvalleytribune.com/special_reports/rigged_privilege/article_db4088f9-5789-5a1d-abed-9af2a5a39cf2.html.

Thus, rather than benefiting students in need, the Arizona program ironically has driven up the cost of private schools, making them less accessible to low-income families. The foreseeable result has been that the majority of students who have received scholarships under the Arizona program have been from middle class or wealthy families. See Carrie Lukas, Goldwater Inst. Policy Report No. 186, *The Arizona Scholarship Tax Credit: Providing Choice for Arizona Taxpayers and Students* (Dec. 11, 2003).

The Arizona program is a far cry from the plan at issue in *Zelman*. Most school choice plans at least attempt to marshal the power of genuine parental choice to promote educational reform and increase opportunity for needy students. In fact, most of these other plans are wholly focused on improving the educational opportunities of low-income or at-risk students.

Compare *Zelman*, itself, for example. The Ohio voucher plan challenged there was designed to give students an alternative to struggling public schools. The plan targeted students in the Cleveland School District at a time when only 10 percent of students were performing at basic proficiency, and fewer than one-third of students were graduating from high school. *See Zelman*, 536 U.S. at 644. The Ohio plan also distributed aid to parents according to their financial need. Families with incomes below 200 percent of the poverty line were given priority access to vouchers and could receive up to 90 percent of private school tuition (up to \$2,250); private schools were prohibited from charging these parents a copayment greater than \$250. Relatively wealthier families could receive up to 75 percent of private school tuition. As a result, when *Zelman* was decided, 60 percent of the students participating in the Ohio plan were from families at or below the poverty line. *See id.* at 646.

Five other states that have enacted tuition tax credit programs (Florida, Georgia, Iowa, Pennsylvania, and Rhode Island) all similarly include provisions targeting low-income students or requiring that scholarship recipients be currently enrolled in a public school.³ Florida's Tax Credit

³ *See* Fla. Stat. Ann. § 1002.395 (West 2010); Ga. Code Ann. §§ 20-2A-1, 48-7-29.16 (West 2010); Iowa Code Ann. § 422.11S;

Scholarship, for example, awards scholarships up to \$4,106. See Florida Department of Education, Florida Tax Credit Scholarship Program FAQs, <http://www.floridaschoolchoice.org/information/ctc/faqs.asp>.

The Arizona program creates no such opportunities for low-income students to attend private schools. And, it lacks basic features to ensure genuine, independent parental choice. These characteristics distinguish it—and far from favorably—from other school choice programs. These failures in the Arizona program’s design and implementation also suggest that the program is not actually intended to promote school reform; rather, its primary purpose is to provide public resources to private, mostly religious schools and the students already attending them.⁴

72 Pa. Cons. Stat. Ann. § 8701-F *et seq.* (West 2010); R.I. Gen. Laws Ann. § 44-62-2, *amended by* 2010 R.I. Pub. Laws 10-239.

⁴ A program genuinely designed to expand high-quality educational options also presumably would impose public accountability, oversight, and at least some curricular control on any school—public or private—that received public funding. After all, where public tax dollars are involved, the public has an interest in ensuring quality education is delivered. The Arizona program contains no such measures.

II. THE ARIZONA PROGRAM VIOLATES *ZELMAN*.

When the *Zelman* Court held that the Ohio school choice plan passed constitutional muster, it made clear that in order for other such plans to satisfy the Establishment Clause they must provide “genuine and independent choice[]” to a broad class of parents and must be religiously neutral. *Zelman*, 536 U.S. at 649. The *amici* agree that these minimum criteria are necessary, both under the Establishment Clause and to ensure that choice plans are effective tools of educational improvement. The Arizona program does not satisfy the minimum criteria set forth in *Zelman*.

A state-funded scholarship program, like Arizona’s, that totally excludes public schools does not give parents a genuine choice and is skewed against public education. Moreover, a program, like Arizona’s, that permits scholarships to be restricted to certain sectarian schools is not religiously neutral and cannot be squared with the program’s ostensible goal of improving public education through competition. Worst of all, a program, like Arizona’s, that allows schools to deny students admission on the basis of their religion countenances one of the principal harms—state-sponsored religious preference—that the Establishment Clause was designed to prevent.

A. The Arizona Program Provides No Public School Option.

Although the merit of any school choice plan that funnels state funds to religious schools is debatable, without question such a plan must include public schools within the choices that it offers to parents. If the only choices offered under a “school choice” plan are private, mostly religious schools, parents inevitably will choose private, mostly religious schools. Such a stacked “choice” does not foster competition or expand educational opportunities; it provides a direct government subsidy to private schools and confers a financial benefit to a narrow class of individuals predisposed to religious education in the first place. This is exactly what has happened in Arizona. *See infra* Section III.⁵

Under this Court’s decisions, it is settled law that for a school choice plan to satisfy the Establishment

⁵ Nor do taxpayers have a truly free choice under the Arizona program. STOs can only provide scholarships to private schools. Therefore, the program’s tax credit is not available to citizens who want to provide similar supplemental resources to public schools. For example, as in many states, Arizona law allows students to transfer between public schools districts, with the families bearing the cost of tuition. The Arizona program, however, does not permit STOs to award scholarships for tuition at a public school, and thus effectively prevents citizens from providing supplemental support to families that want greater choice over which public school their child can attend.

Clause, it must give parents the option to use program benefits at public as well as private schools. This Court four times has approved state programs that direct aid to religious schools through the choices of parents or students, and each time the Court has emphasized that an essential requirement insulating the program from an Establishment Clause violation is that parents had the choice of using program aid at public and private schools.⁶ The only time that the Court has squarely addressed a choice plan preventing parents from using the benefits at public schools, the Court struck it down—largely because the exclusion of public schools skewed the incentives toward religious schools. See *Nyquist*, 413 U.S. 756.

⁶ See *Mueller*, 463 U.S. 388, 391 (inclusion of both public and private schools in a Minnesota tax deduction program was one of the “most important[]” factors “argu[ing] * * * strongly for the provision's constitutionality.”); *Witters*, 474 U.S. at 488 (upholding aid program because “aid recipients have full opportunity to expend vocational rehabilitation aid on wholly secular education,” which “creates no financial incentive for students to undertake sectarian education”); *Zobrest*, 509 U.S. at 10 (approving the use of funds under the Individuals with Disabilities Education Act (“IDEA”) in a Catholic school because it “distributes benefits neutrally * * * without regard to the ‘sectarian-non-sectarian, or public-nonpublic’ nature of the school the child attends”); *Zelman*, 536 U.S. at 649-50. Cf. *Nyquist*, 413 U.S. at 782 n.38 (emphasizing importance for Establishment Clause purposes of the benefit “includ[ing] all schoolchildren, those in public as well as those in private schools”).

Zelman emphasized the constitutional significance of including public schools in the parents' choice. The Ohio plan provided "two basic kinds of assistance": "[T]uition and aid for students * * * to attend a participating public or private school of their parent's choosing" and "tutorial aid for students who choose to remain enrolled in public school." 536 U.S. at 645. That in theory any parent—whether the parent wanted to send their child to public or private school—could take advantage of the program was a crucial factor in the majority's determination that the Ohio plan satisfied the Establishment Clause. As the Court explained, the "program challenged here is a program of true private choice" because "[t]he program permits the participation of *all* schools within the district, religious or nonreligious" and is available to "any parent of a school-age child who resides in the Cleveland City School District." *Id.* at 653.

In contrast to the plan in *Zelman*, the Arizona program prohibits parents from using program funds at public schools. Under the Arizona program, taxpayers make 100-percent tax-refundable contributions to STOs, which then provide scholarships to students at nonpublic schools. See Ariz. Rev. Stat. Ann. § 43-1089(H)(2)-(3) (West 2010). As a result, the Arizona program does not include "the participation of *all* schools" in the State and is not available to "any parent of a school-age child who resides" in Arizona. *Zelman*, 536 U.S. at 653.

By limiting its benefits to private, mostly religious schools, the Arizona program is much more similar to two New York programs that this Court struck down in *Nyquist* than to the plan approved in *Zelman*. Where New York limited tuition grants and tax benefits only to students attending non-public schools, the Court concluded that the law’s function was “to provide assistance to private schools, the great majority of which [85 percent] are sectarian.” *Nyquist*, 413 U.S. at 783. As a result, the programs violated the Establishment Clause because “the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian [schools].” *Id.* at 783.

Like the plan struck down in *Nyquist*, the “[s]pecial tax benefits” conferred on religious schools by the Arizona program “cannot be squared with the principle of neutrality established by decisions of this Court.” *Id.* at 793. In Arizona, program benefits only can be used in nonpublic schools, the vast majority of such schools are sectarian,⁷ and almost all of the program benefits flow to religious schools.⁸

⁷ Forty-six percent of Arizona public schools are Christian (non Catholic), 28 percent are Catholic, 25 percent have no religious affiliation, and 1 percent are Jewish. See Vicki Murray, Goldwater Inst. Report No. 199, Survey of Arizona Private Schools: Tuition, Testing and Curricula (2005).

⁸ Nor are the problems with the Arizona program remedied simply because Arizona maintains a public education system.

B. The Arizona Program Skews Parents' Choice of Private Schools Toward Religious Schools.

In addition to excluding public schools, the Arizona program further skews its benefits toward religious schools and undermines any potential educational benefits of the program by permitting STOs to select participating schools on the basis of religion. This defect further limits “the narrowness of the benefited class,” makes the Arizona program more likely to create “divisiveness” rather than fair competition, and excludes the majority of parents and students in Arizona who have no desire to choose a religious education. *See Nyquist*, 413 U.S. at 794.

The statutory provision authorizing the Arizona program prohibits STOs from “limiting availability [of scholarships and aid] to only students of one

Public education is compulsory and available to everyone. As a result, the existence of the public school system is not relevant to the constitutional analysis of a program that does not include public schools within its benefits. *See Nyquist*, 413 U.S. at 782 n.38 (“The grants to parents of private schoolchildren are given in addition to the right that they have to send their children to public schools ‘totally at state expense.’”). *Zelman* is not to the contrary. *Zelman* addressed the many options available to Cleveland parents in the context of a program that gave parents “genuine and independent” choice to use program benefits at a public or private school, a factor that is non-existent in Arizona. 536 U.S. at 653-56.

school,” Ariz. Rev. Stat. Ann. § 43-1089(H)(3), but it does not prohibit them from limiting scholarships to a class of schools selected on religious grounds. STOs *could* have been required to provide benefits to students at all schools, but Arizona has not applied the program in that way. In practice, Arizona awards tax credits for contributions to many STOs that limit scholarship awards to a small number of schools of a particular type, often defined by religious affiliation. See *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1006 (9th Cir. 2009).⁹

As a result, those students fortunate enough to get a scholarship under the Arizona program may have no option other than a religiously-affiliated

⁹ For example, the largest STO as of 2009, the Arizona Christian School Tuition Organization, Inc. (hereinafter the “Arizona Christian STO”), only awards scholarships to “Arizona Christian schools.” Arizona Christian School Tuition Organization, Inc., <http://www.acsto.org> (“Since it began in 1998, ACSTO has awarded scholarships to more than 18,000 students attending 150 Arizona Christian schools.”). Likewise, the Catholic Tuition Organization of the Diocese of Phoenix (the “Catholic Tuition Organization”), the second-largest STO as of 2009, only grants scholarships to “participating schools [that] are Catholic schools located in the Diocese of Phoenix, which integrate faith throughout an educational process that promotes academic excellence, moral values and lifelong service.” See Catholic Tuition Organization, Participating Schools, <http://www.catholictuition.org/schools.aspx>.

school that may use those scholarship funds to teach its own religious beliefs. Such an option—whether to accept publicly-funded religious indoctrination or forego a government benefit altogether—is not a genuine, religiously neutral choice by any stretch of the imagination.

In *Bowen v. Kendrick*, this Court made clear that a government program is unconstitutional if, in its application, public aid is directed to religious organizations that are “pervasively sectarian” or that use the public funds to “inculcate the views of a particular religious faith.” 487 U.S. 589, 621 (1988). By permitting STOs to award scholarships only to religious schools and to require that scholarship recipients attend those schools, the Arizona program fails this test.

In fact, the Arizona program restricts parental choice even further, as taxpayers that fund the STOs have the real power of choice under the law. For example, under the Arizona program, taxpayers may designate scholarship funds for a particular student and apparently may require that the student attend a particular school. See Catholic Tuition Organization, <http://www.catholictuition.org/faq.aspx#funddistribution> (“[C]ontributors can designate their money to go to the students at a particular school.”). This practice often leaves parents that want to seek a scholarship no choice at all.

At a minimum, a genuine school choice program must allow parents an unfettered opportunity to select the schools that their children will attend with the children's best interests in mind. Limiting parents' choice based on the religious views of certain taxpayers is not only contrary to the Establishment Clause, it is bad educational policy.

C. The Arizona Program Allows Schools To Deny Students Admission Because of Their Religious Beliefs.

The Arizona program also allows participating schools to discriminate against students on the basis of religion. *See* Ariz. Rev. Stat. Ann. § 43-1089(H)(2) (prohibiting only discrimination "on the basis of race, color, handicap, familial status or national origin"). This means that even a parent who wants his or her child to be educated in a religious school may not be able to use the scholarship if his or her child does not meet the religious criteria of a school's admissions policy. But a publicly funded program that permits exclusion from its benefits solely on the basis of religious criteria is plainly prohibited by the Establishment Clause.

The religious discrimination permitted by the Arizona program is in sharp contrast to the non-discrimination requirements of the plan upheld in *Zelman*. The Court found that the Ohio program provided parents a genuine and independent secular

choice in part because it broadly prohibited all discrimination, including religious discrimination, by participating schools. *Zelman*, 536 at 645 (“Participating private schools must agree not to discriminate on the basis of race, *religion*, or ethnic background, or to ‘advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or *religion*.”) (emphasis added). Whereas the Ohio program prohibited discrimination on the grounds of religious belief and provided other crucial safeguards to ensure that program funds were not used to advance religion (for example, allowing parents to choose a public school), the Arizona program, by omission, permits both.

On a more fundamental level, the Arizona program’s authorization of religious discrimination undermines the purposes and goals of publicly funded education, which is designed to be inclusive and to provide an education for all citizens regardless of background, beliefs or circumstances. By allowing religious discrimination, the Arizona program places the State’s “prestige, coercive authority, [and] resources behind * * * religious belief * * * compelling non-adherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community.” *See Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989). This Court should not endorse a program—like Arizona’s—that so

plainly violates the Establishment Clause and undermines the foundations of public education.

III. THE ARIZONA PROGRAM HAS THE EFFECT OF ADVANCING RELIGION

As a direct result of the Arizona program's limitations on parental choice, the benefits of the Arizona program primarily have inured to religiously affiliated STOs, sectarian schools, and parents whose children already attend religious schools. Thus, the "effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Nyquist*, 413 U.S. at 783.

First, the Arizona program has benefited primarily religiously affiliated STOs. In the program's first year of operation in 1998, more than 90 percent of the \$1.8 million in tax credit funds were contributed to STOs that limited scholarship awards to students attending specific religious schools. In 2003 and 2004, respectively, approximately 82 percent and 79 percent of scholarships were awarded by STOs that restricted scholarships to religious schools.

This early trend has continued. An analysis by The Arizona Republic found that, in 2008, 93 percent of the \$54 million in tax credits were directed toward religiously affiliated STOs. See Ronald J. Hansen & Pat Kossan, *Tuition-aid Program Benefits Wealthy Families, Raises Concerns*, Ariz. Republic, Aug. 1, 2009,

<http://www.azcentral.com/arizonarepublic/news/articles/2009/08/01/20090801sto-whobenefits0801.html>.

And currently, four of the largest STOs are religious organizations (Arizona Christian STO, Catholic Tuition Organization of the Diocese of Phoenix, Catholic Tuition Organization of the Diocese of Tucson, and the Jewish Tuition Organization). In 2009, these four STOs received more than half of the \$50,853,086 contributed to the program by Arizona's taxpayers.¹⁰

Second, the State's private, primarily religious schools directly benefit from the program as well. As of 2005, 75 percent of Arizona's private schools were religiously affiliated. Because the program does not prohibit STOs from discriminating on the basis of religion, *see* Ariz. Rev. Stat. Ann. § 43-1089, these private, religious schools receive the vast majority of the taxpayer funds donated to the State's largely religious STOs. As of 2009, only 15 percent of scholarship money was available for use at secular schools. *See Winn v. Ariz. Christian Tuition Org.*, 586 F.3d 649, 650 (9th Cir. 2009) (concurring op.). In

¹⁰ The Arizona Christian STO awarded \$10,807,320 in awards to religious schools, the Catholic Tuition Organization of the Diocese of Phoenix awarded \$9,377,207 in awards to religious schools, and the Catholic Tuition Support Organization for the Diocese of Tucson awarded \$4,330,366 in awards to religious schools. *See* 2009 Ariz. Dep't of Revenue Report of Donations to STOs.

fact, the availability of scholarships under the Arizona program actually has provided a windfall to the religious schools who participate, encouraging them to increase their tuition rather than open their doors to more students. *See Schools Teach Parents How to Skirt Law*, East Valley Tribune, June 15, 2010, http://www.eastvalleytribune.com/special_reports/rigged_privilege/article_db4088f9-5789-5a1d-abad-9af2a5a39cf2.html.

Finally, most of the scholarships go to a small group of individuals who already attend the private, mostly religious schools.¹¹ For example, as of 2005, more than three-fourths of the scholarship dollars awarded had gone to students who were enrolled in private school when the statute was enacted. *See Deborah Katz Levi, Tuition Tax Credit Proposals in Utah—Their Constitutionality and Feasibility*, 2005 Utah L. Rev. 1047, 1075-76 (2005).

¹¹ In 2007-2008, only 4.5 percent of Arizona students attended private schools. *See* National Center for Education Statistics, *Enrollment in Public Elementary and Secondary Schools, by State or Jurisdiction*, http://nces.ed.gov/programs/digest/d09/tables/dt09_034.asp; and National Center for Education Statistics, *Characteristics of Private Schools in the US, 2009* <http://nces.ed.gov/pubs2009/2009313.pdf>. Thus, program funds are available to only a very small percentage of Arizona's students.

At every level, the primary effects of the program are to direct funds to support religious education. Most tax-credit donations go to religiously affiliated STOs, which were created under the program to support religious education. Because STOs are allowed to practice religious discrimination in selecting which schools scholarship recipients can attend, most of the scholarships benefit religious schools, which themselves are not prohibited from discriminating on the basis of religion. And the scholarships are ending up largely in the hands of private individuals who already have chosen a private, and in most cases, religious education for their children.

Rather than providing competition and improving public education, therefore, the Arizona program advances the religious mission of participating schools. This result is inconsistent with both the Establishment Clause and any sound notion of educational reform or school improvement.

IV. THE ARIZONA PROGRAM HARMS PUBLIC EDUCATION

This Court has consistently acknowledged the critical role that public education plays within the states and in American society as a whole. In *Brown v. Board of Education*, for example, the Court emphasized the importance of education as a function of state and local governments and as a public responsibility that serves the public good. 347

U.S. at 493 (“Today, education is perhaps the most important function of state and local governments * * *. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”).¹²

Undermining this commitment, the Arizona program diverts funding from the State’s public schools. As a result, the program directly harms public education in at least three respects. It also threatens the number and quality of public school options in Arizona, the only viable choices for the overwhelming majority of the State’s students.

First, the program’s tax credits divert public funds from the State treasury (where those dollars could support public schools) to STOs, which use those dollars to support the private—in most cases, religious—schools of their choice. Since the program’s inception in 1997, the state treasury has diverted a total of \$350 million to mostly religious STOs. *See Private School Tax Credits Rife with Abuse*, East Valley Tribune, July 31, 2009, http://www.eastvalleytribune.com/special_reports/rig

¹² *See also Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (“[Public] education must prepare pupils for citizenship in the Republic.”) (internal quotation marks and citation omitted); *Plyler*, 457 U.S. at 221 (“In sum, education has a fundamental role in maintaining the fabric of our society.”).

ged_privilege/article_7debd2e5-d000-5aed-b813-a0d252377755.html. In 2009, alone, Arizona taxpayers directed \$50,853,086 would-be state tax dollars to STOs.¹³ The STOs, in turn, distributed that substantial sum in the form of scholarships to just 27,658 Arizona children attending private schools, while the 1,012,068 Arizona children enrolled in public schools—who have had their funding slashed—received none of it. *See* 2009 Ariz. Dep’t of Revenue Report of Donations to STOs.

Second, the Arizona program provides no support for academic programs at public schools. Of the \$350 million that has been diverted from the State treasury since 1997—the majority of which has gone to religiously affiliated schools—not a single dollar has been devoted to supporting Arizona’s public schools. *See id.*

Third, the Arizona program does not give families the option of using program funds within the public school system (for tutoring, transfer costs, transportation or other services, for example). Thus, the program encourages some students to leave the public school system for private schools, taking their per-pupil funding with them. As of 2008, the

¹³ In *Nyquist*, this Court acknowledged that a tax credit, as a diversion of funds from the state treasury, constitutes a “charge made upon the state.” 413 U.S. at 791 (citation omitted).

average per pupil total allocation for public schools in Arizona was \$9,305 (including funding from federal, state, and local sources), so every time a student transfers to a private school, the public schools lose that amount. See U.S. Census Bureau, 2008 Annual Survey of Local Government Finances—School Systems.

On the other hand, since few students transfer out of public schools to use scholarships from STOs under the program, the State does not save nearly enough money to offset the revenue lost through the program. For example, a report by the Iowa Department of Revenue analyzing the financial implications of Iowa's tuition tax credit program—which is similar at least to the extent that it permits taxpayers to divert funding from the state treasury to a tuition program—found that the tax credits have been a significant “drain” on that state's treasury. The number of students in Iowa transferring out of the public schools has not been nearly high enough to offset the cost of the program. See Jim Malewitz & Joyce Russell, IowaWatch, *Back to School Special: Huge Tax Break for Private Schools Strains State Treasury*, Aug. 13, 2010, <http://www.iowawatch.org/?p=1065>.

By diverting millions of dollars that could be used in public schools to private schools, the program constitutes a severe threat to the quality of public education programs. The impact of this diversion in funding is amplified in Arizona where public schools

have been underfunded for years, and the recession has recently forced further reductions in public education funding. Each year between 2005 and 2008 (the latest year for which data are available), Arizona's total per-pupil funding ranked somewhere between 44th and 48th lowest among the 50 states and the District of Columbia.¹⁴ See U.S. Census Bureau, 2008 Annual Survey, *supra*. For the 2010-11 school year, the Arizona legislature cut funding for public schools even further—by \$400 million. See Don Harris, *Sounding the Alarms: Arizona Schools Feeling Budget Pinch*, Ariz. Capitol Times, July 23, 2010.

The impact of these cuts during the 2010-11 school year is dramatic. For example, Arizona's public schools: (1) cut pre-school programs for 4,328 children; (2) lost half of the prior year's State funding for kindergarten; (3) eliminated programs for disadvantaged children in preschool through third grade; (4) reduced financial aid to charter schools; and (5) slashed funding for books, computers, and other supplies.¹⁵ See Nicholas Johnson, et al., Center

¹⁴ Each year between 2005 and 2008 (the latest year for which data is available), Arizona's per-pupil funding from state sources ranked somewhere between 40th and 44th lowest among the 50 states and the District of Columbia. *Id.*

¹⁵ Arizona is not alone. Thirty-two other states and the District of Columbia have been forced to adopt similar budget

on Budget and Policy Priorities, *An Update on State Budget Cuts*, (last updated Aug. 4, 2010), <http://www.cbpp.org/cms/?fa=view&id=1214>. School districts have also been forced to layoff teachers, increase class size, and cut back on music, physical education, and art. *See Harris, supra*.

These cuts in Arizona’s already relatively low public education budget inevitably leave most of Arizona’s parents with fewer educational options from which to choose. They also mean that the students who remain in Arizona’s public schools—either by choice or because there is no scholarship available to them—are likely receiving a lower-quality public education.

The Arizona program again is an outlier among school choice plans in the amount of money that it diverts from public education to private institutions. Many other voucher or tax benefit programs—including the Ohio voucher plan and the Minnesota tax deduction program upheld by this Court—include some financial aid to public schools in recognition of the vital role of public education in a program of true private choice.

Under the Ohio program upheld in *Zelman*, parents can choose to use program aid to enroll their

cuts within their public education systems in response to the economic recession. *See Johnson, supra*.

child in a participating private school, to transfer their child to a public school in an adjacent district, or to have their child receive tutorial services while remaining in his or her public school. *See Zelman*, 536 U.S. at 645. The Ohio program also includes a financial disincentive to choose a private school in that parents who choose to send their children to private school receive only half the assistance given to parents who choose to keep their children in a public school. *See id.* at 654. Likewise, in the Minnesota program upheld in *Mueller*, parents could deduct their children’s educational expenses whether their child attended private or public schools. *See* 463 U.S. at 395.

Pennsylvania’s Educational Improvement Tax Credit (“EITC”) program also contains provisions that support public schools. Under the EITC program, corporations may receive tax credits for donating money to scholarship organizations or “educational improvement organizations.” The scholarship organizations award scholarships to enable students to attend the private or public school of their choice, and the educational improvement organizations distribute grants to improve innovation in public school programs. *See* 72 Pa. Cons. Stat. Ann. 8701-F *et seq.* Similarly, under Florida’s Tax Credit Scholarship program, students receive scholarships to attend a private school or to enroll in a public school in another district. *See* Fla. Stat. Ann. § 1002.395.

The Arizona program's failure to provide any support to the State's public schools is further evidence that true school reform is not the program's goal. This failure and the program's continued diversion of public funds away from the State treasury also constitute a grave threat to Arizona's public schools.

CONCLUSION

For the foregoing reasons and for those in Respondents' brief, the Ninth Circuit's decision should be affirmed.

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