No. 09-991

In The
Supreme Court of the United States

GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue,
Petitioner,

v.

KATHLEEN M. WINN, et. al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF MICHIGAN, FLORIDA, INDIANA, LOUISIANA, NEW JERSEY, PENNSYLVANIA, SOUTH CAROLINA, AND UTAH IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the court of appeals err in holding that if most taxpayers who contribute to STOs [Student Tuition Organization] contribute to STOs that award scholarships to students attending religious schools, Section 1089 has the purpose and effect of advancing religion in violation of the Establishment Clause even though Section 1089 is a neutral program of private choice on its face and the State does nothing to influence the taxpayers of the STO's choice?

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INTEREST OF AMICI CURIAE

The amici curiae States have a substantial interest in improving the quality and accessibility of education for their citizens. That interest extends to private as well as public schools. Indeed, the U.S. Department of Education 2007-2008 survey of private schools reports that there more than 33,700 private elementary and secondary schools nationwide serving over 5 million children, 2 million of which were in urban areas.[1]

Promoting charitable giving through tax incentives is an efficient and legitimate way to achieve the States' goal of improving the quality and accessibility of private schools. To that end, seventeen States including Arizona have proposed or enacted legislation designed to increase access to education, including: California, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Minnesota, Montana, Nevada, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, and Wisconsin.[2]

Applying the analysis used by the U.S. Court of Appeals for the Ninth Circuit in this case, however,

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[1] 2007-08 Private School Universe Survey, U.S. Department of Education, p 2.

[2] *See* A.B. 279, 2009-10 Leg., Reg. Sess., § 1 (Ca. 2009); Fla. Stat. § 220.187; Ga. Code Ann. § 48-7-29.16; 35 Ill. Stat. 5/201(m); Ind. Code § 6-3.1-30.5; Iowa Code § 422.11M, 422.12; La. Stat. § 47.293(9)(a); Minn. Stat. § 290.0674; H.B. 342, 61st Leg., Reg. Sess., § 1(3)(b)-(c) (Mont. 2009); S.B. 289, 75th Leg., Reg. Sess., § 6(1) (Nev. 2009); Ohio Code § 3310.01-17, 3313.974-979; H.B. 2754, 75th Leg., Reg. Sess. (Or. 2009); 24 Pa. Stat. Ann. 20-2005-B; R.I. Gen. Laws § 44-62-2; Vt. Stat. Title 16. Ch. 21; Wis. Stat. § 119.227.

any one of these programs may be subject to challenge under the Establishment Clause if too many individuals choose to attend religious schools or if there are not enough private secular schools in a given area at a given time. That is precisely why this Court has previously rejected such an analysis. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 658 (2002).

Thus, the amici States have a substantial interest in having the Court grant certiorari to confirm that the Ninth Circuit's analysis is contrary to *Zellman* and ensure the States' ability to provide tax incentives to both religious and secular charitable organizations to further their secular goals of improving education for all of their citizens.[3]

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[3] Consistent with Rule 37.2, the State of Michigan informed the original counsel for Respondent of its plan to file an amicus brief in support of Petitioners.

INTRODUCTION

Arizona offers a wide array of education options for its citizens, including public schools in different districts, charter schools, and homeschooling. In order to make private education a more affordable option, Arizona also offers a limited tax-credit for donations to organizations that provide scholarships to students attending private schools.[4]

A qualifying school-tuition organization may not discriminate on the basis of "race, color, handicap, familial status, or national origin." Ariz. Rev. Stat. § 43-01089(G)(2). Noticeably absent from the list are sex and religious affiliation, which simply means that single-sex and religious schools are not excluded as possible options. But because schools of any religious affiliation are included, the plaintiff-taxpayers brought a challenge to this program under the Establishment Clause.

Two layers of truly private choice steer the direction of donations under this program. First, a qualifying school-tuition organization may be created by anyone and may choose to award scholarships to religious or secular schools. In fact, thirty of the fifty-five organizations operating in Arizona have no religious affiliation and five limit scholarships to secular schools. Second, individual taxpayers choose which of the school-tuition organizations, if any, they wish to support, and there is no difference in the tax-credit for donations to organizations that provide scholarships to attend religious or secular schools.

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[4] *See* Ariz. House of Rep. Comm. on Ways & Means, Minutes of Meeting, January 21, 1997.

Relying on this Court's prior decision in *Zelman*, the district court summarily dismissed the challenge because the benefits of the program are available to a "broad spectrum of groups"; there are "multiple layers of private choice"; and there are no financial incentives favoring religious schools. *Winn v. Hibbs*, 361 F. Supp. 2d 1117, 1121 (D. Ariz. 2005).

The Ninth Circuit reversed, however, finding that the program has the "effect" of promoting religion because more private donors are currently giving to organizations that provide scholarships to students attending religious schools than students attending secular private schools. *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1013 (9th Cir. 2009).

Over the dissent of eight judges, rehearing en banc was denied. As the dissent observed, the panel's decision not only conflicts with this Court's prior cases, but casts a pall over attempts to improve access to private education in other States, thereby "jeopardizing the educational opportunities of hundreds of thousands of children nationwide." *Winn v. Ariz. Christian Sch. Tuition Org.*, 586 F.3d 649, 659 (2009) (O'Scannlain, Kozinski, Kleinfeld, Gould, Tallman, Bybee, Bea, and Smith dissenting).

It cannot be the case that a religion-neutral program violates the Establishment Clause merely because the private decisions of ordinary citizens direct government aid towards religious institutions.

This Court should grant certiorari and reverse.

ARGUMENT

The Establishment Clause does not prevent States from encouraging charitable giving for the purpose of increasing access to all private education simply because the private choices of individuals direct donations towards religious schools.

The First Amendment prohibits any law that establishes or inhibits the free exercise of religion. U.S. Const. Amend. I; *see Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947). In particular, the Establishment Clause prohibits "government-financed or government-sponsored indoctrination into the beliefs of a particular faith." *Bowen v. Kendrick*, 487 U.S. 589, 6181 (1988).

In *Agostini v. Felton*, 521 U.S. 203, 222-223 (1997), this Court set forth a two-part test for determining whether a law violates the Establishment Clause: (1) did the government act with the purpose of advancing or inhibiting religion, and (2) does that action have the effect of advancing or inhibiting religion.[5] The three primary criteria the Supreme Court uses to determine whether government aid advances religion under the second prong are: (1) whether there is governmental indoctrination; (2) whether the participants are defined by reference to religion; and (3) whether there is excessive

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[5] *Agostini* essentially folds the "entanglement" prong of the *Lemon* test into the "effect" prong. *See Zelman*, 536 U.S. at 668 (2002) (O'Connor, J., concurring); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

entanglement between government and religion. *Agostini*, 521 U.S. at 234. Government indoctrination occurs when public funding itself constitutes indoctrination or when indoctrination is attributable to the government. *Id.* at 226.

In this case, there is no real dispute that the Arizona statute, Section 1089, was enacted for a valid secular purpose under the first prong of *Agostini*. As the Ninth Circuit noted, the legislative history shows the primary concern was "providing equal access to a wide range of schooling options for students of every income level by defraying the costs of educational expenses incurred by parents." [6] *Winn*, 562 F.3d at 1012. In essence, the program seeks to make private schools an affordable option by promoting charitable donations to organizations that provide grants and scholarships to students attending private schools.

The issue here is whether Section 1089, violates the second prong of *Agostini*. It does not. The Ninth Circuit concluded that because more scholarships are available for religious schools than secular, the program has the effect of promoting religion and, therefore, violates the Establishment Clause. *Winn*, 562 F.3d at 1018.

That decision is erroneous for two reasons – the Arizona program is constitutional. First, the program is religion-neutral and donations are steered by the independent decisions of private citizens, thus

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[6] Although the Ninth Circuit acknowledged this secular purpose, it found that the Respondents could prove that the stated legislative purpose was a sham. *Id.*

breaking the circuit between the State and religion – there is no indoctrination here through public financing nor indoctrination attributable to the State. Second, the mere fact that private choice is currently directing more donations towards religious rather than secular organizations has never been a violation of the Establishment Clause. The First Amendment requires neutrality, not hostility, towards religion. The fact that more individuals are choosing to give to religious organizations is not government endorsement, but rather the free decisions of its citizens.

1. Section 1089 is neutral toward religion and genuine, independent private choice operates as a circuit-breaker between the State and any religious entity.

Where a program is neutral toward religion there is no governmental indoctrination. Likewise, genuine, independent private choice can operate as a circuit-breaker between the State and religion. Neutrality and private choice eliminate governmental indoctrination under *Agostini*'s second prong. Two cases from this Court confirm these principles.

First, in *Mitchell v. Helms*, the Court concluded that a federal law that authorized the federal government to distribute funds to State and local governmental agencies, that in turn loan, on a per capita student basis, educational materials, software, and equipment to religious and nonreligious schools, did not violate the Establishment Clause. *Mitchell*, 530 U.S. 793, 835 (2000) (Thomas, J., plurality opinion). In addressing whether there was governmental

indoctrination, a plurality of the Justices concluded that the aid was allocated on neutral secular criteria that did not favor or disfavor religion. *Id.* at 829-30.

On the question of whether the act advanced religion, the plurality determined that the program made a broad range of schools eligible without regard to religion, and that the aid reached schools only through private decision-making and contained no impermissible content. The plurality attempted to move away from the direct versus indirect aid distinction for purposes of determining governmental indoctrination and instead focused on private choice. *Id.* at 830-32.

But the plurality recognized that the two analyses addressed the same thing, and the direct versus indirect distinction was meant to prevent religion from being subsidized by the government. *Id.* at 815-16. Because private decision-making was involved, the direct aid of materials and equipment was not at issue. *Id.* at 815-18, 831. The plurality recognized, however, that the case did not involve direct money payments and noted direct money payments raise "special Establishment Clause dangers." *Id.* at 818-20, quoting *Rosenberger v. Rector*, 515 U.S. 819, 842 (1995).

Second, in *Zelman v. Simmons-Harris*, the Supreme Court found no Establishment Clause violation in a school voucher program. 536 U.S. 639, 662-63 (2002). This Court recognized a distinction between state action that provides direct aid to religious schools and programs of "true private choice," those in which government aid reaches religious

schools "only as a result of the genuine and independent choices of private individuals." *Id.* at 649. True private choice breaks the circuit between state action and religion. *Id.* at 668. This Court found no "financial incentive" that "skewed" the program toward religious schools, where there was a full range of religious and nonreligious educational options available to parents. *Id.* 536 U.S. at 653-56.

Therefore, where numerous private choices determine the distribution of aid pursuant to neutral eligibility criteria, the government "cannot, or at least cannot easily, grant special favors that might lead to a religious establishment." *Mitchell,* 530 U.S. at 810 (Thomas, J., plurality opinion). It also eliminates the improper appearance of establishment because a reasonable observer is not likely to infer that the government is endorsing a religion through neutral criteria or the private choices of individuals. *Zelman,* 536 U.S. at 653.[7]

Where, as here, there are multiple layers of private choice involved, it should be more – not less –

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[7] *See also Everson,* 330 U.S. at 1 (rejecting Establishment Clause challenge to authorization for reimbursement to parents with a child in private school for the cost of busing); *Mueller v. Allen,* 463 U.S. 388 (1983) (rejecting Establishment Clause challenge to a program allowing tax deductions for educational expenses, including private school tuition); *Witters v. Washington Dept. of Services for the Blind,* 474 U.S. 481 (1986) (rejecting Establishment Clause challenge to a vocational scholarship program); *Zobrest v. Catalina Foothills Sch. Dist.,* 509 U.S. 1 (1993) (rejecting Establishment Clause challenge to federal program that permitted sign-language interpreter to assist hearing-impaired students in religious schools).

difficult to violate the Establishment Clause.[8] At least two layers of true private choice steer the direction of donations under this program:

- Anyone can create a school-tuition organization for a broad array of purposes without regard to religious affiliation; these organizations are created by individuals, not the government; and the program offers no financial incentive that favors creation of an organization that provides scholarships to religious schools.

- Any taxpayer may receive the tax-credit for making a donation; individual taxpayers, not the government, select the organization to which they wish to donate; and there is no difference in the tax-credit based on religious affiliation.

This program is analogous to the relationship between charitable foundations and the tax-exempt organizations to which they grant. *See* 26 U.S.C. § 501(c)(3). Anyone can establish a charitable foundation for a religious or non-religious purpose. Individuals donate to foundations that, in turn, make grants to various charities. This neutral structure would not become unconstitutional if the majority of taxpayers donated to foundations supporting religious organizations.

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[8] As observed by the dissent, the Ninth Circuit's opinion suggests that "by filtering aid through multiple layers of private choice – rather than a single level – the State endorses religion. But that makes no sense. How can *increasing* the separation between state and religion result in heightened government endorsement?" *Winn*, 586 F.3d at 662 n.10 (O'Scannlain, J., dissenting).

It is also similar to the federal tax-deduction for direct donations to tax-exempt organizations. *See* 26 U.S.C. § 170(a); 501(c)(3). Anyone can create a tax-exempt organization for religious or non-religious purposes, and taxpayers choose the organizations to which they wish to donate. Given that a taxpayer can receive a deduction for giving directly to a religious school under 26 U.S.C. § 170(a), it is difficult to see how giving indirectly through a school-tuition organization violates the Establishment Clause.

In fact, according to a 2008 survey by Giving USA, religious organizations currently receive the highest percentage of all contributions made to non-profit organizations, approximately 35%.[9] This reflects the decisions of individuals to donate to religious organizations. These in turn provide communities with a variety of charitable service.

Yet, ironically, the Ninth Circuit found that private choice is what invalidates this program.

The court reasons that since taxpayers are allowed to give to organizations that limit scholarships to religious schools, "parents' choices are constrained by those of the taxpayers exercising the discretion granted by Section 1089." *Winn*, 562 F.3d at 1016. That is not, however, the result of the program, but rather private decisions of Arizona's citizens. As the dissent correctly observes, in a different community this same program could just as easily result in a total dearth of

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[9]http://www.nps.gov/partnerships/fundraising_individuals_statistics.htm (Educational institutions received the second largest percentage, approximately 13%.).

funding for religious schools. *Winn*, 586 F.3d at 662 (O'Scannlain, J., dissenting).

Moreover, Section 1089 is one of many programs in Arizona designed to increase educational options, including access to other public schools, charter schools, and homeschooling. When removed from the vacuum in which the program was analyzed, parents are not as "constrained" as the Ninth Circuit suggests.

The court also concludes that since more scholarships are available for religious schools, the program does not apply to a broad array of parents seeking secular schools. *Winn*, 562 F.3d at 1018. That is exactly the analysis rejected by the majority in *Zelman*.[10] The Arizona program plainly applies to a broad array of groups. In fact, thirty of the fifty-five school-tuition organizations operating in Arizona have no religious affiliation and five limit scholarships to secular schools. The fact more donors are choosing to support religious schools does not change the neutral character of the program. "If the government takes the constitutionally required hands-off approach, external factors will define the playing field." *Winn*, 586 F.3d at 665 (O'Scannlain, J., dissenting).

Further, since more scholarships are available for attending religious rather than secular schools, the Ninth Circuit concludes there is a financial incentive

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[10] Justice Souter's position was that since 46 of the 56 schools participating in the program were religious, there was not a "wide array of private non-religious options." *Zelman*, 536 U.S. at 703, 704 (Souter, J., dissenting). As the majority explained, however, the imbalance was not caused by state action. *Zelman*, 536 U.S. at 656-57.

for parents to choose a religious school. *Winn*, 562 F.3d at 1018. Once again, however, the court fails to differentiate between the effects of state action and private choice. The program itself is religion-neutral, and the fact that more donors have given to organizations that provide scholarships to religious schools is not state action. Moreover, as noted by the district court, parents actually have financial incentives not to choose a private school from the wide array of options available in Arizona.[11]

Individuals, not the State, create school-tuition organizations; individuals, not the State, determine the purposes of those organizations; and individuals, not the State, decide the organization to which they wish to donate. As the dissent correctly noted, "[T]he State's involvement stops with authorizing the creation of [school-tuition organizations] and making tax credits available. After that, the government takes its hands off the wheel." *Winn*, 586 F.3d at 660 (O'Scannlain, J., dissenting).

The conclusion that the actions here are the product of the independent, private conduct of citizens is consonant with this Court's decisions in similar cases.

Individual choice steers the direction of donations under this program. While the program may

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[11] While a student may attend public schools for free, the average scholarship awarded by a tuition organization in 2003 was $1,222, "a sum unlikely to cover all of the costs of private school attendance." *Winn*, 361 F. Supp. 2d at 1121. Furthermore, as discussed in the Petitioner's brief, Arizona offers a wide variety of schooling options outside of public and private schools.

primarily benefit religious schools, the Supreme Court has determined that the Establishment Clause is not violated when money is directed towards religious schools as a result of private choice. *Mueller v. Allen*, 463 U.S. 388, 397-399 (1983) (tax-deduction for expenses relating to tuition, textbooks, and transportation of elementary and secondary school students was upheld.) Similarly, the Establishment Clause is not violated when neutral State programs are primarily used by parents to offset the expense of sending their children to religious schools. *Everson*, 330 U.S. at 18. (Supreme Court approved a statute that spent taxpayer funds to pay the bus fares of students attending religious schools).

Even when state aid is given to students attending a Christian college and training to become pastors or missionaries, the Establishment Clause is not violated when the aid is distributed as part of a neutral program. *See Witters v. Washington Dept. of services for the Blind*, 474 U.S. 481 (1986) (extension of aid under a state statute to finance a student's training at a Christian college does not advance religion in a manner inconsistent with the Establishment Clause). A neutral government program that dispenses aid to individuals, regardless of their religious beliefs, does not run afoul of the Establishment Clause. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (the Establishment Clause does not prevent the school district from furnishing a student with a sign language interpreter to facilitate his education at a religious school).

The cases in which this Court has found a constitutional violation stand in contrast to the

program the State of Arizona created. It is only when singling out of religious entities for special consideration over other similarly situated secular organizations that the First Amendment is offended. For example, the Supreme Court has determined that the Establishment Clause is violated by a tax-exemption for the sale and distribution of periodicals by religious organizations because where the benefits are confined to religious organizations they cannot appear as anything other than state sponsorship of religion. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989).

However, the State of Arizona does not single out religious programs for special consideration or different treatment than other similarly situated secular programs. *See Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970) (tax-exemption to a broad class of property owned by non-profit organizations such as hospitals, libraries, playgrounds, and churches does not single out one particular church or religious group or even religion at all).

The suggestion that a program that is neutral in concept and applied in a neutral fashion may violate the Establishment Clause has broad implications. If extended to other settings, the analysis suggests that neutral programs that this Court has expressly approved – like the deductions for textbooks in *Mueller* – are improper. The basic justification for allowing tax deductions for private donations to religious charitable institutions is predicated on the idea that the conduct of the government is neutral and the government is not clothed with the private decisions of its citizens.

2. The fact that more donors are currently choosing to support religious schools does not change the neutrality of the program.

A neutral tax benefit does not lose its constitutional validity on the day that too many religious institutions are receiving a benefit. Rather, *Agostini* holds that the proportion of aid benefitting students at religious schools from private choice is irrelevant to the constitutional inquiry. *Mitchell*, 530 U.S. at 812 n.6. In the same way, in *Mueller v. Allen*, where 96% of parents used a deduction for tuition at religious schools, this Court stated:

> 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. [*Mueller*, 463 U.S. at 401.]

The program at issue in *Zelman* gave tuition-aid directly to private schools, 82% of which had a religious affiliation. *Zelman*, 536 U.S. at 647. This Court reiterated that the fact that a vast majority of a program's benefits go to religious schools cannot be determinative of whether the program itself is constitutional. *Zelman*, 536 U.S. at 658. Indeed, the Court noted that such an analysis would lead to the "absurd" result of making a truly neutral program constitutional in States with low numbers of religious schools and unconstitutional in States with high

numbers of religious schools. *Zelman*, 536 U.S. at 657. Yet that is exactly the result reached in this case.

Here, the Ninth Circuit concludes that since more scholarships are available for religious schools than secular schools, parents do not have a true choice. *Winn*, 562 F.3d at 1018. Under that analysis, any neutral program intended to improve access to private schools would violate the Establishment Clause because there are currently more religious private schools than secular private schools.

According to a 2007-2008 survey by the Department of Education, approximately 68% of the 33,700 private schools in this country had some form of religious affiliation.[12]

But the Constitution does not require the State to wait until the national culture is barren of religious institutions before it can institute this kind of neutral program. This Court has repeatedly observed that the Establishment Clause requires neutrality, not hostility, towards religion. *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952). Any limitations that are present in the funding available for parents who wish to send to their children to private secular schools is a consequence of the decisions of the citizens generally, not the government. There is nothing constitutionally infirm about this tax credit system even if it has the ultimate effect of benefiting religious schools through the private decisions of Arizona's citizens.

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[12] 2007-08 Private School Universe Survey, U.S. Department of Education, p 2.

As the dissent points out, in *Zelman* there were more opportunities to attend the private religious schools in Cleveland than private secular schools. While the vouchers in that case could be used at adjacent public schools, the other schools elected not to participate, leaving parents with the same limitation on available secular private schools as in this case. *Winn*, 586 F.3d at 664 (O'Scannlain, J., dissenting), citing *Zelman*, 536 U.S. at 647.

It cannot be the case that a religion-neutral program violates the Establishment Clause if too many private individuals in a given area choose to support a religious organization. The implications – if extended to other settings – would suggest that neutral programs are suspect when citizens independently select religious options over secular ones. The list of government programs that provide a benefit to private citizens who may then use that benefit for a religious program or at a religious institution is wide and varied:

- Tuition assistance for soldiers – if too many choose to attend religious schools. *See* 38 U.S.C. § 3015;

- Tax deductions for charitable contributions – if too many are made to religious organizations. *See* 26 U.S.C. § 170;

- Tax-exempt status for non-profit organizations – if too many have a religious affiliation. *See* 26 U.S.C. § 501(c)(3);

- Federal arson assistance for non-profit organizations – if too many are religious institutions. *See* 24 C.F.R. § 573;

- State programs offsetting school expenses – if too many children are attending religious schools. *See* Fla. Stat. § 220.187; Ga. Code Ann. § 48-7-29.16; 35 Ill. Stat. 5/201(m); Ind. Code § 6-3.1-30.5; Iowa Code § 422.11M, 422.12; La. Stat. § 47.293(9)(a); Minn. Stat. § 290.0674; Ohio Code § 3310.01-17, 3313.974-979; 24 Pa. Stat. Ann. 20-2005-B; R.I. Gen. Laws § 44-62-2; Vt. Stat. Title 16. Ch. 21; Wis. Stat. § 119.227.

The fact that more individuals have chosen to support religious organizations is not a function of the program itself, but a reflection of the community – and one that evinces true private choice. As the dissent correctly observed, "If the government takes the constitutionally required hands-off approach, external factors will define the playing field." *Winn*, 586 F.3d at 665 (O'Scannlain, J., dissenting). Under this same program, the majority of donations in a different community could very well support the secular schools.

In taking a truly neutral approach to religion, the most a State can do is draft neutral legislation – which Arizona has done.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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