Nos. 09-987, 09-988, 09-991

In the

Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL
TUITION ORGANIZATION, et al.,

Petitioners,

v.

KATHLEEN M. WINN, et al.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. Does a tax credit for charitable donations violate the Establishment Clause if taxpayers choose to direct their contributions to charities that offer scholarships to schools run by religious organizations?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence,[1] is dedicated to upholding and restoring the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition that the Founders intended to protect religious liberties of all citizens and to encourage participation in religious activities as a civic virtue. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Van Orden v. Perry*, 545 U.S. 677 (2005); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

The Center believes the issue before this Court is one of significance to the individual liberties and rights protected by the Constitution. The Religion Clauses of the First Amendment were meant to restrain federal interference with religious practice—but not forbid public expression of faith. The First Amendment was meant to protect religious expression, not to outlaw it. The decision below, however,

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters of consent from attorneys for Petitioners have been filed with the Clerk of the Court and attorneys for Respondents have filed blanket consents.

Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in any manner, and no counsel or party made a monetary contribution in order to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

rules that a state may have violated the Religion Clauses by allowing taxpayers to earn a credit by making charitable donations to private school scholarship funds. The Plaintiffs complain that too many taxpayers choose to contribute their money to scholarships for church-run schools. Such a complaint was never meant to be encompassed within the freedoms enshrined in the Religion Clauses.

SUMMARY OF ARGUMENT

The Arizona law at issue in this case does not implicate the prohibition contained in the Establishment Clause. That portion of the First Amendment was originally intended as a structural federalism measure to mark the boundaries between federal and state power. Even reading the Establishment Clause to create an individual right not already encompassed in the Free Exercise Clause, that right extends no further than freedom from government coercion by force of law on matters of religious orthodoxy. Nothing in the history of the First Amendment or the Founding supports the notion that government was to avoid any connection with religion or that government was forbidden to prefer or encourage religion. In any event, the Arizona law at issue neither prefers nor encourages religion. Any religious preference in this scheme is the result of free choices made by individual taxpayers who donate to scholarship funds and the children and their families who apply to the funds for scholarships to attend the private school of their choice.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE WAS DESIGNED TO PROTECT FREE EXERCISE OF RELIGION BY PROHIBITING CONGRESS FROM COERCING RELIGIOUS ORTHODOXY BY FORCE OF LAW

The Court in *Everson v. Bd. of Educ. of the Twp. of Ewing*, 330 U.S. 1, 8 (1947), imagined that the terms of the Establishment Clause "reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity." This view, however, is not supported by the historical record surrounding the adoption of the First Amendment.

A fair reading of the congressional proceedings concerning the Bill of Rights supports the conclusion that some of Madison's amendments, including those on religion, reflected Madison's understanding of what Professor Natelson terms "the Gentlemen's Agreement." Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 Wm. & Mary Bill of Rts. J. 73, 86 (2005); *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* 252 (Helen E. Veit et al. eds., 1991) (Letter from Tench Coxe to James Madison (June 18, 1789)). This is the understanding that amendments would be proposed to the new federal constitution as a means of securing ratification. This so-called Gentlemen's Agreement is evidenced in newspaper articles, pamphlets, personal letters, and complete or partial transcripts of most of the state ratifying conventions documenting the roles of hundreds of actors

expressing the concern that, among other things, the federal government would establish a religion contrary to those established by states. It became apparent that in order to secure ratification of the new Constitution over fears expressed by the anti-federalists and others, amendments would be required to make explicit that the new federal government could not exercise its powers in certain areas.

Religious freedoms were among the issues of concern raised in state ratifying conventions. The antifederalists argued that the proposed Constitution would give the federal government enough power to interfere not only with the free exercise of religion, but also the power to abolish existing state establishments in favor of a new federal establishment. Jonathan Elliot, 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 191 (2d ed. 1836); *Freeman's Journal, Jan. 23, 1788*, *reprinted in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1557-58 (Merrill Jensen et al. eds., 1976).

The Establishment Clause was enacted as a measure of structural federalism to forbid the new federal government from encroaching on an area already addressed in state constitutions.[2] While state constitutions generally had provisions relating to religion, those provisions differed markedly from state

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[2] Indeed, for this reason, we have previously argued that the Establishment Clause was not a good candidate for incorporation via the 14th Amendment. *See* Brief of Amicus Curiae Center for Constitutional Jurisprudence, *Zelman*, 536 U.S. 639. Justice Thomas comprehensively addressed the point in his concurring opinion in the case, and we continue to believe that his analysis is correct.

to state. The Massachusetts Constitution urged the state's citizens "to worship the Supreme Being" while at the same time prohibiting government interference with religious societies or the "subordination of any one sect or denomination to another." *The Constitutions of the Several Independent States of America* 38 (Rev. William Jackson ed., 2d ed. 1783) (Mass. Const. Part I, § 2, 3 (1780)). By contrast, the Maryland Constitution required office holders to subscribe "a declaration of [their] belief in the Christian religion." *Id.* at 246 (Md. Const. of 1776, § 35). Officeholders in Pennsylvania and Delaware were also required to confess a particular religious belief as part of their oath of office. *Id.* at 191 (Penn. Const. of 1776, Ch. 2, § 10), 229 (Del. Const. of 1776, § 22), 233 (Del. Const. of 1776, § 29).

By contrast, the New York state constitution guaranteed free exercise of religion "to guard against spiritual oppression and intolerance" from "wicked Priests and Princes." *Id.* at 162 (New York Const. of 1777, § 38). The New Jersey Constitution included an explicit protection against the use of tax funds for "building or repairing any church . . . or places of worship." *Id.* at 175 (New Jersey Const. of 1776, § 18).

It was these provisions that the anti-federalist feared that the new federal government would be able to override with a competing national religious orthodoxy. In response to this fear, Madison proposed, among other provisions, his "no establishment" clause. Natelson, *supra*, at 138. Madison stated in his proposal that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any

manner contrary to their conscience." 1 *Annals of Congress* 451 (Joseph Gales ed., 1834). This was not the construction of a wall between religion and government, as Jefferson might have had it. Instead, it was a provision designed to limit the scope of power of the newly formed federal government. Certainly the measure prohibited Congress from designating a national church to which all must belong, but the language ultimately adopted, and the scraps we have of the debate leading to it, strongly suggest that the Clause was also intended to prohibit federal interference with existing state-religion relationships. The Framers of the Clause certainly did not see the provision as prohibiting acknowledgement or support of religion. *See Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J. dissenting).

The founding generation viewed religion as necessary to civil society and a properly functioning government. Based on this belief, the Framers thought that civil authorities would be wise to encourage religious exercises as long as specific sects were not singled out for preference or punishment. Zabdiel Adams, the cousin of both John and Samuel Adams, declared that "religion and morality among the people, are an object of the magistrate's attention. As to religion, they have no farther call to interpose than is necessary to give a general encouragement." Zabdiel Adams, *An Election Sermon*, Boston, 1782, *in* 1 Charles S. Hyneman & Donald S. Lutz, AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760-1805, 556 (1983). George Washington's Farewell Address cautioned the country from erroneously thinking the government could function without religion among the people, and urged politicians and citizens alike "to respect and to cherish" religion.

George Washington, Farewell Address, Sept. 19, 1796, 35 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 229 (John C. Fitzpatrick ed., 1931). And Daniel Shute, an advocate of the new federal constitution at Massachusetts' ratifying convention, presented that era's views on religion's link to the public good when he stated:

> The great advantages accruing from the public social worship of the Deity may be a laudable motive to civil rulers to exert themselves to promote it . . . there is indeed such a connection between them [church and state], and their interest is so dependent upon each other, that the welfare of the community arises from things going *well* in both; and therefore both, though with such restrictions as their respective nature requires, claim the attention and care of the civil rulers of a people, whose duty it is to protect, and foster their subjects in the enjoyment of their religious rights and privileges, as well as civil, and upon the same principle of promoting their happiness.

Daniel Shute, *An Election Sermon*, Boston, 1768, *in* Hyneman & Lutz, *supra*, at 120.

The Founders' actions matched their words. Benjamin Franklin recalled that the First Continental Congress held daily supplications to the Deity. 1 *The Records of the Federal Convention of 1787*, at 451-52 (Max Farrand ed., 1911). He would later scold the constitutional convention for forgetting that "powerful Friend" who had helped them gain independence, and then moved that daily prayer be again instituted, though the motion eventually failed due

to lack of funds to hire chaplains. *Id.* During the War of Independence General Washington sought funds to hire military chaplains of every denomination for his troops, and was upset when the Continental Congress planned to appoint chaplains at the brigade rather than the smaller regimental level because it "in many instances would compel men to a mode of Worship which they do not profess." *Letter from George Washington to the President of Congress*, June 8, 1777, *in* 8 Fitzpatrick, *supra*, at 203.

This history does not support an interpretation of the Establishment Clause that forbids government acknowledgement of, or even support for religion in general. Instead, the Establishment Clause is best seen as forbidding the use of law to coerce religious belief or activity. *See*, *e.g.*, *Van Orden*, 545 U.S. at 692-94 (Thomas, J. concurring); *Cutter v. Wilkinson*, 544 U.S. 709, 727-31 (2005) (Thomas, J. concurring); *Newdow*, 542 U.S. at 49-54 (Thomas, J. concurring). As Justice Scalia has noted: "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J. dissenting). Justice Thomas has made this same point. *Newdow*, 542 U.S. at 52 (Thomas, J. concurring). Without this element of legal coercion, however, there is no true "establishment." *Id.*; *Lee*, 505 U.S. at 640 (Scalia, J. dissenting).

Not only is there no element of legal coercion in the Arizona law under review in this action, there is not even a government thumb on the scale, either endorsing or preferring religion. Taxpayers choose how to direct their charitable contributions and stu-

dents decide which schools they wish to attend. Objecting state taxpayers are not under any legal compulsion to support any private school—sectarian or secular—any more than federal taxpayers suffer some legal compulsion by the fact that their fellow taxpayers gain a tax deduction for making contributions to religious societies.

The decision of the court below ignores this history. Instead of simply prohibiting coercion, the court below sees the Establishment Clause as a mandated government preference for no religion. Under this reading of the Constitution, a potential Establishment Clause violation lurks in any government program where religion may receive a benefit or where a taxpayer may choose to fund a scholarship that a student may choose to use to attend a sectarian school. Thus, any government program—no matter how neutral—becomes suspect if a religious believer can find common purpose with the program. There is no support in the history or text of the First Amendment for such an interpretation.

Even if the Arizona tax credit is seen as using public funds to support religion (rather than to support scholarships to pay for education that may or may not have a religious element), the Establishment Clause is no bar to the program.

II. THE ESTABLISHMENT CLAUSE WAS NOT INTENDED TO PROHIBIT AID TO PRIVATE SCHOOLS

The founding generation did not see any conflict between federal funding of sectarian efforts and the Establishment Clause. As then-Justice Rehnquist once noted, President Jefferson signed a treaty with

the Kaskaskia Indians that included annual cash payments from the federal government for "support for the Tribe's Roman Catholic priest and church." *Wallace*, 472 U.S. at 103 (Rehnquist, J. dissenting). Similarly, early state governments saw no problem with financing religiously-based public education. However, increased immigration of Catholics in the mid to late Nineteenth Century led to attempts to forbid public support of sectarian education.

Maine Representative James Blaine, with an eye on the presidency, introduced an amendment to the Constitution on December 14, 1875 that would have prohibited federal or state aid in support of parochial schools. H.R.J. Res. 1, 44th Cong., 1st Sess., 4 Cong. Rec. 205 (1875) (Statement of Rep. Blaine). Although the measure succeeded in the House of Representatives, the proposed amendment failed in the senate. Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 673 (1998).

During that era, public education was provided in public schools known as common schools. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551, 558 (2003). The common schools were used as a base to integrate immigrant children into American society by inculcating moral education founded on Protestant religiosity. Viteritti, *supra*, at 668. For example, readings from the Protestant King James Bible were a common part of the curriculum. DeForrest, *supra*, at 559; Viteritti, *supra*, at 668. Even Horace Mann, a proponent of the move from denomi-

national schools to a system of common schools, suggested that devotional exercises should be part of the curriculum. *Id.* In fact, "[s]chools were the primary promulgators of [the] Protestant way of life." Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 45 (1992). In one case, the supreme court of Maine upheld the custom of reading from the King James Bible in common schools, stating that it could not be regarded as sectarian. Green, *supra*, at 44.

An influx of Irish immigrants created a demand for Catholic education. Consequently, Catholics and other minority religionists challenged the Protestant influence in the common schools. Green, *supra*, at 44. By the 1870s, the political influence of the Catholic population was sufficiently strong that Catholics were able to obtain public aid for Catholic parochial schools. *Id.*

This rise of the Catholic influence generated an anti-Catholic uproar by Protestants who favored continuation of the Protestant character of the common schools and opposed government aid for parochial (Catholic) education. *Id.* at 46. Attacks on the Catholic religion became common, as were disparaging remarks against the Irish ethnicity of many of the new immigrants. Viteritti, *supra*, at 667. As the plurality opinion in *Mitchell v. Helms* recently noted, "it was an open secret that 'sectarian' was code for 'Catholic.'" 530 U.S. 793, 828 (2000).

Although he failed to amend the federal Constitution, Blaine was successful in having several states amend their charters to include a ban on funding of sectarian education. At present, 37 states have provisions in their constitutions barring funding to sec-

tarian organizations. Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religions Persecution*, 72 Fordham L. Rev. 493 (2003).

The history of Blaine's attempt to amend the federal constitution shows that Blaine and his contemporaries did not believe that the Establishment Clause prohibited state payments to sectarian schools. This corresponded with the Founding generation's apparent assumption that the Establishment Clause did not bar *federal* payments to religious education. *See Wallace*, 472 U.S. at 103-04 (Rehnquist, J. Dissenting).

The Court need not authorize wholesale public support of parochial schools in order to uphold the Arizona law, however. Arizona's tax credit scheme allows private donors to make the decision about how to direct charitable contributions, a private choice quite similar to that upheld by this Court in *Zelman*, 536 U.S. at 653. *See also*, *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993). The student's family decides which scholarships to seek and which schools to attend. While the state extends a tax benefit to the donor, it does not direct the contribution or how the scholarship is ultimately used.

This is quite similar to federal tax law, which gives taxpayers a deduction for making contributions to charitable organizations, including sectarian organizations. As with the Arizona law, it is the taxpayer that makes the choice. The taxpayer receives a benefit, and the public fisc loses money as a result of that choice. However, there is no coercion of religious orthodoxy and thus no establishment.

CONCLUSION

This case exemplifies the mischief caused by the Court's current Establishment Clause jurisprudence. The Ninth Circuit has ruled that a state taxpayer has standing to contest the tax deductions other taxpayers receive for their charitable donations. Because the law allows a taxpayer to make a donation that will provide a scholarship to a child to attend a religiously oriented private school, it converts the law into something sinister. The court below ruled that such a result empowers the federal courts to inquire into the motives of Arizona State Legislators to determine whether the stated reasons of the legislative branch of a sovereign state government was "mere pretense."

The rationale at the heart of the opinion below would also sanction the depositions of United States Representatives and Senators over their "hidden reasons" for including churches in the universe of charities that qualify for tax benefits. It is only a matter of time before someone will want to challenge the notion that their neighbor is able to get a tax deduction for tithing to their church. This case offers the Court an opportunity to rein in this erroneous interpretation of the Establishment Clause and to return it to its historical purpose of prohibiting the use of legal coercion to enforce a particular religious

orthodoxy. The judgment of the court below should be reversed and the matter dismissed.

DATED: August, 2010.

Respectfully submitted,

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