

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 FOR THE GOLDWATER INSTITUTE
AND U.S. REPRESENTATIVE TRENT FRANKS
AS AMICI CURIAE SUPPORTING PETITIONERS**

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TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE.....	1
SUMMARY OF THE ARGUMENT.....	2
ARGUMENT.....	4
A. Arizona’s K-12 Education System and Alternatives Give Parents Ample Choices Within and Between Public School Districts	5
B. Choice Programs Expand Educational Opportunities for Children Who Need Them.....	9
CONCLUSION.....	16

TABLE OF AUTHORITIES

Page

CASES

Kotterman v. Killian, 193 Ariz. 273, 972 P.2d
606 (1999), *cert. denied*, 528 U.S. 810 (1999).....4

Zelman v. Simmons-Harris, 536 U.S. 639
(2002).....2, 4, 16

STATUTE

Ariz. Rev. Stat. Ann. § 43-1089 (2010).....4, 15, 16

LEGISLATIVE MATERIALS

H.B. 2732 (Ariz. 2010).....15

S.B. 1040 (Ariz. 2010).....15

S.B. 1286 (Ariz. 2010).....15

OTHER AUTHORITIES

Ariz. Dep’t of Educ., *Annual Report of the Ariz.
Superintendent of Public Instruction Vol. 1
Fiscal Year 2008-2009*7, 8

Ariz. Dep’t of Revenue, *Individual Income Tax
Credit for Donations to Private School
Tuition Organizations: Reporting for 2008*7

Caroline M. Hoxby, *The Rising Tide*, EDUC.
NEXT, Winter 2001 at 699, 10

David Figilio and Cassandra M.D. Hart,
*Competitive Effects of Means-Tested School
Vouchers*.....14

TABLE OF AUTHORITIES – Continued

	Page
Jay P. Greene and Marcus A. Winters, <i>The Effect of Special Education Vouchers on Public School Achievement: Evidence From Florida’s McKay Scholarship Program</i> , MANHATTAN INST. CIVIC REPORT (April 2008).....	13
Jay P. Greene, <i>An Evaluation of the Florida A-Plus Accountability and School Choice Program</i> (February 2001).....	12, 13
Joint Legislative Budget Comm., <i>K-12 Funding Since 2000 (All Funding)</i>	7
Michelle Reese, <i>Education Choices Abound</i> , MESA TRIBUNE, March 10, 2010.....	5
Nat’l Ctr. for Educ. Statistics, <i>State Educ. Data Profiles</i>	14
Nat’l Ctr. for Educ. Statistics, <i>The Nation’s Report Card: Reading 2009</i>	11
Pat Kossan, <i>Arizona expands K-12 online learning</i> , ARIZ. REPUBLIC, September 24, 2009.....	6

**BRIEF FOR THE GOLDWATER INSTITUTE
AND U.S. REPRESENTATIVE TRENT FRANKS
AS AMICI CURIAE SUPPORTING PETITIONERS**

INTEREST OF AMICI CURIAE¹

Amicus Goldwater Institute is a tax exempt educational foundation under Section 501(c)(3) of the Internal Revenue Code. The Institute was established in 1988 to advance non-partisan public policies of limited government, economic freedom, and individual responsibility. Of particular interest to the Institute is education reform, including school choice. Many of the recent education reforms in Arizona trace their inspiration to the Institute, which also produces policy studies to support its work. To ensure its independence, the Goldwater Institute neither seeks nor accepts government funds, and no single contributor may provide more than five percent of the Institute's annual revenue on an ongoing basis.

This case concerns the Institute because it works to advance innovative policy solutions to advance educational freedom and opportunity in Arizona. This work includes hosting conferences, testifying at the State Capitol, and working with legislative and community leaders to promote a truly competitive, market-based, high quality educational system. The

¹ No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae and its counsel, made a monetary contribution to the preparation or submission of this brief. All parties consent to the filing of this brief.

United States Court of Appeals for the Ninth Circuit's decision in this lawsuit forecloses important options that expand educational opportunities for Arizona's schoolchildren.

Amicus Trent Franks is a member of the United States House of Representatives. As a former Arizona state legislator, Representative Franks sponsored the scholarship tax credit program that is the subject of this lawsuit.

This brief was primarily written by Matthew Ladner, Ph.D., Vice President of Research at the Goldwater Institute, with the assistance of counsel of record. The brief shares Dr. Ladner's knowledge and expertise in educational policy. Prior to joining the Goldwater Institute, Dr. Ladner was Director of State Projects at the Alliance for School Choice, where he provided support and resources for state-based school choice efforts. Dr. Ladner has written numerous studies on school choice, charter schools, and special education reform. He is a graduate of the University of Texas at Austin and received both a Masters degree and a Ph.D. in Political Science from the University of Houston. Dr. Ladner previously served as director of the Center for Economic Prosperity at the Goldwater Institute and as Vice President of Policy and Communications at Children First America.



SUMMARY OF THE ARGUMENT

Much like the system of school choice upheld by this Court in *Zelman v. Simmons-Harris*, 536 U.S.

639 (2002), Arizona provides genuine opportunities for school choice consistent with the Court's uninterrupted line of precedent. Arizona's private school tax credits are a small component of a larger framework of school choice that includes a number of schooling options such as inter-district choice among public schools, intra-district choice among public schools, one of the nation's most liberal public charter school laws, a growing number of magnet school programs, and state funding for online learning. Given the open statewide public school choice and the plethora of state-funded alternatives, it is reasonable to assert that *every* K-12 student in Arizona attends a school of choice.

Arizona's tax credit program provides scholarships for children to attend both secular *and* sectarian private schools. There is no factual support for the Ninth Circuit's conclusion that Arizona pressures parents into choosing religious private schools over all other diverse and readily available options. When the system is considered as a whole, it becomes clear that Arizona not only provides numerous non-religious schooling options for parents, it also funds these options at a much higher level than the indirect assistance provided to parents through the tax credit program. Arizona law does not compel parents to choose religious private schools. If anything, Arizona's policies skew heavily in favor of secular options.



ARGUMENT

The scholarship's supporters and beneficiaries are, unfortunately, no strangers to legal challenges. This very program was challenged, inter alia, on First Amendment grounds in state court. The program was upheld by the Arizona Supreme Court in *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606 (1999), *cert. denied*, 528 U.S. 810 (1999), which made the commonsense observation that the program's operation is far-removed from the concerns of state and federal establishment clauses not only because of multiple layers of private choice, but also because the funds are conveyed directly to scholarship organizations and therefore never become public funds. This Court declined to review that decision, yet the program is in jeopardy again based on the same legal arguments rejected in *Kotterman*.

In *Zelman v. Simmons-Harris*, this Court held that the Cleveland Scholarship Program, a state funded voucher law, did not violate the First Amendment's Establishment Clause. In reaching this decision, *Zelman* considered the full context of parental choice programs in Ohio. 536 U.S. at 653-60. Likewise, when the full context of Arizona's parental choice programs is considered, it becomes clear that the tax credits at issue, Ariz. Rev. Stat. Ann. (A.R.S.) § 43-1089 (2010), are merely a constitutional component of a larger system of "pure private choice." *See Zelman*, 536 U.S. at 650. The facts below reflect the reality that A.R.S. § 43-1089 in no way compels parents to send their children to religious private

schools. Parents have many more secular options than sectarian options, and secular schools receive far more direct financial support from the State than sectarian private schools receive in aid from the tax credit program at issue.

A. Arizona's K-12 Education System and Alternatives Give Parents Ample Choices Within and Between Public School Districts

Arizona has a vibrant system of K-12 parental choice. State lawmakers adopted both inter and intra district choice programs for school districts in 1994. This law provides for state funds to follow children to the public school of their choice, subject to the availability of space in each school. Although no systematic data exists compiling the number of students exercising inter- and intra-district choice, thousands of children utilize these programs.

The Gilbert Unified School District has over 3,000 out-of-district children attending, and the Mesa Unified School District has nearly 3,000 out-of-district children attending. Michelle Reese, *Education Choices Abound*, MESA TRIBUNE, March 10, 2010. In addition, Arizona school districts created numerous magnet school programs, organized around a particular academic focus and without attendance boundaries. The State also funds online education courses, providing a new horizon of educational options for parents who wish to remain within the

school district system. See Pat Kossan, *Arizona expands K-12 online learning*, ARIZ. REPUBLIC, September 24, 2009, available at <http://www.azcentral.com/news/articles/2009/09/24/20090924onlineexpands0924.html> (last visited August 2, 2010) (reporting that under a pilot program the state liberalized the provision of online courses for districts and charter schools statewide in 2009).

In addition to choices within and between school districts, Arizona has one of the nation's most liberal charter school laws. Charter schools are public schools governed by independent boards of directors and exempt from some aspects of state regulation. Funding for charter schools comes from the State on a per-child basis, and they have no geographically defined attendance boundaries. Arizona parents dissatisfied with their zoned district schools have numerous public charter school choices, including magnet schools, charter schools, cyber-charter schools, and other district schools.

Almost a tenth of Arizona's public school students now attend 566 charter schools, with new schools approved for operation every year. Charter school attendance has grown strongly in Arizona, experiencing a 13% increase in aggregate enrollment during the 2008-09 school year. Not only are charter school options ample, but parents take advantage of these options by sending their children to public charter schools despite the concurrent availability of private school tax credits. Consequently, the facts do not support the conclusion that Arizona forcibly channels

parents and children to private schools, much less sectarian private schools, through the challenged tax credit program.

Arizona's tax credit law provides a profoundly lower amount of private school scholarship aid per student when compared to the aid that follows students attending public schools. Namely, in 2008 the average tax scholarship per pupil was \$1,909. Ariz. Dep't of Revenue, *Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2008*, <http://www.azdor.gov/Portals/0/Reports/private-school-tax-credit-report-2008.pdf> (last visited August 2, 2010). By comparison, in 2009, taxpayers granted a total estimated expenditure for public district school students of \$9,698 per pupil. Joint Legislative Budget Comm., *K-12 Funding Since 2000 (All Funding)*, <http://www.azleg.gov/jlbc/allfunding.pdf> (last visited August 2, 2010). Although the State does not calculate an equivalent expenditure number for Arizona's 566 public charter schools, the total aid per pupil for Arizona public charter schools can be calculated through information provided in the Arizona Superintendent of Public Instruction's Annual Financial Report. Specifically, its 2009 Report lists total revenue for all Arizona charter schools at \$792,071,084. Ariz. Dep't of Educ., *Annual Report of the Ariz. Superintendent of Public Instruction Vol. 1 Fiscal Year 2008-2009* at 6, available at <http://www.ade.az.gov/AnnualReport/AnnualReport2009/Vol1.pdf> (last visited August 2, 2010). The same report lists

the total Average Daily Membership (attendance) for Arizona charter schools as 99,018. *Id.* at 8. Dividing total revenue by total enrollment reveals that in 2009 taxpayers granted a total estimated expenditure for public charter school students of \$7,999 per pupil.

In addition to the fact that aid to students attending public district and charter options is profoundly higher than the indirect subsidies provided by tax credits, the State provides aid to public schools on a guaranteed formulaic basis. As a thought experiment, imagine the situation reversed; public schools collected funds indirectly through a system of tax credits while private schools received direct per-capita subsidies from the State in much larger, guaranteed, and predictable amounts. It would be a brazen religious school supporter indeed to stand up and cry foul by claiming that the State's system of tax credits for public schools *forced* children to attend public schools. Arizona's school funding system, in other words, profoundly favors attending district and charter schools.

Finally, the totality of Arizona's fiscal policy strongly favors public district school attendance over public charter school attendance, and by an *even wider margin* provides much greater assistance for those attending public schools than private schools. Parents must pay public school taxes even if they do their fellow taxpayers the service of placing their children in a private school at their own expense. Namely, if parents decide that private school education is best for their children, the result is that

they effectively pay twice for their choice – first through taxes, and again through private school tuition and fees. Arizona’s modest scholarship program only partially addresses this inequity.

In short, there is no question that Arizona’s fiscal policy disadvantages parents who choose to place their children in private schools rather than public schools. For this very reason, the challenged tax credit program certainly does not evince an intention by the State to force children into private sectarian schools.

B. Choice Programs Expand Educational Opportunities for Children Who Need Them

Scholars researching parental choice programs have found a positive correlation between the competition parental choice programs foster and student learning gains. For example, Stanford economist Caroline Hoxby measured the competitive impact of the Milwaukee Parental Choice Program. Caroline M. Hoxby, *The Rising Tide*, EDUC. NEXT, Winter 2001 at 69, *available at* http://educationnext.org/files/ednext20014_68.pdf (last visited August 2, 2010). The Milwaukee Parental Choice Program limits eligibility to those students who are also eligible for free and reduced lunches, thus the number of children who are eligible for the Choice Program varies greatly among the different Milwaukee public school campuses.

Dr. Hoxby compared academic achievement gains of schools heavily influenced by the voucher program to those less heavily affected (fewer students eligible). She also compared these two groups of Milwaukee schools (heavily and moderately impacted by vouchers) to a group of similar Wisconsin schools outside of Milwaukee that are completely unaffected by vouchers. *Id.* at 70-72. Dr. Hoxby found that those Milwaukee district schools with greater percentages of voucher eligible students enjoyed significantly higher academic achievement gains over lesser-impacted schools. Her results also demonstrated that both groups of Milwaukee schools made greater gains than the comparison group of Wisconsin schools. Schools with higher levels of competition for students demonstrated consistently higher academic gains. *Id.* at 73-74.

Dr. Hoxby's findings are not surprising when one considers the success of Florida's education reform measures, which currently provide the greatest degree of parental choice. Beginning in 1999, Florida implemented a strong set of education reforms that included creating a number of parental choice programs. Florida lawmakers mandated the letter grading (A-F) of all Florida public schools. All students attending a school receiving two failing (F) grades in any four-year period became eligible for school vouchers. Additionally Florida lawmakers created both the nation's largest scholarship tax credit program (Step Up for Students) and the nation's largest school voucher program (the McKay Scholarship Program) for children with disabilities.

Florida also created a strong charter school law, as well as the nation's strongest system of virtual schooling through the Florida Virtual School and other virtual schooling options. Finally, Florida policymakers enabled school funding to follow students down to the course level, with state funding for students in both district and charter schools paying for virtual schooling on a per-course prorated basis.

The National Assessment of Educational Progress (NAEP) tracks K-12 academic achievement across the country by administering academic achievement tests to random samples of students in various subjects and grade levels. As a result of The No Child Left Behind Act of 2001, all 50 states began participating in NAEP testing in 2003. NAEP administers four exams consistently: Fourth and eighth grade mathematics and reading. Florida has made more progress on these four NAEP exams than any other state since 2003 because of its education reforms.

Florida's NAEP progress is profound. Before enacting education reform, Florida was near the bottom of the NAEP rankings. Now, even traditionally low-performing student groups outscore a number of statewide averages for *all* students. For example, the average score for Florida's African American students (211) outscored or tied the statewide averages for all students in eight different states on the fourth grade reading NAEP. Nat'l Ctr. for Educ. Statistics, *The Nation's Report Card: Reading 2009*, available at <http://nces.ed.gov/nationsreportcard/pdf/main2009/2010458.pdf>

(last visited August 2, 2010). Florida's 2009 cohort of African American fourth graders scored twenty-five points higher on the NAEP reading test than their 1998 predecessors.

Likewise, Hispanic students made enormous progress. On the 2009 fourth grade reading NAEP test, Florida's Hispanic students outscored or tied thirty-one different statewide averages for all students. Since 1998, the racial achievement gap between Florida's Hispanic students and the national average for Anglo students decreased from twenty-five points to six points on the NAEP fourth grade reading exam. *Id.*

Parental choice programs are partly responsible for these improvements. Jay P. Greene, *An Evaluation of the Florida A-Plus Accountability and School Choice Program* (February 2001), available at http://www.manhattan-institute.org/pdf/cr_aplus.pdf (last visited August 2, 2010). The Florida Department of Education contracted with Florida State University for an evaluation of the academic impact of the Opportunity Scholarship Program. Scholars at Florida State University collaborated with colleagues at Harvard University's Program on Education Policy and Governance to produce the report. The result was an analysis comparing the academic gains between Florida public schools in danger of receiving a second F grade in a four year period (thus triggering voucher eligibility for their students) and other under-performing schools (D-minus schools, so to speak). Researchers found significantly higher gains among

Florida's voucher-threatened underperforming schools. The scholars attributed the threat of competition as the impetus for larger student learning gains. *Id.* at 8-11.

Researchers also investigated the impact of Florida's McKay Scholarship (voucher) Program on the learning gains of children with disabilities who remained in public schools. Jay P. Greene and Marcus A. Winters, *The Effect of Special Education Vouchers on Public School Achievement: Evidence From Florida's McKay Scholarship Program*, MANHATTAN INST. CIVIC REPORT (April 2008), available at http://www.manhattan-institute.org/pdf/cr_52.pdf (last visited August 2, 2010). The evaluation found that children with disabilities in public schools facing higher levels of competition from the McKay Scholarship Program made statistically significantly higher gains than similar students in schools facing less competition. *Id.* at 8-10. "Our results . . . provide additional evidence that rather than being harmed, public schools respond to the challenge of exposure to school choice by improving the education they provide. These findings are consistent with most previous research, which demonstrates school-choice policies' positive effect on public school achievement." *Id.* at 10.

Finally, Northwestern University researchers studied the impact of Florida's "Step Up for Students" tax credit program and found a statistically significant and positive relationship between the number of participating private schools in proximity

to public schools and student learning gains. David Figilio and Cassandra M.D. Hart, *Competitive Effects of Means-Tested School Vouchers*, <http://www.stepupforstudents.org/cms/10%20Public%20school%20impacts%20from%20Tax%20Credit%20Scholarships.pdf> (last visited August 2, 2010). The Northwestern researchers conclude:

Our results indicate that the increased competitive pressure faced by public schools associated with the introduction of Florida's FTC Scholarship Program led to general improvements in public school performance. Both greater ease of access to private school options (measured by the distance and density measures) and the variety of options that students have in terms of the religious (or secular) affiliations of private schools (measured by the diversity and concentration index measures) are positively associated with public school students' test scores following the introduction of the FTC policy.

Id. at 35.

To be clear, the research outlined above only partially attributes Florida's successful education reform to the State's parental choice policy. Nevertheless, this research is instructive because Arizona currently ranks towards the bottom on NAEP testing. See Nat'l Ctr. for Educ. Statistics, *State Educ. Data Profiles*, <http://nces.ed.gov/programs/stateprofiles> (last visited August 2, 2010). The State desperately needs every available tool to help improve academic achievement.

In 2010, Arizona adopted measures emulating Florida's K-12 education reform policies, such as requiring schools to be graded A-F, adopting alternative teacher certification and curtailing social promotion. S.B. 1286 (Ariz. 2010), *available at* http://www.azleg.gov/DocumentsForBill.asp?Bill_Number=SB1286&Session_ID=93 (last visited August 2, 2010); S.B. 1040 (Ariz. 2010), *available at* http://www.azleg.gov/DocumentsForBill.asp?Bill_Number=SB1040&Session_ID=93 (last visited August 2, 2010); H.B. 2732 (Ariz. 2010), *available at* http://www.azleg.gov/DocumentsForBill.asp?Bill_Number=HB2732&Session_ID=93 (last visited August 2, 2010). Arizona also improved and expanded parental choice programs. The legislature expanded the oversight and powers of the Arizona Department of Revenue over groups participating in the tax credit program and eased the use of the program for taxpayers. In addition, Arizona empowered universities to authorize charter schools.

Arizona anticipates that its education reform policies will help the State foster academic achievement vis à vis improved NAEP test scores. Florida's experience strongly suggests that parental choice improves public education and that Arizona's low-income and minority students will be the big winners if laws such as A.R.S. § 43-1089 are upheld.



CONCLUSION

Arizona does not force or coerce parents into using a tax credit scholarship, much less to send their children to sectarian private schools. Therefore, the Ninth Circuit's decision needlessly impairs parental choice as well as vital educational opportunities for Arizona's schoolchildren. The data presented in this brief underscores that the Ninth Circuit's decision departs from vertical *stare decisis* by ignoring the "unbroken line of decisions" that culminated in *Zelman's* holding. 536 U.S. at 662-63. For these reasons, the Court should overturn the Ninth Circuit's ruling and uphold A.R.S. § 43-1089.

Respectfully submitted,

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August 6, 2010