In The
Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL
TUITION ORGANIZATION, *et al.*,

Petitioners,

v.

KATHLEEN M. WINN, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In direct conflict with this Court's precedents, and a factually indistinguishable Arizona Supreme Court decision, the Ninth Circuit declared that an educational tax credit program that permits—but in no way encourages or promotes—donations to religious scholarship-granting organizations has the unconstitutional purpose and effect of advancing religion. The questions presented are:

1. May courts reject as a sham a legislature's stated secular purpose for enacting a tax credit simply because it allows taxpayers to choose among religious or nonreligious charities in making their donations?

2. Does a tax credit that advances the legislature's legitimate secular purpose of expanding educational options for families unconstitutionally endorse or advance religion simply because taxpayers choose to direct more contributions to religious organizations than nonreligious ones?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner-Intervenor Arizona School Choice Trust is a not-for-profit school tuition organization founded in 1993—four years before Arizona enacted the tax credit law being challenged in this case—and is the third-largest nonreligious school tuition organization in Arizona. The Arizona School Choice Trust only provides scholarships to low-income families, but allows those families to use their scholarships at any private school of their choice, whether religious or nonreligious. The Arizona School Choice Trust has no parent corporation and no publicly held company owns stock in it.

Petitioners-Intervenors Luis Moscoso and Glenn Dennard are parents whose children receive scholarships from the Arizona School Choice Trust. Both Moscoso and Dennard have chosen to send their children to religious schools.

Petitioner-Intervenor Arizona Christian School Tuition Organization, Inc. is a tax-exempt nonprofit school tuition organization that provides scholarships to parents who wish to send their children to a private Christian school. It has no parent corporation and no publicly held company owns stock in it.

Petitioner Gale Garriott is the director of the Arizona Department of Revenue.

Respondents Kathleen M. Winn, Diane Wolfthal, Maurice Wolfthal, and Lynn Hoffman are Arizona citizens and residents who pay income taxes on income earned in Arizona.

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OPINIONS BELOW

Arizona law allows individuals to claim a tax credit for donations to charitable organizations that provide scholarships for children to attend private schools, including both religious and nonreligious schools. For no other reason than the fact that a majority of taxpayers have so far chosen to direct their charitable contributions to organizations that provide scholarships to attend religious schools, a panel of the United States Court of Appeals for the Ninth Circuit, consisting of Judges Fisher, Reinhardt, and Nelson, concluded that the law has the forbidden purpose and effect of advancing religion in violation of the Establishment Clause. The panel decision is reported at 562 F.3d 1002 (2009) and is reproduced in the Appendix (App.) at 1-45.

Over the dissent of eight judges, the Ninth Circuit denied the petitions for rehearing en banc. The original panel concurred with the denial in a written opinion, and Judge Pregerson also concurred in the denial for the reasons stated by the panel in its concurrence. The dissent, authored by Judge O'Scannlain, emphasized that the panel decision conflicts with this Court's prior Establishment Clause cases and warned that it "casts a pall over comparable educational tax-credit schemes in states across the nation." App. 163. The dissenting and concurring opinions concerning rehearing are available at 2009 U.S. App. LEXIS 23077 and appear at App. 138-90.

The district court's decision dismissing this action is reported at 361 F. Supp. 2d 1117 (D. Ariz. 2005) and is reprinted at App. 46-63. This Court's prior decision in this case, *Hibbs v. Winn*, 542 U.S. 88 (2004), and the panel's prior opinion in *Winn v. Killian*, 307 F.3d 1011 (9th Cir. 2002), are included at App. 67-118 and 119-37, respectively.

JURISDICTION

The Court of Appeals denied the petitions for rehearing en banc on October 21, 2009. On January 15, 2010, Justice Kennedy granted the Petitioners' joint application to extend the time for filing their petitions until February 18, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Establishment Clause of the First Amendment to the United States Constitution. U.S. Const. amend. I. The challenged Arizona statute allows a tax credit for individuals who voluntarily contribute to nonprofit organizations that provide scholarships to students attending private schools and is codified at Ariz. Rev. Stat. Ann. (A.R.S.)

§ 43-1089 (2009). The Appendix contains copies of these provisions. App. 191-94.

STATEMENT OF THE CASE

A. Factual Background

As part of a continuing effort to expand educational opportunities for children, the Arizona Legislature in 1997 approved two tax credits for private donations intended to expand educational options for students. One credit is available to individuals who donate to public schools to fund extracurricular activities. A.R.S. § 43-1089.01 (2010). The other credit, which is the one challenged by Respondents in this case, allows individuals who donate to school tuition organizations—private charities that give families scholarships for children to attend private schools chosen by their parents—to claim a dollar-for-dollar credit up to $500 or $1,000 for married couples not to exceed their total tax liability. A.R.S. § 43-1089. App. 191.

The scholarship tax credit was immediately challenged in state court in 1997. The Arizona Supreme Court exercised original jurisdiction and held the tax credit constitutional under the Establishment Clause of the First Amendment to the U.S. Constitution and the Arizona constitution's religion clauses. *Kotterman v. Killian*, 972 P.2d 606, 616 (Ariz. 1999) ("[W]e conclude that the tuition tax credit does not prefer one religion over another, or religion over nonreligion. It

aids a 'broad spectrum of citizens,' allows a wide range of private choices, and does not have the primary effect of either advancing or inhibiting religion.") (citation omitted).[1] This Court denied certiorari. 528 U.S. 921 (1999).

1. Arizona Provides Many Educational Options To Parents

The scholarship tax credit is one part of a broader effort to provide educational options for Arizona's schoolchildren. Before adopting the tax credit, Arizona established a robust charter school law "to provide additional academic choices for parents and pupils." A.R.S. § 15-181 (2009). Nearly 500 charter schools now operate in Arizona and educate more students per capita than any other state in the nation. Howard Fischer, *US giving Arizona funds to create 92 new charter schools*, Ariz. Daily Star, July 31, 2009. Arizona also allows parents to enroll their children in any public school, even schools outside their usual district boundaries, subject only to classroom availability. A.R.S. § 15-816.01(A) (2009).

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[1] On October 28, 2009, after both the panel decision and the Ninth Circuit's denial of rehearing en banc in this case, the Arizona Supreme Court declined to review the Arizona Court of Appeals' opinion in *Green v. Garriott*, 212 P.3d 96 (Ariz. App. 2009), which rejected a nearly identical Establishment Clause challenge to Arizona's separate tax credit for corporate contributions to school tuition organizations. App. 206-07. The Arizona Supreme Court thereby declined to revisit its holding in *Kotterman*.

Arizona also gives wide latitude to families that home school. A.R.S. § 15-802 (2009).

Arizona continues to expand parental choice through both private and public options. Arizona now operates an online public school known as the Arizona Virtual Academy. *See* Arizona Virtual Academy, http://www.k12.com/azva (last visited Jan. 15, 2010). Many school districts now operate "traditional" academies—using a back-to-basics curriculum and requiring students to wear uniforms—alongside their neighborhood public schools. *See, e.g.,* Chandler Traditional Academy, http://www.mychandlerschools.org/freedom (last visited Jan. 15, 2010). In 2006, Arizona adopted a tax credit for corporate contributions to school tuition organizations that fund scholarships for low- and middle-income families who transfer from public to private school. A.R.S. § 43-1183 (2009). And just last year, Arizona created a new tax credit for corporate contributions to school tuition organizations that fund scholarships for children with disabilities and children in foster care. A.R.S. § 43-1184 (2009).

2. Arizona's Scholarship Tax Credit Operates Based On Private Choice

Arizona's scholarship tax credit allows individual taxpayers to claim a dollar-for-dollar credit against their taxes due for charitable donations to school tuition organizations. School tuition organizations must obtain federal recognition as a nonprofit

organization pursuant to § 501(c)(3) of the Internal Revenue Code. A.R.S. § 43-1089(G)(3). App. 194. They must pay out at least 90% of their revenue in the form of scholarships to students attending private schools. *Id.* App. 194. They may not restrict all of their scholarships to students attending the same school. *Id.* App. 194. Donors may not request that their contribution be used to benefit a dependent. A.R.S. § 43-1089(E). App. 192. School tuition organizations also may not award scholarships to students who attend schools that discriminate on the basis of race, color, handicap, familial status, or national origin. A.R.S. § 43-1089(G)(2). App. 193-94. They may award scholarships to students attending same-gender schools. There are no other limits placed on school tuition organizations. Therefore, as this Court recognized in its prior opinion in this case, school tuition organizations "are not precluded by Arizona's statute from designating schools that provide religious instruction or that give admissions preference on the basis of religion or religious affiliation." App. 71.

Fifty-five school tuition organizations have been established, all except the Arizona School Choice Trust after passage of the tax credit law. *See* Ariz. Dep't of Revenue, *Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2008* (2009) (reproduced at App. 208-36). These different organizations serve a wide variety of needs, teaching methods, and geographic areas. The various school tuition organizations work to meet the needs of markedly different student

populations. For example, five organizations currently offer scholarships to families seeking a non-religious Montessori-style education. App. 223-24. Other organizations serve students in particular geographic areas, such as children attending private schools on Native American reservations or in particular cities outside the state's major metropolitan areas. App. 223-24. Many organizations affiliate themselves with particular religious entities, App. 223-24, which is not surprising considering that a large percentage of Arizona's private schools are religious. *See, e.g., Kotterman*, 972 P.2d at 626 ("At least seventy-two percent of [Arizona private] schools are sectarian") (Feldman, J., dissenting) (citing Michael Coffey, *A Survey of Arizona Private Schools* (Goldwater Institute, Issue Analysis #129, 1993)). The practical impact of these diverse organizations is more money for scholarships and more choices for parents.

According to the most recent data reported to the Arizona Department of Revenue (the "Department"):

- Arizona's 55 school tuition organizations awarded 28,321 scholarships in 2008. App. 224.
- At least 30 of the 55 school tuition organizations have no obvious religious affiliation. App. 223-24.
- The third largest school tuition organization, the Arizona Scholarship Fund, has no religious affiliation. App. 221.

- Four of the top ten school tuition organizations in terms of both donations and scholarships have no religious affiliation. App. 221-24.
- The average scholarship amount in 2008 was $1,909. App. 224.
- Students used the scholarships to attend 373 different private schools—including nearly 100 private schools that have no obvious religious affiliation. App. 209, 227-34.

B. Proceedings Below

This challenge to Arizona's tax credit was filed in federal court on February 15, 2000, shortly after this Court denied the petition for certiorari in *Kotterman*. The Respondents' complaint asserts that the tax credit violates the Establishment Clause both facially and as-applied because it authorizes school tuition organizations to award scholarships to families "to pay tuition for students at religious schools." App. 203.

The district court initially dismissed the complaint pursuant to the Tax Injunction Act, 28 U.S.C. § 1341. The Ninth Circuit reversed and this Court affirmed that decision. App. 67-137. Upon remand, two school tuition organizations and two parents whose children rely on tax-credit-funded scholarships intervened and moved to dismiss the complaint. On March 24, 2005, the district court granted the

Arizona School Choice Trust, *et al.*'s motion to dismiss, holding that no valid claim could be stated against the tax credit because it is a facially neutral program based on true private choice. App. 61-62. The Respondents appealed.

At oral argument before the Ninth Circuit on January 24, 2008, the Respondents substantially altered their claims and theories of the case by abandoning their facial claims. App. 7, n.5. They did so without any prior notice to the panel or to counsel for Petitioner Garriott or the Petitioners-Intervenors. Respondents now concede that the statute is facially neutral with regard to religion and that there is no constitutional violation when parents choose to use scholarships to attend religious schools. App. 8, n.6, 33-34.

On April 21, 2009, the Ninth Circuit reversed the district court's dismissal and reinstated the Respondents' as-applied legal challenge, which is based on the fact that most Arizona taxpayers choose to donate to religiously affiliated school tuition organizations. Petitioner Garriott and Petitioners-Intervenors filed timely petitions for rehearing en banc on May 14, 2009. The Ninth Circuit issued its order denying rehearing on October 21, 2009. App. 138. Eight judges dissented from the denial of the petition for rehearing en banc because they believed that the panel decided an important federal question in a way that conflicts with relevant decisions of this Court and "jeopardiz[es]

the educational opportunities of hundreds of thousands of children nationwide." App. 163.

C. Petitioner Arizona School Choice Trust Is Being Directly Challenged In This Case

The Respondents asserted at oral argument and the panel opinion agreed that Petitioner-Intervenor Arizona School Choice Trust "is not being directly challenged" in this case. App. 8, n.6. That is incorrect. The panel's decision specifically revived the Respondents' claim under the first prong of the *Lemon* test, which asks whether the tax credit was enacted for a valid secular purpose. If the district court answers no to that question on remand, it will have to enjoin the entire tax credit law as unconstitutional, *see Wallace v. Jaffree*, 472 U.S. 38, 56 (1985), thus preventing taxpayers from claiming credits for contributions to the Arizona School Choice Trust. As a result, the Arizona School Choice Trust has a significant and protectable interest in the outcome of this case.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S DECISION WARRANTS SUMMARY REVERSAL BECAUSE IT ERRONEOUSLY HELD THAT A RELIGIOUSLY NEUTRAL TAX CREDIT BASED ON TRUE PRIVATE CHOICE VIOLATES THE ESTABLISHMENT CLAUSE MERELY BECAUSE THE LEGISLATURE ALLOWS DONATIONS TO BOTH RELIGIOUS AND NONRELIGIOUS SCHOLARSHIP-GRANTING ORGANIZATIONS AND MOST TAXPAYERS CHOOSE TO DONATE TO RELIGIOUS CHARITIES

The Ninth Circuit's April 2009 decision warrants summary reversal because it clearly and directly conflicts with this Court's numerous Establishment Clause precedents upholding religiously neutral laws based on true private choice. *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Agostini v. Felton*, 521 U.S. 203 (1997). The panel decision also conflicts with the Arizona Supreme Court's decision upholding the challenged law in *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), and, as Judge O'Scannlain's dissent explains, "it jeopardizes the educational opportunities of thousands of children who enjoy the benefits of . . . [Arizona's tax credit] and related programs across the

nation." App. 190. Two aspects of the panel's decision must be reversed because they openly conflict with this Court's Establishment Clause precedents.

First, the panel mistakenly concluded that the legislature's decision to allow taxpayers to donate to either religious or nonreligious school tuition organizations may render a statute's stated secular purpose "a sham" if the majority of taxpayers choose to donate to religiously affiliated entities. App. 18-20, 157-61. The panel reasoned that the legislature may have had a hidden desire to advance religion when it provided taxpayers the ability to choose among religious and nonreligious scholarship organizations because it might have "known" that taxpayers would donate more money to religious than to nonreligious organizations. App. 158. But that reasoning is squarely at odds with this Court's long-standing approval of tax benefits that flow to both religious and nonreligious entities, such as deductions for contributions made directly to religious charities and tax exemptions for religious organizations, *see, e.g., Walz v. Tax Comm'n*, 397 U.S. 664 (1970), as well as the principle that only "government action itself" can reveal an otherwise valid purpose to be a sham. *McCreary County v. ACLU*, 545 U.S. 844, 862 (2005). The panel's conclusion also directly conflicts with the Arizona Supreme Court's careful analysis and conclusion that the challenged law was passed for a valid secular purpose. *Kotterman*, 972 P.2d at 611-12.

Second, the panel held that a religiously neutral tax credit based on private choice violates the

Establishment Clause if too many taxpayers contribute to religious charities. App. 21-22. The panel's reliance on annual statistics about where private individuals choose to direct their charitable donations conflicts with this Court's repeated instruction not to ground the constitutionality of a facially neutral law on "annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Mueller*, 463 U.S. at 401; *see Zelman*, 536 U.S. at 658 ("The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school."). The panel's holding is in direct conflict with this Court's Establishment Clause precedents—which "have never found a program of true private choice to offend the Establishment Clause." *Zelman*, 536 U.S. at 653. The panel's holding also contradicts the Arizona Supreme Court's holding that no reasonable observer could conclude the tax credit law constitutes the governmental endorsement of religion. *Kotterman*, 972 P.2d at 614.

A. Allowing Taxpayers To Choose Between Religious Or Nonreligious Charities Does Not Render A Tax Credit That The Legislature Enacted To Promote A Valid Secular Purpose A "Sham," Even If Most Donations Go To Religious Charities

The touchstone of Establishment Clause jurisprudence is religious neutrality. *E.g., Walz*, 397 U.S. at 669. Under no circumstance may the government enact a law intended either to inhibit or advance religion, or to endorse one religion over another. *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947); *Larsen v. Valente*, 456 U.S. 228, 244 (1982). Thus, the threshold Establishment Clause question is whether the state acted with a valid, neutral, and nonreligious purpose when it passed a challenged law. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). As Judge O'Scannlain wrote in his dissent, "a program of scrupulous 'governmental neutrality between religion and religion, and between religion and nonreligion' cannot violate the Establishment Clause." App. 162 (citation omitted).

A claim that the government passed a law for an improper purpose is a question only for a facial challenge. *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988). A statute's secular purpose cannot be challenged as-applied. *Id.* The Respondents abandoned their facial claims at oral argument, meaning they abandoned their challenge to the tax credit law's secular purpose. App. 7, n.5. The panel thus erred by reviving Respondents' challenge to the tax credit's

secular purpose. By reinstating a facial claim to the tax credit law, the panel invited the district court to strike down the tax credit law in its entirety.

In light of the serious consequences attached to finding that a law was motivated to endorse or advance religion, this Court has always been reluctant "to attribute unconstitutional motives to the states." *Mueller*, 463 U.S. at 394. This is especially true when, as in this case, there is nothing in the text, legislative history, or other state action suggesting the government was motivated by a desire to advance (or inhibit) religion. *Id.* Yet the panel held that the legislature's stated purpose could be merely a charade to mask improper governmental motives because it set up a system under which taxpayers might favor religion when exercising their voluntary choice to contribute to either religiously affiliated or nonreligious school tuition organizations. App. 18-20, 157-61. But "[t]he legislature could hardly have had the 'purpose' of endorsing religion when it set up a plan that, for all it knew, could have resulted in absolutely no funding for religious entities." App. 188-89 (O'Scannlain, J., dissenting).

As demonstrated below, there is nothing in the text of the tax credit law, nothing in the legislative history, and nothing in the government's implementation of the law—or any other official act—that could lead an objective observer to conclude that the legislature acted with an improper religious motivation.

1. The Tax Credit's Text Is Facially Neutral With Regard To Religion

Every court to consider the tax credit law—including the Ninth Circuit—has agreed that the statute is facially neutral. *Kotterman*, 972 P.2d at 611; App. 34 (panel decision), 54 (district court). As the district court said, the law does not mention religion or "provide taxpayers or students financial incentives which are skewed toward religious schools." App. 57. Because the tax credit amount does not vary depending on the type of school tuition organization, there is no financial incentive to donate to a religiously affiliated school tuition organization over a nonreligious organization.

Of course, on its own, "[f]acial neutrality is not determinative." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). If there is any "[o]fficial action that targets religious conduct for distinctive treatment," such action "cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.* In this case, however, there is no official action, no allegation by Respondents, nor any finding by the Ninth Circuit that suggests the government had any hidden motive to favor or disfavor religion by enacting the tax credit law. "Here, the alleged impropriety arises from taxpayer, not government action." App. 188 (O'Scannlain, J., dissenting).

2. There Is No Legislative History Suggesting An Improper Purpose

The Arizona Supreme Court thoroughly examined the context and legislative history surrounding the adoption of the tax credit law and readily discerned a wide variety of valid secular purposes for the law. *Kotterman*, 972 P.2d at 611. Neither the Respondents nor the panel assert the existence of any legislative history that suggests an improper purpose motivated Arizona to enact the tax credit law. On the contrary, the panel and Respondents agree that the legislative history reveals the law's primary sponsor acted with a purpose that was "both secular and valid." App. 18.

Yet the panel questioned whether this stated purpose is "genuine" because the legislature enacted a system under which Arizona taxpayers are free to donate their money to religiously affiliated school tuition organizations. App. 18-20, 157-61. The panel then held that the decisions by taxpayers to donate more money to religious school tuition organizations are "probative" of whether the legislature actually knew this is how taxpayers would behave. App. 160. But the panel itself demonstrated why this is an untenable position by concluding that money is directed to school tuition organizations "only as a result of the genuine and independent choice of . . . Arizona taxpayer[s]." App. 34. Because the law gives taxpayers a genuine choice regarding their donation, it was not possible for the legislature to know who, if anybody, would donate to school tuition organizations

or to which school tuition organizations they would donate. Indeed, when the legislature passed the tax credit law there was only one scholarship-granting organization in Arizona, the *nonreligious* Arizona School Choice Trust.

3. Private Charitable Contributions Are Not Official Acts Attributable To The Government Under The Establishment Clause

It is axiomatic that only governmental action can violate the Establishment Clause. Here, the state's involvement ends with its authorization of the tax credit for donations to school tuition organizations. App. 165 (O'Scannlain, J., dissenting). Anyone can create a school tuition organization. App. 165 (O'Scannlain, J., dissenting). Anyone can donate to any school tuition organization "and receive identical tax benefits." App. 165 (O'Scannlain, J., dissenting). "Anyone can apply for any scholarship offered by any S[chool] T[uition] O[rganization]." App. 165 (O'Scannlain, J., dissenting).

The panel nevertheless tried to find *some* form of government action that might "belie" the legislature's stated, and otherwise valid, secular purpose for the tax credit law. It did so by pointing to the fact that "the Arizona Department of Revenue *allows* tax credits for contributions to S[chool] T[uition] O[rganization]s that provide scholarships only to religious schools." App. 160 (emphasis added). The implication is that

the Department's *implementation* of the tax credit law (1) is contrary to the statute that created the tax credit (which the panel concedes is facially neutral) and (2) reveals an actual legislative purpose to advance religion.

The panel's suggestion—that in interpreting the statute to allow credits for contributions to religiously affiliated school tuition organizations, the Department revealed the legislature's stated purpose for the credit to be a "sham"—is meritless.

The text of the law itself explicitly allows school tuition organizations to limit scholarships to either religious or nonreligious schools. A.R.S. § 43-1089(G)(3). App. 194. Indeed, the Respondents' complaint recognizes as much, noting that school tuition organizations "may . . . restrict their grants to students attending religious schools." App. 198; *see also* App. 188 (O'Scannlain, J., dissenting) ("But that result is apparent from the statute itself, which is satisfied so long as S[chool] T[uition] O[rganization]s provide scholarships to two or more schools, a fact plaintiffs themselves recognize in their complaint.") (citation omitted). Moreover, every court to consider the tax credit law, including the Ninth Circuit in its prior opinion in this case, has understood the law to permit the establishment and operation of religiously affiliated school tuition organizations. App. 71 (this Court in *Hibbs v. Winn*), 121 (the Ninth Circuit in *Winn v. Killian*), 50 (district court); *Kotterman*, 972 P.2d at 614 (recognizing that school tuition organizations "may not limit grants to students of only one"

private school). Thus, the panel's suggestion that the Department has implemented the tax credit law in a way that belies the legislature's stated, secular purpose fails. The plain language of the statute permits school tuition organizations to limit the availability of scholarships to students attending religious schools.

The panel also ignored the fact that many school tuition organizations—such as the Montessori and Waldorf school tuition organizations—exist only to serve nonreligious private schools. App. 223-24. If the Department did as the panel suggested and refused to permit individuals to claim a tax credit for donations to religious organizations while allowing a credit for donations to nonreligious organizations, the scholarship tax credit would cease to operate in a manner neutral to religion and would actually operate in a discriminatory fashion against religion. The Department would also have to ignore the plain text of the tax credit law, which grants school tuition organizations wide latitude in awarding scholarships —just as federal and state tax laws allow private and religious charities wide latitude in their operations.

4. An Objective Observer Examining The Text, Legislative History, Implementation, And Private Conduct Associated With The Tax Credit Would Conclude That The Government Enacted The Law For A Valid Secular Purpose

When it is alleged that the government's stated purpose is not genuine, but instead a pretense to advance or inhibit religion, a court asks whether an objective observer who takes "account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act" would conclude that the stated purpose is merely a charade designed to mask improper government motives. *McCreary,* 545 U.S. at 862. Here, there is nothing in the legislative history or the Department's implementation of the tax credit law that could lead an objective observer to believe that the legislature intended to advance or endorse religion when it enacted the law.

An objective observer would see (1) that school tuition organizations are privately founded and operate without any governmental influence or control; (2) that private citizens decide how much to contribute to school tuition organizations and have a genuine choice as to which organizations they contribute; and (3) that any parent is free to apply to any school tuition organization to attend any school supported by that organization. "No *reasonable* observer would think this lengthy chain of choice suggests the

government has endorsed religion." App. 190 (O'Scannlain, J., dissenting).

Under limited circumstances, private conduct might be probative of a law's purpose, but neither the Respondents nor the panel identified any relevant private conduct in this case. This Court's decision in *Lukumi* illustrates the proper use of private conduct to determine the government's purpose for enacting an otherwise neutral law. In *Lukumi*, this Court took notice of the fact that many residents expressed their concern to the City Council about the religious practices of the Santeria church during an "emergency public session." *Lukumi*, 508 U.S. at 526. The Council reacted to the public's animosity toward the Santeria religion by enacting several resolutions and ordinances aimed at preventing that church from engaging in its practice of ritual animal sacrifice. *Id.*; *cf. Staley v. Harris County, Tex.*, 461 F.3d 504 (5th Cir. 2006), *vacated*, 470 F.3d 1086 (5th Cir. 2006), *declared moot*, 485 F.3d 305 (5th Cir. 2007) (examining the public's reaction to the state's erection of a statue containing symbol of Christian religion as part of religious-purpose inquiry).[2] As *Lukumi* makes

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[2] The panel's citation to *Bonham v. District of Columbia Library Administration*, 989 F.2d 1242 (D.C. Cir. 1993), App. 159, n.9, is inapposite because *Bonham* does not involve any examination of private action. *Bonham* reversed the dismissal of a complaint alleging that the District of Columbia closed one of its libraries on Easter for an improper religious purpose. The district court had dismissed the case even though the government had not asserted any purposes underlying the statute in

(Continued on following page)

clear, private religious discrimination (or even private action favoring religion) that actually prompts some specific governmental action can be used to show that an otherwise facially neutral law might have been motivated by an improper purpose. However, private decisions that had no influence on the law's enactment and that are not coerced in any way by the government can shed no light on the legislature's motivations for enacting the law.

Under this Court's controlling precedents, the legislature's enactment of a tax credit law that *provides taxpayers a genuine choice to donate to both* nonreligious and religious school tuition organizations—even if the majority of taxpayers choose to donate to religious charities—cannot lead an objective observer to conclude the government acted with an improper purpose when it enacted the law.

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moving to dismiss solely on procedural grounds. In reversing, the D.C. Circuit merely required the district court to examine the government's purpose for enacting the law. 989 F.2d at 1245.

B. The Panel Opinion Directly Conflicts With This Court's Determination That Religiously Neutral Laws Based On True Private Choice Do Not Violate The Establishment Clause And With The Arizona Supreme Court's Ruling That No Reasonable Observer Could Conclude The Tax Credit Endorses Religion

Once a court is satisfied the legislature acted with a valid secular purpose, the next question is whether a reasonable observer would conclude that the law has the forbidden effect of advancing or endorsing religion. *Agostini*, 521 U.S. at 223. The Arizona Supreme Court answered that very question of this tax credit by saying, "[u]nder the circumstances, we believe that 'no reasonable observer is likely to draw from [these facts] an inference that the State itself is endorsing a religious practice or belief.'" *Kotterman*, 972 P.2d at 614 (second alteration in original) (quoting *Witters*, 474 U.S. at 493 (O'Connor, J., concurring)).

This Court has confronted four Establishment Clause challenges to neutral government programs based on private choice, like the tax credit at issue here, and four times this Court has rejected such challenges. *Mueller*, 463 U.S. 388; *Witters*, 474 U.S. 481; *Zobrest*, 509 U.S. 1; *Zelman*, 536 U.S. 639. Every court in the country to consider a similar constitutional challenge—with the exception of the Ninth Circuit in this case—has rejected such challenges.

Two significant factors govern this inquiry. First, "[f]or a law to have the forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 337 (1987). But as Judge O'Scannlain aptly observed, this case is notable "for what it does not involve: state action advancing religion." App. 162. Second, the court must consider whether the challenged law coerces individuals to choose religion over nonreligion, or one religion over another. "Far from 'coercing' parents into sending their children to religious schools, Arizona provides a wide variety of secular alternatives." App. 180 (O'Scannlain, J., dissenting).

The panel's contrary conclusion is a clear departure from this Court's precedents and conflicts with the Arizona Supreme Court's decision in *Kotterman*. The panel's holding is erroneous for three reasons: (1) every decision under the tax credit program is private; (2) the panel's holding is premised on irrelevant annual statistics about where taxpayers donate their money; and (3) no parent is coerced into sending their child to a religious school.

1. The Tax Credit Is Based On True Private Choice

When a law is based on "true private choice, with no evidence that the State deliberately skew[s]

incentives toward religious schools, [that is] sufficient for the program to survive scrutiny under the Establishment Clause." *Zelman*, 536 U.S. at 650. As this Court stated in *Mueller*, 463 U.S. at 400, the "historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case."

Private choice imbues every aspect of Arizona's tax credit law. As Judge O'Scannlain observed:

> Multiple layers of private, individual choice separate the state from any religious entanglement: the "*government itself*" is at least four times removed from any aid to religious organizations. First, an individual or group of individuals must choose to create a[ ] S[chool] T[uition] O[rganization]. Second, that S[chool] T[uition] O[rganization] must then decide to provide scholarships to religious schools. Third, taxpayers have to contribute to the S[chool] T[uition] O[rganization] in question. Finally, parents need to apply for a scholarship for their student.

App. 169.

Considering that the government itself does not disburse the tax credit's benefits, there is no way for the government to grant any special favors that might lead to a religious establishment. *See Mitchell*

v. Helms, 530 U.S. 793, 810 (2000). For example, once a school tuition organization is established, it is up to its board and staff to solicit charitable contributions from taxpayers, and the law provides no financial incentive for taxpayers to donate to religiously affiliated scholarship organizations over nonreligious organizations. Parents also have no financial incentive to choose a religious education. In fact, there are financial *disincentives* for parents to choose a private education—whether religious or nonreligious—because, as the district court noted, the average scholarship amounts are low enough to mean that *every* private school is going to require some form of copayment from the parents. App. 57; *see also Zelman*, 536 U.S. at 654 (noting that "[t]he program here in fact creates financial *dis*incentives for religious schools"). Public schools, including public charter and magnet schools, on the other hand, are free of charge to the parents.

"In every respect and at every level, these are purely private choices, not government policy." App. 169 (O'Scannlain, J., dissenting).

2. Annual Statistics Concerning How Taxpayers Choose To Donate Are Irrelevant To The Constitutional Inquiry

The panel's decision relied heavily on annual statistics about where beneficiaries choose to direct their benefits to support its conclusion. App. 31.

These statistics are irrelevant to the constitutional inquiry. *Mueller*, 463 U.S. at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.").

The wisdom of this Court's refusal to consider the ever-changing dynamics of laws based on true private choice is borne out by looking at how much has changed about the tax credit since this lawsuit was filed in 2000. The number of school tuition organizations has more than tripled since this lawsuit was filed. *Compare* App. 199 with 211. Thirty of the 55 school tuition organizations have no obvious religious affiliation. App. 166, n.6 (O'Scannlain, J., dissenting). The third largest school tuition organization in 2008, the Arizona Scholarship Fund, has no religious affiliation. App. 221. Indeed, four of the top ten school tuition organizations have no religious affiliation. App. 221-22. And students used the over 28,000 scholarships issued by these organizations to attend 373 different private schools—including nearly 100 private schools that have no obvious religious affiliation. App. 227-34.

This Court has stated that attributing constitutional significance to constantly fluctuating statistics about where private individuals choose to use their benefits would lead to the "absurd result that a neutral school-choice program might be permissible" in some states where a lower percentage of individuals choose religion, but not in states where high

percentages of individuals choose religion. *Zelman*, 536 U.S. at 657. In this case, over time, the program has become "less" religious rather than "more" religious—not because of any state action, but because of private choice. And while the pendulum may swing again in the future back toward religion, any reasonable observer who is familiar with the way the law works would attribute that swing not to the government, but to individual taxpayers.

Hinging the constitutionality of a neutral tax credit law on the fact that individuals donate a lot of money to religious organizations also jeopardizes numerous other tax credit laws—and such reasoning could easily spill over into challenges to tax deductions and exemptions. *See Kotterman*, 972 P.2d at 618 (finding no "principled" distinction between tax credits and "other established tax policy equivalents like deductions and exemptions"). Considering that Americans donate significant sums each year to religious charities, the panel's holding, if logically and consistently applied, places the constitutionality of other tax benefits in grave jeopardy.

The panel constructs an artificial distinction between the financial benefits flowing from a tax credit versus a typical tax deduction to justify its departure from this Court's precedents. App. 11, 25. As the Arizona Supreme Court noted, this "would appear to be a matter of form rather than substance." *Kotterman*, 972 P.2d at 618. The panel's approach is not a principled standard by which to evaluate different types of tax benefits. For example, the tax

exemption approved in *Walz* is arguably far more valuable to religious organizations than an indirect, third-party tax credit. A credit merely reduces the amount of taxes owed while an exemption allows an organization to completely escape the government's taxing authority.

Additionally, the panel placed a heavy emphasis on the fact that Arizona's tax credit is a dollar-for-dollar credit. App. 14. But not all tax credits are dollar-for-dollar. At what point does a tax credit violate the constitution? Is it only at 100%? Would a credit that allowed 80% of the contribution to be claimed pass muster? The panel provides no guidance on this crucial question. Fortunately, there is no need to answer the question because this inquiry is totally irrelevant to the constitutionality of facially neutral laws based on private choice.

3. The Tax Credit Does Not Coerce Parents Into Sending Their Children To Religious Schools

At the heart of the Establishment Clause's "effects" inquiry is whether Arizona's tax credit coerces parents into sending their children to religious schools. *Zelman*, 536 U.S. at 655-56. The answer to that question is clearly "no" because that question "must be answered by evaluating *all* options [the state] provides [its] schoolchildren, only one of which is to obtain a program scholarship and . . . choose a religious school." *See id.* at 656; *see also id.* at 663

(O'Connor, J., concurring) (emphasizing that the court's inquiry "should consider all reasonable educational alternatives to religious schools that are available to parents").

"The panel did not even engage in this inquiry." App. 178 (O'Scannlain, J. dissenting). The panel "reject[ed] the suggestion that the mere existence of the public school system guarantees that any scholarship program provides for genuine private choice." App. 32. The inquiry, however, is not whether a public school system exists. Rather, the court must evaluate and consider the range of nonreligious educational options provided to parents by the state.

Arizona leads the nation in offering families educational choice. Jay P. Greene, *The Education Freedom Index*, 2000, at 2 (Manhattan Inst. for Policy Research, Civic Report No. 14, 2000) (ranking Arizona first in educational freedom). Parents who want their children to receive a nonreligious education have ample options from which to choose, including nearly a hundred nonreligious private schools that receive scholarships from school tuition organizations. As the Arizona Supreme Court explained:

> The Arizona Legislature has, in recent years, expanded the options available in public education. *See, e.g.*, A.R.S. § 15-181 (1994) (establishing charter schools in order to "provide additional academic choices for parents and pupils"); A.R.S. § 15-816.01(A) (1995) (requiring all public school districts to "implement an open enrollment program

> without charging tuition"). It now seeks to bring private institutions into the mix of educational alternatives open to the people of this state.

Kotterman, 972 P.2d at 611. Since *Kotterman*, Arizona has become the national charter school leader, with more charter schools per capita than any other state. Fischer, *supra*. Arizona has also since established a "virtual academy" that offers a public school education online. *See* Arizona Virtual Academy, http://www.k12.com/azva (last visited Jan. 15, 2010). And local school districts have established "traditional academies" in addition to the common district schools. *See, e.g.,* Chandler Traditional Academy, http://www.mychandlerschools.org/freedom (last visited Jan. 15, 2010).

The panel reasoned that taxpayers, because they have a genuine choice as to where they donate their money, actually limit—rather than expand—parental choice by directing large sums of money to religiously affiliated school tuition organizations. App. 29-33. But "[t]he question is not whether a parent's choice is somehow limited or constrained, the question is whether the *government* has somehow limited or constrained the choice." App. 172 (O'Scannlain, J., dissenting). The fact is that private decisions will often limit parental choice under similar educational aid programs.

For example, in *Zelman* many nonreligious private schools chose not to participate in the voucher

program, as did neighboring public schools. 536 U.S. at 656-57. This resulted in the voucher participants not having the choice to attend many nonreligious private or public schools. *Id.* The *Zelman* majority refused to "attribute constitutional significance" to such decisions because doing so would lead to the absurd result that a facially neutral school choice program might be constitutional in some places or at certain times, but not others. *Id.* at 657. Thus, even if all taxpayers chose to donate to religious schools—instead of increasingly giving to nonreligious school tuition organizations as is the current trend in Arizona—the tax credit law would still be constitutional and the law would still result in more options for Arizona parents, not fewer options. The only way to limit parental choice would be to disrupt the neutral operation of the law. "The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time most private schools are run by religious organizations," or in this case, why most taxpayers choose to donate to religious school tuition organizations. *Zelman*, 536 U.S. at 657.

In light of all of the nonreligious options, both public and private, no family in Arizona is coerced into choosing a religious education. The panel's conclusion that the state's tax credit for donations to both nonreligious and religious school tuition organizations is coercing parents into sending their children to religious private schools is profoundly mistaken.

4. No Reasonably Informed Observer Could Conclude That By Enacting The Scholarship Tax Credit The Government Is Advancing Or Endorsing Religion

This Court has "repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement." *Zelman*, 536 U.S. at 654-55. A reasonable observer examining Arizona's law would discover: (1) the state provides no direct aid to religious organizations; (2) the state has not provided any incentives for taxpayers to donate to religious over nonreligious school tuition organizations; and (3) no parent is coerced into sending their child to a religious school because the state provides myriad nonreligious educational options to Arizona families. The only conclusion for any reasonable observer is that the tax credit does not violate the Establishment Clause.

II. THE PANEL'S DECISION CASTS A CONSTITUTIONAL CLOUD OVER TAX CREDIT LAWS NATIONWIDE AND JEOPARDIZES THE EDUCATIONAL FUTURE OF THOUSANDS OF CHILDREN RELYING ON TAX-CREDIT-FUNDED SCHOLARSHIPS

The panel's decision casts doubt on the validity of similar educational tax credits being considered

throughout the country and credits already adopted in other states. And because there is no limiting principle in the panel's decision, nothing prevents its holding from being extended to other kinds of tax credits, meaning the decision could raise serious concerns for other types of charitable tax credits that allow donations to religious charities—such as charities that provide child and other dependent care and charities that offer assistance to the working poor.

A. The Decision Casts A Cloud Of Uncertainty Over Proposed And Existing Educational Tax Credits

The panel's holding "could derail legislative efforts" in other states seeking "to create similar programs," App. 163 (O'Scannlain, J., dissenting), and it raises constitutional concerns about existing educational tax credits. At least four states in the Ninth Circuit are considering adopting scholarship tax credit laws and five states currently allow tax credits for contributions to charitable, scholarship-granting organizations similar to the challenged Arizona law. App. 163, n.1 (O'Scannlain, J., dissenting); Fla. Stat. § 220.187 (2009) (corporate tax credit for contributions to scholarship-funding organizations); Ga. Code Ann. § 48-7-29.16 (2009) (individual and corporate tax credits for donations to student scholarship organizations); Iowa Code § 422.11S (2010) (individual tax credit for donations to school tuition organizations); 72 Pa. Cons. Stat. §§ 8701-F to 8708-F

(2009) (corporate tax credit for contributions to scholarship organizations); R.I. Gen. Laws §§ 44-62-1 to -7 (2009) (corporate tax credit for donations to scholarship organizations). Arizona also allows tax credits for corporate contributions that fund scholarships for low-income and special-needs children. *See* A.R.S. §§ 43-1183, -1184.

Arizona's other tax credit laws, along with the Georgia, Iowa, Pennsylvania, and Rhode Island tax credit laws, operate in a manner analogous to the scholarship tax credit law at issue here by allowing religiously affiliated scholarship-granting organizations to operate and receive tax-credit-eligible donations. The panel's flawed opinion should not be allowed to inhibit the passage of new programs, nor be permitted to disturb the operations of other established and religiously neutral educational tax credit laws.

B. The Decision Jeopardizes Other Types Of Charitable Tax Credit Laws

Religious charities routinely participate in social welfare programs under which tax-credit-eligible contributions can be made. For example, Arizona provides tax credits for donations made to organizations that provide assistance to the working poor, including religious organizations. A.R.S. § 43-1088 (2009); Ariz. Dep't of Revenue, *List of qualifying charitable organizations*, http://www.azdor.gov/LinkClick.aspx?fileticket=OImvlZYxatI%3d&tabid=133 (includes many religious

charities) (last visited Jan. 15, 2010). Other states allow tax credits for contributions to religious organizations that provide child and other dependent care. *E.g.*, Fla. Stat. § 220.19 (2009); Florida Dep't of Children and Families, *Child Care Regulation*, http://www.dcf.state.fl.us/childcare (last visited Jan. 15, 2010) (list of qualified child care providers, including religious organizations); 35 Ill. Comp. Stat. 5/210 (2010) (dependent care tax credit allowing funds to be used at religious service providers); Iowa Admin. Code r. 701-42.9(422) (2009); Iowa State University, *Child Care Tax Credit on Income Tax*, http://www.extension.iastate.edu/Publications/PM1848.pdf (allowing religious charities to serve as eligible care providers) (last visited Jan. 15, 2010).

These examples only scratch the surface. Absent immediate intervention by this Court, there is no telling how wide-reaching the negative ramifications will be from the panel's opinion, especially when it is taken into account that Americans donate a substantial sum of money to religious organizations every year.

C. The Panel Decision Threatens To Disrupt The Educational Future Of Thousands Of Arizona School Children

As it currently stands, the panel decision will inhibit taxpayer donations to school tuition organizations because taxpayers will fear that if the law is struck down they will be found to owe additional

taxes; the only way to eliminate that uncertainty is to forgo donating. Every day this decision stands is another day donations to school tuition organizations that fund scholarships for children who desperately need them will be chilled.

If this case returns to the district court, as Judge O'Scannlain points out, the district court may have "no choice but to declare the program unconstitutional as applied" because no one disputes "how the program operates in practice." App. 167, n.7. If that happens, the panel's decision has the potential to uproot tens of thousands of Arizona school children who are thriving in their current private schools. For nearly a decade these children have had the Arizona Supreme Court's assurance that the tax credit law is constitutional, but the Ninth Circuit's decision straying from this Court's established precedent has cast a dark shadow over their educational futures.

In light of the glaring errors in the panel opinion, there is simply no reason to jeopardize the educational opportunities provided by the scholarship tax credit law.

CONCLUSION

For the reasons stated, Petitioners-Intervenors respectfully request that this Court grant their petition for writ of certiorari. The panel opinion is so clearly erroneous that it should be summarily reversed.

Respectfully submitted,

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