Nos. 09-987 and 09-991

IN THE

Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,

Petitioner,

v.

KATHLEEN M. WINN, ET AL.,

Respondents.

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

Petitioner,

v.

KATHLEEN M. WINN, ET AL.,

Respondents.

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

BRIEF *AMICUS CURIAE* OF FLORIDA SCHOOL CHOICE FUND, FOUNDATION FOR EXCELLENCE IN EDUCATION, FLORIDA ASSOCIATION OF ACADEMIC NONPUBLIC SCHOOLS, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, BLACK ALLIANCE FOR EDUCATIONAL OPTIONS, AND HISPANIC COUNCIL FOR REFORM AND EDUCATIONAL OPTIONS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Ninth Circuit erred when it held that Respondents who have no stake in the Arizona tax credit scholarship program have standing to assert an as-applied Establishment Clause challenge as if privately donated funds were a type of "direct aid" for religious institutions or whether the crux of the challenge itself is to the private conduct of third persons in lieu of state action.

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INTEREST OF *AMICI CURIAE*[1]

Amici are nonprofit organizations working to improve education by creating, sustaining and expanding parental choice programs including corporate tax credit scholarships that provide educational options for K-12 students in Florida and Arizona.

Foundations

The **Florida School Choice Fund** d/b/a Step Up for Students ("FSCF") is responsible for initiating the Florida Tax Credit Scholarship Program. FLA. STAT. §§ 1002.395 and 1002.421; FLA. ADMIN. CODE rr. 6A-6.03315 and 6A-6.0960. The program expands educational opportunities for economically disadvantaged children by giving them the ability to attend a K-12 school that best meets their individual learning needs. Corporations participate in the program by applying on a first-come, first-served basis for a dollar-for-dollar tax credit against their liability for corporate income, insurance premium, alcoholic beverage excise, and direct-pay sales taxes up to an annual ceiling for donations to one or more Scholarship Funding Organizations ("SFOs") approved by the Department of Education such as

[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), the parties have consented to the filing of this brief of *amici curiae*. All but one of their letters of consent is on file with this Court. The Arizona Christian School Tuition Organization's letter is enclosed with this brief.

FCSF. FLA. STAT. § 1002.395(5). The SFOs redistribute the funds as K-12 education scholarships to lower-income students who qualify for free or reduced lunch. During 2009-10, the maximum scholarship was $3,950. Approximately 28,927 students benefited, roughly 37 percent of which were black and 25 percent Hispanic.[2] Scholarship recipients attended 1,033 private schools, roughly 79% of which were religious.[3]

The **Foundation for Excellence in Education** has as its goals transforming our public schools into world class learning institutions and ensuring that all students enter the world with the skills to compete and succeed in the increasingly competitive global marketplace through the application of seven principles: (1) raising academic standards, (2) requiring standardized measurement of student achievement, (3) holding schools accountable for student performance, (4) rewarding teacher excellence, (5) increasing outcome-based funding for public schools, (6) expanding school choice; and (7) applying technological innovation in the classroom. The Honorable Jeb Bush, Governor of Florida from 1999 through 2007, is chairman of the Foundation for Excellence in Education. He championed and signed into law the Florida Corporate Income Tax Scholarship Program, along with a host of other educational reforms and school

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[2] *See* Florida Department of Education., *Corporate Tax Credit Scholarship Program*, June Quarterly Report at 4 (2010) *available at* www.floridaschoolchoice.org/Information/CTC/quarterly_reports/ftc_report_june2010.pdf (last visited July 10, 2010).

[3] *Id*. at 5.

choice measures which, together, have dramatically lifted the State of Florida's national ranking in public education.[4]

Private Schools

The **Florida Association of Academic Nonpublic Schools** ("FAANS") is an association of 23 academic school associations including 13 nonpublic school accrediting associations. Its membership encompasses the majority of nonpublic schools in the State of Florida including both non-sectarian and faith-based schools excluding post-secondary and vocational schools. More than an estimated 280,000 of Florida's children attend schools that are affiliated with FAANS and located in most of the 67 counties of the State of Florida. The number of schools from each of the 23 member associations which comprise FAANS and participate in the Florida Corporate Tax Scholarship Program varies widely irrespective of religious affiliation, but

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[4] *See, e.g.*, Florida Department of Education, *National Assessment of Educational Progress: Reading Report for Florida Grade 4* (March 2010), *available at* www.fldoe.org/asp/naep/pdf/Grade4Reading.pdf (last visited July 30, 2010) [hereinafter "NAEP Report"]; John E. Chubb, *The Achievement Gap* in REFORMING EDUCATION IN FLORIDA: A STUDY PREPARED BY THE KORET TASK FORCE ON K-12 EDUCATION (Paul Peterson ed., 2006), *available at* http://media.hoover.org/sites/default/files/documents/ktf_florida_book_67.pdf (last visited July 30, 2010); MATTHEW LADNER AND VICKI MURRAY, DEMOGRAPHY IS NOT DESTINY: REFORM LESSONS FROM FLORIDA ON OVERCOMING ACHIEVEMENT GAPS (2008), *available at* http://liberty.pacificresearch.org/docLib/20080811_080708_Demography_Destiny.pdf (last visited July 30, 2010).

nearly all support it in some manner. Consequently, FAANS is supportive of school choice programs such as the Florida Corporate Tax Scholarship Program, because it enables parents to enroll children in the religious or non-religious schools of their choice.

The **Association of Christian Schools International** ("ACSI") is an international association of Christian schools including preschools, elementary and secondary schools. The Florida region serves 373 schools that provide instruction, both religious and secular, for approximately 57,000 students. The Arizona region serves 110 schools that provide the same type of instruction for roughly 15,000 students. Worldwide, ACSI serves 5,904 schools and roughly 1,450,000 students. ACSI's services include teacher and administrator conferences, school accreditation, teacher certification, and the publication of curriculum materials. ACSI is a member of FAANS. Roughly 50% of ACSI schools participate in the Florida and Arizona tax credit scholarship programs. ACSI is supportive of school choice programs like these, because they enable parents to enroll children in the schools where they are most likely to succeed.

Parents and Students

The **Black Alliance for Educational Options** ("BAEO") is a non-profit, intergenerational organization of parents, students, educators, community activists, public officials, religious leaders, and business people. BAEO is committed to improving the educational opportunities available to minority and low-income children throughout the

United States. Low-income parents – principally blacks and Hispanics – have less access than others to high-quality teachers and schools. They are also less satisfied than middle- and upper-income parents with the schools that are available to their children. This lack of access to educational opportunities contributes to the widening gap between poor black children and whites on virtually all indicators of academic achievement. BAEO's mission is to support parental choice through programs similar to Arizona's and Florida's tax credit scholarship program as a means of empowering families and increasing educational options for black and other children living in depressed neighborhoods.

The **Hispanic Council for Reform and Educational Options** ("HCREO") is a non-profit grass roots organization of Hispanic parents, students, educators, public officials, religious leaders, and business people. HCREO's mission is to improve educational outcomes for Hispanic children by empowering families through parental choice in education, because Hispanics are among the most under-educated minority groups in the United States. HCREO is the only national public policy and grass roots Hispanic organization dedicated solely to responding to this crisis by insisting upon K-12 educational reform through programs and policies such as Arizona's and Florida's tax credit scholarship programs which empower parents to put their children in the schools where they are most likely to succeed.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is well settled that taxpayers must ordinarily have special injury to assert standing to challenge a statute. Respondents are taxpayers without any stake whatsoever in the program that they would enjoin. ARIZONA REVISED STATUTE Section 43-1089 (hereinafter "Section 1089") authorizes taxpayers to receive a tax credit for donating their own funds to a non-profit "School Tuition Organization" ("STO"), which, in turn, must allocate at least 90% of its annual revenue for educational scholarships to children to allow them to attend any qualified religious or non-religious school of their parents' choice.

Respondents complain that too many religious parents and schools and not enough secular ones benefit, because of those with whom donors and STOs freely choose to associate. But Respondents lack standing to invoke the jurisdiction of this Court for the simple reason that they are not any of these persons, *i.e.*, donors, STOs, parents, or school operators, and allege no concrete or particularized injury of their own as a result of Section 1089 – not even a disproportionate tax burden. Respondents' alleged injury is also uncertain and speculative. This Court has previously recognized that tax credits have an ambiguous impact on the state treasury. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006). In Arizona, the tax credit program is, at worst, revenue-neutral, and more likely results in substantial net savings.

Rather than rule as such, the Ninth Circuit improvidently relied upon a narrow exception to the taxpayer standing rule set forth in *Flast v. Cohen*, 392 U.S. 83 (1968). But *Flast* is not applicable on these facts, because Arizona makes no public appropriation under Section 1089. Donations to STOs do not pass through the treasury; they are private and entirely voluntary, so that no taxpayer is compelled to support religion. Additionally, Section 1089 lacks a direct nexus with an exercise of the legislative taxing and spending power.

The Ninth Circuit should be reversed for the additional reason that the source of the constitutional violation that Respondents allege is not so much state action by means of the grant of the tax credit under section 1089, but the claimed imbalance in the number of donors, STOs and scholarship applicants who choose to associate with religious schools. If as many or more private persons donated to STOs that provided scholarships exclusively to secular schools, as compared to religious schools, Respondents would have no objection to Section 1089. It is primarily the private conduct of third parties that is the genesis of their complaint. But state action is not involved in the decisions of donors to contribute to and form STOs, STOs to associate with religious schools, or parents to spend scholarships at religious schools. Their conduct is not traditionally the prerogative of the state, coerced or incentivized by the state, or part of a symbiotic relationship with the state where the relationship involves the supposed constitutional violation. Never before has this Court held such a

slim reed of a connection to the state an adequate nexus or indicium of joint action.

Nor has this Court treated as "direct aid" the type of benefit conferred under Section 1089 on religious schools. The closer analogies this Court has held constitutional are "indirect aid," which passes to religious schools only as a result of numerous, private choices of individual parents of school-age children. The scholarships authorized under Section 1089 ensure even greater separation between church and state than this Court approved in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), because they are composed of private funds and because of the additional layers of choice available to private parties. Section 1089 could also be analogized to a religion-neutral public charitable investment or fee-for-services transaction, inasmuch as Arizona receives low-cost, well educated students in exchange for the tax credit. Last, Section 1089 may be viewed as another type of neutral tax-favored treatment benefiting religious and non-religious persons alike. Consequently, this Court should reverse the Ninth Circuit and deny Respondents the relief they request.

ARGUMENT

1. Respondents Lack Standing to Invoke the Jurisdiction of the Federal Courts to Bring This As-Applied Challenge.

Taxpayers must ordinarily allege special injury to challenge a statute. In this case, the two primary injuries that Respondents speculate could occur (without affirmatively alleging they do occur) by virtue of the enactment of Section 1089 are to parents who may not be able to send their children to non-religious, nonpublic schools (ACSTO App. 124a ¶ 25), or to secular schools unable to enroll the students.[5] (ACSTO App. 124a ¶ 26) However, Respondents are neither of these. Respondents do not claim to be parents of students who applied to an STO, but were turned down or put on a waiting list. They did not seek to enroll children in a qualified secular school, but discover there were insufficient tax credit scholarships for it. Unlike the key cases upon which Respondents rely, they do not claim even to be parents of public school students. *Cf. Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 762 (1973) (some plaintiffs had children attending public schools).

[5] Under Federal Rule of Civil Procedure 19, the parents and schools in question are indispensable parties; therefore, this court cannot adjudicate directly upon their rights and the case should be dismissed. *See* 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY K. KANE, FEDERAL PRACTICE & PROCEDURE § 1611, at 164, 168 (3d ed. 2001) (*citing, inter alia, Mallow v. Hinde*, 12 Wheat. (25 U.S.) 193, 198 (1827)).

The families with a *bona fide* interest in this case are predominately low-income families.[6] An injunction would have a real and immediate impact on them – on their ability to succeed where others cannot.[7] In Florida, the results of educational reforms such as the Florida Tax Credit Scholarship Program have been remarkable, improving student scores generally and narrowing the achievement gap between whites and minorities at twice the rate nationwide.[8] Since 2003, African-Americans in grade four have closed the gap in reading with whites by 9 points and Hispanic-Americans by 8 points.[9]

But the injunction would not affect the Respondents as parents or operators of a qualified secular school somehow disadvantaged under Section 1089. No school or association of schools participating in the tax credit scholarship program is a party to this case. Nor do Respondents purport to operate an STO or to have tried to establish one serving only secular schools, but confronted some obstacle. Most basically, Respondents do not claim even to be donors or would-be donors to any STO.

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[6] Carrie Lips and Jennifer Jacoby, *The Arizona Scholarship Tax Credit: Giving Parents Choices, Saving Taxpayers Money*, Cato Institute Policy Analysis no. 414 (Sept. 17, 2001), at 2, *available at* www.cato.org/pubs/pas/pa414.pdf [hereinafter the "Lips and Jacoby Report"]. As amended, the Arizona tax credit requires STOs to consider financial need of applicants. 2010 Ariz. Legis. Serv, ch. 293 § 2 (West).

[7] *See* Chubb, *supra* note 4, at 68.

[8] *Id.* at 72.

[9] *See* NAEP Report, *supra* note 4, at 1.

Respondents do not allege even a psychological injury incident to the operation of the Program. *Cf. Valley Forge Christian College v. Ams. United for Separation of Church and Sta*te, 454 U.S. 464, 485-86 (1982) (rejected as a basis for standing). In sum, Respondents do not claim to be invested or affected in any unique manner whatsoever in the Arizona tax credit scholarship program. If "the gist of the question of standing" is whether the party seeking relief has alleged a sufficient "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions," Respondents have utterly failed the test. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

Repeatedly, this Court has emphasized that the case-or-controversy limitation as enforced by Article III standing is crucial in maintaining the balance of power. Most recently, in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 339 (2006), this Court found that city and state taxpayers lacked standing to challenge property tax abatements and investment tax credits granted to an automobile manufacturer to induce it to remain in the city. Applying the three-prong standing test developed in *Allen v. Wright*, 468 U.S. 737 (1984), this Court rejected their argument for reasons equally applicable in this case: (1) the alleged injury resulting from a tax expenditures is not legally cognizable, because it is not unique to any particular taxpayer; (2) the alleged injury is not "fairly traceable" to a tax expenditure, because its economic effects are uncertain; and (3) any increase in revenue

that would result from invalidating the tax benefit is not sufficiently likely to redress the Respondents' injury, because the legislature has the discretion to spend as it likes.

a. The Injury that Respondents Allege Is to Third Parties, Not Particular to Them.

This Court in *Cuno* found that the injury the taxpayers alleged was not "'concrete and particularized,'" but instead a grievance the taxpayer "'suffers in some indefinite way in common with people generally.'" 547 U.S. at 344 (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Frothingham v. Mellon*, decided with *Mass. v. Mellon*, 262 U.S. 447, 488 (1923)). This is equally true for the Respondents who manage not to identify a single particular harm to themselves in the complaint, in contrast to parents who they speculate may be unable to enroll their students in secular schools or secular schools themselves unable to receive scholarships. (ACSTO App. 124a ¶¶ 25-26) Respondents cannot rely for standing upon third party interests. *Valley Forge*, 454 U.S. at 474; *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952); *Hein v. Freedom from Religious Found.*, 551 U.S. 587, 598 (2007) (plurality). Especially in the field of education, this Court has recognized the prerogative of the states to experiment and rejected speculative harms to others as a basis for standing. *Everson v. Bd. of Educ.*, 330 U.S. 1, 506 n.2 (1947).

At bottom, Respondents are simple taxpayers with "generalized grievances about the conduct of

government," *Flast v. Cohen*, 392 U.S. 83, 106 (1968), as opposed to "those persons likely to be most directly affected by a judicial order." *Valley Forge*, 454 U.S. at 473. At most, Defendants claim that as a direct consequence of Defendants' supposed constitutional violations, "Plaintiffs and other Arizona taxpayers have been and will continue to be irreparably harmed by the diminution of the state general fund through the tax credit program…" (ACSTO App. 126a ¶ 32) But as freely conceded in the allegation itself, any such depletion of the general fund would necessarily impact people generally, not Respondents particularly. (*Id.*)

Equally clear, "a plaintiff who has been subject to injurious conduct of one kind" does not "possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982). Consequently, even if the injury to the general fund somehow counted as a special injury to the Respondents, it is different in kind from the injuries they speculate may accrue to parents or secular schools and, thus, inadequate for standing.

b. The Economic Effects of the Alleged Injury Are Uncertain or Beneficial.

The second reason this Court held that the plaintiffs lacked standing in *Cuno* was that the injury they alleged was not "fairly traceable" to a particular tax expenditure, because its economic effects were, at best, too uncertain. *Cuno*, 547 U.S.

at 344 (*citing Lujan*, 504 U.S. at 560). The injury was not "'actual or imminent," but instead 'conjectural or hypothetical.'" *Id*. Respondents claim that Section 1089 causes diminution of the state general fund. (ACSTO App. 126a ¶ 32) But in *Cuno*, this Court held, as a matter of law, "it is unclear that tax breaks of the sort at issue … do in fact deplete the treasury…." *Id*. In Arizona, research suggests the program is revenue-neutral or beneficial to taxpayers by as much as $186.2 million.[10] Similarly, Florida taxpayers saved $1.49 in state education funding for every dollar of tax credit received in Fiscal Year 2007-08,[11] and $1.44 after a major increase in the allowed tax cap in Fiscal Year 2008-09.[12]

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[10] Lips and Jacoby Report, *supra* note 6, at 1, 18; Charles M. North, *Estimating the Savings to Arizona Taxpayers of the Private School Tuition Tax Credit*, *available at* www.azpolicy.org/sites/azpolicy.org/files/downloads/ArizonaSTOTaxCreditCMNorth.pdf (last visited July 30, 2010).

[11] Office of Program Policy Analysis and Govt. Accountability, *The Corporate Income Tax Credit Scholarship Program Saves State Dollars,* at 1 (Dec. 2008), *available at* www.oppaga.state.fl.us/reports/pdf/0868rpt.pdf (last visited June 20, 2010) [hereinafter "2008 OPPAGA Report"].

[12] Office of Program Policy Analysis and Government Accountability, *Florida Tax Credit Scholarship Program Fiscal Year 2008-09 Fiscal Impact,* at 1 (March 1, 2010), *available at* www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/0868_1rpt.pdf (last visited July 30, 2010); Collins Center for Public Policy, Inc., *The Florida Corporate Income Tax Credit Scholarship Program: Updated Fiscal Analysis*, at 2 (February 2007), *available at* www.collinscenter.org/resource/resmgr/Education_Docs/Tax_Credit_Scholarship_Updat.pdf (last visited July 10, 2010).

As recognized by this Court in *Mueller v. Allen*, 463 U.S. 388, 395 (1983), states have "a strong public interest in assuring the continued financial health of private schools, both sectarian and non-sectarian," because, among other reasons, they "relieve public schools of a correspondingly great burden" to educate students "to the benefit of all taxpayers." The savings outlined in the reports mentioned above boil down to this type. However, the indirect benefits of the tax scholarship program would prove even more substantial, preventing the Respondents from showing the alleged injury is "fairly traceable" to the tax expenditure authorized by Section 1089. Even as alleged, Respondents claim no more than parents choosing to send their children to secular schools "*may* be unable to locate an STO." (ACSTO App. 124a ¶ 26) This is an as-applied challenge, yet Respondents failed to assert any definite or actual Establishment Clause violation and, thus, lack standing for this additional reason.

c. Respondents Have Not Adequately Alleged a Nexus Between An Injunction and Redress of Their Claimed Injury.

The third requisite for standing under *Cuno* and *Allen* is also not met in this case. This test requires a nexus between the increases in revenue that Respondents hypothesize would result from enjoining the tax credit and redress of their claimed injury. "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751. But the Respondents do not allege an effect on their own tax liability at

all, as a result of striking the tax credit. As distinct from the taxpayers in *Cuno*, 547 U.S. at 343, Respondents do not allege even that the scholarship tax credit imposes disproportionate tax burdens upon them. Accordingly, Respondents' allegations are less sufficient.

There is also no allegation – and could not be – that mere termination of the Arizona tax credit would lower the tax burden on Arizona's taxpayers in general. "A taxpayer plaintiff has no right to insist that the government dispose of any increased revenue it might experience as a result of his suit by decreasing his tax liability or bolstering programs that benefit him." *Id*. at 344-45. Rather, "the decision of how to allocate any such savings is the very epitome of a policy judgment committed to the 'broad and legitimate' discretion of lawmakers, which 'the courts cannot presume either to control or to predict.'" *Id*. at 345 (citation omitted). Any effect that enjoining the tax credit will have depends upon "precisely the sort of conjecture" and pure speculation that this Court "may not entertain in assessing standing." *Id*. at 350; *accord Allen*, 468 U.S. at 758-59.

d. The Narrow Exception Carved Out in *Flast v. Cohen* Is Inapplicable to this Case.

For standing, the Ninth Circuit relied primarily upon a narrow exception to the taxpayer standing rule that this Court carved out in *Flast v. Cohen*, 392 U.S. 83 (1968), but it is no more relevant in this case than it was in *Allen*, 468 U.S. at 754,

Valley Forge, 454 U.S. at 472, or *Hein*, 551 U.S. at 605. In *Flast*, this Court articulated a two-part test for determining whether a federal taxpayer has standing to challenge an allegedly unconstitutional expenditure:

> First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution.... Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.

392 U.S. at 102-03.

Assuming arguendo this Court intended *Flast* to apply equally to federal and state taxing and spending, *see Cuno*, 547 U.S. 347-49, the first prong of *Flast* is not met here as it was not in *Hein* and *Valley Forge,* because the "Respondents do not

challenge any specific [legislative] action or appropriation; nor do they ask the Court to invalidate any [legislative] enactment or legislatively created program as unconstitutional." *Hein*, 551 U.S. at 605; *accord Valley Forge*, 454 U.S. at 479-80. In fact, Respondents have not raised and cannot raise a challenge under Section 1089 to any disbursement of public funds at all via grant, voucher, or otherwise nor to any extraction of taxes, because this case involves a purely voluntary tax credit and private donations. *Cf. Flast*, 392 U.S. at 85 (funds for purchase of textbooks and other instructional materials); *Nyquist*, 413 U.S. at 762-64 (maintenance and repair and tuition reimbursement grants); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (federal grants for services and research in the area of premarital adolescent sexual relations and pregnancy); *Zelman v. Simmons-Harris*, 536 U.S. 639, 645 (2002) (public tuition aid).[13] Consequently, Respondents have not satisfied the primary reason for the exception in *Flast*, which was to avoid forcing any citizen "to contribute three pence only of his property for the support of any one establishment." 392 U.S. at 103. Section 1089 requires nobody to contribute anything to a religious entity.

Another guiding principle of *Flast* that Respondents have not met is that the nexus between

[13]The Ninth Circuit's reliance on this Court's silence about the challengers' standing in *Mueller v. Allen*, 463 U.S. at 390; *Hunt v. McNair*, 413 U.S. 734 (1973), and *Walz v. Tax Comm'n*, 397 U.S. 664, 666 (1970), all of which challenges failed, is inapposite The exercise of jurisdiction is not precedent for jurisdiction. *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478-79 (2006); *accord Hibbs v. Winn*, 542 U.S. 88, 127 (2004) (Kennedy, J., dissenting).

the plaintiff's taxpayer status and the legislative enactment must be direct. *Hein*, 551 U.S. at 603-04. This Court in *Hein* made clear that only expenditures made pursuant to an express congressional mandate and a specific congressional appropriation met the nexus requirement, as contrasted with the plaintiffs' claim that "any 'expenditure of government funds in violation of the Establishment Clause' met the test." *Id.* In this case, there is no government expenditure of funds, but even if private donated dollars somehow counted as such, Section 1089 does not mandate that parents spend scholarships at any religious school – merely that STOs provide scholarships to students attending at least two qualified schools. The discretion that STOs and parents have about where to send their children is a critical intervening variable, breaking the nexus chain.

At bottom, these Respondents are much more like the plaintiffs in *Doremus* who "sought to litigate … not a dollars-and-cents injury but [] a religious difference." 342 U.S. at 434. Theirs is not a "good-faith pocketbook action," but a call for more entrepreneurs to found private secular schools. *Id.* Their "'interest in the moneys of the treasury … is comparatively minute and indeterminable, and the effect upon future taxation … remote, fluctuating and uncertain'" without even an allegation of "'any payment out of the (Treasury's) funds'" *Flast*, 392 U.S. at 92 (*citing Frothingham*, 262 U.S. at 487). Nothing about Respondents' status assures this Court that they adequately represent the interests of those with real stakes in the program or have a sufficient nexus to the constitutional infringement

alleged to bring this case. Consequently, the Ninth Circuit should be reversed.

2. State Action Is Missing As Necessary to Assert Respondents' Establishment Clause Challenge.

The Establishment Clause attaches by virtue of the Due Process Clause to state action, not private conduct. *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947). Applying the Establishment Clause outside this context would not advance its structural purpose of ensuring separation of church and state, but impinge upon "other language of the [First] [A]mendment." *Id.* at 16. Consequently, from the beginning, this Court has emphasized that the First Amendment "requires the *state* to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Id.* at 18 (emphasis added). Before this Court in the instant case is a challenge primarily to the decisions that donors, non-profit companies, parents and private schools make to associate with religious persons in light of a tax credit available to anyone. Their conduct is not attributable to state officials, *see Blum*, 457 U.S. at 1003, 1005; *Polk County v. Dodson*, 454 U.S. 312, 324-25 (1981), but rather protected by the First Amendment.

The state action is the State of Arizona's grant of a tax credit to any taxpayer which desires to contribute the taxpayer's funds to an STO. ARIZ. REV. STAT. § 43-1089(A). The Respondents do not object to the tax credit *per se*, but to the supposed imbalance that follows from the taxpayers' choice of

the STOs to which to donate (ACSTO App. 118a ¶¶ 5, 7-8), the STOs' choice of the schools with which to associate (ACSTO App. 119a-121a, 125a-126a ¶¶ 11-12, 15-18, 28-31), the parents' choice of the STOs for scholarships (ACSTO App. 124a ¶¶ 25-26), the qualified schools' admission of students adhering to a particular religion (ACSTO App. 123a-124a ¶ 23), the schools' receipt of private funds from the STOs (ACSTO App. 122a-123a¶¶ 21-22), and the schools' instruction of students consistent with a religious educational philosophy. (ACSTO App. 121a-122a, 124a ¶¶ 16-18, 24) None of this conduct can be attributed to the state under the three primary tests articulated by this Court as described below: (1) the public function test, (2) the state compulsion test, or (3) the nexus/joint action test.

a. Donors, STOs, Parents and Schools Do Not Perform Functions that Are Traditionally the Exclusive Prerogative of the State.

The public function test for state action covers only private actors performing functions "traditionally the exclusive prerogative of the State." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974) (*citing Nixon v. Condon*, 286 U.S. 73 (1932) (election); *Terry v. Adams*, 345 U.S. 461 (1953) (election); *Marsh v. Ala.*, 326 U.S. 501 (1946) (company town); *Evans v. Newton*, 382 U.S. 296 (1966) (municipal park)). None of the functions at the heart of the complaint fall into this category. Donations are traditionally voluntary, rather than coerced gifts. Arizona provides tax-favored treatment for them, but Arizona taxpayers decide

whether to contribute to an STO at all and whether to seek a tax credit for the gift. Donors play a private, not public function.

STOs are also private persons and non-profit corporations exempt from federal taxation under section 501(c)(3) with just three statutory limitations: (1) they must allocate at least 90% of annual revenue for scholarships; (2) provide scholarships to students attending at least two schools, and (3) provide annual reports. ARIZ. REV. STAT. § 43-1089(F), (G)(3). In comparison to utility companies or nursing homes which the state extensively regulates without converting them into state actors, *see Jackson*, 419 U.S. at 350; *Blum*, 457 U.S. at 1004, the liberty that STOs have prevents attributing state action to them under the public function test. The fact that STOs perform a public function and have a corporate charter conferred by the state does not render STOs state actors. *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 544 (1987). Nor is it material that the state creates a precursor in the form of a tax credit to their scholarship awards. "Mere approval of or acquiescence in the initiatives of a private party is not sufficient" to trigger state action. *Blum*, 457 U.S. at 1004.

Parents and private schools also do not perform functions that are traditionally the state's exclusive prerogative. The fundamental duty to educate children is not the state's, but the parents'. *Wisconsin v. Yoder*. 406 U.S. 205, 213-14 (1972); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925). Private schools "serve as a benchmark for public

schools" and offer "wholesome competition with our public schools"; consequently, their independence is a legitimate interest of the state. *Mueller*, 463 U.S. at 395. Respondents allege erroneously that schools receiving tax credit scholarships receive public subsidies, but even this allegation is insufficient to invoke state action. "The Government may subsidize private entities without assuming constitutional responsibility for their actions." *San Francisco*, 483 U.S. at 544. In fact, the subsidization may be radical; for example, paying up to 90% of the patients in a nursing home, without triggering state action under the public function test. *Blum*, 457 U.S. at 1011.

b. Arizona Does Not Coerce or Encourage Religious Association.

The state compulsion test of state action is also not met in this case. It applies when the government "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." *See San Francisco*, 483 U.S. at 546 (collecting cases). Arizona does not compel or even financially incentivize a taxpayer to seek a tax credit to donate to an STO, much less a religious STO. Respondents are no worse off whether they contribute or not to an STO. *See Hibbs v. Winn*, 542 U.S. 88, 95 (2004) (Section 1089 "gives Arizona taxpayers an election. They may direct $500 to an STO, or to the Arizona Department of Revenue."). Arizona does not even require taxpayers to choose between paying taxes and contributing to STOs; taxpayers may claim multiple

alternative tax credits or deductions relating to education; *see, e.g.*, the public school tax credit, ARIZ. REV. STAT. § 43-1089.01, charitable tax credit, ARIZ. REV. STAT. § 43-1088, and education and library property exemption. ARIZ. REV. STAT. § 42-11104.

In addition, Section 1089 does not provide a greater credit for donations to religious STOs as compared to secular ones. Anybody can create an STO; and STOs are free to decide the schools with which they will associate whether religious or secular. Section 1089 requires merely that STOs associate with at least two schools of any sort. ARIZ. REV. STAT. § 43-1089(g)(3). Parents are not required or incentivized to apply for scholarships from STOs for their children to attend secular or religious schools. As in *Zelman*, families are actually disincentivized to choose a private school over public schools where their children could receive a good education, because of the cost involved. 536 U.S. at 654.

Parents have multiple other options to educate their children in Arizona. *See Kotterman v. Killian*, 193 Ariz. 273, 972 P. 2d 606, 611 (1999), *cert. denied*, 528 U.S. 921 (1999) (listing some options). But the Ninth Circuit disregarded them against this Court's warning to avoid the "arbitrariness" of failing to "consider all reasonable educational alternatives to religious schools that are available to parents," *Zelman*, 536 U.S. at 660; *id*. at 663 (O'Connor, J., concurring), and the full panoply of tax-favored options. *Mueller*, 463 U.S. at 396. Because donors, STOs and parents are entirely free to support and associate with religious STOs or

schools or a plethora of secular alternatives, and are not hindered from founding their own, their conduct cannot be attributed to the state under the state compulsion test.

c. Arizona Has Not Entered into a Symbiotic Relationship with Donors, STOs, Parents or Schools.

The nexus/joint action test for state action is also not met in this case, because Arizona has not "so far insinuated itself into a position of interdependence" with the Petitioners so as to become "a joint participant in the enterprise." *Jackson*, 419 U.S. at 357-58 (*citing Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)). To charge a private party with state action under this test, the governmental body and private party must be intertwined in a "symbiotic relationship," *Jackson*, 419 U.S. at 357; *Evans*, 382 U.S. at 299, which involves the alleged constitutional violation. *San Francisco*, 483 U.S. at 547 n.29.

Far short of this type of relationship, Arizona's exclusive involvement in the tax credit program after granting the tax credit is to receive the most basic of reports from STOs about scholarship recipients.[14] ARIZ. REV. STAT. § 43-1089(F). Donors must merely file their taxes. Never before has this Court held such a slender reed of a connection to the state an adequate nexus or

[14]As amended, Section 1089 requires the state to begin certifying STOs, but this is still far short of the type of nexus required for state action. *See* 2010 Ariz. Legis. Serv, ch. 293 (West).

indicium of joint action. Causation is not even established in this instance, where parents are at liberty to sacrifice and send their children to religious schools whether or not on scholarship and donors may contribute to religious schools directly.

d. The Tax Credit Itself is Constitutional.

The only state action at issue in this case, the grant of a tax credit to taxpayers who choose to apply for one, is not itself unconstitutional. To the extent the tax credit involves the state at all with religion; it is exclusively on a neutral basis with non-religion. Tax-favored treatment of donations "encouraging gifts to charitable entities, including but not limited to religious organizations – is neither to advance nor inhibit religion." *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 696 (1989). Consequently, a program "that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause." *Mueller*, 463 U.S. at 398-99; *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

In the interest of federalism, this Court held in *Walz*, "States, while bound to observe strict neutrality, should be freer to experiment with involvement [in religion] – on a neutral basis than the Federal Government." 397 U.S. at 699. In the same spirit, this Court has accorded to "legislatures … especially broad latitude in creating classifications and distinctions in tax statutes," *Mueller*, 463 U.S. at 396, *accord Zobrest*, 509 U.S. at

9; and, in stark contrast to the approach of the Ninth Circuit, has refused to "attribute unconstitutional motives to states" or to second-guess a legislature's secular purpose of a program. *Compare Mueller*, 463 U.S. at 394; *accord Bowen*, 487 U.S. at 604 (refusing to second-guess Congress' secular purpose even if part religious) *with Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F. 3d 1002, 1012 (9th Cir. 2009), *cert. granted*, _ U.S. _, 130 S.Ct. 3350 (May 24, 2010) (treating the legislature's purpose as a potential sham). Nowhere is this deference more critical than in the area of education to enable the types of reforms proven successful in Florida to combat a growing achievement gap nationally between whites and minorities.[15] *Zelman*, 536 U.S. at 678-79 (Thomas, J., concurring).

This would be a much different case were there an allegation that Section 1089 limits the tax credit exclusively for services that religious institutions are somehow uniquely well qualified to carry out, *accord Bowen*, 487 U.S. at 605, or if the statute advantaged donors who contribute to religious STOs or parents who choose to associate with religious schools. Instead, Petitioners' complaint boils down, at best, to a concern that not enough taxpayers are donating to secular STOs and not enough secular schools are taking advantage of the Program. If true, this is something for the invisible hand of the market to correct, but it is not a constitutionally cognizable dilemma. *See Mueller*, 463 U.S. at 401 ("[T]he fact that private persons fail

[15] *See* Chubb, *supra* note 4, at 69.

in a particular year to claim the tax relief to which they are entitled – under a facially neutral statute – should be of little importance in determining the constitutionality of the statute permitting such relief."). Because the market is responsible for any limits on choice, not the government, the Ninth Circuit should be reversed.

3. The Ninth Circuit's Decision Rests on an Erroneous Interpretation of "Aid" and Favored Tax Treatment.

The term "aid" is bandied about in much of the analysis of the Ninth Circuit below, but without a familiar footing in this Court's jurisprudence. The Ninth Circuit uses the term "aid" like it does "benefit," *see Winn*, 562 F. 3d at 1013, and treats the aid at issue in this case like this Court does "direct aid." *See id*. at 1002 & 1021. On the other hand, the Ninth Circuit denies the validity of much closer analogies to our facts such as "indirect aid" and neutral favored tax treatment. *See id*. at 1014-18. There is also a similarity between Section 1089 and constitutional governmental services not considered by the Ninth Circuit.

a. Incidental Benefits Conferred on Religious Persons Are Not *Per Se* Unconstitutional.

One potential reading of the Ninth Circuit's decision below is that the court meant the word "benefit" as a synonym for "aid" as if any incidental benefit received by a religious institution is somehow impermissible aid. To the contrary, "[o]ne fixed

principle" is this Court's "consistent rejection of the argument that 'any program which in some manner aids an institution with a religious affiliation violates the Establishment Clause.'" *Mueller*, 463 U.S. at 392 (collecting cases); *Agostini v. Felton*, 521 U.S. 203, 226 (1997) ("[W]e have departed from the rule … that all government aid that directly assists the educational function of religious schools is invalid.").

The primary intended and actual beneficiaries of Section 1089 are the children and families receiving scholarships to send their children to private schools. The STOs providing the scholarships and private schools receiving them are, at most, incidental beneficiaries of Section 1089. When, as in this case, parents and children primarily benefit, this Court has approved all sorts of incidental benefits for religious schools, such as reimbursement for expenses incurred in transporting children to school, *see Everson*, 330 U.S. at 3; loans of secular textbooks to schoolchildren, *see Bd. of Educ. v. Allen*, 392 U.S. 236, 241 (1968), tax deductions for expenses incurred in providing "tuition, textbooks and transportation" for children attending religious schools, *Mueller*, 463 U.S. at 391 n.1; and scholarships. *Zelman*, 536 U.S. at 645.

In these cases, it was immaterial that religious schools and parents predominately or primarily participated in the program. *See Mueller*, 463 U.S. at 391 (95% of the students attended sectarian schools); *Zelman*, 536 U.S. at 655 ("That 46 of the 56 private schools now participating in the program are religious schools does not condemn it as

a violation of the Establishment Clause."); *Agostini*, 521 U.S. at 229 ("Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid.") Any benefit that religious schools receive under Section 1089 is no different in kind, type, or extent than these.

Respondents express concern that Section 1089 may "enabl[e] children to attend religious schools at State expense." (ACSTO App. 120a ¶ 12) But this Court has previously rejected similar "but for" causation arguments, acknowledging that without constitutional "aid," parents may, indeed, not have chosen to send their children to parochial schools. *Zobrest*, 509 U.S. at 11; *Allen*, 392 U.S. at 242-43; *Everson*, 330 U.S. at 17-18. Scholarships "'necessarily reliev[e] a religious school of 'an expense that it otherwise would have assumed.'" *Agostini*, 521 U.S. at 228. But cutting off church schools from these services "is obviously not the purpose of the First Amendment." *Everson*, 330 U.S. at 18. "State power is no more to be used so as to handicap religions, than it is to favor them." *Id*. Consequently, impermissible "aid" under the Establishment Clause is not, as the Ninth Circuit implies, merely an incidental benefit conferred on religious persons.

b. Section 1089 Is Not A Form of "Direct Aid."

Another erroneous use of the term "aid" in the decision below is to confuse Section 1089 with "direct aid." As used by this Court, "direct aid" to religious

institutions has ordinarily involved direct financial or other unreimbursed assistance financed by government funds. It is like a "gift" or payment "made with no expectation of a financial return commensurate with the amount of the gift." *Hernandez*, 490 U.S. at 690. Direct aid has also been termed a "direct cash subsidy," *Zobrest*, 509 U.S. at 12, where there is no *quid pro quo* exchange. *Id.* Its purpose is "*unmistakably* to provide desired financial support for nonpublic, sectarian institutions." *Nyquist*, 413 U.S. at 783.

Examples of "direct aid" include a New York program that gave a package of benefits exclusively to private schools and the parents of private school enrollees, *see id.*; remedial education teachers, guidance and job counselors assisting at religious schools, *see Agostini*, 521 U.S. at 208; and a loan of textbooks for religious schools. *See Allen*, 392 U.S. at 241. These cases involving direct aid have nothing in common with the Arizona tax credit program for several reasons. First, Arizona writes no check to any institution under Section 1089; donors and STOs do. Not a single religious school or person receives any public appropriation or reimbursement. The State's credit is not even at stake. Second, the benefit accrues to religious institutions only as a result of the independent decisions of taxpayers and STOs. Third, Section 1089 does not require or encourage checks to be written to religious, as opposed to secular, STOs, parents, or schools; therefore, the statute's purpose is not "unmistakably" in support of religious institutions. Fourth, students and their parents are the primary beneficiaries of the tax credit. Consequently, direct

aid is not a suitable analogy for the benefits religious persons receive under Section 1089.

c. If Aid, Section 1089 Is Similar to Constitutional "Indirect Aid," Although Less Direct.

A use of the term "aid" in conjunction with Section 1089 explicitly rejected by the court below is "indirect aid." Yet this is a closer characterization of Section 1089 with the important caveat that the funds at issue here are not derived from the public treasury. As used by this Court, "indirect aid" programs are "neutral with respect to religion, and provide[] 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." *Zelman*, 536 U.S. at 652. This Court has "never found a program of true private choice to offend the Establishment Clause." *Id*. at 653. In fact, contrary to the Ninth Circuit, this Court has determined that "no reasonable observer would think a neutral program of private choice … carries with it the imprimatur of government endorsement." *Id*. at 655.

If it is indirect aid at all, Section 1089 provides an even less direct sort than was true in *Zelman*, because of the role donors and STOs play in exercising their independent private choices. This does not, as the Ninth Circuit claimed, render the aid somehow more suspect, but even less so, because the nexus between state and religion is further removed financially and through the additional layers of choice that private parties make such as

these: (1) whether to form an STO, (2) whether to donate to an STO and, if so, which one, (3) whether an STO will associate with religious or secular schools or both, (4) whether a parent should apply to an STO for a scholarship or exercise another type of school choice, and (5) whether to send children on scholarship to a religious or secular school.

The government itself makes none of these decisions. Whatever assistance Arizona provides through Section 1089 still becomes "available only as a result of numerous, private choices of individual parents of school-age children." *Mueller*, 463 U.S. at 399; *Zelman*, 536 U.S. at 649; *Zobrest*, 509 U.S. at 9. Furthermore, as in *Zelman*, there are no obstacles to non-religious schools forming and nothing to prevent STOs from associating exclusively with secular schools. New schools and STOs come and go as a result of supply and demand, so that taking snapshots of the operation of Section 1089 is misleading. *Accord Zelman*, 536 U.S. at 658 n.4. The market where private choice is exercised is fluid, whereas the parity that Respondents demand is feasible only through the introduction of government inducements and controls that are the hallmark of direct aid, rather than the very indirect type of aid, if aid at all, evident in this case.

d. Section 1089 Is A Public Charitable Investment.

Section 1089 could also be analogized to a religion-neutral public charitable investment or fee-for-services transaction, rather than government aid. "[T]his Court has long recognized that religious

schools pursue two goals, religious instruction and secular education." *Allen*, 392 U.S. at 245. For the tax credit, Arizona receives low-cost, well-educated students. The cost of the tax credit is revenue-neutral or revenue-generating and the test gains substantial.[16] The full extent of the gains have not yet been fully studied in Arizona as in Florida, where students who participate in the Florida Tax Credit Scholarship Program previously attended some of the lowest-performing public schools and were themselves among the lowest-performing students.[17] Parents in Florida report far greater satisfaction with the schools their children attend on scholarship, where they score on par with students nationally not from their same low-income or racial backgrounds.[18] In this manner, the program helps to shrink the achievement gap in education between whites and minorities.

Another revenue-neutral program and investment in education this Court approved was tax-exempt bond financing benefiting religious and non-religious post-secondary institutions neutrally. This Court called it a "very special sort" of aid similar to a "governmental service," pursuant to which educational institutions receive private

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[16] *See* Lips and Jacoby Report, *supra* note 6, at 1, 18; 2008 OPPAGA Report, *supra* note 11, at 1.

[17] *See* David N. Figlio, *Evaluation of the Florida Tax Credit Scholarship Program: Participation, Compliance, Test Scores and Parental Satisfaction in 2008-09,* at 2 (June 2010), *available at* www.floridaschoolchoice.org/information/ctc/files/figlio_ftc_test_score_report_2010.pdf (last visited on July 31, 2010).

[18] *Id.*

financial support. *Hunt v. McNair*, 413 U.S. 734, 745 n.7 (1973).[19] In *Hunt*, this Court considered constitutional the "instrumentality (Authority) through which educational institutions may borrow" tax-exempt funds "upon more favorable interest terms than otherwise would be available." *Id.* All of the Authority's expenses incurred in issuing the bonds were paid from the revenue of the projects without any expenditure of general revenue, *id*. at 738, so bond issuances were revenue-neutral as is Section 1089, and they were also an investment in education.

The question how many religious versus secular schools utilized the Authority was not important to this Court in *Hunt*. Neither has the comparison played a role with respect to other government services considered constitutional by this Court, such as "state-paid policemen, detailed to protect children going to and from church schools," *Id*.; *accord Everson,* 330 U.S. at 17; *Zobrest*, 509 U.S. at 8; "fire protection, connections for sewage disposal, public highways and sidewalks," *Everson*, 330 U.S. at 17-18; *accord Zobrest*, 509 U.S. at 8; *Widmar v. Vincent*, 454 U.S. 263, 274-75 (1981); and school health services, *Zobrest*, 509 U.S. at 13 n.10. To suggest that the constitutionality of a scholarship

[19] When *Hunt* was decided, this Court distinguished the eligibility of pervasively religious schools to participate neutrally in tax-exempt bond financing. But this Court has since replaced this doctrine. *See Columbia Union College v. Oliver*, 254 F. 3d 496, 502-04 (4th Cir. 2001) (*citing Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality), and *Steele v. Indus. Dev. Bd.*, 301 F. 3d 401, 407-08 (6th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); *see also Bowen*, 487 U.S. at 611.

tax credit, which is more obviously a public investment than these services, depends upon how many religious persons use it makes less sense than enjoining publicly-paid crossing guards who primarily help parochial students across the street.

e. Section 1089 Is Just Another Type of Constitutional and Favored Tax Treatment.

The last analogy explicitly rejected by the Ninth Circuit is that between a tax deduction or exemption and Section 1089. *See Winn*, 562 F. 3d at 1010, 1014-15 & n.12. All three have "an economic effect comparable to that of aid," but are not in fact aid. *Compare Mueller*, 463 U.S. at 399, *with Winn*, 562 F.3d at 1009. A tax credit is much more like a tax exemption than a grant, because "the government does not transfer part of its revenue to churches, but simply abstains from demanding" support from the taxpayer. *Walz*, 397 U.S. at 675. The credit is another type of neutral, favored tax treatment considered constitutional from the country's founding. *Id*. at 676-77. This Court has repeatedly held that when private persons donate even directly to a religious institution and receive favored tax treatment for it, there is no establishment. *Hernandez*, 490 U.S. at 696; *Mueller*, 463 U.S. at 396 (upholding Minnesota tax deduction for educational expenses); *Walz*, 397 U.S. at 675 (upholding an exemption for religious organizations from New York property tax). Arizona has not even done that much here.

True, Section 1089 is a tax credit, not a tax deduction. Laboring to distinguish the two, the Ninth Circuit spills much ink over the one-for-one character of the credit, as compared to the lesser deduction, as if the absolute dollars raised should affect the constitutional analysis. But even if it took three deductions to equal a credit, surely it would put form over substance to consider the one constitutional and the other not. The total allowed in credits in this case is not materially different from in *Mueller*, 463 U.S. at 391 (a deduction may not exceed $500 per dependent in grades K through six and $700 per dependent in grades seven through twelve."). *Cf.* ARIZ. REV. STAT. § 43-1089(A) ($500 per single individual or head of household or $1,000 for a married couple filing jointly). Furthermore, the value of the tax credit scholarships that parents redeem at religious schools, as in *Zelman*, to quote from Justice O'Connor, "pales in comparison to the amount of funds that federal, state, and local governments already provide religious institutions" through income, property, and tax deductions and, Justice O'Connor added, "tax credits for educational expenses." *Zelman*, 536 U.S. at 665 (O'Connor, J. concurring).

CONCLUSION

Respondents are without standing to bring this action, have complained essentially about private conduct not subject to the Establishment Clause, and have mischaracterized Section 1089 as impermissible aid. The judgment of the United

States Court of Appeals for the Ninth Circuit should be reversed.

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