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Nos. 09-987, 09-991

In the
Supreme Court of the United States

Arizona Christian School Tuition Organization,
Petitioner,
v.
Kathleen M. Winn, et al.,
Respondents.

Gale Garriott,
Petitioner,
v.
Kathleen M. Winn, et al.,
Respondents.

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

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF AMICI[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the Ninth Circuit Court of Appeals should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation*, released in 2010.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Arizona has wisely designed its STO contribution credit to accommodate parental and religious rights. It steers clear of Establishment Clause traps by allowing taxpayers to voluntarily channel their own "tax dollars" to desired destinations. This multi-tiered layering of private choices takes the constitutionally mandated "hands off" approach necessary to ensure

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

the absence of state action—a prerequisite for any constitutional violation.

ARGUMENT

I. IN THE ABSENCE OF STATE ACTION, THE ANALYSIS SHOULD END UPON FINDING A VALID SECULAR PURPOSE.

State action is the launching pad for constitutional violations. Constitutional rights are protected against *state* interference—not the conduct of private parties—with rare exceptions such as the Thirteenth Amendment right to be free from involuntary servitude. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 278 (1993).

Arizona's program involves a series of uncoordinated decisions by literally thousands of private parties. These do not add up to the singular *state* action required to allege a constitutional violation:

> [I]f *numerous private choices*, rather than the *single choice of a government*, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment.
>
> *Mitchell v. Helms*, 530 U.S. 793, 810 (2000) (emphasis added) ("*Mitchell*")

It is easier to identify state action in the context of affirmative rights—free exercise, speech, association. Plaintiffs base their standing on taxpayer status,

asserting the state has violated their right not to support religion through their taxes. But even if tax credits are economically equivalent to a subsidy, funds are wholly directed by *private* actors—not *state* actors.

Reliance on *Lemon v. Kurtman*, 403 U.S. 602 (1973) has resulted in judicial treatment of the Establishment Clause that is inconsistent with other constitutional provisions. "More explicit and concerted applications of the state action doctrine to the Establishment Clause will help ameliorate this incoherence." *Developments in the Law: State Action and the Public / Private Distinction: The State Action Doctrine and the Establishment Clause*, 123 Harv. L. Rev. 1278, 1280 (2010) ("*Developments*"). In religion cases, the state action doctrine would help courts draw "the crucial dividing line" between *protected* private conduct and *prohibited* government action—"the public/private distinction that is enshrined in the Constitution's two Religion Clauses." *Id.* at 1284, 1290.

This critical dividing line is particularly important in Arizona, a state that "forged a clear path toward separation by prohibiting state aid to sectarian education." *Kotterman v. Killian*, 193 Ariz. 273, 300, 972 P.2d 606 (1999) (Feldman, J., dissenting) ("*Kotterman*"). *State* support is prohibited—not *private* conduct.

There is no state action in the implementation of Arizona's tax credit—and the Ninth Circuit cannot magically "manufacture what does not exist." *Winn v. Ariz. Christian Sch. Tuition Org.*, 586 F.3d 649, 670 (9th Cir. 2009) (O'Scannlain, J., dissenting). Without

a threshold finding of state action, there is no Establishment Clause issue to adjudicate.

A. Case Law Reveals Many Valid Secular Purposes—And Virtually No Probability That Improper Sectarian Motives Influenced The Challenged Legislation.

There are many reasons for the state to aid all of its students, including those in private schools. The state action doctrine does not alter the need to address *Lemon's* purpose prong, which "goes to the substance of the Establishment Clause." *Developments, supra*, 123 Harv. L. Rev. at 1282. Courts "continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged." *Agostini v. Felton*, 521 U.S. 203, 222-223 (1997) ("*Agostini*").

Cases rarely fail this inquiry. This Court is "reluctan[t] to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute." *Mueller v. Allen*, 463 U.S. 388, 394-395 (1983) ("*Mueller*"). Evaluating tax benefits in *Mueller*, this Court shifted focus from *Lemon's* "effect" prong to the secular purpose, sustaining a well-educated citizenry. Boyer, Jonathan D., *Education Tax Credits: School Choice Initiatives Capable of Surmounting Blaine Amendments*, 43 Colum. J.L. & Soc. Probs. 117, 126 (2009) ("*Education Tax Credits*").

Cases upholding school aid have found numerous secular purposes: *Board of Education v. Allen,* 392 U.S. 236, 247 (1968) ("raising national levels of knowledge, competence, and experience"); *Hunt v.*

McNair, 413 U.S. 734, 741 (1973) (facilities and structures to give youth the "fullest opportunity to learn and to develop their intellectual and mental capacities"); *Mueller, supra*, 463 U.S. at 395 ("[a]n educated populace is essential to the political and economic health of any community"); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 485 (1986) ("*Witters*") (vocational rehabilitation); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 5 (1993) ("*Zobrest*") (sign language interpreter); *Agostini, supra*, 521 U.S. 203 (remedial services to low-income students); *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) ("*Zelman*") ("providing educational assistance to poor children in a demonstrably failing public school system").

"The encouragement of private schools, in itself, is not unconstitutional." *Kotterman, supra*, 193 Ariz. at 278. Tax benefits are "legitimate tools" in that endeavor. *Id.* at 279. Even cases striking down school aid have jumped the secular purpose hurdle: *Wolman v. Walter*, 433 U.S. 229, 236 (1977) ("*Wolman*") (protecting the health of schoolchildren and "providing a fertile educational environment"); *id.* at 262 (Powell, J., concurring in part) (relieving tax burdens, stimulating public schools through healthy competition, facilitating high quality education); *Comm. for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973) ("*Nyquist*") (safe, healthy educational environment; pluralism and diversity); *id.* at 796 (educational choices for low-income families); *Meek v. Pittinger*, 421 U.S. 349 (1975) ("*Meek*") (supplemental auxiliary services); *Sch. Dist. v. Ball*, 473 U.S. 373, 382 (1985) (providing for the education of children is a "praiseworthy goal"); *Aguilar v. Felton*, 473 U.S. 402 (1985) (programs for

educationally deprived children from low-income families).

A program is "doomed from the start" if the state allocates benefits *because of*, rather than *in spite of*, a recipient's religious character. *Mitchell, supra*, 530 U.S. at 809-810. This Court struck down a state sales-tax exemption granted *solely* to religious periodicals. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14-15 (1989). That case is poles apart from the Arizona program, where results depend on the convergence of many uncoordinated private decisions—not *state* action. Under these circumstances, this Court has overwhelmingly rejected the relevance of statistics for evaluating constitutionality. *Mueller, supra*, 463 U.S. at 401; *Witters, supra*, 474 U.S. at 491 n. 3 (Powell, J., concurring); *Agostini, supra*, 521 U.S. at 229; *Mitchell, supra*, 530 U.S. at 801, 812 n. 6, 826; *Zelman, supra*, 536 U.S. at 650, 652, 655. Following suit, Arizona "refuse[d] to hinge constitutional scrutiny on such ephemeral numbers" when evaluating the tax credit scrutinized in this case. *Kotterman, supra*, 193 Ariz. at 282.

Framers of the Arizona Constitution took education seriously, believing that "educated citizens are vital to a free and united society." *Id.* at 290. When legislators created the charter school program in 1994, they "hoped to encourage the development of educational settings that would invigorate learning, improve academic achievement, and provide additional choices for parents and children. See A.R.S. § 15-181(A)." *Id*. The tax credit furthers similar goals. *Id*. *See also Green v. Garriott*, 221 Ariz. 404, 409, 212 P.3d 96 (2009) (business tax credit facilitates high quality education).

Plaintiffs face monumental evidentiary difficulties in challenging Arizona's facially valid statute. The state does not control the formation, management, or policies of the STOs. The state does not control the decisions of taxpayers who contribute to them. Even concurring Ninth Circuit judges admit that "[i]ndividuals' contributions to STOs that discriminate on the basis of religion are not, of themselves, probative of Section 1089"s purpose." *Winn v. ACSTO, supra*, 586 F.3d at 658 (Nelson, Reinhardt and Fisher, J., concurring).

The Ninth Circuit cites two other circuits that "have considered private conduct... probative of [a state] program's purpose, and *Winn* does not foreclose the possibility that plaintiffs can point to private conduct probative of whether Section 1089 has a secular purpose." *Id.* at 657-658. These cases are not on point. Community response helped the Fifth Circuit find a secular purpose for a state-sponsored monument—portraying a citizen carrying a Bible—which had stood for 32 years without objection. *Staley v. Harris County, Tex.,* 461 F.3d 504, 513 (5th Cir. 2006). While helpful in assessing the appearance of endorsement, this barely touches the *state's* original intent. The D.C. Circuit dismissed a case objecting to the closing of a public library on Easter Sunday, finding it proper to consider the "testimony of parties who participated in the enactment or implementation" of the law. *Bonham v. D.C. Library Admin.*, 989 F.2d 1242, 1244-45, 300 U.S. App. D.C. 370 (D.C. Cir. 1993). These "private" parties were acting in official capacities, unlike Arizona's taxpayers.

Even if some Arizona legislators secretly hoped to assist religious schools, the probability of achieving

that purpose is remote. The state has taken the "constitutionally required hands-off approach," allowing "external factors [to] define the playing field." *Winn v. ACSTO, supra*, 586 F.3d at 665 (O'Scannlain, dissenting). Whatever the purpose—secular or religious—taxpayers could easily thwart it. *Id*. at 668.

B. Arizona Has Not Delegated An Exclusively *Public* Function To Private Actors.

Private citizens have substantial rights and responsibilities in the education of children. *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Unlike *Larkin v. Grendel's Den*, 459 U.S. 116 (1982) (zoning) or *Bd. of Educ. of Kiryas Joel Village v. Grumet*, 512 U.S. 687 (1994) (public school district) ("*Kiryas Joel Village*")—in the present case education is not an exclusively state function, nor has Arizona improperly delegated it.

In *Larkin*, the state abdicated its traditional zoning authority and granted absolute veto power to individual churches. *Larkin v. Grendel's Den, supra,* 459 U.S. at 125. "[S]tate cooperation with churches is a far cry from state cooperation with taxpayers." *Winn v. ACSTO, supra*, 586 F.3d at 668 (O'Scannlain, dissenting). *Larkin* created a prohibited "fusion of governmental and religious functions." *Larkin v. Grendel's Den, supra*, 459 U.S. at 126-127, citing *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963). Even the Ninth Circuit acknowledged that *Larkin* does not control this case because "the delegation of scholarship funding to individual taxpayers...does less to promote religion than the delegation of zoning authority to churches." *Winn v. Ariz. Christian Sch. Tuition Org*., 562 F.3d 1002, 1020

(9th Cir. 2009). No individual taxpayer has more than a nominal impact on education—unlike *Larkin*, where a single church could usurp the government's zoning authority.

In *Kiryas Joel Village*, the state purposely vested power in religious individuals when it carved out a unique school district to accommodate a Jewish sect. Religious identity was the basis for their civic authority. *Kiryas Joel Village, supra*, 512 U.S. at 699. A court injunction, based on the now-overruled *Aguilar* case, precluded them from receiving assistance for their disabled children. *Id.* at 692-693; Bassett, William W., *Changing Perceptions of Private Religious Schools: Public Money and Public Trust in the Education of Children*, 2008 BYU L. Rev. 243, 264 (2008) ("*Changing Perceptions*"). These individuals were not *private* taxpayers making *private* choices, but *public* officials supervising a *public* school district. Moreover, the efforts of these religious officials were coordinated—unlike the combined effect of Arizona taxpayers who support STOs with no plan or organization.

Education existed in America long before the instigation of public schools. The Ninth Circuit argues that educational policy is "certainly a traditional government function." *Winn v. ACSTO, supra*, 586 F.3d at 656 n. 8 (Nelson, Reinhardt and Fisher, J., concurring). This broad statement overlooks the context in *Kiryas Joel Village*: "Authority over public schools belongs to the State." *Kiryas Joel Village, supra*, 512 U.S. at 698. The special school district subjected all families in the district to a religiously controlled *public* school system. Arizona families have a broad spectrum of choices and no coercion is

anywhere on the horizon. The uncoordinated choices of taxpayers are hardly tantamount to the exercise of government authority over *public* education.

C. Tax Benefits Are Not Equivalent To An Outright Subsidy. The Government's Role Ends With The Granting Of Tax Relief.

It is difficult to contend that state action extends after the government's role has ended. Arizona's role ended with the enactment of tax benefits. Having crossed that crucial dividing line, state action vanishes.

Arizona's credit involves no "direct transfer of public monies to the subsidized enterprise...us[ing] resources exacted from taxpayers as a whole." *Nyquist, supra*, 413 U.S. at 807 (Rehnquist, J., dissenting). Beyond creating the tax program, there is no "genuine nexus" or state action. Even the *Zobrest* dissent acknowledged this point—distinguishing *Witters* and *Mueller* because "[t]hose cases dealt with the payment of cash or a tax deduction, where governmental involvement ended with the disbursement of funds or lessening of tax." *Zobrest, supra*, 509 U.S. at 22 (Blackmun, J., dissenting) (*Zobrest* upheld IDEA aid to a deaf high school student in a Catholic school).

"Private choice" cases also resonate with the state action doctrine. In *Mueller*, *Witters*, and *Zobrest* "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Zelman, supra*, 536 U.S. at

652. In Arizona, similarly, "the state's involvement stops with authorizing the creation of STOs and making tax credits available. After that, the government takes its hands off the wheel." *Winn v. ACSTO, supra*, 586 F.3d at 659 (O'Scannlain, dissenting).

Arizona's tax credit is analytically similar to a tax exemption:

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees "on the public payroll." There is no genuine nexus between tax exemption and establishment of religion.
>
> *Walz v. Tax Comm'n*, 397 U.S. 664, 675 (1970) ("*Walz*")

D. None Of The Private Decision Makers—Taxpayers, STOs, Or Parents—Are "State Actors." There Is No Concerted Action Or Close Nexus Sufficient To Attribute Their Conduct To The State.

The Ninth Circuit implicitly concedes that STOs are not state actors. *Winn v. ACSTO*, *supra*, 562 F.3d at 1013 n. 10 ("Plaintiffs do not argue that STOs are state actors, so we do not decide whether the STOs' conduct, in itself, could support an Establishment

Clause claim.") Parents are not state actors and neither are the taxpayers who merely direct a few of their own tax dollars.

"[T]he acts of a private party are fairly attributable to the state on certain occasions when the private party acted in concert with state actors." *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 n. 6 (1982). Nothing suggests that taxpayers, STOs, parents, or schools have acted "in concert" with Arizona to advance religion. Instead, there is a disconnected series of private actions with unpredictable results.

The level of funding flowing to religious schools does not create state action since there is no "direct connection" between the funding procedure and the religious activities of the schools. "[Q]uestioned behavior always requires a *nexus* with the state for it to be considered unconstitutional." *Developments, supra*, 123 Harv. L. Rev. at 1284. State funding does not transform private conduct into state action "where there is little direct connection between that funding and the prohibited activity." *Id*. at 1290. In *Kendell-Baker*, this Court found an absence of state action where a private school—which received 99% of its funding from the government—terminated a teacher who disagreed with the director. *Rendell-Baker v. Kohn, supra*, 457 U.S. at 836-837. The employee could not allege a free speech violation. No matter how much funding flows to religious entities, Arizona's taxpayer-directed mechanism does not convert either STOs or schools into state actors.

Admittedly "an STO could pool several contributions and then pay the full tuition for any student, group of students, or...all students in any

group of schools of a single religious faith." *Kotterman, supra*, 193 Ariz. at 297 (Feldman, J., dissenting). Some STOs restrict scholarships on the basis of religion—as *private* actors are constitutionally entitled to do. Some taxpayers support religious STOs. Neither possibility transgresses *Agostini*'s requirement that a court consider whether an aid program "defines its recipients by reference to religion." *Mitchell, supra*, 530 U.S. at 813. There is no constitutional violation where *private* actors make such distinctions.

E. The *Government Itself* Does Not Advance, Promote, Or Endorse Religion.

"For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,* 483 U.S. 327, 337 (1987). This restates the prerequisite for a constitutional violation:

> This case is...notable...for what it does not involve: state action advancing religion. The government does not direct any aid to any religious school. Nor does the government encourage, promote, or otherwise incentivize private actors to direct aid to religious schools.
>
> *Winn v. ACSTO, supra*, 586 F.3d at 658-659 (O'Scannlain, dissenting)

Arizona has not advanced religion by enacting legislation that sets in motion a series of disconnected private choices. The process is analogous to proximate causation (tort law). The state is the "actual cause" of

private school benefits, which would not exist apart from the statute, but there are too many broken links in the chain for Arizona to be the "proximate cause" of the aid. Private parties—taxpayers, STOs, parents—are the "superseding intervening independent causes" that rupture the connection. "[T]he '*government itself*' is at least four times removed from any aid to religious organizations." *Winn v. ACSTO, supra*, 586 F.3d at 662 (O'Scannlain, dissenting). The program "could just as easily have resulted in a total dearth of funding for religious organizations...." *Id*.

Arizona does not directly appropriate funds to a religious entity. But the Ninth Circuit, oblivious to the elaborate funding route, highlights the lack of absolute parental choice "to suggest that by filtering aid through multiple levels of private choice—rather than a single level—the state endorses religion. But that makes no sense. How can *increasing* the separation between state and religion result in heightened government endorsement?" *Id*. at 662 n. 10. *Taxpayer* choices may limit the options available to parents, but "the question is whether the *government* has somehow limited or constrained [parental] choice[s]"—and taxpayers are not state actors. *Id*. at 663.

In *Agostini*, this Court began to focus on whether religious indoctrination "could reasonably be attributed to governmental action." *Agostini, supra*, 521 U.S. at 226, quoting *Zobrest, supra*, 509 U.S. at 10. "[T]he answer to the question of indoctrination will resolve the question whether a program of educational aid 'subsidizes' religion, as our religion cases use that term. [citations omitted]." *Mitchell, supra*, 530 U.S. at 809. The issue of governmental indoctrination is

ultimately a question of state action. *Developments, supra*, 123 Harv. L. Rev. at 1281.

Finally, it is difficult to believe that several layers of private choice could possibly be perceived as *state* action improperly endorsing religion:

> [U]nder the endorsement test, any level of attenuation between government action and aid to religion necessarily reduces the likelihood that a "reasonable observer" will find impermissible government approbation.
>
> *Winn v. ACSTO, supra*, 586 F.3d at 667 (O'Scannlain, dissenting)

Only the most irrational or biased observer could possibly believe the *state* has surreptitiously engineered a program to advance religion within the parameters of Arizona's multi-tiered scheme.

"[E]ndorsement of [a] religious message is reasonably attributed to the individuals who select the path of the aid." *Mitchell, supra*, 530 U.S. at 842-843 (O'Connor, J., concurring). Where direct state aid is used for religious indoctrination, it is logical to perceive endorsement of the message, but not where private choices select the route. *Mueller, supra*, 463 U.S. at 399; *Zelman, supra*, 536 U.S. at 654-655. In *Witters*, this Court held there was no state action where a private citizen used neutrally available aid for a religious education. *Witters, supra*, 474 U.S. at 488-489. The situation is analogous to a state-created speech forum that does not "confer any imprimatur of state approval." *Widmar v. Vincent,* 454 U.S. 263, 274 (1981), quoted in *Mueller, supra*, 463 U.S. at 397.

F. The State Action Doctrine Is Consistent With This Court's Shift To A More Flexible Approach Based On Nondiscrimination And Private Choice.

This Court has struggled to apply the Establishment Clause to school aid cases. *Mitchell, supra*, 530 U.S. at 807. But only a thin thread connects Arizona to the attenuated benefits flowing to private schools. This Court offered a helpful analogy in *Witters* when it began to abandon the strict "no aid" principle:

> It is well settled that the *Establishment Clause* is not violated every time money previously in the possession of a State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary.
>
> *Witters, supra*, 474 U.S. at 486-487; cited in *Agostini, supra*, 521 U.S. at 225-226 and *Mitchell, supra*, 530 U.S. at 816, 841

The tax credit's economic effect is comparable to direct aid, but the constitutional analysis is radically different. Direct aid is *state* action. Private choice programs are not. *Nyquist* acknowledged the relevance of the funding route but considered it only one of many factors. *Nyquist, supra*, 413 U.S. at 781. *Mueller* elevated the importance of this factor. *Education Tax Credits, supra*, 43 Colum. J.L. & Soc.

Probs. at 126; *Mueller, supra*, 463 U.S. at 399. There is no state action where private actors channel the flow of funds, and while "private choice is easier to see when aid literally passes through the hands of individuals...there is no reason why the Establishment Clause requires such a form." *Mitchell, supra*, 530 U.S. at 816.

Various forms of state action emerge in school aid cases. Recently, this Court has upheld some aid *in spite of state action* where benefits are offered on a nondiscriminatory basis without regard to religion. But no case has struck down aid where—as here—there is no state action beyond the enactment of a facially neutral program.

The direct monetary aid in *Lemon* and *Nyquist* is the most obvious instance of state action. The services of *public* employees were implicated in four cases this Court subsequently overruled: *Meek, supra*, 421 U.S. 349 (auxiliary services); *Wolman, supra*, 433 U.S. 229 (diagnostic, therapeutic, and remedial services); *Aguilar v. Felton, supra*, 473 U.S. 402 (services for educationally deprived children); *Sch. Dist. v. Ball, supra*, 473 U.S. 373 (teachers in private school classrooms "leased" to the state). These services are readily traced to the state, but later cases allowed such aid if it resulted from private choices: *Zobrest, supra*, 509 U.S. at 10 (sign language interpreter in Catholic school not attributable to state decision); *Agostini, supra*, 521 U.S. 203 (remedial education for low-income students). *Agostini* abandoned the *Meek-Ball* presumption that placing public employees on private school premises will inevitably create state-sponsored indoctrination or a symbolic union between the state and religion. *Id.* at 223.

In some cases, state-owned equipment, books, and/or materials were loaned to private schools or their students: *Meek, supra*, 421 U.S. 349; *Wolman, supra*, 433 U.S. 229; *Mitchell, supra*, 530 U.S. 793. In *Meek*, the Court upheld loans of textbooks acceptable for public school use but struck down loans of items that might be diverted to teach religion or free up money for religious instruction. *Meek, supra*, 421 U.S. at 395. In *Wolman*, this Court upheld a secular textbook loan program similar to *Meek*. *Wolman, supra*, 433 U.S. at 237-238. *Mitchell* overruled portions of both of these cases and upheld loans of federally funded equipment "offered to a broad range of groups or persons without regard to their religion." *Mitchell, supra*, 530 U.S. at 809. As with public employees, the judicial tide turned and carefully crafted aid survived in spite of state action.

Minimal state action characterizes private choice cases—*Mueller*, *Witters*, *Zobrest*, *Mitchell,* and *Zelman*. *Zelman* implicitly acknowledges the state action doctrine: "While our jurisprudence with respect to the constitutionality of direct aid programs has 'changed significantly' over the past two decades...our jurisprudence with respect to true private choice programs has remained consistent and unbroken." *Zelman, supra*, 536 U.S at 649. *Mueller*, *Witters*, and *Zobrest* are examples of that consistency—all three times rejecting Establishment Clause challenges because aid reached religious entities solely by the direction of private individuals—not the state. Justice O'Connor affirms this point in *Mitchell*, observing that the advancement of religion is "*wholly* dependent on the student's private decision." *Mitchell, supra*, 530 U.S. at 842 (O'Connor, concurring).

Arizona's program does not involve direct aid, public employees, or loans of state-owned assets. All aid is mediated through the tax code and must be initiated through private action. *Arizona* has not "created an overwhelming disparity in the number of scholarships exclusively available for use at religious schools" merely by allowing tax credits to STOs that "discriminate" by limiting funds to such schools. *Winn v. ACSTO, supra*, 586 F.3d at 653 (Nelson, Reinhardt and Fisher, J., concurring). Thousands of private decisions combined to create that disparity—which could flip in the future. "[T]he fact that private persons fail 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." *Mueller, supra*, 463 U.S. at 401. Similarly, the conduct of *private* Arizona citizens is constitutionally irrelevant. Reliance on wavering numbers brings neither certainty nor principled standards to this Court's Establishment Clause jurisprudence. *Id*. Application of the state action doctrine is consistent with recent trends in this Court's school aid jurisprudence and leads naturally to the conclusion that Arizona's tax credits are constitutional because there is no state action at any critical juncture in the funding route.

II. ARIZONA'S STATUTORY SCHEME IS UNIQUELY CRAFTED TO UPHOLD THE CONSTITUTION.

Arizona offers families a statutory smorgasbord of educational options, in keeping with the trend of many states to "explor[e] alternatives to traditional public education—from charter schools to private school

vouchers." *Kotterman, supra*, 193 Ariz. at 290. In addition to the tax credit challenged in this litigation (A.R.S. § 43-1089), the entrees on that "smorgasbord" include tuition-free public schools (A.R.S. § 15.816.01(A)), charter schools (A.R.S. § 15-181), home schooling (A.R.S. § 15.802), corporate tax credits (A.R.S. § 43-1183), and a credit for public school extracurricular activity fees (A.R.S. § 43-1089.01).

Arizona's tax credit scheme is carefully designed to promote constitutional values. Unlike past credits that facilitated racial segregation in defiance of the Constitution, Arizona accommodates the free exercise of religion and parental rights to direct the upbringing of their children. Moreover, the role permitted to taxpayers furthers the Establishment Clause goal of protecting against coerced financial support of religion.

A. Allowing *Taxpayers* To Initiate The Flow Of Funds Ensures That No Citizen's "Tax Dollars" Are Forcibly Diverted To Support Religion.

The Ninth Circuit is fixated on the point that *taxpayers*—not *parents*—choose to aim funds toward religious destinations. But "[p]arental choice cannot help the *taxpayer* who does not want to finance the religious education of children." *Zelman, supra*, 536 U.S. at 728 (Breyer, J., dissenting). Arizona confronts this objection—the only "tax dollars" flowing to religious STOs or schools are directed there by particular taxpayers. Plaintiffs base standing on taxpayer status, but not one penny of *their* tax dollars supports religious education.

All taxpayers are compelled to support education. Arizona's ingenious multi-tiered scheme allows them to channel some of their own educational "tax dollars." The program insulates the state against charges of financing religion and facilitates compliance with a primary Establishment Clause purpose:

> No tax in any amount, large or small, can be levied to support any religious activities or institutions....
>
> *Everson v. Board of Education*, 330 U.S. 1, 16 (1947)

Legislature history confirms this point:

> Mr. Franks stated that he believes all citizens do presently contribute dramatically to the public school system. This legislation represents an option to redirect some of the money that would go to the general fund to a charity fund.
>
> Minutes of the Committee on Education, Arizona S., 43rd Leg., 1st Reg. Sess. (March 20, 1997); *see* Joint Appendix, p. 231.

"One of the strengths of the scholarship tax credit is that it puts power in the hands of individuals to allocate resources instead of giving all control to the state." Goldwater Report, December 11, 2003, The Arizona Scholarship Tax Credit: Providing Choice for Arizona Taxpayers and Students; *see* Joint Appendix, p. 67.

School aid has repeatedly sparked legal challenges. *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) appears to have "launch[ed] a nationwide campaign to purge the religious schools of every penny of public money and the public schools of every vestige of religious sentiment." *Changing Perceptions, supra*, 2008 BYU L. Rev. at 258.

Nevertheless, federal and state tax codes direct a broad array of benefits to religious institutions. The $8.2 million implicated in *Zelman's* school voucher program "pale[d] in comparison to the amount of funds that federal, state, and local governments already provide[d] religious institutions"—income and property tax exemptions, charitable deductions, and programs like the "Hope Tax Credit." *Zelman, supra*, 536 U.S. at 665 (O'Connor, J., concurring).

Tax exemptions and government subsidies are not the same, despite economic similarity. Unlike an exemption, where government passively refrains from assessing a tax, a subsidy "'forcibly diverts the income of both believers and nonbelievers....' Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, pt. II, 81 Harv. L. Rev. 513, 553 (1968)." *Walz, supra*, 397 U.S. at 690-691 (Brennan, J., concurring). Arizona's credit is more like an exemption. It hinges on voluntary participation, not funds extracted from taxpayers in general. The *Kotterman* dissent erroneously objected that "[i]t is a dangerous doctrine that permits the state to divert money otherwise due the state treasury and apply it to uses forbidden by the state's constitution." *Kotterman, supra*, 193 Ariz. at 307 (Feldman, J., dissenting). The *state* has neither diverted a penny nor "somehow imposed a tax by declining to collect potential revenue

from its citizens." *Id*. at 288. Otherwise, courts "would also be forced to rule that deductions for charitable contributions to private schools [are] unconstitutional because they too, would amount to the laying of a tax." *Id*.

Granting taxpayers choices guarantees that no one is compelled to support religion. The state does not levy a tax or appropriate funds for religious education. Taxpayers direct *their own tax dollars* to STOs they support. Religious STOs bolster Establishment Clause compliance by ensuring that only voluntarily directed "tax dollars" reach religious schools.

B. Arizona's Program Of "Benevolent Neutrality" Accommodates And Facilitates Fundamental Rights.

"[T]he tuition tax credit is a neutral adjustment mechanism for equalizing tax burdens and encouraging educational expenditures." *Kotterman, supra*, 193 Ariz. at 292. This program reflects the "benevolent neutrality" that "permit[s] religious exercise to exist without sponsorship [or] interference." *Walz, supra*, 397 U.S. at 669. Arizona encourages religious instruction without coercing financial support, thus "follow[ing] the best of our traditions...respect[ing] the religious nature of our people and accommodat[ing] the public service to their spiritual needs." *Zorach v. Clauson,* 43 U.S. 306, 313 (1952). It would be "most bizarre" for this Court to "reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children." *Mitchell, supra*, 530 U.S. at 827-828. The

same is true here. Arizona offers both secular and religious options. The *Kotterman* dissent objected that "the statute does not prevent an STO from directing all of its grant money to a group of schools that restrict enrollment or education to a particular religion or sect." *Kotterman, supra*, 193 Ariz. at 293 (Feldman, J., dissenting). That flexibility permissibly accommodates the religious freedom of taxpayers, STOs, and parents.

1. Arizona's Tax Credit Facilitates The *Exercise* Of Constitutional Rights, Unlike Past Programs That Promoted The *Denial* Of Equal Protection.

"[W]here the state law is genuinely directed *at enhancing a recognized freedom of individuals*, even one involving both secular and religious consequences, such as the right of parents to send their children to private school...the Establishment Clause no longer has a prohibitive effect." *Nyquist, supra*, 413 U.S. at 802 (Burger, C.J., dissenting) (emphasis added).

Arizona's tax credits facilitate the *exercise* of parental and religious rights—rather than the *denial* of rights—equal protection and freedom from discrimination. Decades ago, "[t]he prospect of subsidized private schools threatened to aggravate the difficulties of desegregation by expanding the avenues for white flight." Laycock, Douglas, *Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions: It's a Lot More than Just Republican Appointments*, 2008 BYU L. Rev. 275, 285 (2008) ("*Why the Supreme Court Changed Its Mind* "). This Court rightly struck down schemes to deny equal protection by diverting public funds to racially discriminatory private schools:

> The injunction against paying tuition grants and giving tax credits while public schools remain closed is appropriate and necessary since those grants and tax credits have been essential parts of the county's program, successful thus far, to deprive petitioners of the same advantages of a public school education enjoyed by children in every other part of Virginia.
>
> *Griffin v. County Sch. Bd.*, 377 U.S. 218, 233 (1964)

In *Griffin*, tax credits enabled *denial* of rights to public education and equal protection. In Arizona, tax credits enable the *exercise* of rights—religion and parenting—without trampling the rights of others.

This Court also enjoined enforcement of a Mississippi textbook lending program that assisted discriminatory private schools:

> Racial discrimination in state-operated schools is barred by the Constitution and "it is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Lee v. Macon County Bd. of Ed.,* 267 F.Supp. 458, 475-476 (M.D. Ala. 1967).
>
> *Norwood v. Harrison*, 413 U.S. 455, 463-465 (1973)

Although the *government itself* may not advance religion, it also must not inhibit religion. Accommodation may be mandatory—to lift a

government-imposed burden—or permissible. Arizona's permissible accommodation stands in stark contrast to the *Griffin* and *Norwood* programs that stifled rights.

2. Arizona Accommodates Religion And Parental Rights.

Education is compulsory for Arizona children. A.R.S. § 15-802(A). But parents may fulfill that obligation through private school placement. *Pierce v. Society of the Sisters, supra*, 268 U.S. at 535 ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."). Many families cannot afford the tuition for an education compatible with their beliefs. Arizona's program is a permissible accommodation that opens doors for such families.

Ever since the initiation of public schooling and compulsory education laws, it has been desirable to facilitate choices. *Education Tax Credits, supra*, 43 Colum. J.L. & Soc. Probs. at 119. The *Nyquist* majority and *Everson* dissent both expressed sympathy for the double burden borne by parents who place children in private schools while supporting public schools with their taxes. *Nyquist, supra*, 413 U.S. at 788-789; *Everson v. Bd. of Educ., supra*, 330 U.S. at 18 (Jackson, J., dissenting). "[I]t is no more than simple equity to grant partial relief to parents who support the public schools they do not use." *Nyquist, supra*, 413 U.S. at 803 (Burger, J., dissenting).

Tax benefits provide a "rough return for the benefits...provided to the State" when parents bear the

financial burden of private education on top of their taxes. *Mueller, supra*, 463 U.S. at 402. Similarly, "Arizona's tax credit achieves a higher degree of parity by making private schools more accessible and providing alternatives to public education." *Kotterman, supra*, 193 Ariz. at 282. Far from offering a financial incentive to enroll in religious schools, Arizona merely "effectuat[es] the secular purpose of the equalization of the cost of educating [Arizona] children that are borne by parents who send their children to nonpublic schools." *Nyquist, supra*, 413 U.S. at 812 (Rehnquist, J., dissenting). Moreover, "[t]he program does not force any individual to submit to religious indoctrination or education." *Zelman, supra*, 536 U.S. at 680 (Thomas, J., concurring).

Parents have religious freedom rights. Many are dissatisfied with public schools. Religion has been systematically expelled. *Engel v. Vitale*, 370 U.S. 421 (1962) (prayer); *Abington Township Sch. Dist. v. Schempp, supra,* 374 U.S. 203 (Bible reading); *Stone v. Graham*, 449 U.S. 39 (1980) (Ten Commandments); *Lee v. Weisman*, 505 U.S. 577 (1992) (graduation prayers); *Santa Fe. Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (student-led prayer at athletic events). When mandatory school curriculum clashes with faith, parents have little recourse—either subject their children to objectionable material or get out of the public schools. *Epperson v. Arkansas*, 393 U.S. 97 (1968) (evolution); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (same). Evangelical parents face the same dilemma as their Catholic counterparts years ago, "paying taxes for public schools they [cannot] use in good conscience, and also paying tuition to fund religiously acceptable private schools." *Why the*

Supreme Court Changed Its Mind, supra, 2008 BYU L. Rev. at 289.

There is a grave need for accommodation. *Meek* illustrates the unjust burden on religious liberty when a parent is forced "to choose between the 'free exercise' of a religious belief by opting for a sectarian education for his child or to forgo the opportunity for his child to learn to cope with—or overcome—serious congenital learning handicaps, through remedial assistance financed by his taxes." *Meek, supra*, 421 U.S. at 387 (White, J., dissenting).

The state is obligated to educate its children and compels school attendance. Thus "it should be wholly acceptable for the State to contribute to the secular education of children going to sectarian schools." *Id*. at 394-395 (Rehnquist, J., dissenting). Arizona is not supporting *churches*, but *education* in a religious atmosphere. This aligns with *Zelman's essence*, "that the religious schools in Cleveland were not 'pervasively sectarian,' nor centers of 'indoctrination,' but were genuine institutions of education." *Changing Perceptions, supra*, 2008 BYU L. Rev. at 270.

C. For Establishment Clause Purposes—Unlike Free Speech And Other Constitutional Rights—Tax Benefits Are Treated As Qualitatively Different From Direct Subsidies.

The Establishment Clause occupies a unique place in the Constitution. It limits government but also complements the Free Exercise Clause, guarding religious liberty. Taken to extremes and wrenched from its context, the clause morphs into a sword

attacking religious freedom instead of a shield protecting it:

> [S]chool choice programs that involve religious schools appear unconstitutional only to those who would twist the Fourteenth Amendment against itself by expansively incorporating the Establishment Clause. Converting the Fourteenth Amendment from a guarantee of opportunity to an obstacle against education reform distorts our constitutional values and disserves those in the greatest need.
>
> *Zelman, supra*, 536 U.S. at 683-684 (Thomas, J., concurring)

Tax benefits and direct subsidies are qualitatively different in the Establishment Clause context, despite economic equivalence. The state actively subsidizes an enterprise when it transfers funds collected from taxpayers as a whole, but government is passively involved in tax relief. Tax credits, deductions, vouchers, and STO contribution credits "differ in terms of the source and path of funds, as well as the financial gain ultimately accruing to the beneficiary." *Education Tax Credits, supra*, 43 Colum. J.L. & Soc. Probs. at 141.

The Ninth Circuit presumes that Arizona's credit is tantamount to a direct subsidy. *Winn v. ACSTO, supra*, 562 F.3d at 1009 ("The Supreme Court has recognized...that state tax policies such as tax deductions, tax exemptions and tax credits are means of 'channeling...[state] assistance' to private organizations, which can have 'an economic effect comparable to that of aid given directly' to the

organization. *Mueller, supra,* 463 U.S. at 399.") But *Mueller* upheld Minnesota's tax deductions, recalling the historic Establishment Clause purpose in "preventing that kind and degree of government involvement in religious life that...is apt to lead to strife and frequently strain a political system to the breaking point. [citations omitted]." *Id.* at 399-400. We are far removed from the risk of religious control over our government or schools, particularly in light of the positive contributions of sectarian schools. *Id.* at 400, citing *Wolman, supra*, 433 U.S. at 263 (Powell, J., concurring in part).

The Ninth Circuit roots its subsidy/tax benefit equivalence in cases litigating other constitutional rights. In a free speech challenge to a narrow tax exemption, Justice Scalia explained that "[o]ur opinions have long recognized—in First Amendment contexts as elsewhere—the reality that tax exemptions, credits, and deductions are 'a form of subsidy that is administered through the tax system,' and the general rule that 'a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny.'" *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 236 (1987) (Scalia, J. dissenting), citing *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 544 (1983). The Ninth Circuit cuts off this quote mid-sentence after the words "tax system" (*Winn v. ACSTO, supra*, 562 F.3d 1002), missing the point: The state was not *obligated* to fund free speech. Justice Scalia would have upheld Minnesota's right to offer a tax-based "subsidy" to fledgling publications without transgressing the free speech rights of other publications.

Similarly, the Ninth Circuit resurrects the *Kotterman* dissent's flawed reasoning, extracting statements from *Rosenberger* out of context:

> [T]he large body of literature about tax expenditures accepts the basic concept that special exemptions from tax function as subsidies. *Rosenberger v. Rector & Visitors,* 515 U.S. 819, 861 n.5 (1995) (Thomas, J., concurring), quoting Donna D. Adler, *The Internal Revenue Code, The Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making,* 28 Wake Forest L. Rev. 855, 862 n.30 (1993). The majority in *Rosenberger* also makes it quite clear that the expenditure of funds that have not and will never enter the public treasury is nevertheless the use of public money subject to scrutiny under the federal Establishment Clause, a provision much less specific than our constitutional provisions. 515 U.S. at 842-43.
>
> *Kotterman, supra*, 193 Ariz. at 309 (Feldman, J., dissenting).

Rosenberger was about granting equal access to a limited speech forum created by a state university. The Establishment Clause did not permit the school to engage in viewpoint discrimination by denying funding to a religious student newspaper. *Rosenberger v. Rector & Visitors, supra,* 515 U.S. at 837-846.

This Court's treatment of tax benefits varies depending on the area of substantive law:

> The Court has fully accepted the equivalence of direct spending programs and tax expenditures in the area of Free Speech rights, but it has not fully applied this concept in the context of Establishment Clause analysis. . . .
>
> Donna D. Adler, *The Internal Revenue Code, the Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 Wake Forest L. Rev. 855, 857 (1993), quoted in *Kotterman, supra*, 193 Ariz. at 286.

The government is not *required* to subsidize constitutional rights. Tax-exempt status may be denied to a lobbying organization without violating the Free Speech Clause. *Regan v. Taxation With Representation, supra,* 461 U.S. 540. But where religion is involved, courts refuse to regard tax benefits as a form of hidden spending. *Kotterman, supra*, 193 Ariz. at 286; see Joseph M. Kuznicki, *Comment, Section 170, Tax Expenditures, and the First Amendment: The Failure of Charitable Religious Contributions for the Return of a Religious Benefit*, 61 Temp. L. Rev. 443, 473 (1988). This anomaly is best understood against the backdrop of benevolent neutrality: Government *may* grant tax benefits that indirectly subsidize religion or facilitate free exercise. *Walz, supra*, 397 U.S. at 676-677. In contrast to *Rosenberger*, *Arkansas Writers Project*, and *Regan*, the issue is not whether Arizona *must* grant the tax credits, but whether it *may*. "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the *Free Exercise Clause*." *Id.* at 673. Arizona is well within the boundaries of permissible accommodation.

The Ninth Circuit engages in legal gymnastics to distance Arizona's tax *credits* from deductions and exemptions. The credits offer dollar-for-dollar reimbursement, while deductions grant partial relief. "Tax credits are therefore a powerful legislative device for directing money to private organizations." *Winn v. ACSTO, supra*, 562 F.3d at 1009. Perhaps, but deductions also provide incentives. Arizona donor-taxpayers direct the flow of their own tax dollars without compulsion from the state or any incentive to direct those funds to a *religious* STO. Moreover, tax *exemptions* also grant dollar-for-dollar benefits, relieving charitable organizations of 100% of the taxes that would otherwise be levied.

The distinction between credits, deduction, and exemptions creates new problems: "If credits constitute public funds, then so must other established tax policy equivalents like deductions and exemptions." *Kotterman, supra*, 193 Ariz. at 285. The *Kotterman* dissent would have defined *all* these tax benefits as "public money" because they result in lost revenue for the state, citing the legislative requirement for an annual report of all "tax expenditures"—including deductions, subtractions, exclusions, exemptions, allowances *and credits* (A.R.S. § 42-105). *Id.* at 307 (Feldman, J., dissenting).

This proves too much. *If reporting on fiscal impact determines constitutionality, no tax benefits would survive*. Even this dissenting judge does not go that far: "*Walz* establishes the constitutionality of exemptions due to their neutrality toward religion, using words quite applicable to deductions, credits, and other tax benefits." *Kotterman, supra*, 193 Ariz. at 311 n. 21 (Feldman, J., dissenting). Shifting gears a

few pages later: "The Arizona tax credit...is available *only* for grants to predominantly religious institutions.... It is as invalid as a statute limiting charitable deductions *only* to contributions to religious organizations." *Id*. at 311 (Feldman, J., dissenting) (emphasis added). Such a statute would indeed be unconstitutional, but there is no comparable restraint on Arizona taxpayers. The reader is left to wonder: Is Arizona's tax benefit objectionable because it is a *credit*, or because a multitude of private decisions coincidentally result in an unacceptable level of benefits to religious organizations? The alternative is intolerable—*prohibiting* contributions to religious entities would unlawfully discriminate *against* religion. *Id.*

D. The Arizona Scheme Would Also Survive The State Constitution.

Arizona's elaborate system is even *more* likely than other tax benefit programs to survive scrutiny under its state constitution:

> Any alleged government benefit a religious school receives is so attenuated that it seems unlikely for a court to find any benefit, whether direct or indirect. At no point in the financial operation of these programs does the government disburse public funds, so alleged benefits accruing to a religious school rest merely on an abstract notion of indirectness that has no real boundary. In particular, tax credits for STO contributions are often designed specifically to test this illusive boundary of indirectness, as they require a number of

> entities to participate in the creation of an elaborate chain of financial exchanges.
>
> *Education Tax Credits, supra*, 43 Colum. J.L. & Soc. Probs. at 146-147

This Court has consistently declined to invalidate "any program which in some manner aids an institution with a religious affiliation." *Mueller, supra*, 463 U.S. at 393. Arizona likewise rejects "the strict view that in essence no public monies may be channeled through a religious organization for any purpose whatsoever without, in fact, aiding that church contrary to constitutional mandate." *Cmty. Council v. Jordan,* 102 Ariz. 448, 451, 432 P.2d 460, 463 (1967).

The Arizona Constitution strictly forbids any appropriation of public money for religion. Ariz. Const. art. II, § 12. There is also a high hurdle to jump in funding private education: "No tax shall be laid or appropriation of public money made in aid of any church, *or private or sectarian school*, or any public service corporation." Ariz. Const. art. IX, § 10 (emphasis added). Arizona's strict separation is reminiscent of the Blaine Amendment proposed in the 1870's to bar all aid to sectarian institutions. In spite of congressional rejection, many states adopted similar provisions. *Education Tax Credits, supra* 43 Colum. J.L. & Soc. Probs. at 131 (reporting thirty-seven state "Blaine" amendments).

In light of these restraints it is all the more vital to accommodate and protect religious liberty. Arizona has not rejected religion generally. Churches are tax-exempt. Ariz. Const. art. IX, § 2(2). Apparently this

indirect aid is not considered a grant of public money. *Kotterman, supra*, 193 Ariz. at 287. The Preamble to the Arizona Constitution has strong religious overtones: "We, the people of the State of Arizona, grateful to Almighty God for our liberties, do ordain this Constitution." *Id.* at 290. The state motto, "Ditat Deus," means "God enriches." *Id.*, citing Ariz. Const. art. XXII, § 20. The framers most likely understood that the Establishment Clause, along with state counterparts, *protects* religion from government intrusion.

It is reasonable to welcome students of all creeds into the public school, but the state may accommodate families who desire education in a religious environment. Arizona has dodged a deadly bullet by devising a multi-layered private choice program where only a thin thread connects the state with private school funding:

> Consider, for example, the observation in *Kotterman v. Killian* that "no money ever enters the state's control," which is precisely the material difference between how refundable and nonrefundable tax credit programs operate. Given that *state control of funds is uniquely absent* in the processing of a nonrefundable tax credit, such a tax credit program avoids a potentially fatal fact when faced with Blaine Amendment scrutiny.
>
> *Education Tax Credits, supra*, 43 Colum. J.L. & Soc. Probs. at 143 (emphasis added)

CONCLUSION

Arizona "has done *nothing* to cajole parents, STOs, or taxpayers into supporting religious education." *Winn v. ACSTO, supra*, 586 F.3d at 668-669 (O'Scannlain, dissenting). On the contrary, its uniquely structured layering of private choice merely adds one more alternative to an already broad array of educational options. The program accommodates religious and parental rights while steering clear of Establishment Clause pitfalls.

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