Nos. 09-987, 09-991

IN THE
Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,
Petitioner,

v.

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

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

v.

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

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

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BRIEF OF THE CATO INSTITUTE, ANDREW J. COULSON, *ET AL.,* AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does a state law giving tax credits to people who donate to scholarship organizations violate the Establishment Clause simply because some donors—as it happens, a declining majority—choose to fund scholarship programs affiliated with religious schools?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

Other Authorities:

INTEREST OF *AMICI CURIAE*[1]

The Cato Institute, Foundation for Educational Choice, American Federation for Children, Council for American Private Education, Center for Education Reform, and Andrew J. Coulson have joined together to file this brief. A description of each of these *amici* follows. This case is of central concern to *amici* because it affects a broad range of educational tax credits and deductions at the state and national levels and because the freedom of choice in education would be seriously injured if this lawsuit succeeds.

The **Cato Institute** was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies works to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs.

The **Foundation for Educational Choice** was founded on the ideals and theories of Nobel Laureate economist Milton Friedman and economist Rose D. Friedman. The Foundation strives to educate parents, policymakers, and other organizations about the

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[1] In conformity with Supreme Court Rule 37, all parties have consented to the filing of this brief and letters of consent have been filed with the Clerk. *Amici* also state that no party's counsel authored this brief in whole or in part and no person or entities other than *amici*, its members, and counsel made a monetary contribution to the preparation and submission of this brief.

desperate need for a shift of power to the disenfranchised parents of America who have limited choices in the education of their children.

The **American Federation for Children** is a leading national advocacy organization promoting school choice, with a specific focus on school vouchers and scholarship tax credit programs. It seeks to improve our nation's K-12 education by advancing systemic and sustainable public policy that empowers parents, particularly those in low-income families, to choose the education they determine is best for their children. The Federation envisions a vibrant and successful education system where achievement is high and where low-income children are provided with equal opportunity to attend the finest schools possible, whether these schools are public, charter, or private.

The **Council for American Private Education** is a coalition of national organizations and state affiliates serving religious and independent elementary and secondary schools. Founded in 1971 to provide a coherent voice for private eduation, CAPE members and affiliates represent more than 80 percent of private school enrollment nationwide. CAPE's mission is to preserve and promote educational pluralism so that parents have a choice in their children's schooling. CAPE is dedicated to fostering communication and cooperation within the private school community and with the public sector to improve the quality of education for all children.

The **Center for Education Reform** is a national, independent, nonprofit advocacy organization founded in 1993 to advance substantive reforms in public

education. CER drives the creation of better educational opportunities for all children by leading parents, policymakers, and the media in advocating for school choice, advancing the charter school movement and challenging the education establishment. CER is an active broker in bridging policies and practices through coalition building and working with diverse constituencies to implement reforms that improve access, accountability, and assessment, to help restore excellence and equity in America's public schools.

Andrew J. Coulson directs the Cato Institute's Center for Educational Freedom and is author of *Market Education: The Unknown History* (Transaction Books, 1999), a comparative review of school systems from classical Greece to modern America, England, Canada, and Japan. He has also produced the most comprehensive worldwide review of the statistical research comparing alternative school systems (*Journal of School Choice*, Vol. 3, No. 1, 2009). Coulson has written extensively about education tax credit programs for many years.

STATEMENT OF THE CASE

Respondents allege that Arizona's Revised Statute § 43-1089 ("Section 1089") violates the First Amendment's Establishment Clause. Section 1089 provides citizens who voluntarily donate to school tuition organizations ("STOs") with a tax credit of up to $500 for individual taxpayers and up to $1000 for married couples filing jointly. Ariz. Rev. Stat. Ann. § 43-1089(A) (2010). An STO must use at least 90 percent of its annual revenue to provide educational

scholarships that allow children to attend a qualified private school of their parents' choosing. *Id.* § 43-1089(G)(3). An STO may limit the number of schools to which it provides such scholarships, so long as it provides them to more than one school. *Id.*

Initially, the district court dismissed the suit as barred by the Tax Injunction Act. The Ninth Circuit reversed, *Winn v. Killian*, 307 F.3d 1011 (9th Cir. 2002), and this Court affirmed, *Hibbs v. Winn*, 542 U.S. 88 (2004). On remand, the district court granted defendants' motion to dismiss for failure to state a claim under the Establishment Clause. The Ninth Circuit reversed, holding that "plaintiffs have alleged facts upon which a reasonable, informed observer could conclude that Section 1089, as applied, violates the Establishment Clause even though the state does not directly decide whether any particular sectarian organizations will receive program aid." *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1023 (9th Cir. 2009) (panel). The Ninth Circuit subsequently denied rehearing *en banc*. *Winn v. Ariz. Christian Sch. Tuition Org.*, 586 F.3d 649 (9th Cir. 2009) (en banc).

SUMMARY OF ARGUMENT

Section 1089 has created numerous instances of "genuine and independent choice" that insulate the program from any Establishment Clause challenge. *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002). By nevertheless allowing such a challenge to go forward, the Ninth Circuit blatantly ignored this Court's precedent and harmed countless children's

educational opportunities. The Court here can thus preserve *stare decisis* by upholding the standard of "genuine and independent choice" in its Establishment Clause jurisprudence.

Most importantly, a taxpayer's choice of which STO to donate to—and whether to donate at all—is wholly within the discretion of that taxpayer. Any benefit to religious institutions is merely incidental to that choice. If left uncorrected, the Ninth Circuit's error will be widely cited and potentially invalidate not only the numerous education tax credit programs enjoyed by tens of thousands of students around the country, but also charitable tax deduction programs that serve millions of beneficiaries. The Ninth Circuit's faulty reasoning and plain misreading of this Court's jurisprudence jeopardizes each of these programs.

Far from advancing or endorsing religious education—via Section 1089 or otherwise—Arizona maintains a substantial financial disincentive to it. For example, parents receiving aid from an STO are typically required to spend several thousand dollars of their own money to send their children to religious schools. In contrast, tuition at both charter and regular public schools is free. Parents thus have a strong inducement *not* to choose a private religious institution over the secular, tuition-free public system.

Moreover, the Ninth Circuit's conclusion that parents in Arizona are pressured to accept scholarships to religious schools due to the limited number of scholarships available to secular schools is simply not supported by the evidence. In fact, the share of STO scholarships available for use at secular

schools is now *almost twice as large* as the share of families actually choosing secular schools. The percentage of scholarships reserved for religious schooling fell to 76 percent by 2004, and 65 percent in 2008. Andrew Coulson, *The Case of the Missing Evidence*, (Jan. 26, 2010), http://www.cato-at-liberty.org/2010/01/26/the-case-of-the-missing-evidence. Parents seeking scholarships for secular schooling for their children are thus not, in practice, at any disadvantage with respect to parents seeking scholarships for religious schooling.

Finally, programs like Section 1089 are necessary across the country to preserve parents' true choice in the education of their children. That is because the freedom to choose which STOs to support under Section 1089, and the freedom of each STO to focus its scholarship funds on certain schools, provides educational opportunities to a broad range of schools that many children would otherwise be unable to attend. Section 1089 fundamentally broadens the educational choice of Arizona parents and the educational opportunities of their children. This Court's precedent supports both of these goals.

ARGUMENT

I. This Court Should Uphold Section 1089 to Preserve Freedom of Educational Choice Across the Nation

Florida, Georgia, Indiana, Iowa, Pennsylvania and Rhode Island have programs like the one at issue here. All but Florida's are jeopardized by the Ninth Circuit

ruling because they, like Section 1089, allow STOs to serve religious constituencies on the same basis as secular ones. Pennsylvania's program alone served 44,000 students in 2007-08. Alliance for School Choice, *School Choice Yearbook: 2008-09,* at 51 (2009). And interest in these programs is growing: In 2009, 37 scholarship tax credit bills were introduced in state legislatures. The Foundation for Educational Choice, *2009 School Choice Legislation,* https://www.edchoice.org/School-Choice/Legislative-Round-Up/2009-School-Choice-Legislation.aspx (last visited August 2, 2010).

Because both the number of programs and the number of students served by each program have grown over the past decade, the long-term repercussions of this litigation will be profound. If current trends are allowed to continue, many hundreds of thousands of children nationwide will be served by programs like Arizona's in the next decade. But if the Ninth Circuit's ruling stands, it would not only curtail this growth but likely reverse it, as existing and potential donors would fear the tax implications of claiming credits that are subsequently struck down.

In short, the educational choices of tens of thousands of students in six states depend on the resolution of this case, as do the prospective choices of many more students in coming years.

II. Arizona's Law Involves a System of Genuine and Independent Private Choice That Insulates It From Establishment Clause Challenges

While Section 1089 does nothing to favor children attending religious schools, individual Arizonans have indeed donated the majority of their scholarship funds to religious STOs. Therefore, according to the Ninth Circuit, "Section 1089, as applied, 'fails to provide genuine opportunities for . . . parents to select secular educational options for their school-age children.'" *Winn,* 562 F.3d at 1018 (quoting *Zelman*, 536 U.S. at 655) (panel). That reasoning is flawed in several respects: first, it mistakenly applies Establishment Clause scrutiny to private choices; second, it proposes a distinction between tax credits and tax deductions that has no basis in law; and third, it invents a distinction between parent and taxpayer choice that is irrelevant to Establishment Clause analysis. Respondents' additional Establishment Clause arguments similarly misconstrue *Zelman* and other precedents and have no independent legal basis.

A. The Court Below Misapplied the Establishment Clause to Private Choices

In *Zelman*, this Court identified the existence of individual private choice as critical to an educational program's surviving Establishment Clause challenges. "[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice,

the program is not readily subject to challenge under the Establishment Clause." *Zelman*, 536 U.S. at 652. Much like the program this Court upheld in *Zelman*, Section 1089 fully complies with the requirement that any aid to religious schools be the result of genuine and independent private choice.

As Judge O'Scannlain recognized in his dissent to the Ninth Circuit's refusal to rehear this case *en banc*:

> 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 an STO. Second, that STO must then decide to provide scholarships to religious schools. Third, taxpayers have to contribute to the STO in question. Finally, parents need to apply for a scholarship for their student.

Winn, 586 F.3d at 662 (9th Cir. 2009) (en banc) (O'Scannlain, J., dissenting) (emphasis in original). In each of these layers, there is genuine and independent private choice insulating the program from any Establishment Clause challenge.

While the Ninth Circuit alleges that Section 1089 "creates incentives that pressure [secular-education-seeking] parents into accepting . . . scholarships [to] a religious school," *Winn,* 562 F.3d at 1018 (panel), the court failed to consider Arizona's numerous other educational programs.

As this Court noted in addressing the educational

program at issue in *Zelman*, "[t]he Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school." 536 U.S. at 655-56 (emphasis in original).

In Arizona, as Judge O'Scannlain noted,

> [P]ublic schools must provide for open enrollment, allowing parents to send their children, tuition free, to schools of their choice. Tax credits are available for donations to public schools for "extracurricular activities or character education." An extensive system of charter schools "provide[s] additional academic choices for parents and pupils." Homeschooling is permitted and protected. Indeed Section 1089 itself offers parents yet another alternative: they can create their own STO and solicit donations for use at secular private schools.

Winn, 586 F.3d at 666 (en banc) (O'Scannlain, J. dissenting) (internal citations omitted).

Arizona provides its citizens a broad range of academic options, only one of which is to obtain an STO scholarship to attend a religious school. The Ninth Circuit thus erred in arguing that Arizona parents are pressured to send their children to religious schools.

B. The Court Below Created a Distinction Between Tax Credits and Tax Deductions That Lacks a Legal Basis

Petitioners argue that Section 1089 is essentially equivalent, for Establishment Clause purposes, to long-accepted federal tax deduction programs for charitable donations. The Ninth Circuit panel disagreed, positing that Section 1089 bears only a "superficial resemblance" to federal deductions and so does not partake of their Establishment Clause acceptability. *Winn*, 562 F.3d at 1015 (panel).

But Section 1089 resembles charitable deduction programs—far from superficially—in *all* the particular features essential to their constitutionality under the Establishment Clause. Of the two cases the Ninth Circuit cites to support its position, the first, *Hernandez v. Comm'r*, 490 U.S. 680 (1989), actually supports Petitioners' position and the second, *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983), is irrelevant.

Hernandez, in the course of ruling on the tax deductibility of a particular donation, reaffirmed the constitutionality of a provision, I.R.C. § 170 ("Section 170"), that allows deductions for charitable donations, including to "entities organized and operated exclusively for religious purposes." *Hernandez*, 490 U.S. at 683. The Court upheld Section 170 because it made no distinctions between different religious groups and satisfied the *Lemon* test. *Id.* at 695-96 (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971), finding religious neutrality in both purpose and effect and avoidance of state entanglement with religion).

Section 1089 is even less problematic than Section 170 because it does not refer to religion at all—let alone distinguish among sects. And Respondents already conceded the first prong of the *Lemon* test—that the Arizona provision is facially neutral with respect to religion—turning this case into an as-applied challenge to the program's effects. *Winn*, 562 F.3d at 1007, n. 6 (panel). Yet Section 1089's primary effect is "encouraging gifts to charitable entities, including but not limited to religious organizations," which the *Hernandez* Court found "does not advance or inhibit religion." *Hernandez*, 490 U.S. at 696.

Finally, the Arizona Department of Revenue's ("ADOR") interactions with religious organizations under Section 1089 are comparable to those of the IRS under Section 170. The IRS's bookkeeping responsibility is merely "routine regulatory interaction which involves no inquiries into religious doctrine . . . no delegation of state power to a religious body . . . and no detailed monitoring and close administrative contact between secular and religious bodies . . . [and thus] does not of itself violate the nonentanglement command." *Id*. at 696-97 (internal citations and quotation marks omitted). Similarly, the ADOR must only determine that STOs use a certain percentage of their revenues on scholarships for K-12 schooling and collect certain data (*e.g.*, number of donations received, total value of donations, etc.). Section 1089 thus creates no doctrinal or other potentially church-state-entangling responsibilities.

In short, Section 1089 possesses all the features the Court deemed necessary to Section 170's survival under the Establishment Clause—and so *Hernandez*

undermines the Ninth Circuit's contention that there is any fundamental difference between Section 1089 and federal charitable tax deduction programs.

The only other case the Ninth Circuit cited—without discussion or explanation—to distinguish Section 1089 from charitable deduction programs with respect to the Establishment Clause is *Regan*. 461 U.S. 540. *Regan*, however—an appeal from the denial of tax-exempt status by a group lobbying on federal taxation issues—has no relation to Establishment Clause challenges to government programs. Indeed the word "Establishment" is wholly absent from the case. The First Amendment aspects of *Regan* are limited to the Free Speech Clause, which no party contends is at issue here.

In sum, the Ninth Circuit can find no support in this Court's precedent—or other law—to distinguish Section 1089 from functionally equivalent programs that have been held constitutional. The lower court's analysis thus urges the absurd and untenable result of invalidating federal charitable tax deductions.[2]

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[2] Religious organizations have received more donations than any other type of charity; in 2008, they received 34.7 percent of all charitable contributions, compared to 13.3 percent for educational organizations. National Center for Charitable Statistics, *Quick Facts About Nonprofits* (2008), http://nccs.urban.org/ (follow "Quick facts & figures" hyperlink under "U.S. Nonprofit Sector" section) (last visited August 2, 2010). While the ultimate recipients of the donated funds—who may be seeking food, shelter, medical services, etc.—have their options circumscribed by taxpayer decisions, deductions for donations to religious charities have passed constitutional muster.

C. The Court Below Invented a Distinction Between Parent and Taxpayer Choice That Is Irrelevant to Establishment Clause Analysis

Finally, the choice of which STO to donate to—and the choice of whether to donate to an STO at all—remains at the taxpayers' sole discretion. The Ninth Circuit seems to apply to the free, private, ever-evolving choices of countless Arizona taxpayers the same constraints imposed on government decisions by the Establishment Clause. As the Arizona Supreme Court recognized in analyzing this very statute, however, "[t]he decision-making process is completely devoid of state intervention or direction and protects against the government 'sponsorship, financial support, and active involvement' that so concerned the framers of the Establishment Clause." *Kotterman v. Killian*, 972 P.2d 606, 614 (Ariz. 1999) (quoting *Waltz v. Tax Comm'n of New York*, 397 U.S. 664,668 (1970)).

Nonetheless, the Ninth Circuit attempts to distinguish the statutory scheme in Section 1089 by arguing that "unlike parents, whose choices directly affect their children, taxpayers have no structural incentives under Section 1089 to direct their contributions primarily for secular reasons, such as the academic caliber of the schools to which an STO restricts aid, rather than for sectarian reasons . . . ." *Winn*, 562 F.3d at 1022 (panel). In doing so, the court not only ignores the aforementioned federal charitable tax deduction system—which has been upheld as constitutional despite involving purely taxpayer choice—but provides no sound reason for accepting its characterization of taxpayer motivations. Indeed the

lower court's characterization is both untenable in theory and false in practice.

The same public that the Court claims to have no compelling interest in the broad-based secular education of all children is the one that created the existing broad-based secular public school system through its elected representatives, and that has consistently voted to increase its funding for generations. Over the past 40 years, Americans have chosen to increase spending on a k-through-12 education by a factor of four, after adjusting for inflation.[3] Given that public school levies in many parts of the country require a 60 percent margin of support to pass, this demonstrates the public's considerable and enduring support for the academic and practical preparation of all children.

Furthermore, it is widely recognized that a free, prosperous and harmonious republic depends on universal access to a broad-based education that fits children for both success in private life and participation in public life. Taxpayers thus have an

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[3] To compute the average cost of a complete k-12 education for graduates in a given year, we sum that year's per-pupil spending figure with the corresponding figures for the preceding 12 years—yielding a 13 year (k-12) sum. The k-12 education of 1970 graduating seniors cost approximately $39,000, in 2009 dollars. The figure for 2009 graduating seniors was roughly $150,000. Inflation adjustment to 2009 dollars computed using the BLS inflation calculator. Missing year per-pupil spending values were linearly interpolated or extrapolated from the available data. Data were sourced from: Thomas D. Snyder & Sally A. Dillow, *Digest of Education Statistics 2009*, Nat'l Center Educ. Stat. table 182 (2010), *available at* http://nces.ed.gov/pubs2010/2010013.pdf.

obvious self-interest in ensuring that their neighbors' children are capable of supporting themselves, so that they do not create a burden on the state—and hence on taxpayers—for their support.

It is therefore not surprising that voters consistently place education among their top priorities in public opinion polls.[4] We want our neighbors' children to succeed in life because it is in both our nature and our interests to want it.

To summarize, the court below offered neither reason nor evidence to support its claim that a taxpayer considering an STO donation would be any more likely than a parent to discount the importance of academics. Indeed, both logic and evidence confute its claim. There is thus no reason to accept the distinction the Ninth Circuit draws between taxpayers and parents on this subject.

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[4] *See*, *e.g.* Mark DiCamillo & Mervin Field, *Majorities Rate Jobs/The Economy, The State Budget Deficit, Education and Health Care as Top Issues in this Year's Governor's Race*, Field Research Corp. Poll #2334 (2010), *available at* http://www.field.com/fieldpollonline/subscribers/Rls2334.pdf; Lydia Saad, *Iraq and the Economy are Top Issues to Voters*, Gallop, Feb. 13, 2008, http://www.gallup.com/poll/104320/Iraq-Economy-Top-Issues-Voters.aspx; Memorandum from Lake Research Partners and The Tarrance Group to Interested Parties, *Recent Poll Findings on National Survey* (Oct. 11, 2006), *available at* http://www.publiceducation.org/pdf/Publications/National_Poll/2006_PEN_Public_Poll.pdf; Mark DiCamillo & Mervin Field, *Candidate Views on Education Considered Most Important Issue when Deciding Whom to Support for Governor,* Field Research Corp. Poll #2039 (2002), *available at* http://www.field.com/fieldpollonline/subscribers/Rls2039.pdf.

D. Respondents' Additional Establishment Clause Argument, Regarding the Scholarship Recipients' Financial Need, Misconstrues This Court's Precedent

Respondents, in their brief opposing certiorari, suggested an additional reason why Section 1089 ostensibly runs afoul of the Establishment Clause. They argued that this Court upheld the Cleveland program at issue in *Zelman* in part because the vouchers "were issued on the basis of financial need," Resp't Cert. Br. in Opp'n 1, and that Section 1089 lacks this constraint. But Respondents provide no legal argument in defense of their view. Indeed, no such argument *could* be provided—because the recipients' income was not integral to *Zelman*'s holding and is not material to Establishment Clause analysis. *Zelman*, 536 U.S. at 652–53; *see also Mitchell v. Helms*, 530 U.S. 793, 801–836(2000) (plurality opinion); *id.* at 836–68 (O'Connor, J., concurring in judgment).

Respondents further claimed that STOs award "most of [their] scholarships to the children of middle-class and wealthy parents," Resp't Cert. Br. in Opp'n 2, citing two newspaper stories. This claim too is legally immaterial, *Zelman*, 536 U.S. at 652–53, and moreover is contradicted by the evidence. For example, Baylor University economist Charles M. North last year reported to the Arizona legislature's Ad Hoc Committee on Private School Tuition Tax Credit Review that "at least 14 of the largest STOs place substantial emphasis (including six that place sole emphasis) on financial need in deciding on scholarship awards. These 14 STOs account for 18,452 (or 65.2

percent) of the 28,321 scholarships awarded in 2008. They also accounted for $37.6 million (or 69.5 percent) of the $54.1 million in scholarships awarded in 2008." Charles M. North, *Estimating the Savings to Arizona Taxpayers of the Private School Tuition Tax Credit*, (Nov. 2009), http://www.azpolicy.org/sites/azpolicy.org/files/downloads/ArizonaSTOTaxCreditCMNorth.pdf.

In short, the Respondents have not identified a legal basis upon which to mount a successful Establishment Clause challenge to Section 1089.[5]

III. Arizona Does Not Promote Religious Education

This Court's precedent unambiguously holds that the actual share of students enrolled in religious schools under a neutral program of true private choice is immaterial to that program's constitutionality under the Establishment Clause. *See Zelman*, 536 U.S. at 639; and *Mueller v. Allen*, 463 U.S. 388 (1983). Even if we ignored that finding, however, Arizona most certainly does not favor religion.

As noted above, *all* available education programs must be considered when determining whether or not government is favoring religious instruction in violation of the Establishment Clause. *Zelman*, 536

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[5] Recent scholarship questions whether "as-applied" Establishment Clause challenges are *ever* viable—because either a legislature in the first instance makes a "law respecting an establishment of religion" or it doesn't. *See, e.g.*, Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209, 1263-68 (2010).

U.S. at 655-56. When we do this here, we find that, far from favoring religious instruction, Arizona maintains a substantial financial disincentive to it.

Arizona operates a system of district-based public schools and a network of semi-autonomous public charter schools, supports private school choice through Section 1089, and permits home-schooling. The 2008-09 breakdown of funding and participation for the first three categories is given in Table 1.[6]

Table 1 shows that the tax credits granted under Section 1089 are 185 times smaller in value than Arizona's expenditures on strictly secular district and charter schools. The number of children benefiting from the credits is 38 times smaller. The average scholarship size, $1,909, is less than one quarter the per-pupil funding available to students in charter schools, and roughly one fifth the funding available to traditional public school students. To put that last figure in perspective, a 2006 study by *amicus* Coulson

[6] Table 1. Funding & Participation in Arizona K-12 Education

	District Schools	Charter Schools	Section 1089
Students	979,841	99,018	28,321
Total Expenditures	$9,239,346,175	$768,228,014	$54,063,195
Per Pupil Expenditures	$9,429	$7,758	$1,909

Created using data from Tom Horne, *Superintendent's Annual Report for Fiscal Year 2008-2009*, Vol. 1, at 47-48 (2010); Gale Garriott, *Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2008* (2008).

found average day tuition at Arizona private schools to have been $4,398 during the 2004-05 school year ($4,923 in 2009 dollars). Andrew Coulson, *Arizona Public and Private Schools: A Statistical Analysis*, Goldwater Institute, Policy Report No. 213 (2006).

A corollary to the above figures is that even parents who receive STO scholarships must typically spend several thousand dollars of their own money to send their children to religious schools. By contrast, both charter and district public schools are tuition-free. And as this Court said in *Zelman*:

> Families too have a financial disincentive to choose a private religious school over other schools. Parents that choose to participate in the scholarship program . . . must co-pay a portion of the school's tuition. Families that choose a community school, magnet school, or traditional public school pay nothing. Although such features of the program are not necessary to its constitutionality, they clearly dispel the claim that the program "creates . . . financial incentive[s] for parents to choose a sectarian school."

536 U.S. at 654 (quoting *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993)).

Given all the options Arizona parents have for their children's education—and the state's disproportionate support for secular ones—it is absurd to suggest that the state coerces them into choosing religious schools. *See* Tim Keller, Op-Ed., *Not An Endorsement of*

Religion, National Law Journal, Mar. 8, 2010, at 38.[7]

IV. Respondents Rely on a Moving Statistical Target That Has Never Supported Their Legal Argument

In *Mueller*, this Court said that it 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." 463 U.S. at 401. Applying this precedent in *Zelman*, the Court stated that:

> To attribute constitutional significance to [the local percentage of religious private schools] would lead to the absurd result that a neutral school-choice program might be permissible in some [places] . . . but not in [others] . . . . The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time,

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[7] Note also that the financial incentive argument raised by Justice Souter in his *Zelman* dissent, 536 U.S. at 705–706—an argument countered by the majority, 536 U.S. at 656 n.4—does not apply to Section 1089. The Cleveland program requires private schools to accept the voucher as full payment of tuition, and, given its comparatively low value, Justice Souter argued that this created a disincentive to the participation of (usually more expensive) secular private schools, biasing the program toward religion. Section 1089 imposes no such restriction on tuition charged by private schools, and so even if the Court now chose to accept Justice Souter's *Zelman* argument, it would not apply to the program at issue here.

> most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.

536 U. S. at 657-58.

The Ninth Circuit acknowledged this precedent, *see Winn*, 562 F.3d at 1018 n.14 (panel), but then chose to discount it, finding that, as Respondents allege,

> [T]he 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.

Id. at 1013.

For the reasons described above, the Ninth Circuit's reasoning misuses Supreme Court precedent by improperly applying to the independent choices of taxpayers the Establishment Clause's restrictions on government religious bias—and by failing to consider Section 1089 in the context of the overwhelming predominance of secular education programs in the state. But what if we were to ignore precedent and to suppose that the distribution of scholarships reserved for religious education is constitutionally relevant? Would the lower court be correct in concluding that Section 1089 "skews aid in favor of religious schools,

requiring parents who would prefer a secular private school . . . to choose a religious school . . .”? *Id.*

The answer is no. A simple preponderance of scholarship availability for religious schools would not mean that parents seeking secular private schooling would be any less likely to obtain a scholarship than parents seeking religious schooling. To support the Ninth Circuit’s holding, it would be necessary to show that secular parents were in fact being rejected for scholarships in greater proportion than their religious peers—or, at the very least, to show that the share of scholarships reserved for religious schooling was *greater than the share of private school demand already given over to religious schools due to parental preferences*. Because if the share of scholarships reserved for religious schools is less than or equal to the share of private school students already enrolled in religious schools, then there is no evidence that parents seeking secular schools would be at a disadvantage in obtaining a scholarship.

So what are the facts? Respondents allege that, in 1998, 94 percent of donated scholarship funds went to STOs that reserved them for use at religious schools. Compl. 3, n. 15. That was the first year in which Section 1089 was in operation, however, and little funding was actually distributed, as Respondents acknowledge. According to Respondents’ own complaint, the share of scholarships *actually distributed* in 1998 that were reserved for use at religious schools was 75 percent, not 94. *Id.* at 4.

Was this larger than the actual religious share of private school enrollment? No. Based on U.S.

Department of Education data, we estimate that the share of Arizona private school students attending religious schools in 1998-99 was 75.5 percent.[8] The share of scholarship funds reserved for religious schooling was an almost precise match for the share of private school students statewide whose parents preferred that they be enrolled in religious schools. (In fact, it was slightly lower.) There is no evidence that the small fraction of private school parents seeking secular schooling would have had any less access to scholarships in 1998 than the much larger share seeking religious schooling.

And one cannot reasonably argue that Section 1089 itself substantially inflated the religious share of private sector enrollment in the 1998-99 school year. Respondents admit that, no more than $276,445 was awarded in scholarships in 1998—too small a sum to have substantially affected the distribution of private school enrollment state-wide.[9] Further, the average religious share of enrollment for the three preceding years for which data are available (1993-94, 1995-96, 1997-98) is 75.7 percent—again *above* the share of scholarships reserved for religious schools in 1998-99.

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[8] The Department of Education periodically conducts a "Private School Universe Survey," though it did not do so in the relevant 1998-99 school year. If we estimate the Arizona religious enrollment share for 1998-99 by averaging together the percentages from the 1997-98 and 1999-2000 surveys, however, we arrive at 75.5 percent. Andrew Coulson, *The Case of the Missing Evidence*, (Jan. 26, 2010), http://www.cato-at-liberty.org/2010/01/26/the-case-of-the-missing-evidence.

[9] Calculated from notes 15 through 19 of the Respondents' complaint. *See* Compl. 3-4, nn. 15-19.

See Coulson, *The Case of the Missing Evidence*, *supra*.

Most damning for Respondents' empirical claim is the fact that the share of total scholarship donations reserved for use in religious schools has fallen significantly since 1998. As already noted, Respondents allege that it was 94 percent in 1998 (the bulk of which was not distributed in that year). Based on our calculations from the official tabulations published by the ADOR, that share had fallen to 76 percent by 2004, and to 65 percent in 2008. The latter figure is more than 15 percentage points below the share of Arizona private school students enrolled in religious schools in the most recent year for which data are available (81 percent in 2007-08). *Id.* In other words, the share of scholarship funding *available* for use at secular schools is currently almost twice as large as the share of families *choosing* secular schools. There is thus no evidence that families seeking secular schooling would have any more difficulty obtaining scholarships under Section 1089 than those who prefer religious schooling.

The evidence just presented serves to underline the wisdom of Supreme Court precedents such as *Zelman*: it would indeed be "absurd" to rule on the constitutionality of a religiously neutral program based on statistical targets that vary from place to place and over time, solely as a result of changes in private choices.

V. Far from Being an Impediment to Parental Freedom, the Autonomy Granted to Taxpayers and STOs Under Section 1089 Is Ultimately Essential to It

Respondents are implicitly concerned with maximizing the freedom of parents to choose schools that comport with their values, and believe—contrary, as we have shown, to both evidence and precedent—that Section 1089 is unconstitutionally injurious to that end. Similarly, the Ninth Circuit misconstrued Section 1089 as harmful to "the secular purpose of the program, which is to provide 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." *Winn*, 562 F.3d at 1022 (panel).

Going beyond the errors in Respondents' and the Ninth Circuit's reasoning, described above, Section 1089 and similar programs are not simply *compatible* with the unfettered exercise of parental choice, they are ultimately *essential* to it. If Respondents' suit is successful, it will impede rather than advance Respondents' own implicit goal.

After 16 years of studying school systems in an international and historical context, *amicus* Coulson concludes that taxpayers' freedom to choose STOs, and of STOs to focus their scholarships on certain schools, is necessary to preserve parental choice in the long term. The reason is straightforward: The curriculum offered in elementary and secondary education systems paid for by third parties has invariably been constrained by the preferences of those who fund them. Therefore, to ensure that families with limited means

have access to a wide range of educational choices, it is necessary to provide a *proliferation of different sources* of tuition aid. This is true under both autocratic and democratic governments, and it is true whether the third party funder is a private or a government organization. *See* Coulson, *Market Education: The Unknown History* (Transaction Books, 1999).

Consider, first, the case of private funding. When left to their own devices, people do not generally subsidize activities they find morally objectionable or that violate their own convictions. When they make voluntary contributions to philanthropic causes, they tend to choose ones that specifically comport with their values. The scope of services provided by any one charitable organization thus reflects the values of its donors; it usually offers a limited subset of the services that it could conceivably provide. The Nature Conservancy does not subsidize paving contractors, and evangelical Protestant charities do not evangelize in favor of Catholicism.

The crucial point is that *so long as there is a multiplicity of charitable organizations, a wide range of services will be available to the ultimate beneficiaries*. By allowing anyone to start an STO, Section 1089 has led to the rise of a wide range of STOs, from among which parents seeking scholarships may select the one most consistent with their own values. This diversity among STOs is directly analogous to the diversity of religious and secular charitable organizations that benefit from tax deductible donations claimed against federal income taxes.

Now compare this to the case of a third-party payment system operated by a democratic government, which encompasses both Arizona's district and charter public school systems. From the start, parents in both of those systems lose all religious education options due to the Establishment Clause. And yet, as we have seen, there is strong demand in Arizona for religious educational options, so these publicly funded systems present a drastic constraint on parents' educational freedom of choice. And contrary to Section 1089, parents cannot shop around for an alternative funder in the charter or traditional public school sectors. Government-funded education systems are, by definition, single-payer.

But the advantages of Section 1089 extend beyond merely expanding parents' educational options. In his *Zelman* dissent, Justice Breyer posited that compelling taxpayers to fund religious schooling "risks creating a form of religiously based conflict potentially harmful to the Nation's social fabric." 536 U.S. at 728-29 (Breyer, J., dissenting). Even if the Court were now to agree with that argument—the *Zelman* Court found it irrelevant to Establishment Clause analysis, *id*. at 662, n.7—it does not apply here. Under Section 1089, nobody is ever compelled to support religious schooling: Taxpayers may choose to donate to secular STOs—or forego donating to any STO.

Indeed, Section 1089's reliance on voluntary donations makes it not simply *equivalent* to public schooling for purposes of minimizing social conflict caused by taxpayer compulsion but *superior* to it. While taxpayers are not compelled to fund religious education under the public school system, they are

compelled to fund instruction in a host of ideologically and morally charged areas that have precipitated social conflicts—from the teaching of history and evolutionary biology to sex education and even different reading methodologies. *See* Coulson, *Market Education*, *supra*; Stephen Arons, *Compelling Belief, The Culture of American Schooling* (Univ. of Mass. Press 1983).

Eliminating this compulsion-based source of conflict confers an additional benefit on Section 1089: It relieves pressure to restrict parents' choices through the regulation of their educational options. Since no taxpayer is compelled to support a form of education he finds objectionable, he has much less incentive to lobby for regulations curtailing such education. While individual STOs may only support schools of a particular religion or outlook, parents are free to seek scholarships from any STO they choose. The possibility of a tyranny of the majority with regard to pedagogical options is thus considerably reduced under Section 1089 as compared to a single payer system such as public schooling.

Making tuition assistance available from a multiplicity of sources thus offers unique advantages in advancing the goal of providing families with access to a wide variety of choices over the long term, while simultaneously avoiding the compulsion of taxpayers that concerned Justice Breyer in his *Zelman* dissent. Section 1089 is the solution, not the problem.

CONCLUSION

It is difficult to find a better or more succinct conclusion to our arguments than the one offered by Judge O'Scannlain in his dissent from the Ninth Circuit's refusal to rehear this case *en banc*. And so we echo it here: "Because the three-judge panel's decision strays from established Supreme Court precedent, and because it jeopardizes the educational opportunities of thousands of children who enjoy the benefits of Section 1089 and related programs across the nation . . . ," *Winn*, 586 F.3d at 671 (en banc) (O'Scannlain, J., dissenting), we respectfully request that this Court reverse the Ninth Circuit.

Respectfully submitted,

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