

MAY 3 - 2010

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,

vs.

KATHLEEN M. WINN, et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

REPLY BRIEF FOR PETITIONER

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The court of appeals held that a tax credit for contributions to Section 501(c)(3) organizations that provide scholarships to students attending private schools has the purpose and effect of advancing religion because the statute authorizing it, Arizona Revised Statute Section 43-1089, allows – but does not encourage – the organizations to provide scholarships only to religious schools. The court of appeals’ decision is contrary to this Court’s private choice precedent, especially *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and *Mueller v. Allen*, 463 U.S. 388 (1983), and squarely conflicts with the decisions of the Arizona appellate courts. See *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921, and *cert. denied*, 528 U.S. 810 (1999) (upholding the tuition tax credit in Section 1089 under the Establishment Clause); *Green v. Garriott*, 212 P.3d 96 (Ariz. App. 2009) (upholding a corporate tuition tax credit that is similar to the tax credit in Section 1089 under the Establishment Clause). The Court should grant the Petition for Writ of Certiorari because the court of appeals’ decision jeopardizes the scholarships that thousands of children receive from Section 1089 and similar tax credit programs.

Although it is obvious that Respondents do not like Arizona’s tax credit program, most of their criticism of Section 1089 is irrelevant to the Establishment Clause issues presented here and is based on inadmissible hearsay that was not part of the record

below.¹ Respondents' arguments against review are unavailing.

¹ Respondents' citation to a series of newspaper articles concerning Arizona's tuition tax credit, Brief in Opposition at 9-11, is inappropriate for several reasons. First, newspaper articles are normally considered inadmissible hearsay and they are not part of the record below. *See Larez v. City of Los Angeles*, 946 F.2d 641-42 (9th Cir. 1991) (overruling the district court's admission of statements in newspaper articles because hearsay); *see also Trans-Sterling, Inc. v. Bible*, 804 F.2d 525, 528 (9th Cir. 1986) (refusing to supplement the record on appeal with a newspaper article because no rule permitted it). Second, Respondents rely on the newspaper articles to show that the tax credit program lacks oversight, has been manipulated for personal and financial gain, and failed to benefit the poor, Brief in Opposition at 9, but these purported failures are not relevant to the Establishment Clause issues raised here. Third, to the extent there is validity to the newspapers' criticism that STO executives have used tax credit donations to enrich themselves or otherwise benefit private individuals, the STOs may no longer qualify for § 501(c)(3) status. *See* 26 C.F.R. § 1.501(c)(3)-1(d)(ii) (to meet § 501(c)(3) requirements, an organization must establish that it is not organized or operated for the benefit of private interests). Finally, although the Court should not consider the newspaper articles, they serve an important function by putting legislators on notice that they may want to reconsider certain policy decisions concerning the program, voters on notice concerning the legislators' policy determinations, and taxpayers on notice that they may not want to contribute to certain STOs.

Respondents criticize the tuition tax credit program for failing to establish standards "requiring that aid be given to children from low income families" and note that the result of the lack of these standards is that "a majority of children who receive Arizona program scholarships are children of middle class or wealthy families." Brief in Opposition at 4 (citing Lucas, Carrie, *The Arizona Scholarship Tax Credit: Providing Choice for Arizona Taxpayers and Students*, Goldwater Institute Policy

(Continued on following page)

I. The Court of Appeals' Decision Conflicts with the Decisions of the Arizona Appellate Courts.

Respondents erroneously argue that the court of appeals' decision does not conflict with the Arizona Supreme Court's decision in *Kotterman* and simply ignore the decision's conflict with the Arizona Court of Appeals' decision in *Green*. The Court should grant the Petition to resolve this conflict.

1. Petitioner Garriott explained why there is a conflict between the court of appeals' decision below regarding Respondents' as-applied challenge to Section 1089 and the Arizona Supreme Court's *Kotterman* decision upholding the facial validity of Section 1089. Garriott's Petition in 09-991 at 26-28; see also Arizona School Choice Trust's Petition in 09-988 at 19-20, 25-33 (addressing why the court of appeals' decision conflicted with *Kotterman*). Respondents do not address the Petitioners' arguments.

2. Petitioner Garriott argued that there is a conflict between the court of appeals' decision below and the Arizona Court of Appeals' decision in *Green* and noted that the court of appeals recognized the

Report No. 186 (Dec. 11, 2003)). Again, the failure to require that scholarships be based on financial need is not relevant to the Establishment Clause issues presented here. Moreover, the article that Respondents cite noted that at least five of the six largest STOs, which accounted for seventy-three percent of total donations received in 2002, awarded scholarships based on financial need. Lucas, *supra*, at 8-11.

conflict. Garriott's Petition in 09-991 at 28-30. Respondents do not address this conflict.

II. Tax Credit Programs in Other States Could Be Invalid Under the Court of Appeals' Rationale.

Respondents argue that Arizona's tax credit program is unique and that because the tax credit programs in other States are different from Arizona's program, they would not be affected by the court of appeals' decision. Brief in Opposition at 16. Respondents' information about the Georgia, Iowa, Rhode Island, and Pennsylvania tax credit programs is simply wrong. These programs are sufficiently similar to Arizona's program to be jeopardized by the rationale of the court of appeals' decision.²

- Rhode Island offers a tax credit to businesses that make contributions to qualified scholarship organizations. R.I. Gen. Laws §§ 44-62-1, 44-62-2. The Rhode Island program defines a scholarship organization as a § 501(c)(3) tax-exempt, non-profit organization "that allocates at least ninety percent of its annual revenue through a scholarship program for tuition assistance grants to eligible

² Florida's tax credit scholarship program is sufficiently distinct from Arizona's program that it would not likely be affected by the court of appeals' decision but Petitioner did not assert that Florida's program would be affected.

students to allow them to attend any qualified school of their parents' choice represented by the scholarship organization." R.I. Gen. Laws § 44-62-2(a). During the 2008-2009 school year, the Rhode Island Division of Taxation certified three scholarship organizations. R.I. Div. of Taxation, *2009 Year End Summary Reports*, available at <http://www.tax.ri.gov/Credits/2007summary.php> (last visited April 29, 2010). Approximately ninety percent of the students and seventy-eight percent of the total scholarship money went to participating private religious schools. *Id.* Two of the three certified scholarship organizations represent only religious schools.³

- Iowa permits taxpayers to take a tax credit of sixty-five percent of donations to a school tuition organization. Iowa Code § 422.11S(1). School tuition organizations are defined as § 501(c)(3) tax-exempt,

³ Financial Aid for Children's Education (FACE) of Rhode Island distributed \$430,000 in funds to 404 students to attend one of forty-five participating Catholic private schools. R.I. Div. of Taxation, *Summary of Scholarships Issued*, available at <http://www.tax.ri.gov/Credits/2009%20Year%20End%20Reports/FACE%20of%20RI%202009%20SummaryZC> (last visited April 29, 2010). The Foundation for Rhode Island Day Schools awarded \$475,000 to sixty-three students to attend one of two Jewish affiliated private schools. R.I. Div. of Taxation, *Summary of Scholarships Issued*, available at <http://www.tax.ri.gov/Credits/2009%20Year%20End%20Reports/RI%20Day%20Schools%202009%20Summary.pdf> (last visited April 29, 2010).

non-profit organizations that provide “tuition grants to students without limiting availability to only students of one school.” Iowa Code § 422.11S(5)(c)(3). Several tuition organizations provide scholarships only to students attending religious schools. For example, in 2008 the Iowa Lutheran School Tuition Organization distributed \$142,000 to 290 students to attend fourteen Lutheran-affiliated private schools. Iowa Lutheran STO, *2008 Iowa Lutheran STO Review*, available at <http://www.iowalutheransto.org/Documents/ILSTO%202008%20Summary%20Booklet.pdf> (last visited April 27, 2010). And the Catholic Tuition Organization of the Des Moines Diocese provided scholarships to students attending one of sixteen Catholic schools in the 2008-2009 academic year. Catholic Tuition Organization Diocese of Des Moines, *Tuition Assistance for More than 1,100 Families*, available at <http://www.ctodsmdiocese.org/pdf/NEWSTuitionAssistance1100Families.pdf> (last visited April 29, 2010).

- Pennsylvania has established the Educational Improvement Tax Credit that provides tax credits to businesses that contribute to scholarship organizations. 72 Pa. Stat. Ann. § 8704-F. A scholarship organization must be a § 501(c)(3) tax-exempt, non-profit organization that donates at least 80 percent of its cash receipts to a scholarship program. 72 Pa. Stat. Ann. § 8702-F. Scholarship

organizations must award their financial aid to eligible students “without limiting availability to only students of one school.” 72 Pa. Stat. Ann. § 8702-F. By fiscal year 2008-09, Pennsylvania had approved 239 scholarship organizations. Legislative Budget & Fin. Comm., *Preliminary Report on Pennsylvania’s Educational Improvement Tax Credit Program 4* (June 2009), available at <http://lbfc.legis.state.pa.us/reports/2009/40.PDF>. Several of the scholarship organizations appear to provide scholarships only to students who attend religious schools. See, e.g., The Children’s Scholarship Fund of Pa., *List of Participating Schools*, available at http://www.csfofpa.org/qualifying_families.htm (last visited April 26, 2010); Pennsylvania Catholic Conference, *EITC Spells Success* (August 1, 2008), available at http://www.pacatholic.org/catholic_education/eitc-spells-success (last visited April 29, 2010) (noting that each diocese in Pennsylvania has its own scholarship organization).

- The Georgia Private School Tax Credit allows both individual taxpayers and businesses to take a tax credit for donating to a student scholarship organization. Ga. Code Ann. § 48-7-29.16. The total individual income tax credit is limited to \$1,000 per single individual and \$2,500 for married couples filing jointly. Ga. Code Ann. § 48-7-29.16(b). Student scholarship organizations are defined as § 501(c)(3)

organizations that furnish “educational scholarships or tuition grants to eligible students without limiting availability to only students of one school.” Ga. Code Ann. § 20-2A-1(3). Georgia recognizes twenty-eight student scholarship organizations. Ga. Dep’t of Educ., *SSO List* (March 20, 2010), *available at* <http://public.doe.k12.ga.us/DMGetDocument.aspx/March%2030%202010%20SSO%20List.pdf?p=6CC6799F8C1371F624C52E0A156CD8FAE1DC7596E3F08978720F688FFA7186D1&Type=D> (last visited April 29, 2010). Like Arizona STOs, many of the student scholarship organizations in Georgia appear to be religiously affiliated. *Id.* For example, G.R.A.C.E. Scholars, Inc. provides scholarships only to students attending religious schools. Grace Scholars, G.R.A.C.E. Scholars, Inc. Schools List, *available at* <http://www.gracescholars.org/schools.php> (last visited April 27, 2010).

In determining that the Respondents could prove that Section 1089 violates the Establishment Clause, the court of appeals reasoned as follows:

In practice, plaintiffs allege, the choice delegated to taxpayers under Section 1089 channels a disproportionate amount of government aid to sectarian STOs, which in turn limit their scholarships to use at religious schools. The scholarship program thus skews aid in favor of religious schools, requiring parents who would prefer a secular private school but who cannot obtain aid

from the few available nonsectarian STOs to choose a religious school to obtain the perceived benefits of a private school education. Accordingly, Section 1089's delegation to taxpayers operates to deprive these parents, as the program's aid recipients, of genuinely independent and private choices to direct the program aid to secular schools.

Pet. App. in 09-991 at 22a-23a (footnote and internal quotations omitted). Thus, under the court of appeals' rationale, the Rhode Island, Iowa, Pennsylvania, and Georgia tax credit programs are constitutionally suspect because they allow taxpayers to receive a tax credit for contributing to religiously affiliated scholarship organizations, which may in turn limit parental choice.

III. The Court of Appeals' Decision Is Contrary to This Court's Precedent.

Petitioner Garriott explained at length why the court of appeals' decision is contrary to this Court's precedent. Garriott Petition in 09-991 at 12-25; see also Arizona School Choice Trust's Petition in 09-988 at 11-34. Respondents do not address the Petitioners' arguments and rely on their erroneous interpretation of *Zelman*. The Court should grant this Petition because the court of appeals' decision deviates from this Court's precedents and jeopardizes the educational opportunities of thousands of children.



CONCLUSION

For the foregoing reasons, and those stated in the Petition, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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