
In The
Supreme Court of the United States

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

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

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QUESTIONS PRESENTED

- I. Do Respondents lack taxpayer standing because they do not allege, nor can they, that the Arizona Tuition Tax Credit involves the expenditure or appropriation of state funds?
- II. Is the Respondents' alleged injury – which is solely based on the theory that Arizona's tax credit reduces the state's revenue – too speculative to confer taxpayer standing, especially when considering that the credit reduces the state's financial burden for providing public education and is likely the catalyst for new sources of state income?
- III. Does a tax credit that advances the legislature's legitimate secular purpose of expanding educational options for families unconstitutionally endorse or advance religion simply because taxpayers choose to direct more contributions to religious organizations than nonreligious ones?

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INTEREST OF AMICI CURIAE

The Framers and the citizens of the Founding Era took very seriously the idea that federal courts should not assume a supervisory role over state governments. Yet, as this case demonstrates, state officials are frequently sued in federal court by state taxpayers seeking to enjoin various government actions and programs on Establishment Clause grounds. *See also Pedreira v. Kentucky Baptist Homes for Children*, 579 F.3d 722 (6th Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3566 (U.S. Mar. 16, 2010) (09-1121), 78 U.S.L.W. 3644 (U.S. Apr. 19, 2010) (09-1295); *Hinrichs v. Speaker of the House of Representatives of the Ind. Gen. Assembly*, 506 F.3d 584 (7th Cir. 2007); *Am. United for Separation of Church & State v. Prison Fellowships Ministry*, 509 F.3d 406 (8th Cir. 2007).

From the States' perspective, vigilance concerning Article III standing is required to avoid turning federal courts into fora "in which to air . . . generalized grievances about the conduct of government or the allocation of power in the Federal System." *Flast v. Cohen*, 392 U.S. 83, 106 (1968); *see also Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 593 (2007) ("[I]f every federal taxpayer could sue to challenge any Government expenditure, the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus.").

Even more to the point, maintaining proper limits on federal-court standing is necessary to prevent federal courts from becoming state fiscal monitors. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006). Just as federal courts scrutinize federal-

taxpayer-standing claims in order to avoid creating a system whereby "the other departments would be swallowed up by the judiciary," *id.* at 341 (quoting 4 *Papers of John Marshall* 95 (Charles T. Cullen ed. 1984)), so too, federal courts must police state-taxpayer standing claims to avoid swallowing state-government autonomy.

This Court has consistently equated federalism concerns with separation-of-powers concerns when faced with a decision whether to expand federal-court standing. *See, e.g., Allen v. Wright*, 468 U.S. 737, 759-60 (1984) (drawing a direct analogy between federalism and separation-of-powers principles); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 476 (1982) (stressing that Article III "is a part of the basic charter . . . which . . . provided for the interaction between that government and the governments of the several States, and was later amended so as to either enhance or limit its authority with respect to both States and individuals"). This Court has also relied on federalism principles when rejecting the justiciability of citizen lawsuits for injunctive relief against state officials based only on past conduct. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 111-13 (1983); *Rizzo v. Goode*, 423 U.S. 362, 380 (1976); *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974).

The *amici* States have a strong interest in urging this Court to adhere to these principles of federalism and in supporting Arizona's efforts to limit federal courts to their proper role in Establishment Clause cases.

Moreover, 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 were 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. In fact, six States have enacted legislation similar to the program in Arizona designed to increase access to education: Florida, Georgia, Indiana, Iowa, Pennsylvania, and Rhode Island.² All the amici curiae States have an interest in ensuring the proper neutrality between government and religion – maintaining adherence to Establishment Clause principles, while protecting programs that rely on religion-neutral criteria and that do not hinder the independent decisions of private citizens. The reaffirmation of the principles from *Zelman v. Simmons-Harris*, 536 U.S. 639, 645 (2002), will ensure that this program and others will not fall when the State has not acted to advance or hinder religion but only given benefits to private citizens and allowed them to use the benefits as they see fit.

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

² See Fla. Stat. § 1002.395; Ga. Code Ann. § 48-7-29.16; Ind. Code §§ 20-51-1-1 *et. seq.*; 6-3.1-30.5; Iowa Code §§ 422.11S, 422.12; 72 Pa. Cons. Stat. § 8705-F; R.I. Gen. Laws § 44-62-2.

SUMMARY OF ARGUMENT

Respondents allege that a state tax credit for donations to school tuition organizations, when those donations create scholarships to religious schools, causes "irreparabl[e] harm[] [to taxpayers] by the diminution of the state general fund." Both *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923), and *DaimlerChrysler v. Cuno*, 547 U.S. 332, 344 (2006), generally preclude state taxpayer standing of this sort. Nonetheless, the court below accorded taxpayer standing based on the taxpayer standing exception created by *Flast v. Cohen*, 392 U.S. 83, 103 (1968). The *Flast* exception, however, has been reduced to a sliver. In *Hein v. Freedom from Religion Foundation*, 551 U.S. 587, 604 (2007), this Court limited *Flast* to its facts and made clear that taxpayer standing was permitted only for challenges directed at "specific congressional appropriation[s]" dispersed in accordance with a "direct and unambiguous" congressional mandate. This case, where the plaintiffs challenge tax credits rather than appropriation, and where the operative legislation does not direct that donations eligible for credits be made to religious schools, does not fit the *Hein* criteria.

What is more, Respondents' insistence that this case amounts to an as-applied challenge makes taxpayer standing completely untenable. If what Respondents really complain about, as they have argued for purposes of avoiding *res judicata*, is how the Arizona tax authorities have administered the program, then they are challenging not legislative directives, which *Flast* permits, but executive branch activity, which *Hein* precludes. Hence, to accord standing here would be to reverse course after *Hein* and expand the concept of taxpayer standing, this time

at the expense of States rather than the federal government.

Moreover, if this Court reaches the Establishment Clause issue raised by the State of Arizona, this Court should reverse the decision of the U.S. Court of Appeals for the Ninth Circuit.

This case provides a significant opportunity for this Court to reiterate that the controlling analysis under the Establishment Clause is whether a state program has the purpose or effect of advancing or inhibiting religion. Neutrality is the linchpin to the analysis. That is the primary holding of *Zelman v. Simmons-Harris*.

As long as the State has remained neutral in creating a program, providing benefits to taxpayers irrespective of religion, the fact that private citizens or organizations elect to direct money toward religious enterprises – or not to do so – reflects the decisions of private citizens, not the decisions of the State. The program created by the State of Arizona here is neutral regarding religion, and therefore does not have the purpose or effect of advancing or inhibiting religion.

The Ninth Circuit rejected the Arizona program because the taxpayers in providing support to student tuition organizations (STOs) may elect to support them for religious reasons and the STOs may decide to limit their support to religious schools for religious reasons. But these are the decisions of private citizens, not the government. The endeavor of quantifying the number of opportunities created by the STOs to measure whether parents have an equal amount of money to

attend private secular schools to attend as against private religious schools misunderstands the point. Such an analysis implies that the resolution of the question whether the program has the "effect" of advancing religion depends on the religious character of the citizens at issue, not the actions of the government. Where the government provides a benefit – here a tax credit – to a private citizen, who independently may decide to use the benefit in favor of religion, the citizen is the author of the decision, not the government. The Establishment Clause is not offended when citizens use benefits provided by the government religiously.

The Establishment Clause does not require that religion be quarantined from receiving some benefit from a state program before the constitutionality of the program may be affirmed. When a governmental program establishes religion-neutral criteria for conferring a benefit to its citizens, the private, independent decisions of those citizens operate as a circuit-breaker between the government and any private decisions to favor religion. These criteria satisfy the Establishment Clause, and the inquiry should end there.

This Court should reverse the United States Court of Appeals for Ninth Circuit.

ARGUMENT

I. Because no legislative appropriations are at stake, respondents cannot establish standing.

Respondents' assertion of taxpayer standing conflicts with this Court's Article III precedents. Article III requires federal-court plaintiffs to show a "concrete and particularized" injury that is neither "conjectural [n]or hypothetical." *Cuno*, 547 U.S. at 344. The complaint in this case is essentially that, as applied to donations that create scholarships to religious schools, a state tax credit for donations to school tuition organizations causes taxpayers some undefineable injury shared in common with taxpayers generally. Such a claim is insufficient to confer Article III standing, even if it arises under the Establishment Clause. *Id.*

A. Like federal taxpayers, state tax-payers may not challenge taxing and spending policies in federal court.

1. This Court long ago set forth the basic rule that Article III does not permit taxpayers to challenge in federal court the constitutionality of government taxing and spending policy. In *Frothingham*, this Court ruled that federal taxpayers had no standing to challenge a congressional appropriation creating a state-federal partnership targeting infant mortality and maternal health. *Frothingham*, 262 U.S. at 488. This Court observed that any particular taxpayer's interest in the federal treasury is "shared with millions of others" and therefore "comparatively minute and indeterminable"

such that "the effect upon future taxation, of any payment out of the funds" is too "remote, fluctuating and uncertain" to afford equity jurisdiction. *Id.* at 487.

As the decision below acknowledged, there is no doubt that the rules governing federal taxpayer standing carry over to state taxpayers. *See Winn v. Garriott*, 562 F.3d 1002, 1008 (9th Cir. 2009); Pet. App. at 9a ("This rule applies with equal force to taxpayer suits challenging an allegedly unconstitutional state action and those challenging federal action."). In *Doremus v. Bd. of Educ. of Borough of Hawthorne*, 342 U.S. 429 (1952), this Court set the same course for state taxpayer standing as *Frothingham* did for federal taxpayer standing, expressly holding that, when it comes to taxpayer standing, "what the Court said of a federal statute [i]s equally true when a state Act is assailed" *Id.* at 434 (quoting *Frothingham*, 262 U.S. at 488). This Court stressed that a state taxpayer could satisfy Article III "only when it is a good-faith pocketbook action." *Id.* And it relied extensively on the relationship between the states and the federal government and noted that while state courts may entertain public-interest lawsuits brought by taxpayers, federal courts may not. *See id.* at 434.

More recently, in *DaimlerChrysler v. Cuno*, 547 U.S. 332, 344 (2006), the plaintiffs challenged an Ohio tax credit that induced DaimlerChrysler to maintain manufacturing facilities located within the State. *Id.* at 337-38. They claimed to have standing "by virtue of their status as Ohio taxpayers, alleging that the franchise tax credit 'depletes the funds of the State of Ohio to which the Plaintiffs contribute through their tax payments' and thus 'diminish[es] the total funds

available for lawful uses and impos[es] disproportionate burdens on' them." *Id.* at 342-43.

The "reduced revenue" theory was insufficient first because the impact of tax credits on the state fisc was speculative – "[t]he very point of the tax benefits is to spur economic activity, which in turn *increases* government revenue" – and second because there was no way to know whether invalidating the credits would benefit the plaintiffs as taxpayers. *Id.* at 344. Ultimately, a state taxpayer must have a claim for disgorgement of paid taxes from a state official – or a claim that a state official is about to deprive the taxpayer of money unlawfully through taxation – in order to sue that official in federal court *as a taxpayer*. *See id.* at 345-46.

2. This case, where the Respondents claim only that they have been "irreparably harmed by the diminution of the state general fund through the tax credit program," is indistinguishable. The tax credit at issue in this case, like the tax benefit awarded in *Cuno*, is intended to *improve* the State's financial position and *lessen* the burden on taxpayers. This Court has already recognized that programs increasing the affordability of private schools likely decrease a State's tax burden. *See Mueller v. Allen*, 463 U.S. 388, 395 (1983) ("By educating a substantial number of students [private] schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers."). And by enabling more parents to send their children to private schools using scholarships, the tax credit may also encourage new private educational institutions to open and create new teaching, administrative, and management positions, all of

which would contribute to the State's tax base and lessen the burden on current taxpayers, including the plaintiffs. To say the least, it is speculative to say that tax credits create greater burdens for non-participating taxpayers.

Furthermore, Respondents cannot show that if the tax credit did not exist, they would pay a smaller amount on tax day. They have argued that money paid to religiously oriented STOs should go instead to the State, but even if so it does not follow that taxpayers would themselves realize any concrete benefits from that result. What happens to the money would be up to the Arizona legislature, and it might need to raise extra tax revenue to cover the cost of educating more children, as but one example of an alternative use that would not benefit the Respondents. Therefore, as in *Cuno*, the allegations of harm and redressability are far too speculative to sustain Article III standing.

B. Respondents do not challenge an appropriation directly supporting religious schools, so *Flast* does not apply here.

In according taxpayer standing in this case, the court below, rather than simply apply *Cuno*, erroneously relied on the exception to the *Frothingham* rule created by *Flast*. *Winn*, 562 F.3d at 1008-09; Pet. App. at 10a-11a. Neither *Flast* nor subsequent Establishment Clause cases extend federal court jurisdiction to this case.

1. A discussion of the parameters of *Flast* must actually begin with *Doremus*, which, as noted

above, held that state taxpayers pursuing Establishment Clause violations must allege "a good-faith pocketbook action" in which there is a "direct dollars-and-cents injury." *Doremus*, 342 U.S. at 434. The *Doremus* plaintiff lacked standing because he failed to identify any funds that had been used to facilitate the school's practice of reading Bible verses to start school. *Doremus* involved a "grievance [that] is not a direct dollars-and-cents injury but is a religious difference." *Id.* Litigating religious differences is insufficient for purposes of standing.

Doremus notwithstanding, this Court in *Flast* permitted federal taxpayer standing to challenge acts of Congress when "the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power." *Flast*, 392 U.S. at 102-03. The Establishment Clause provides one (indeed the *only*) "specific constitutional limitation" on the spending power that can justify taxpayer standing. Accordingly, this Court in *Flast* permitted an Establishment Clause challenge to grants authorized by the Elementary and Secondary Schools Act of 1965, and later permitted taxpayers to bring an Establishment Clause challenge against grants authorized by the Adolescent Family Life Act. See *Bowen v. Kendrick*, 487 U.S. 589, 618-20 (1988).

Not intending to jettison its Article III standing precedents entirely, however, this Court in *Flast* expressly declared the taxpayer/spending nexus test to be "consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus*" *Flast*, 392 U.S. at 102-03. Perhaps in keeping with that assertion, *Flast* did not signal an era of ever-

expanding taxpayer standing in Establishment Clause cases. In fact, this Court has rejected taxpayer standing to assert an Establishment Clause violation through a transfer of property to a religious group, underscoring the "rigor with which the *Flast* exception to the *Frothingham* principle ought to be applied." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 481 (1982).

To be sure, the decision below cited post-*Flast* cases decided on the merits by this Court where taxpayers challenged tax provisions or "indirect aid programs" that benefitted religious organizations. *Winn*, 562 F.3d at 1010-11; Pet. App. at 15a-16a (citing *Mueller v. Allen*, 463 U.S. 388, 390 (1983); *Comm. for Pub. Educ. & Religious Lib. v. Nyquist*, 413 U.S. 756, 789-90 (1973); *Hunt v. McNair*, 413 U.S. 734, 737-38 (1973); *Walz v. Tax Comm'n*, 397 U.S. 664, 666 (1970); *Zelman*, 536 U.S. at 645). But these cases hardly establish firm precedent that taxpayers can bring federal court lawsuits challenging tax credits that allegedly violate the Establishment Clause. Two of the cases originated in state court, where Article III's restrictions do not apply. *See Hunt*, 413 U.S. at 735-36; *Walz*, 397 U.S. at 666-67. And two more dealt with, among other things, actual legislative expenditures, not just tax deductions or credits. *See Nyquist*, 413 U.S. at 774; *Zelman*, 536 U.S. at 644-45. And in none did this Court actually address standing.

With regard to such arguably *sub silentio* precedents, this Court faced a similar situation in *Frothingham*, where it observed that prior cases had permitted taxpayer standing without expressly

addressing the issue. Yet this Court in no way felt constrained by those prior cases. *Frothingham*, 262 U.S. at 486 ("In cases where it was presented, the question has either been allowed to pass sub silentio or the determination of it expressly withheld.") (citing *Millard v. Roberts*, 202 U.S. 429, 438 (1906); *Wilson v. Shaw*, 204 U.S. 24 (1907); *Bradfield v. Roberts*, 175 U.S. 291 (1899)).

Even more important, in its most recent pronouncement on the subject, *Hein*, this Court clung to *Flast* as a matter of *stare decisis*, but also made it equally clear that *Flast* was limited to its facts. *Hein*, 551 U.S. at 604. In *Hein*, this Court refused to extend taxpayer standing to challenges of the Executive Branch's use of tax money to fund religious conferences and speeches. *Id.* at 605. This Court made clear that *Flast* only permitted taxpayer standing in challenges directed at "exercises of congressional power" under the Taxing and Spending Clause. *Id.* (quoting *Valley Forge Christian Coll.*, 454 U.S. at 479).

Under *Hein*, that is, taxpayers may challenge "specific congressional appropriation[s]" dispersed pursuant to Congress' Tax and Spend powers, provided that the appropriations in question were dispersed in accordance with a "direct and unambiguous" congressional mandate. *Id.* at 604. This nexus requirement is not met absent "the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion." *Cuno*, 547 U.S. at 348 (quoting *Flast*, 392 U.S. at 106). The requirement of "direct injury" requires taxpayer-plaintiffs to show that the State has extracted taxes from them, or has appropriated and spent public

monies, to fund a program that allegedly violates the Establishment Clause. *See Hein*, 551 U.S. at 603.³

2. The Respondents here cannot, under the *Hein* standard, "point[] to any specific appropriation of funds by the legislature to implement the program." *Hinrichs v. Speaker of the House of Representatives of the Ind. Gen. Assembly*, 506 F.3d 584, 598 (7th Cir. 2007). Further, "[t]hey have not shown that the legislature has extracted from them tax dollars for the establishment and implementation of a program that violates the Establishment Clause." *Id.* at 599. The Arizona tax credit at issue does not unambiguously mandate that government funds be spent in support of religious schools, so Respondents do not have standing to challenge it as taxpayers.

Respondents lack standing for the exact reasons that this Court rejected standing in *Hein* and *Doremus*. They do not, and cannot, allege that taxpayer funds have been extracted from them to fund Arizona's tuition tax credit program. Arizona's tax *credit* program does not extract or appropriate any money at all. Private citizens, not the legislature, determine both the amount donated and the destination of funds

³ Notwithstanding *Hein*, to support its finding of taxpayer standing, the Ninth Circuit cited to opinions from this Court equating tax breaks with government assistance for substantive Establishment Clause purposes. *Winn*, 562 F.3d at 1009; Pet. App. at 13a. But whether government action benefitting religion has the same impact as a specific legislative appropriation for purposes of substantive Establishment Clause analysis does not inform whether taxpayer standing exists. Otherwise the Court would surely have been compelled to find standing in *Hein*.

by selecting charitable organizations of their own choosing.

In fact, when rejecting a facial challenge to the same tax credit program at issue in this case, the Arizona Supreme Court authoritatively decided that education funds raised through tax credits are private dollars, not public funds, as "no money *ever* enters the State's control" and "[n]othing is deposited in the state treasury." *Kotterman v. Killian*, 972 P.2d 606, 618 (Ariz. 1999) (en banc); *see also Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975); *Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (per curiam) ("[T]he views of the State's highest court with respect to state law are binding on the federal courts.").

Arizona's tax credit program includes neither the extraction nor spending of "tax money," so it does not fit the model of taxpayer lawsuits permitted by *Hein*. *Kotterman*, 972 P.2d at 618.

3. In the court below, Respondents insisted that this case represents "an as-applied challenge, not to the statute's text, but to the program as it actually operates." Opp. Cert. at 15. They did this in order to avert the argument that they were barred by principles of *res judicata* from relitigating the facial constitutionality of the program in the wake of *Kotterman*. The Ninth Circuit accepted this argument, stating that Respondents were challenging facets of implementation rather than the legislation itself. *Winn*, 562 F.3d at 1007 n.3; Pet. App. at 6a-7a.

This gambit for avoiding *res judicata*, however, ultimately undercuts any remaining argument that

Flast applies. Again, *Hein* permits taxpayer challenges to *legislative* directives only. Yet from Respondents' point of view, this case apparently can only be characterized as an attack either on interpretive discretion exercised by the Arizona Department of Revenue or market behavior of private individuals in the wake of religion-neutral tax credits. And if what Respondents seek is a declaration that cabins the exercise of executive authority, see *Winn v. Hibbs*, 361 F. Supp. 2d 1117, 1118-19 (D. Ariz. 2005); Pet. App. at 50a-52a, then the case represents an attempt to achieve a marked expansion of the *Flast* doctrine that would countermand both *Hein* and this Court's otherwise consistent retreat from *Flast* over the past several decades.

* * *

Permissive treatment of state-taxpayer lawsuits undermines our federalist structure by involving federal courts in the daily functioning of state bureaucracies. This Court has repeatedly emphasized that federal courts must respect principles of federalism when cases portend judicial regulation of state programs. See *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990) (refusing to impose a tax levy for purposes of desegregation, stressing that "[o]ne of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions"); *id.* at 58-59 (Kennedy, J., concurring) (categorically rejecting, on federalism grounds, the power of federal courts to mandate state-tax levies); *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977) ("[F]ederal courts in devising a remedy must take into account the interests of state

and local authorities in managing their own affairs, consistent with the Constitution."); *O'Shea*, 414 U.S. at 500 (holding that the need for proper balance in the federalist system counsels restraint against granting injunctions against state officers administering state laws) (citing *Younger v. Harris*, 401 U.S. 37, 46 (1971)). These same concerns apply in Establishment Clause cases, and consequently this Court should reject the expansion of taxpayer standing invited here.

II. There is no Establishment Clause violation when a State encourages charitable giving through a religion-neutral tax credit for the purpose of increasing access to all private education.

In determining whether a State program has the effect of advancing religion, it is the government's actions that are examined, not the actions of private citizens. Where the government has remained neutral on the issue of religion, the program does not have the effect of favoring religion – even if private citizens use the benefits they receive for religious purposes. The neutrality of government is the beginning and end of the analysis.

The Ninth Circuit erred in clothing the decisions of the taxpayers with the mantle of State action. The decision of many taxpayers to create religious STOs, and give money to religious STOs, which give scholarships for children to attend religious schools, reflects the choices of the taxpayers, not the State. The Establishment Clause does not require the State to make sure that its citizens act for only secular purposes once it has conferred a benefit on them. The

Ninth Circuit's analysis – if applied to other cases – would call into question other similar State programs as well as any number of programs that give benefits to citizens who then act independently to assist religious causes.

A. Neutrality is the linchpin for determining whether the program has the effect of advancing religion.

The critical issue here is whether a state program that is neutral to religion violates the Establishment Clause when its citizens independently decide to use the benefits from the program for religious purposes. This Court's decision in *Zelman* made clear that it does not. Neutrality is the key to this conclusion. As a matter of common sense, where the government enacts a policy that is neutral regarding religion, there is no violation of the Establishment Clause. The government is not responsible for the independent decisions of its citizens.

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 religious faith." *Bowen v. Kendrick*, 487 U.S. 589, 611 (1988).

The basic standard for evaluating Establishment Clause challenges is outlined in *Agostini v. Felton*. There, 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. *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997).⁴

In determining whether an action has the "effect" of advancing religion, this Court's analysis focuses on the nature of the government's actions – not the actions of private citizens. Where "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. In reaching this conclusion, this Court reviewed other cases finding no constitutional violation where a government program benefitted a religious organization based on the "true private choice" rather than based on the actions of the government. *Id.* at 649 (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (permitting sign-language interpreters to assist deaf children enrolled in religious school selected by the parents); *Witters v.*

⁴ *Agostini* essentially folds the "entanglement" prong of the *Lemon* test into the "effect" prong. See *Zelman*, 536 U.S. at 668 (O'Connor, J., concurring) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)). The three primary criteria this 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 entanglement between government and religion. *Agostini*, 521 U.S. at 234.

Washington Dep't of Servs. for Blind, 474 U.S. 481 (1986) (permitting vocational scholarships); and *Mueller v. Allen*, 463 U.S. 388 (1983) (permitting tax deductions for educational expenses)).

Under *Zelman*, any "incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Zelman*, 536 U.S. at 652. True private choice breaks the "circuit" between state action and religion. *Id.* at 652.⁵

The program at issue in *Zelman* gave tuition-aid to parents who then directly paid the private schools, 82% of which had a religious affiliation. *Id.* at 647. This Court restated the point that merely because a vast majority of a program's benefits go to religious schools does not answer the question whether the program itself is constitutional. *Id.* at 658. Indeed, 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. *Id.* at 657.

This Court also found no "financial incentive" that "skewed" the program toward religious schools, where there was a full range of religious and

⁵ "Because the program ensured that parents were the ones to select a religious school as the best learning environment for their handicapped child, the circuit between government and religion was broken, and the Establishment Clause was not implicated." *Zelman*, 536 U.S. at 652.

nonreligious educational options available to parents. *Id.* at 653-56.

In this case, the State of Arizona's program is neutral because it is available to all Arizona citizens irrespective of religion. Citizens may choose to create an STO that donates scholarships to private religious schools or instead choose to create an STO that donates to private secular schools, or choose to create one that donates to both. *See* Ariz. Rev. Stat. Ann. § 43-1089(G)(2) and (3). If an STO is voluntarily created, citizens then may choose to donate "*voluntary* cash contributions" to an STO of their choice and receive the tax credit. Ariz. Rev. Stat. Ann. § 43-1089(A) (emphasis added).

The STOs then provide scholarships "to children to allow them to attend any qualified school of their *parents' choice*." Ariz. Rev. Stat. Ann. § 43-1089(G)(3) (emphasis added). The STOs may elect to donate scholarships to *both* private secular and private religious schools, or may limit themselves to only secular or religious schools. And parents always retain the ability to choose from a broad array of other educational options: public schools in different districts, charter schools, and homeschooling, in addition to private schools. Thus, Arizona does not steer parents toward religious schools through Section 1089. Instead citizens choose to create STOs and choose to fund STOs. And parents choose, from a wide assortment of educational settings, where to send their children. Section 1089 is neutral toward religion and therefore does not have the effect of advancing religion.

The analysis from *Zelman* applies equally here. 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." *Zelman*, 536 U.S. at 652-53 (quoting *Mitchell v. Helms*, 530 U.S. 793, 810 (2000)). Such an arrangement 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. "[N]o reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement." *Id.* at 655.

The Arizona 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. Consistent with *Zelman*, this program is constitutional.

B. The Ninth Circuit's fundamental error was failing to recognize that the independent decisions of the taxpayers in donating to the STOs did not reflect government action.

The Ninth Circuit found Arizona's program constitutionally defective under the Establishment Clause for two primary reasons: (1) the taxpayers have

constrained the options of parents by giving money to STOs that predominately give scholarships to only religious schools (85% of the money available); and (2) this process creates financial incentives for parents that skew the program toward religious schools. *Winn*, 562 F.3d at 1017, 1021-23; Pet. App. at 31a, 40a-45a.

The decision is wrong on both counts.

First, the Ninth Circuit ignores the critical distinction between State action and the private action of the taxpayers. The Ninth Circuit noted that taxpayers "have no structural incentives under Section 1089 to direct their contributions primarily for secular reasons[.]" *Id.* at 1022; Pet. App. at 43a. But the conduct of the taxpayers is not attributable to the State. *See Zelman*, 536 U.S. at 652. The government need not ensure that citizens only use the resources given to them for secular reasons, as long as the reason for the program itself is secular. As noted by Judge O'Scannlain in dissent in *Winn*, the "self-evident fact is that by 'delegating' the choice to the taxpayers, the government already broke the circuit." *Winn v. Garriott (Rehearing Denied)*, 586 F.3d 649, 667 (9th Cir. 2009) (O'Scannlain, J. dissenting); Pet. App. at 107a.

The program's purpose here is to ensure a wide range of education opportunities for children in Arizona, including private schools, homeschooling, charter schools, and attending other public schools in which the children are not members of the district. These purposes are fulfilled by allowing taxpayers to give money to STOs to make more money available for the private schools.

The Ninth Circuit concluded that these taxpayers had the responsibility of advancing the secular purposes of the government because the Arizona program delegated a power ordinarily vested in a governmental agency to them. *See Winn*, 562 F.3d at 1020-21; Pet. App. at 39a-40a; *see also Winn (Rehearing Denied)*, 586 F.3d at 655-56 n.8; Pet. App. at 79a-80a. ("Educational policy is certainly a traditional government function, and the state's decision to reimburse contributions to private scholarship funds is indisputably an educational policy decision."). It concluded that the structure of the Arizona program "encourage[d]" taxpayers to use the tax credits to advance sectarian goals. *Winn*, 562 F.3d at 1022; Pet. App. at 44a.

But the provision of a tax credit for a donation of funds to a student tuition organization (a charitable organization) is just like a donation to a charitable organization, for which one may claim a tax deduction, an endeavor that no one expects a taxpayer to do for primarily secular purposes. The Ninth Circuit fails to acknowledge that taxpayers are not stewards of the government's money. Rather, the money here was that of the taxpayers. And allowing STOs to include private secular or private religious schools, as well as allowing taxpayers to support either religious or secular schools through their donations to STOs, is religiously neutral – it does not encourage the STOs or taxpayers in any specific direction.

The Ninth Circuit's analysis is also predicated on a misapprehension of the analysis in *Zelman*. The Ninth Circuit indicated that one of the reasons that the

Ohio program was constitutional in *Zelman* is that the parents had "incentives to apply the program's aid based on their children's educational interests instead of on sectarian considerations[.]" *Winn*, 562 F.3d at 1021; Pet. App. at 40a. But this point wrongly assumes that a child's educational interests might not include considerations of the religious upbringing of the child. As noted by Judge O'Scannlain in dissent, many parents – the parents in *Zelman* included – do consider religion in selecting private educational schools for their children. See *Winn (Rehearing Denied)*, 586 F.3d at 668 (O'Scannlain, J. dissenting); Pet. App. at 109a-110a ("I disagree with the panel's conclusion that parents are somehow less motivated to promote religious objectives than taxpayers generally.").

Second, the options of the parents were not constrained or "skewed" by the State of Arizona. The options created were determined by the market decisions of private citizens. *Winn*, 562 F.3d at 1016; Pet. App. at 29a. The Ninth Circuit focused on the fact that the statute allowed STOs to offer scholarships at only religious schools. *Id.* at 1006, 1022; Pet. App. at 5a, 43a-44a. Yet this opportunity also allows the STOs to *exclude* religious schools, providing an opportunity to limit the amount of money available for religious schools. The fact that 25 of the 55 STOs limit their funding to religious schools is a reflection of the decision of private citizens, not the government. Any limitation in number is not the result of the program, but rather reflects the 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 funding for religious

schools. *Winn (Rehearing Denied)*, 586 F.3d at 662 (O'Scannlain, J., dissenting); Pet. App. at 95a. The government need not wait until the citizenry grows less religious before it seeks to create opportunities for children to attend private schools.

In denying rehearing en banc, the Ninth Circuit indicated that other similar State programs (Florida, Georgia, Indiana, Iowa, and Rhode Island) require that every STO enable parents to obtain funding for either private religious or private secular schools. *Id.* at 651 n.4 (majority opinion); Pet. App. at 68a-69a. But like Arizona, at least four State programs – Georgia, Iowa, Pennsylvania, and Rhode Island – allow particular STOs to limit their scholarships to religious schools or secular schools.⁶

⁶ For Georgia – See Georgia Dep't of Edu., *2010 List of Student Scholarship Organizations as of July 12, 2010*, available at http://www.doe.k12.ga.us/pea_policy.aspx?PageReq=PEAHB1133 (follow "SSO List – 08/04/2010" hyperlink) (last visited August 5, 2010). For Iowa – See Iowa Advocates for Choice in Education, *Tax Credits for Contributions to Scholarship Organizations - 2009 Year End Summary Reports*, available at <http://www.iowaadvocates.org/sto.html> (last visited August 5, 2010). For Pennsylvania – See REACH Foundation: Educational Tax Credits, *List of Scholarship Organizations*, available at <http://www.paschoolchoice.org/reach/cwp/view.asp?a=1367&q=568487> (follow "scholarship organizations" hyperlink) (last visited August 5, 2010). For Rhode Island – See Rhode Island Department of Revenue: Division of Taxation, *Tax Credits for Contributions to Scholarship Organizations – Summary of Scholarships Issued*, available at <http://www.tax.ri.gov/Credits/2007summary.php> (follow "F.A.C.E. of Rhode Island," "STEPS," and "The Foundation for Rhode Island Day Schools" hyperlinks) (last visited August 5, 2010).

It also should be no surprise that there might be more religious 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. 2007-08 Private School Universe Survey, U.S. Department of Education, at 2. With more religious private schools, one would expect more scholarships to be available at religious private schools.

The Ninth Circuit's quantitative inquiry is exactly the analysis rejected by this Court in *Zelman*. 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 this Court explained, however, the imbalance was not caused by state action. *Id.* at 656-57 (majority opinion). 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. *See id.* at 647.

The existence of multiple layers of neutrality and true private choice should not be ignored. When, as here, there are multiple layers of private choice involved, it should be more – not less – difficult to violate the Establishment Clause. *Winn (Rehearing Denied)*, 586 F.3d at 662 n.10 (O'Scannlain, J., dissenting); Pet. App. at 95a ("The panel . . . suggest[s] that by filtering aid through multiple levels 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?" (emphasis in original).

A neutral tax credit does not lose its constitutional validity on the day when too many religious institutions participate. 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 (Thomas, J., plurality opinion). 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.]

Under the Ninth Circuit's theory, what is constitutional today could be unconstitutional tomorrow. "The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time" there are more scholarships for religious private schools. *Zelman*, 536 U.S. at 658. "Such an approach would scarcely provide the certainty that this field stands in need of, nor can [courts] perceive principled standards by which such statistical evidence might be evaluated." *Mueller*, 463 U.S. at 401. The standard

established by this Court in *Zelman* and reflected in the dissent in *Winn (Rehearing Denied)* is clear and is one rooted in common sense.

"The 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." *Zelman*, 536 U.S. at 655-56. Like Ohio, the program created by the State of Arizona does not coerce anyone. In fact, 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.⁷

Here, multiple layers of neutrality demonstrate that Section 1089 is neutral toward religion:

- 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

⁷ 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; Pet. App. at 57a. Furthermore, as discussed in the Petitioner's brief, Arizona offers a wide variety of schooling options outside of public and private schools. Pet. Cert. at 22.

the government, select the organization to which they wish to donate; and there is no difference in the tax-credit based on religious affiliation

Moreover, no reasonable person would believe that a donation received or a scholarship used at a religious school somehow bore the imprimatur of the State.

C. There are broad implications to the States if a neutral program violates the Establishment Clause when too many people make independent private decisions that cause some financial benefit to reach a religious organization.

The cases in which this Court has found a constitutional violation involved statutes that differ from the program the State of Arizona created. For example, this Court has determined that the Establishment Clause is violated by a tax-exemption for the sale and distribution of periodicals by religious organizations where the benefits were confined to religious organizations so they cannot appear as anything other than state sponsorship of religion. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 5, 17 (1989) (holding that tax exemption from sales tax for sales of religious publications violates the Establishment Clause). Also, this Court invalidated tuition reimbursement grants where the "effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Nyquist*, 413 U.S. at 783.

And this Court in *Zelman* explained that "we now hold that *Nyquist* does not govern neutral

educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion." *Zelman*, 536 U.S. at 662. Just as in Ohio in *Zelman*, the State of Arizona does not single out religious programs for special consideration or different treatment than other similarly-situated secular programs.

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. *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. The donation to religious "entities organized and operated exclusively for religious purposes" are deductible. *Hernandez v. Comm'r*, 490 U.S. 680, 683, 695-96 (1989). The effect of "encouraging gifts to charitable entities, including but not limited to religious organizations – is neither to advance nor inhibit religion." *Id.* at 696. 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.

The same is true of tax exemptions for charitable religious organization. *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. *See Walz*, 397 U.S. at 673 (stating that 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 implications of the Ninth Circuit's analysis – if extended to other settings – would suggest that neutral programs are suspect when too many citizens choose an option that incidentally benefits religion. The list of government programs that provide a benefit to private citizens who may then use that benefit is wide and varied:

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

- Tax-exempt development bonds – if too many buildings are built by religious organizations. *See Steele v. Indus. Dev. Bd.*, 301 F.3d 401 (6th Cir. 2002);
- State programs offsetting school expenses – if too many children are attending religious schools. *See Fla. Stat. § 1002.395; Ga. Code Ann. § 48-7-29.16; 35 Ill. Comp. Stat. 5/201(m); Ind. Code §§ 20-51-1-1 et. seq.; 6-3.1-30.5; Iowa Code §§ 422.11S, 422.12; La. Rev. Stat. Ann. § 47:293(9)(a)(xiv); Minn. Stat. § 290.0674; Ohio Code §§ 3310.01-17, 3313.974-979; 72 Pa. Cons. Stat. § 8705-F; R.I. Gen. Laws § 44-62-2.*
- Federal arson assistance for non-profit organizations – if too many are religious institutions. *See 24 C.F.R. § 573.1 et. seq.*;
- Aid under the Stafford Disaster Relief and Emergency Assistance Act of 1974 – if too many claimants are religiously affiliated. *See 42 U.S.C. § 5172(a)(1)(B);* <http://www.justice.gov/olc/FEMAAssistance.htm> (last visited August 5, 2010);
- Housing and Urban Development (HUD) Section Eight Housing Choice Vouchers – if too many use funds for lodging managed by religious organizations. *See 42 U.S.C. § 1437f(o); and*
- Federal Prisoner Rehabilitation Programs – if too many prisoners use services provided by

religious organizations. See 42 U.S.C. § 3797w(b).

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. The decisions of the Arizona's taxpayers and parents are private ones – reflections of "true private choice" – and therefore are not attributable to the government. *Zelman*, 536 U.S. at 662-63 ("[Ohio] permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice.").

The Establishment Clause does not require that religion be "quarantined" from being the recipient of an incidental benefit from a private citizen merely because the government originally conferred that benefit to the private citizen. See *Roemer v. Board of Pub. Works*, 426 U.S. 736, 746-47 (1976) (Blackmun, J., plurality opinion) ("[R]eligious institutions need not be quarantined from public benefits that are neutrally available to all. . . . Neutrality is what is required.").⁸ Rather, there exists a common-sense coexistence that can be achieved by "not tolerat[ing] either governmentally established religion or governmental interference with religion," what this Court described as "benevolent neutrality." *Walz*, 397 U.S. at 669. Since the 1980s, "the general trajectory of [this Court's]

⁸ "The White House Office of Faith-Based and Neighborhood Partnerships forms partnerships between government at all levels and non-profit organizations, both secular and faith-based, to more effectively serve Americans in need." <http://www.whitehouse.gov/administration/eop/ofbnp/about> (last visited August 5, 2010).

Establishment Clause cases has moved away from no-aid separationism and toward the neutrality principle." Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 Notre Dame J.L. Ethics & Pub. Pol'y 285, 290 (1999). And the Establishment Clause analysis should stop there – at neutrality. Applying that analysis here renders the conclusion that the tax benefit at issue is constitutional. In taking a truly neutral approach to religion, the most a State can do is draft neutral legislation – which Arizona has done.

CONCLUSION

The decision of the U.S. Court of Appeals for the Ninth Circuit should be reversed.

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