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

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

BRIEF OF THE ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, THE NATIONAL ASSOCIATION OF EVANGELICALS, AND THE CONVOCATION OF ANGLICANS IN NORTH AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

KELLY J. SHACKELFORD
Counsel of Record
JEFFREY C. MATEER
HIRAM S. SASSER, III
JUSTIN E. BUTTERFIELD
LIBERTY INSTITUTE
2001 Plano Parkway #1600
Plano, TX 75075
(972) 941-4444
kshackford@libertyinstitute.org

M. SEAN ROYALL
LAWRENCE VANDYKE
GAVIN S. MARTINSON
KEVIN P. GRADY
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Dallas, TX 75201
(214) 698-3100

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF *AMICI CURIAE*[1]

The Ethics and Religious Liberty Commission ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention, the nation's largest Protestant denomination with over 44,000 churches and 16 million members. The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States, serving 50 member denominations and associations and representing more than 45,000 local churches and 30 million Christians. The Convocation of Anglicans in North America ("CANA") was established in 2005 to provide a new home for faithful Anglicans displaced by the widening divisions in Anglicanism in North America. It is affiliated with the Anglican Church in North America and with the Anglican Church of Nigeria, the largest and most vibrant Province in the worldwide Anglican Communion. The ERLC, NAE, and CANA each believe that religious freedom is a gift from God, and work to address social and moral concerns at the local, state, and national levels, with particular attention to the impact on American families and their faith. *Amici* believe that parents should have the right and opportunity to provide their children with an education based on a distinctly Christian worldview.

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[1] Pursuant to this Court's Rule 37, letters of consent from all parties to the filing of this brief have been submitted to the Clerk. *Amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Petitioners and Judge O'Scannlain in his dissent from the Ninth Circuit's denial of rehearing en banc have amply demonstrated why faithful application of the *Lemon* test and this Court's prior decisions in *Zelman* and *Mueller* compel the conclusion that Arizona's scholarship tax credit ("Section 1089") does not violate the Establishment Clause. Rather than revisit those arguments, *amici* ERLC, NAE, and CANA submit this brief for two additional purposes. First, *amici* discuss some of the more troubling aspects of the Establishment Clause analysis applied by the Ninth Circuit panel, explaining how the panel's approach undermines rather than protects First Amendment values like governmental neutrality, private choice, and free exercise. Second, *amici* explain why, contrary to the panel's conclusion, this case is even *easier* than *Zelman*. Not only is Arizona's program a strictly neutral program of private choice, but it also steers clear of other concerns that various Justices of the Court have discussed in the context of the Establishment Clause, including concerns expressed by the dissenters in *Zelman*. Section 1089 is plainly constitutional.

I. In finding that Arizona's program violates the Establishment Clause, the Ninth Circuit panel subtly but unmistakably altered important aspects of the analysis in *Zelman* and earlier cases, which if adopted by this Court would work a sharp and destructive departure from settled Establishment Clause jurisprudence. For example, this Court has long considered "governmental neutrality" with respect to religion a key element of any program passing muster under the Establishment Clause. Thus, in *Zelman*, the

Court upheld Ohio's voucher program precisely because it was "a *neutral* program of private choice." *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002) (emphasis added). In determining that Arizona's "program is not 'neutral in all respects toward religion,'" Pet. App. 34a,[2] the panel below substituted neutrality of *outcome* for "governmental neutrality," *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). The government cannot both be facially neutral and guarantee neutrality of outcome. Where private choice plays any significant role in a program, the government can only guarantee a religiously neutral outcome by influencing that private choice either for or against religion. The panel's insistence on outcome neutrality reads the Establishment Clause as requiring governmental *non-neutrality*, compelling the government to search out and eliminate downstream private choices that favor religion, lest a program be adjudicated to violate the Establishment Clause. The panel's version of "neutrality" is a far cry from—indeed, incompatible with—the *governmental* neutrality required by this Court in *Zelman* and earlier cases.

In addition to undermining governmental neutrality in the name of neutrality, the panel's analysis also reduces the real choice of many different private actors—taxpayers, STOs, and parents generally—in the name of maximizing the choices of "parents who wish to place their children in a private secular school." Pet. App. 33a. The panel erred because it focused narrowly on only the options

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[2] "Pet. App." citations refer to the appendix attached to Petitioner Garriott's Petition for Writ of Certiorari.

presented to parents by Section 1089, instead of "*all* options" presented by Arizona. *Zelman*, 536 U.S. at 655-56 (emphasis in original). Arizona parents who seek a quality nonreligious education for their children have a smorgasbord of *free* options to choose from, including public schools with open enrollment, charter schools, traditional academies, an online "virtual academy," and homeschooling. Section 1089 merely adds private schools to those options. If parents seeking a religious education for their children have more options within Arizona's tax credit scholarship program, that is not a function of any governmental bias built into Section 1089, but instead because parents seeking a nonreligious education already have many other free options. For parents who seek a religious education for their children who otherwise cannot afford it, Section 1089—together with taxpayer donations and STOs that choose to fund religious education—is the only choice they have. That the majority of Section 1089 scholarships are used at religious schools therefore says nothing about whether the choices of parents seeking a nonreligious education are unduly constrained, but speaks volumes about the fact that none of the public schools are an option for parents seeking a religious education. By myopically focusing on only Section 1089, the panel eliminated real and beneficial choice from parents, STOs, and taxpayers, to alleviate a supposed constraint on choice that is as disconnected from reality as it is speculative.

The panel's conclusion that the secular purposes behind Section 1089 might be shown to be a "sham" or "pretense" because private actors—STOs and taxpayers—have channeled their donations and scholarships to religious entities is yet another radical deviation from this Court's Establishment Clause

jurisprudence. Pet. App. 18a-20a. Where, as here, both the face of the statute and its legislative history evidence only secular purposes, permitting courts or juries to divine hidden religious legislative agendas from private conduct occurring *after* enactment makes no sense, and threatens to expand exponentially Establishment Clause challenges to a wide variety of laws. The panel's approach also chills private religious conduct and expression, for fear that some court might infer from private religious action an impermissible purpose behind a facially neutral law.

II. This should not be a hard case after *Zelman*. In most important respects, Arizona's scholarship tax credits are indistinguishable from the vouchers in *Zelman*. The government's role in the program is completely neutral with respect to religion. Any money that reaches religious schools under the program does so only as the result of "true private choice"—indeed, more private choices than were present in *Zelman*. The only meaningful way that Arizona's program differs from the Ohio program at issue in *Zelman* is that, in addition to parental choice, the Arizona program also incorporates *taxpayer* choice. Although not dispositive under the Court's analysis in cases like *Zelman* and *Mueller*—and correctly so—certain Justices of the Court have opined that protecting the freedom of conscience of taxpayers from having their tax dollars used by the government to financially support religion is a valid Establishment Clause concern. The taxpayer choice designed into Arizona's scholarship tax credit directly addresses that concern even better than did the vouchers in *Zelman*. Under Arizona's program, no taxpayer can complain that any of his taxes are being taken to support religion against his will.

The taxpayer choice integral to Arizona's program also better advances another objective that motivated the Establishment Clause. As James Madison explained in his famous Memorial and Remonstrance, direct financial support from the government may corrupt religion by making it "dependen[t] on the powers of this world"—i.e., government—rather than on the support of its adherents. The program at issue in *Zelman* protected against this concern by mediating any indirect governmental support for religion through the choices of private citizens—parents. Arizona's program goes one step further by adding to parental choice a tax benefit scheme that, in other contexts such as federal charitable deductions, has a long history of encouraging private giving while minimizing the recipients' dependence on the government. Under Arizona's tax credit program, religious (and nonreligious) private schools, STOs, and parents, depend first and foremost not on direct governmental largess but on the generosity of private citizens. The panel was correct that taxpayer choice in Arizona's program distinguishes it from the vouchers in *Zelman*. But that additional choice differentiates Arizona's program in a way that *advances* First Amendment interests, only underscoring its constitutionality.

* * *

In sum, while the panel below purportedly applied *Zelman* to this case, it found the Establishment Clause violated only by inverting core constitutional concepts such as neutrality, private choice, and secular purpose. Clearing away the confusion, Arizona's program addresses all possible concerns underlying the Establishment Clause better than the voucher program upheld in *Zelman*, and should likewise be upheld.

ARGUMENT

I. THE NINTH CIRCUIT PANEL ALTERED CORE ESTABLISHMENT CLAUSE PRINCIPLES IN EVALUATING ARIZONA'S PROGRAM.

A. The Panel Replaced Governmental Neutrality With Neutrality Of Outcome.

In *Zelman*, this Court considered an Ohio voucher program that provided government funds to parents for use as private school tuition. Although parents were allowed to use the funds for either religious or nonreligious education, the vast majority (96%) of children in the program "enrolled in religiously affiliated schools." *Zelman*, 536 U.S. at 647. Relying on a string of earlier cases, the Court upheld the Ohio program against an Establishment Clause challenge because the program met the twin requirements of governmental neutrality and private choice. The Court reiterated that even where tax dollars ultimately reach religious organizations, the Establishment Clause is not violated by a program where (1) the government is neutral with regard to religion and (2) "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Id.* at 649 (citing *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Wash. Dep't of Servs. for Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)). Petitioners—and Judge O'Scannlain in his dissent from the Ninth Circuit's denial of rehearing en banc—have carefully and correctly explained why Arizona's program is constitutional under *Zelman*'s framework.

For decades this Court has considered "governmental neutrality between religion and religion, and between religion and nonreligion" a critical factor in analyzing an Establishment Clause challenge. *Epperson*, 393 U.S. at 104. Thus, in *Zelman* the Court upheld Ohio's voucher program against an Establishment Clause challenge precisely because it was a "*neutral* program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals." *Zelman*, 536 U.S. at 655 (emphasis added). For a law to violate the requirement of neutrality, "it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,* 483 U.S. 327, 337 (1987) (emphasis in original).

No less than the program at issue in *Zelman*, Arizona's program is structured so that the "*government itself*" is neutral with regard to religion. *Id.* at 337. As the panel below acknowledged, even the plaintiffs in this case "do not contest that Section 1089 is neutral with respect to taxpayers who direct money to STOs, or that any of the program's aid that reaches a STO does so only as a result of the genuine and independent choice of an Arizona taxpayer." Pet. App. 34a. Yet the panel nonetheless concluded that Section 1089 "is *not* a 'neutral program of private choice.'" Pet. App. 23a (emphasis added).

The panel reached that conclusion only because it *sub silentio* converted the Establishment Clause's requirement of *governmental* neutrality into a requirement of *outcome* neutrality. Section 1089 was

deemed unconstitutional because a myriad of private choices ultimately "channels a disproportionate amount of government aid to . . . religious schools." Pet. App. 22a.[3] Arizona's program purportedly violates the Establishment Clause not as a result of any *governmental* partiality, but because *private* "STOs have not provided scholarships in a way that is neutral toward religion." Pet. App. 17a n.9. According to the panel, "Section 1089 is not, from the parents' perspective, 'neutral in all respects toward religion,' . . . . *because* the individual taxpayers' choices available under the program serve to restrict parents' opportunities to select secular educational options for their school-age children." Pet. App. 32a, 34a.

Insofar as the Establishment Clause is concerned, however, the breadth of choices ultimately available to parents, or any other downstream aid recipient, is not the relevant issue. The focus of this Court's Establishment Clause decisions is neutrality of state action, not neutrality of outcome.

In *Zelman* and earlier Establishment Clause cases, one of the main points of disagreement between the Court and the dissenters was whether neutrality should be measured before or after the effects of private choice. *Zelman*, 536 U.S. at 670 (O'Connor, J., concurring) ("Justice Souter [in dissent] rejects the

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[3] Although the Ninth Circuit panel remanded the case for "further proceedings," Pet. App. 46a, the relevant facts as alleged are not in dispute. As a practical matter, therefore, the panel's decision mandates that the district court "declare the program unconstitutional as applied, rendering the remand little more than an empty formality." Pet. App. 92a n.7 (O'Scannlain, J., dissenting from denial of rehearing en banc).

Court's notion of neutrality, proposing that the neutrality of a program should be gauged not by the opportunities it presents but rather by its effects."). The Court has consistently required *governmental neutrality*, not neutrality of results. As the Court noted in *Zelman*: "The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school." *Zelman*, 536 U.S. at 658; *see also Mueller*, 463 U.S. at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."). When government aid is "neutrally available and . . . first passes through the hands . . . of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion.'" *Mitchell v. Helms*, 530 U.S. 793, 816 (2000) (plurality opinion) (quoting *Witters*, 474 U.S. at 489). To make an Establishment Clause challenge turn on neutrality of outcome produces the "absurd result that a neutral school-choice program might be permissible" in states with low religious involvement, but unconstitutional in states with a high concentration of religious participation. *Zelman*, 536 U.S. at 657.

Imposing a neutrality-of-outcome requirement on the Establishment Clause is flawed for several reasons. Most importantly, guaranteeing or policing outcome neutrality is inconsistent with the time-honored Establishment Clause principle that the "*government itself*" must be neutral with regard to religion. *Amos,* 483 U.S. at 337. The panel's version

of "neutrality" would require the government to ensure that even facially neutral laws that allow money to reach religious institutions "only as a result of the genuinely independent and private choices of individuals," *Agostini v. Felton*, 521 U.S. 203, 226 (1997) (internal quotation marks and citation omitted), produce an outcome that is strictly neutral with regard to religion and nonreligion. But to guarantee a neutral outcome, the government would have to manipulate, coerce, and cajole private choice.

Rather than maintaining religious neutrality and honoring private choices—as precedent requires—the panel's "neutrality" requires the government to actively tip the scales in favor of nonreligion whenever the independent public fails to produce a religiously neutral outcome on its own. *See* Pet. App. 73a-74a (D.W. Nelson, Reinhardt, and Fisher, JJ., concurring in the denial of rehearing en banc) (arguing that to ensure the constitutionality of Section 1089, Arizona "*could* . . . require that STOs" not apply religious criteria in awarding scholarships). Governmental neutrality and private choice would give way to government meddling to guarantee religiously neutral outcomes. Put simply, neutrality of outcome "is unattainable in *any* program where the government is neutral with respect to religion and nonreligion." Pet. App. 102a (O'Scannlain, J., dissenting from denial of rehearing en banc).

Requiring outcome neutrality is also problematic because it punishes thriving religious institutions merely because they are successful. Where private citizens mostly choose to support or utilize religiously based services, one likely explanation is that those services are perceived to be superior to other

alternatives, perhaps even by some outside the faith. Or it may be because the majority of those citizens are religious. Or it may be some other constitutionally permissible reason. The panel's outcome-oriented approach appears to tolerate some participation by religious organizations in a facially neutral program such as Section 1089, but only so long as they are not *too* successful in securing the support of taxpayers, STOs, and parents. This approach is completely at odds with the neutrality required by the Establishment Clause. As this Court has said: "We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 669 (1970) (citation omitted). Punishing religious schools merely because taxpayers (or STOs, or parents) prefer them is not neutrality, it is hostility towards religion. *See Zorach v. Clauson*, 343 U.S. 306, 315 (1952) ("We cannot read into the Bill of Rights such a philosophy of hostility to religion.").

The Ninth Circuit panel's neutrality-of-outcome requirement is also troubling because it renders all charitable deductions constitutionally suspect. The panel determined that Arizona's scholarship tax credit program unconstitutionally delegates governmental authority, while other tax benefit programs—including deductions—do not. *See* Pet. App. 24a-27a. But the panel's distinction between a tax credit and a tax deduction, while perhaps interesting as a matter of tax policy, "can have no constitutional significance." Pet. App. 89a n.3 (O'Scannlain, J., dissenting from denial of rehearing en banc). A partnership by which taxpayers and the government effectively split the cost of an Establishment Clause violation—i.e., through a

deduction program—would be no more constitutionally acceptable than a violation for which the government foots the entire bill—i.e., through a tax credit. If a state were to establish a church, for example, it would be unconstitutional regardless of whether the state supported that church entirely with tax dollars, or offered only to match private contributions. Contrary to the panel's argument, tax deductions for religious donations are not constitutionally permissible merely because they involve cost splitting between taxpayers and the government. Rather, deductions for private religious donations are allowed because, like Section 1089, they are given under a tax benefit scheme that incorporates governmental neutrality and private choice. Whether the challenged program provides a tax credit or a tax deduction, the analysis is the same—governmental neutrality layered with private choice insulates the program from attack under the Establishment Clause.

By replacing governmental neutrality with outcome neutrality, the panel below fundamentally altered a foundational pillar of this Court's Establishment Clause jurisprudence. Future application of this new rule will replace governmental neutrality with hostility towards religion. A neutrality-of-outcome standard requires intrusive state enforcement, regulation, and interference with private choice—the antithesis of true governmental neutrality.

B. The Panel's Ruling, Not Arizona's Program, Sharply Limits Private Choice.

The Ninth Circuit panel also improperly determined that Section 1089 unconstitutionally restricts the private choice of "parents who wish to

place their children in a private secular school." Pet. App. 33a. The panel's erroneous conclusion resulted from an analysis that was too narrow on two fronts: (1) it focused only on the private choices available to parents, while ignoring the other private choices exercised under Arizona's program; and (2) it focused on the options available under Section 1089 alone, ignoring the many other options available to Arizona parents outside of the tax credit scholarship program. It was the panel's decision—not Section 1089—that circumscribed the educational choices available to Arizona parents.

The panel found that Section 1089 limits parental choice because the upstream choices of taxpayers and STOs make more scholarship money available for use at religious schools than at nonreligious schools. Pet. App. 31a-32a. Focusing narrowly on Section 1089, the panel miscomprehended the breadth of options available to parents desiring a nonreligious education for their children. But as the Court explained in *Zelman*, the question of whether a program like Section 1089 is "coercing parents into sending their children to religious schools . . . must be answered by evaluating *all* options." *Zelman*, 536 U.S. at 655-56 (emphasis in original). Parents who seek a nonreligious education enjoy a plethora of *free* options in Arizona, including public schools with open enrollment, traditional academies, a virtual academy, homeschooling, and the largest number per capita in the nation of charter schools—which are "in substance merely private schools with state funding." *Id.* at 701 n.9 (Souter, J., dissenting). Arizona's Legislature worked hard to greatly "expand[] the options available in public education," *Kotterman v. Killian*, 972 P.2d 606, 611 (Ariz. 1999), with remarkable success. *See*

JAY P. GREENE, CIVIC REPORT NO. 14, THE EDUCATION FREEDOM INDEX 2 (Manhattan Inst. for Policy Research 2000), *available at* http:// www.manhattan-institute.org/pdf/cr_14.pdf (ranking Arizona first in educational freedom).

Given the abundance of free nonreligious educational options, the panel's conclusion that Section 1089 significantly constrains the choices of parents seeking a nonreligious education is simply untrue. On the other hand, *none* of Arizona's free public schooling options provide a real choice to parents who desire a religious education for their children. Before Section 1089, those parents who could not afford private school tuition had no meaningful choice in Arizona. They were "coerced into accepting public education." *Kotterman*, 972 P.2d at 615. Indeed, even now, because of the many free nonreligious schools in Arizona, "parents are actually *discouraged* from sending their children to private religious schools." Pet. App. 105a n.18 (O'Scannlain, J., dissenting from denial of rehearing en banc). In light of the disparity between overall options available to parents seeking a nonreligious versus a religious education, it is not surprising that the majority of Section 1089 scholarships are used at religious schools.

Because the panel artificially narrowed its analysis of parental choices, its decision eliminated much more private choice than it created. According to the panel, Section 1089 would be constitutional only "if the program made scholarships available to parents on a religiously neutral basis and gave them a true private choice as to where to utilize the scholarships." Pet. App. 30a. In other words, only if Arizona removed from taxpayers and STOs the choice to support only

religious education would the program be upheld. Unlike some contrived limit on parental choice, however, it is clear that taxpayers and STOs appreciate and routinely exercise their choice to support religious education, as evidenced by the fact that the "vast majority of the scholarship money under the program . . . is available only for use at religious schools." Pet. App. 31a-32a.

Taxpayer and STO choice is not the only casualty of the panel's faulty analysis—parental choice would also likely suffer under a program that denied taxpayers the opportunity to designate their donations for use at religious schools. There can be little question that religion is a powerful motivation for charitable giving. *See, e.g.,* Arthur C. Brooks, *Religious Faith and Charitable Giving*, POL'Y REV., Oct.-Nov. 2003, *available at* http://www.hoover.org/publications/policy-review/article/6577 ("[R]eligion may be a key ingredient in promoting social capital, which in turn encourages giving."); INDEPENDENT SECTOR, FAITH AND PHILANTHROPY: THE CONNECTION BETWEEN CHARITABLE BEHAVIOR AND GIVING TO RELIGION 36 (2002), *available at* http://www.independentsector.org/uploads/Resources/faith_and_philanthropy.pdf ("Givers to religious congregations are more generous . . . than those not motivated to support religion."). If taxpayers are denied the opportunity to give to STOs that pursue religious aims, then it is likely that some material number of taxpayers will stop giving, thereby reducing available scholarship funds. If that happens, fewer parents who rely on Section 1089 scholarships will be able to choose to send their children to private schools.

Ultimately, the panel held Section 1089's neutral program of private choice unconstitutional because the upstream choices of private actors (taxpayers and STOs) have the potential, however speculative, to constrain the downstream choices of parents. But that potential will always exist under any government program that incorporates private choice. In *Zelman*, for example, parents' choices were constrained by which schools chose to participate in the voucher program. *See Zelman*, 536 U.S. at 703-07 (Souter, J., dissenting). "The question is not whether a parent's choice is somehow limited or constrained, the question is whether the *government* has somehow limited or constrained the choice." Pet. App. 97a (O'Scannlain, J., dissenting from denial of rehearing en banc). Where, as here, any constraints on private choice are merely the result of choices made by other private actors, the multiplicity of private choices is cause for celebration under the Establishment Clause, not condemnation.

C. The Panel Incorrectly Considered Post-Enactment Private Conduct As Relevant To Whether A Statute Has A Secular Purpose.

The panel below readily acknowledged that the legislative history of Section 1089 evidences a purpose for the law that, on its face, "is both secular and valid." Pet. App. 18a. But the panel determined this otherwise valid purpose could be shown to be a "sham" or "pretense" based on the fact that private taxpayers, *after* the law was enacted, have given to religious STOs. Pet. App. 18a-20a. The panel's focus on post-enactment private conduct as evidence of a sham purpose behind a facially valid law finds no support in

the Court's Establishment Clause jurisprudence, and for good reason.

As support for its holding, the panel cited this Court's *McCreary* decision. Pet. App. 19a. But as *McCreary* itself plainly states, it is only government action itself, not private action, that can reveal an otherwise valid purpose to be a sham. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862 (2005). Nowhere in *McCreary* did the Court look to *private* action as evidence of a sham purpose. To do so would require the Court to "attribute to a neutrally behaving government *private* religious expression." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 764 (1995) (plurality opinion) (emphasis in original). Such analysis "has no antecedent in [this Court's] jurisprudence." *Id.*

In addition to having no basis in either logic or precedent, the panel's suggestion that post-enactment private conduct can be probative of legislative purpose has the potential to chill private religious expression and activity. Religious groups who might otherwise express support for a law or program may wisely self-censor lest courts presume from that expression a hidden legislative agenda. Similarly, religious organizations may prophylactically temper their participation in generally available government programs to avoid a later judicial finding that a "disproportionate amount of government aid" has been "channel[ed]" to them. Pet. App. 22a. Allowing courts to deduce a hidden religious legislative agenda from post-enactment private conduct is a dangerous precedent with troubling consequences.

II. THIS CASE IS EASIER THAN *ZELMAN*.

A. Taxpayer Choice Addresses Any Plausible Concern About Taxpayer Freedom Of Conscience.

The Ninth Circuit panel acknowledged that Arizona's program is facially neutral with regard to religion and that any money reaching religious schools under the program does so only through the private choices of taxpayers, STOs, and parents. Yet it held the program unconstitutional, distinguishing *Zelman* because Section 1089 also permits *taxpayer* choice. The panel concluded that this added element creates "a meaningful constitutional distinction" between Ohio's program and Arizona's. Pet. App. 45a. As noted above, the panel erred in finding that the impact of taxpayer choice on downstream private choices has any constitutional significance. But even assuming, *arguendo*, that taxpayer choice does have constitutional significance, it clearly *helps*, not hurts, Arizona's program.

Justices on the Court have at times remarked on the "Constitution's special concern that freedom of conscience not be compromised" by taxpayer support for religion. *Hein v. Freedom from Religion Found., Inc.,* 551 U.S. 587, 616 (2007) (Kennedy, J., concurring). While *amici* do not subscribe to this legal theory, it was perhaps the primary concern expressed by the dissenters in *Zelman*. *See, e.g.*, *Zelman*, 536 U.S. at 689 (Souter, J., dissenting) (arguing that the Ohio program's "use of tax-raised funds forced a taxpayer to contribut[e] to the propagation of opinions which he disbelieves") (internal quotation omitted); *id.* at 728 (Breyer, J., dissenting) ("Parental choice cannot

help the taxpayer who does not want to finance the religious education of children."). *See also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 348 (2006) (acknowledging the view stated in *Flast v. Cohen*, 392 U.S. 83 (1968), that one of "'the specific evils feared by'" the drafters of the Establishment Clause was the forced "'extraction and spending' of 'tax money' in aid of religion") (citation and alteration marks omitted).

Ohio's voucher program was upheld despite the *Zelman* dissenters' objections about taxpayer freedom of conscience. But by making taxpayer choice a key part of Section 1089, Arizona has ensured that no taxpayer is coerced into supporting—even indirectly—any religious institution, thus alleviating any plausible concern over taxpayer freedom of conscience. Any money reaching religious schools under Section 1089 was never "extract[ed]" from any taxpayer by coercion or force. *Id*. at 348. Rather, any money received for religious education is a result of the voluntary decisions of taxpayers themselves. Taxpayers can choose whether to give to an STO that funds religious education, nonreligious education, or both. Or a taxpayer can choose not to give to any STO. Under Arizona's program, not a single penny of taxpayers' money is taken without their authorization to support religion.

Thus, Section 1089 does not simply meet the Establishment Clause requirements laid out in *Zelman*, it exceeds them. In addition to being a neutral program of private choice, Arizona's program, by adding the element of taxpayer choice to the other types of private choice present in *Zelman*, more than satisfies any concern for taxpayers' freedom of

conscience. While this added protection is not necessary in light of *Zelman*, Arizona can hardly be faulted for taking extra care to safeguard the liberty of conscience of its citizens. Even assuming that the Ninth Circuit panel was correct in finding that taxpayer choice is a material distinction, it tips the scales in favor of Section 1089's constitutionality, not against it.

B. Multiple Layers Of Private Choice Prevent Religious Institutions From Depending On Direct Governmental Support.

Arizona's program is also an improvement over the program upheld in *Zelman* because it better addresses one of the motivating factors behind the Establishment Clause: protecting religious institutions from the corrupting consequences of "dependence on the powers of this world." JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, ¶ 6, *reprinted in* 5 THE FOUNDERS' CONSTITUTION 83 (P. Kurland & R. Lerner eds., 1987). As Madison opined, "Religion flourishes in greater purity, without than with the aid of Gov[ernment]." Letter from James Madison to Edward Livingston (July 10, 1822), *in* 5 THE FOUNDERS' CONSTITUTION 106.

The voucher program upheld in *Zelman* promoted religious autonomy by filtering any governmental support through the genuine and independent choices of private citizens, i.e., the parents of schoolchildren. Arizona's program goes even further in promoting the independence of religious organizations. On top of parental choice, Section 1089 layers a tax benefit scheme that further removes any state involvement in aid reaching a religious organization. Instead of

providing scholarship funds directly to parents who then give the funds to a private school, aid under Section 1089 "is mediated first through taxpayers, and then through private scholarship programs." Pet. App. 29a. As Judge O'Scannlain explained, "[m]ultiple 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." Pet. App. 94a (O'Scannlain, J., dissenting from denial of rehearing en banc).

This scheme—even more than the program in *Zelman*—shields religious institutions from "the threat of dependence on state money." *Zelman*, 536 U.S. at 690 (Souter, J., dissenting). By providing a tax credit for all STO donations, Section 1089 encourages taxpayers to independently support a privately created STO of their choice. These principles have successfully incentivized private contributions in other situations—such as providing tax deductions for charitable donations—without risking undue dependence on governmental support. As with any charitable donations, contributions reaching religious institutions under Arizona's program do so only because of the generosity of private citizens, not governmental favoritism. Under Section 1089, religious (and nonreligious) schools depend directly on the favor and voluntary support of taxpayers, STOs, and parents, *not* the government.

CONCLUSION

For the foregoing reasons, together with the reasons stated by Petitioners and Judge O'Scannlain in his dissent below, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

KELLY J. SHACKELFORD
Counsel of Record
JEFFREY C. MATEER
HIRAM S. SASSER, III
JUSTIN E. BUTTERFIELD
LIBERTY INSTITUTE
2001 Plano Parkway, Suite 1600
Plano, TX 75075
(972) 941-4444
kshackelford@libertyinstitute.org

M. SEAN ROYALL
LAWRENCE VANDYKE
GAVIN S. MARTINSON
KEVIN P. GRADY
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Dallas, TX 75201
(214) 698-3100

Counsel for Amici Curiae

August 6, 2010