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.

GALE GARRIOTT, DIRECTOR, ARIZONA DEPARTMENT OF REVENUE, PETITIONER

v.

KATHLEEN M. WINN, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether respondents have standing as taxpayers to assert an Establishment Clause challenge to an Arizona statute that provides tax credits for voluntary contributions to organizations that award scholarships to children attending private schools, including religious schools.

2. Whether the Arizona statute has the purpose or effect of advancing religion in violation of the Establishment Clause.

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INTEREST OF THE UNITED STATES

This case involves an Establishment Clause challenge by Arizona taxpayers to a state statute that provides tax credits for taxpayers who donate money to private organizations that provide scholarships to students attending private schools. The Court has granted

petitions for writs of certiorari addressing respondents' standing and the merits of their claim. The United States has an interest in both questions.

The United States and federal officials are frequently defendants in Establishment Clause cases in which plaintiffs claim standing solely as federal taxpayers. See, *e.g.*, *Hein* v. *Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007); *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982); *Flast* v. *Cohen*, 392 U.S. 83 (1968). The United States has an interest in the proper resolution of the question whether respondents have standing as state taxpayers because federal and state taxpayer standing are analyzed similarly under this Court's precedents. See *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 345 (2006).

The United States also has an interest in the merits of this case since several federal statutes authorize federal income tax credits, deductions, and exemptions that provide indirect benefits to a wide range of private schools, including religious schools. See, *e.g.*, 26 U.S.C. 25A (Hope and Lifetime Learning credits); 26 U.S.C. 530(a) and (b)(3)(A)(ii) (exempting from income tax Coverdell education savings accounts used to pay tuition for "elementary or secondary school student at a public, private, or religious school"); 26 U.S.C. 222(a) (tax deduction for qualified tuition and related expenses). The United States has appeared in this Court as amicus curiae in several cases such as this one that involved Establishment Clause challenges to neutral programs of true private choice. See *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters* v. *Washington Dep't of*

Servs. for the Blind, 474 U.S. 481 (1986); *Mueller* v. *Allen*, 463 U.S. 388 (1983).

STATEMENT

1. For the last 13 years, the Arizona Tuition Tax Credit Act has permitted Arizonans to support organizations that provide scholarships to children attending private schools. See 1997 Ariz. Sess. Laws, page no. 549 (Ariz. Rev. Stat. Ann. § 43-1089 (Supp. 2009) (Section 1089)), *reproduced at* Pet. App. 117a.[1] Section 1089 allows any individual who owes at least $500 in Arizona income taxes a credit against state tax liability by the amount, not to exceed $500, that he or she contributes to a school tuition organization (STO). See Section 1089(A)(1); see also Section 1089(C) (credit not refundable). Married couples receive a credit of up to $1000 for contributions to an STO. See Section 1089(A)(3). Any person can make a donation to an STO and receive a state tax credit, regardless of whether the taxpayer has children in school or has incurred any educational expenses. See Section 1089(A). A tax credit is not allowed "if the taxpayer designates the taxpayer's contribution to the [STO] for the direct benefit of any dependent of the taxpayer." Section 1089(E).[2]

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[1] Citations to the Pet. App. refer to the Appendix filed in No. 09-991.

[2] In a recent amendment, Arizona also specified that a tax credit is not allowed under Section 1089 if (1) the taxpayer designates *any* "student beneficiary as a condition of the taxpayer's contribution to the [STO]," or (2) "if the taxpayer, with the intent to benefit the taxpayer's dependent, agrees with one or more other taxpayers to designate each taxpayer's contribution to the [STO] for the direct benefit of the other taxpayer's dependent." 2010 Ariz. Legis. Serv. ch 293 § F (West); see Garriott Br. 10-11 (summarizing other changes to statute made in 2010). All citations in this brief are to the previous version of the statute.

An STO must be a charitable organization that is exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code and must "allocate[] at least ninety per cent of its annual revenue for educational scholarships or tuition grants" for children attending "qualified school[s]." Section 1089(G)(3); see Section 1089(G)(2) (defining "qualified school" as one that, *inter alia*, "does not discriminate on the basis of race, color, handicap, familial status or national origin"). An STO may not limit its scholarships to students attending only one school, see Section 1089(G)(3), but is otherwise free to decide at which schools its scholarships may be used.

2. Shortly after Section 1089's enactment, the Supreme Court of Arizona rejected an Establishment Clause challenge to the statute. See *Kotterman* v. *Killian*, 972 P.2d 606, cert. denied, 528 U.S. 810, and 528 U.S. 921 (1999). The court held that Section 1089 had the secular purpose of "bring[ing] private institutions into the mix of educational alternatives open to the people of [Arizona]." *Id.* at 611. The court also held that the statute does not have the primary effect of advancing religion because the tax credit it authorizes is "available to all taxpayers who are willing to contribute to an STO" without regard to religion and because "multiple layers of private choice" preclude attributing to the State any benefit religious schools may derive from the statute. *Id.* at 613, 614; see *id.* at 616-625 (rejecting challenges brought under Arizona constitution).

3. Respondents subsequently filed this suit in federal court, alleging that Section 1089 violates the Establishment Clause because Arizona interprets the statute to allow STOs to provide scholarships to students attending only religious schools. The district court dismissed the complaint for lack of federal subject-matter

jurisdiction pursuant to the Tax Injunction Act, 28 U.S.C. 1341, but the Ninth Circuit reversed and remanded, and this Court affirmed. See *Hibbs* v. *Winn*, 542 U.S. 88 (2004).

On remand, the district court dismissed the complaint, holding that Section 1089 is a neutral program of private choice of the kind this Court found consistent with the Establishment Clause in *Zelman*, 536 U.S. 639. See Pet. App. 47a-63a.

The court of appeals reversed. The court first held that respondents have taxpayer standing because they allege that Arizona is using its taxing and spending power to advance religion in violation of the Establishment Clause. Pet. App. 9a. On the merits, the court held that if respondents are able to prove that Arizona permits STOs to grant scholarships only to students attending religious schools, respondents may be able to show that the statute's ostensible purpose—to expand the access of Arizona students to a wide range of schooling options—is a "pretense." *Id.* at 20a. The court of appeals also held that, accepting respondents' allegations as true, Section 1089 unlawfully "delegat[es] to taxpayers a choice that, from the perspective of the program's aid recipients, 'deliberately skew[s] incentives toward religious schools.'" *Id.* at 22a (brackets in original) (citation omitted). Because respondents alleged that several of the largest STOs limited scholarships to only attendees of certain religious schools, the court of appeals held that the statute impermissibly "requir[ed] parents who would prefer a secular private school but who cannot obtain aid from the few available nonsectarian STOs to choose a religious school to obtain the perceived benefits of a private school education." *Id.* at 23a.

The court of appeals denied rehearing, with eight judges in dissent. See Pet. App. 87a-116a.

SUMMARY OF ARGUMENT

The court of appeals made two errors. First, it found that respondents had standing, even though they have suffered no legally cognizable injury. Arizona's decision to voluntarily forego some particular tax collections from individuals who make private and voluntary donations to STOs does not harm respondents. Second, the court of appeals incorrectly analyzed Section 1089 on the merits. Properly understood, the statute is a neutral program of private choice and thus does not have the purpose or effect of advancing religion in violation of the Establishment Clause.

A. Article III requires plaintiffs in federal court to show they have standing by establishing that they suffered a concrete injury that is fairly traceable to the defendant's allegedly illegal conduct and that would be redressed by the requested relief. Generalized grievances, such as those expressed by a taxpayer who objects to use of her tax money for a government program she alleges is unlawful, do not typically satisfy this requirement. See *Frothingham* v. *Mellon*, 262 U.S. 447 (1923). In such a case, the claimed injury is infinitesimally small and conjectural, and affording standing to the plaintiff puts the federal courts in the inappropriate role of superintending state and federal fiscal administration. See *Cuno*, 547 U.S. at 341.

In *Flast*, 392 U.S. 83, the Court established a narrow exception to the prohibition on taxpayer standing. In that case, the Court found that plaintiffs had standing to assert an Establishment Clause challenge to legislatively mandated grants to religious organizations. In

subsequent cases, the Court has limited the *Flast* exception to those facts, and has not allowed taxpayer standing for other constitutional claims or for other kinds of expenditures. See *Hein*, 551 U.S. at 602 (opinion of Alito, J.).

The program challenged by respondents in this case is materially different from the one involved in *Flast*, and their status as Arizona taxpayers is thus insufficient to confer standing. The Court has never found that some taxpayers have standing to challenge a tax credit provided to other taxpayers. And it certainly has not done so in the context of a statute like Section 1089, where every dollar that flows to religious organizations does so as the result of private choices rather than a government mandate. A finding of standing in this case would thus impermissibly extend the *Flast* exception to the prohibition on taxpayer standing. *Hein*, 551 U.S. at 610, 615 (opinion of Alito, J.).

B. Section 1089 is consistent with the Establishment Clause because it has neither the purpose nor the effect of advancing religion. The Court has consistently and repeatedly rejected Establishment Clause challenges to neutral programs of private choice such as this one.

Section 1089 has an obvious secular purpose: increasing educational options for Arizona's school children. There is no indication in the statute's text or legislative history of a purpose to advance religion. This case is thus distinctly unlike the instances in which the Court has found that statutes—such as ones requiring display of the Ten Commandments—had impermissible religious purposes. The fact that Section 1089 permits STOs to limit their scholarships to only a subset of Arizona's private schools provides no evidence of a religious

purpose. That flexibility is available to all STOs, not just religious ones.

Nor does Section 1089 have the primary effect of advancing religion. This Court has on several occasions found that programs of private choice pass this test. See, *e.g.*, *Zelman*, 536 U.S. at 648-649. Such programs provide a governmental benefit on a neutral basis without regard to religion and permit recipients to direct that benefit to their choice of institutions—secular and religious. Money that flows to religious institutions in such cases does so as the result of private decisionmaking, not state direction, and thus does not amount to the establishment of religion by the government. Section 1089 fits squarely within that paradigm. Any Arizona taxpayer (with sufficient tax liability) may claim a credit, and may do so for contributions to any STO, whether secular or religious. Because Section 1089 merely enables taxpayers to engage in unconstrained and wholly voluntary private decisions to write checks to STOs of their choice, "the circuit between government and religion [i]s broken," and the Establishment Clause analysis ends. *Id.* at 652.

The court of appeals further erred by shifting the focus beyond the choices exercised by Arizona taxpayers to those available to Arizona parents applying to STOs for scholarships. It is true that those parents' choices are constrained by the availability of scholarship money and by the policies of STOs. Those constraints, however, are not attributable to Arizona but are the result of individual private decisions. They thus do not concern the Establishment Clause. *Zelman*, 536 U.S. at 656.

ARGUMENT

I. RESPONDENTS LACK STANDING TO ASSERT THEIR CLAIM

Plaintiffs generally lack Article III standing to challenge government programs to which they object based solely on their status as taxpayers. This Court in *Flast* v. *Cohen*, 392 U.S. 83 (1968), established a narrow exception to this general prohibition for Establishment Clause claims involving legislatively-mandated government grants to religious institutions, but the theory of standing in that case has not been extended beyond such challenges. *Hein* v. *Freedom From Religion Found., Inc.*, 551 U.S. 587, 609-610, 615 (2007) (opinion of Alito, J.).[3] The challenge here—to a tax credit, not a government grant, and to expenditures made as the result of private choices, not legislative requirement—is very different from the one at issue in *Flast*. Respondents' status as taxpayers is thus insufficient to provide them with standing.

A. Article III's Case-Or-Controversy Requirement Generally Prohibits Taxpayer Standing

Article III of the Constitution limits the judicial power to resolution of actual "Cases" and "Controversies." U.S. Const. Art. III, § 2. "[N]o principle is more fundamental to the judiciary's proper role in our system

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[3] A three-Justice plurality in *Hein* found no standing because the *Hein* plaintiffs' claim was materially different from the one the plaintiffs in *Flast* had standing to assert. See 551 U.S. at 615. Justices Scalia and Thomas concurred in the judgment on the ground that *Flast* should be overruled (thus foreclosing all taxpayer standing). See *id.* at 618. The plurality's opinion controls because it rests on narrower grounds. See *Marks* v. *United States*, 430 U.S. 188, 193 (1977). All subsequent citations to *Hein* in this brief are to the plurality opinion.

of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 341 (2006) (internal quotation marks and citations omitted). To establish standing to proceed in federal court, a plaintiff must establish "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984).

Plaintiffs typically do not have a "sufficient personal stake" in a case for purposes of Article III when they "challenge laws of general application where their own injury is not distinct from that suffered in general by other taxpayers or citizens." *Asarco Inc.* v. *Kadish*, 490 U.S. 605, 613 (1989) (opinion of Kennedy, J.). Accordingly, in *Frothingham* v. *Mellon*, 262 U.S. 447 (1923), the Court held that a plaintiff's status as a federal taxpayer did not establish her standing to challenge the constitutionality of a federal spending program. *Id.* at 486-487. As the Court explained, a taxpayer's

> interest in the moneys of the Treasury * * * is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

Id. at 487; see *Cuno*, 547 U.S. at 344 (taxpayer's "injury" from allegedly unlawful expenditure is "not 'concrete and particularized,'" nor is it "actual or imminent") (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

Permitting standing based on nothing more than a plaintiff's status as a taxpayer would put no limit on those able to invoke the federal courts' jurisdiction to air generalized grievances. See *Frothingham*, 262 U.S. at 487. And in a case (like this one) in which plaintiffs challenge a state statute as unconstitutional, "affording state taxpayers standing * * * simply because their tax burden gives them an interest in the state treasury would interpose the federal courts as virtually continuing monitors of the wisdom and soundness of state fiscal administration, contrary to the more modest role Article III envisions for federal courts." *Cuno*, 547 U.S. at 346 (internal quotation marks and citation omitted).

B. The Exception To The Rule Against Taxpayer Standing Recognized In *Flast* Has Been Limited To A Narrow Category Of Establishment Clause Challenges

Flast "carved out a narrow exception to the general constitutional prohibition against taxpayer standing." *Hein*, 551 U.S. at 602. In *Flast*, plaintiffs challenged expenditures that "were funded by a specific congressional appropriation and were disbursed to private schools (including religiously affiliated schools) pursuant to a direct and unambiguous congressional mandate." *Id.* at 604. *Flast* held that the plaintiffs had standing to challenge those expenditures because they satisfied two requirements.

First, the plaintiffs "establish[ed] a logical link between [their] status [as taxpayers] and the type of legislative enactment attacked." *Flast*, 392 U.S. at 102. The "logical link" was established in *Flast* because "the alleged Establishment Clause violation * * * was funded by a specific congressional appropriation and was undertaken pursuant to an express congressional

mandate." *Hein*, 551 U.S. at 604. Second, the Court in *Flast* held that the plaintiffs had "establish[ed] a nexus" between their "status" as taxpayers and "the precise nature of the constitutional infringement alleged" because they alleged that the "challenged enactment exceed[ed] 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 102-103.

The Court has subsequently made clear that *Flast* only "slightly lowered" the "impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers." *United States* v. *Richardson*, 418 U.S. 166, 173 (1974) (quoting *Flast*, 392 U.S. at 85); see *Cuno*, 547 U.S. at 348 (*Flast* has a "narrow application in our precedent"). The Court has narrowly interpreted *Flast*'s first requirement—that plaintiffs establish a "logical link between [their] status [as taxpayers] and the type of legislative enactment attacked," 392 U.S. at 102. Accordingly, the Court has rejected standing to raise Establishment Clause challenges that do not go to Congress's taxing and spending power, see *Hein*, 551 U.S. at 610, and it made clear in *Hein* that even exercises of the taxing and spending power will not be subject to taxpayer challenge unless certain prerequisites are satisfied.

In *Hein*, the Court concluded that the plaintiffs lacked taxpayer standing to challenge Executive Branch expenditures—made pursuant to general Congressional appropriations—on conferences they alleged violated the Establishment Clause. 551 U.S. at 595. *Flast* did not support taxpayer standing to bring such a claim, the plurality explained, because the expenditures at issue in

Hein "were not made pursuant to any Act of Congress" whose text expressly contemplated religiously-oriented expenditures. *Id.* at 605. "Rather, Congress provided general appropriations to the Executive Branch to fund its day-to-day activities. These appropriations did not expressly authorize, direct, or even mention the expenditures of which respondents complain[ed]"; the expenditures "resulted from executive discretion, not congressional action." *Ibid.* (footnote omitted).

After *Hein*, therefore, taxpayer standing to assert Establishment Clause claims is available only where a plaintiff is challenging a statute that expressly mandates or contemplates that a government grant will be disbursed to religious organizations or for religious uses. 551 U.S. at 605, 609. The Court has said that it has refused to "extend" *Flast* to provide standing for other types of challenges. *Id.* at 610.

C. Respondents Lack Taxpayer Standing To Challenge A Neutral Statute That Provides Tax Credits For Contributions Made Independently By Private Citizens

The theory of taxpayer standing upheld by the court of appeals in this case exceeds the "outer boundary" of the *Flast* exception. *Hein*, 551 U.S. at 610 (quoting *Richardson*, 418 U.S. at 196 (Powell, J., concurring)). *Flast* involved an Establishment Clause challenge to a federal grant program that benefitted religious schools. See 392 U.S. at 86-87. "The expenditures challenged in *Flast* * * * were funded by a specific congressional appropriation and were disbursed to private schools (including religiously affiliated schools) pursuant to a direct and unambiguous congressional mandate." *Hein*, 551 U.S. at 604. Unlike the statute in *Flast* (and unlike the Virginia statute to which James Madison objected in

his famous Memorial and Remonstrance Against Religious Assessments, *Flast*, 392 U.S. at 103), the Arizona statute at issue here does not make grants or disburse government funds, and it does not direct the transfer of government money to religious institutions. Rather, the statute merely provides a beneficial tax consequence for private citizens who donate their own funds to STOs of their own choosing. The money involved never enters the State's treasury, and the portion of it that goes to religious institutions does so only due to the unfettered discretionary choices of private individuals.

These two key features—a credit against taxes owed by a private person rather than a grant out of the public treasury and independent private decisions to contribute to religious organizations rather than legislative mandate to pay money—distinguish this statute from the one at issue in *Flast*. Respondents' asserted injury is more speculative and attenuated than that found adequate in *Flast* and thus provides no basis for standing.

1. The general rule against taxpayer standing applies not only to challenges to traditional spending programs but also to "challenges to so-called 'tax expenditures,' which reduce amounts available to the treasury by granting tax credits or exemptions." *Cuno*, 547 U.S. at 343-344. The Court has never held, however, that the narrow *Flast* exception to the rule against taxpayer standing likewise applies to challenges to tax expenditures.

To the contrary, the Court has repeatedly emphasized that *Flast* applies only where the plaintiff alleges that his tax money is being "extracted and spent" by the government in violation of the Establishment Clause. 392 U.S. at 106; see *Hein*, 551 U.S. at 623 (quoting *Flast*); *Valley Forge Christian Coll.* v. *Americans*

United for Separation of Church & State, Inc., 454 U.S. 464, 507 (1982). A tax credit, by definition, does not extract one cent from taxpayers. To the contrary, it *forgoes* the extraction of state income taxes. As the Arizona Supreme Court explained in analyzing the statute at issue here,

> no money *ever* enters the state's control as a result of this tax credit. Nothing is deposited in the state treasury or other accounts under the management or possession of governmental agencies or public officials. Thus, under any common understanding of the words, we are not here dealing with "public money."

Kotterman v. *Killian*, 972 P.2d 606, 618, cert. denied, 528 U.S. 810, and 528 U.S. 921 (1999).

While the Court has made economic analogies in other contexts between tax credits and exemptions on the one hand and expenditures on the other, see, *e.g.*, *Regan* v. *Taxation With Representation*, 461 U.S. 540, 544 (1983), it has distinguished them in Establishment Clause cases, see *id.* at 544 n.10. In that context, the Court has held that "[t]here is no genuine nexus between tax exemption and establishment of religion" because the government's decision to passively forego tax revenue does not implicate the historical concerns with government cash subsidies that animated the Establishment Clause. *Walz* v. *Tax Comm'n*, 397 U.S. 664, 675 (1970); see *id.* at 690 (Brennan, J., concurring) ("Tax exemptions and general subsidies * * * are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other

hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes.") (footnotes omitted); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 882 n.7 (1995) (Souter, J., dissenting) ("[T]he Court in *Walz* explicitly distinguished tax exemptions from direct money subsidies and rested its decision on that distinction.") (internal citation omitted).[4]

In addition, the "harm" to the treasury allegedly caused by certain tax credits is conjectural in a way that is not necessarily true of government spending. The Court in *Cuno* explained that it was "unclear that tax breaks of the sort at issue [in that case] do in fact deplete the treasury: The very point of the tax benefits is to spur economic activity, which in turn *increases* government revenues." 547 U.S. at 344. The Court has made a similar observation with respect to tax benefits that encourage private school attendance: "By educating a substantial number of students such schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers." *Mueller* v. *Allen*, 463 U.S. 388, 395 (1983).

2. The integral feature of private choice in Section 1089 provides a second critical difference with the statute at issue in *Flast*. In *Hein*, the Court distinguished *Flast* because expenditures to which the *Hein* plaintiffs objected were made pursuant to a general appropriation

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[4] In *Walz* the Court's distinction between tax exemptions and subsidies was part of its analysis of the merits of the Establishment Clause claim in that case. The Court did not consider the plaintiffs' standing. See *infra* n.5 (discussing court of appeals' suggestion that *sub silentio* exercises of jurisdiction in previous cases supported finding of standing here).

for the Executive Branch that "did not expressly authorize, direct, or even mention th[ose] expenditures." 551 U.S. at 605. The challenged expenditures "resulted from executive discretion, not congressional action." *Ibid.;* see *id.* at 615 ("[W]e have never extended [*Flast*'s] narrow exception to a purely discretionary Executive Branch expenditure."). If a discretionary expenditure by a government official made pursuant to a general spending program will not support taxpayer standing, then, *a fortiori*, a discretionary expenditure by a *private* taxpayer pursuant to a general tax credit provision will not.

The money that flows to religious institutions under Section 1089 does so as the result of multiple, independent private decisions rather than any legislative mandate. The statute establishes a neutral rule in which any eligible taxpayer can receive a tax credit for a donation to any eligible STO. The statute itself does not establish any STOs. It does not require that any STO provide scholarships to religious schools, and, in fact, it includes no textual references to religious institutions. The fact that respondents' fellow private citizens have utilized this neutral framework to create STOs that provide scholarships to students attending religious schools, and that other private citizens have independently contributed to those STOs, does not injure respondents in any legally cognizable way.

3. The court of appeals read this Court's decision in *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), to provide that "taxpayers have standing to challenge a legislature's exercise of its taxing and spending power even when the legislature does not use that power to directly fund religious organizations, but instead uses the power to authorize third parties to fund such organizations." Pet.

App. 15a. In *Hein*, however, this Court rejected that reading of *Bowen*, noting that taxpayer standing existed in *Bowen* because the statute at issue there "not only expressly authorized and appropriated specific funds for grantmaking, [but] also expressly contemplated that some of those moneys might go to projects involving religious groups." 551 U.S. at 607. Indeed, the statutory text at issue in *Bowen* made four explicit references to the involvement of outside religious groups in the funding program it was establishing. 487 U.S. at 595-596.

Where, as in *Hein* and here, a statute includes no such express direction that government money flow to religious institutions, the required connection between the expenditures to which plaintiffs object and legislative action is absent. It makes no difference in this regard that the legislature enacting a statute free of references to religious institutions expects some of the money to flow to them. After all, that was precisely the case in *Hein,* where Congress had "informally 'earmarked' portions of its general Executive Branch appropriations to fund the offices and centers whose expenditures [were] at issue." 551 U.S. at 608 n.7. The Court deemed such non-textual evidence of the legislature's intent not "relevant" to the standing inquiry. *Ibid.* Finally, even if the court of appeals were correct that *Bowen* stood for the broad proposition that "taxpayer standing exists even when a legislature does not directly allocate funds to religious organizations, but instead mediates the funds through another agency," Pet. App. 14a, that rule would not support standing in this case. There is a fundamental difference between spending decisions made by a governmental "agency" (at issue in

Bowen) and one made by a private taxpayer (at issue here).[5]

4. A finding that respondents do not possess taxpayer standing would not alter several other established means for asserting Establishment Clause challenges. Many Establishment Clause cases are brought not by taxpayers, but by other injured parties. See, *e.g.*, *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 294-295 (2000) (students objecting to prayers at school events); *Edwards* v. *Aguillard*, 482 U.S. 578, 581 (1987) (parents of school children challenging teaching of "creation science"); *Larson* v. *Valente*, 456 U.S. 228, 233-234 (1982) (church alleging discrimination among religious organizations in violation of Establishment Clause). And even with respect to taxpayers, "a taxpayer has standing to challenge the *collection* of a specific tax assessment as unconstitutional; being forced to pay such a tax causes a real and immediate economic injury to the individual taxpayer." *Hein*, 551 U.S. at 599. Likewise, if a state were to authorize a tax credit for donations to religious schools only, a private secular school would likely have traditional Article III standing to challenge the pro-

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[5] The court of appeals also noted that on several occasions, this Court has reached the merits of Establishment Clause challenges both to programs that involved tax benefits and to programs that provide aid indirectly to religious institutions only by means of private choices. See Pet. App. 15a-16a; see also *id.* at 12a-13a. In none of those cases, however, did the Court address standing. As a result, they do not support extending the exception to the prohibition on taxpayer standing to a case like this one. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (noting "drive-by jurisdictional rulings of this sort * * * have no precedential effect"). In addition, each of these cases came before *Hein*, which limited *Flast* to its "facts" and "results" and established that the Court would not "expand[]" *Flast*. 551 U.S. at 609, 610, 615.

gram. See, *e.g.*, *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 8 (1989) (secular magazine had standing to challenge as "underinclusive" state sales tax exemption for only religious periodicals). In addition, "the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution." *Asarco*, 490 U.S. at 617.[6] In any event, "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Valley Forge Christian Coll.*, 454 U.S. at 489 (brackets in original) (citation omitted).

II. SECTION 1089 IS CONSISTENT WITH THE ESTABLISHMENT CLAUSE

The court of appeals' decision should be reversed on the merits. The Establishment Clause (as applied to the States by the Fourteenth Amendment) "prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 648-649 (2002). Section 1089 has a manifestly secular purpose of increasing educational opportunities for Arizona's school children. And this Court has repeatedly held that neutral programs of private choice like this one do not have the impermissible effect of advancing religion, even when

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[6] The Arizona Supreme Court reached the merits of a taxpayer's Establishment Clause challenge to the statute at issue here without interposing any standing barrier. See *Kotterman*, 972 P.2d at 610-616; see also *Ethington* v. *Wright*, 189 P.2d 209, 212 (Az. 1948) (rejecting *Frothingham*'s prohibition on taxpayer standing).

some private participants choose to direct funding to religious institutions.

A. Section 1089 Does Not Have The Primary Purpose Of Advancing Religion

"The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations." *Lynch* v. *Donnelly*, 465 U.S. 668, 680 (1984). "In each [of those] case[s], the government's action was held unconstitutional only because openly available data supported a commonsense conclusion that a religious objective permeated the government's action." *McCreary County, Ky.* v. *ACLU*, 545 U.S. 844, 863 (2005) (*McCreary County*); see *id.* at 864 (secular purpose "has to be genuine, not a sham, and not merely secondary to a religious objective"). As of 2005, the Court had found "government action motivated by an illegitimate purpose only four times" since adoption of the modern test for Establishment Clause claims in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). *McCreary County*, 545 U.S. at 859. Each of those cases involved obvious, overt support for religion, namely governmental display of religious texts, government-sanctioned prayer, or religious instruction in public schools.[7]

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[7] See *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314 (prayer at public school football games); *Edwards*, 482 U.S. at 581, 597 (teaching of "Creation-Science" in the public schools); *Wallace* v. *Jaffree*, 472 U.S. 38, 40, 56-61 (1985) (period of silence in public school for "meditation or voluntary prayer"); *Stone* v. *Graham*, 449 U.S. 39, 41 (1980) (per curiam) (posting of Ten Commandments in public school class rooms). *McCreary County* became the fifth case; it involved the posting of the Ten Commandments in courthouses. 545 U.S. at 881.

The Court has described "cases involving state assistance to private schools" as "easily distinguishable" from those rare instances in which it has found an impermissible purpose, since "[s]uch assistance has the obvious legitimate secular purpose of promoting educational opportunity." *Stone* v. *Graham*, 449 U.S. 39, 43 n.5 (1980) (per curiam). Without exception, the Court has found (or noted that it was not disputed) that such education assistance programs have a secular purpose.[8] In particular, the Court has held that a "State's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable." *Mueller*, 463 U.S. at 395.

There is nothing about Section 1089 that should make it the first education assistance statute ever found by this Court to have an impermissible religious purpose. As the district court correctly recognized, the Arizona statute's clear purpose is to "maximize parents' choices as to where they send their children to school." Pet. App. 54a; see *id.* at 111a-112a (dissent from denial of rehearing en banc) (same); *Kotterman*, 972 P.2d at 611-612 (same). The statute makes no mention of reli-

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[8] See *Zelman*, 536 U.S. at 649; *Mitchell* v. *Helms*, 530 U.S. 793, 808 (2000) (opinion of Thomas, J.); *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 485-486 (1986); *School Dist. of City of Grand Rapids* v. *Ball*, 473 U.S. 373, 383 (1985); *Mueller*, 463 U.S. at 394-395; *Committee for Pub. Educ. & Religious Liberty* v. *Regan*, 444 U.S. 646, 654 (1980); *Wolman* v. *Walter*, 433 U.S. 229, 236 (1977) (opinion of Blackmun, J.); *Roemer* v. *Board of Pub. Works of Md.*, 426 U.S. 736, 754 (1976) (opinion of Blackmun, J.); *Sloan* v. *Lemon*, 413 U.S. 825, 825-826 (1973); *Committee for Pub. Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 773 (1973); *Levitt* v. *Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 479 n.7 (1973); *Tilton* v. *Richardson*, 403 U.S. 672, 678-679 (1971) (opinion of Burger, C.J.); *Lemon*, 403 U.S. at 613.

gion, and its legislative history confirms that the Arizona legislature's goal was to expand the types of educational opportunities that are available to Arizona families. See Committee on Ways & Means, Minutes of Meeting, Jan. 21, 1997 (43d Leg., 1st Reg. Sess.) at 7 (remarks of Rep. Anderson).

The court of appeals was of the view that respondents could prove that the legislature's stated secular purpose in enacting Section 1089 was a "pretense." Pet. App. 20a. According to the court of appeals, "Section 1089 could, on its face, be interpreted to require each STO to provide scholarships for use at any qualified private school, religious or secular." *Id.* at 19a. If, however, respondents could "prove" their "allegations" that "in practice STOs are permitted to restrict the use of their scholarships to use at certain religious schools," then the court of appeals thought they might be able to prove an impermissible religious purpose. *Id.* at 19a-20a.

As an initial matter, there is nothing for respondents to "prove" on this point; their "allegation" is confirmed by the face of the statute. Section 1089 requires only that STOs not limit their scholarships to students who attend only one qualified private school. See Section 1089(G)(3). By obvious implication, that means an STO can limit scholarships to students who attend at least two such schools. The Arizona Supreme Court was fully aware of this aspect of the statute when it rejected the facial challenge to it. See *Kotterman*, 972 P.2d at 626 (Feldman, J., dissenting) ("[T]he 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.").

Nor does this completely neutral aspect of the statute suggest any non-secular purpose. STOs are permitted to restrict use of their scholarships to *any* group of two or more schools, not just religious schools. For example, an STO can limit its scholarships to a group of secular schools whose mission or philosophy it supports. See, *e.g.*, Jewish Tuition Org. Amicus Br. in Support of Cert. 15-16 (discussing STOs that select participating schools by their focus on special needs children or their use of Montessori or Waldorf pedagogy). The legislature reasonably could have concluded that permitting STOs to target their scholarships in this way would lead to greater contributions by donors who supported such educational philosophies. See *id.* at 17-18. There is no support for a finding that this is one of "those unusual cases where the claim [of secular purpose] was an apparent sham." *McCreary County*, 545 U.S. at 865.

B. Section 1089 Does Not Have The Primary Effect Of Advancing Religion Because It Is A Neutral Program Of Private Choice

The Court has repeatedly found that neutral programs that empower individuals to decide where government benefits will flow do not violate the Establishment Clause, even where some of those individuals use their discretion to choose religious institutions. Section 1089 is just such a program. The court of appeals failed to afford adequate constitutional significance to the role of private choice in Arizona's scheme and, as a result, erroneously believed the State, rather than private decisionmaking, was responsible for the assistance that flows to religious STOs and schools.

1. Neutral programs that permit individuals to direct aid to religious institutions are consistent with the Establishment Clause

This Court has consistently held that "neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing" do not have the primary effect of advancing religion. *Zelman*, 536 U.S. at 649. In such programs, "government aid reaches religious schools only as the result of the genuine and independent choices of private individuals." *Ibid.* As a result, any aid to religion that results from such a program "is reasonably attributable to the individual recipient, not to the government." *Id.* at 652.

This Court has applied this principle in a number of settings. In *Mueller* v. *Allen*, *supra*, the Court held that a state program that allowed parents to take a state tax deduction for tuition at private schools, whether religious or secular, was a neutral program of genuine private choice that was consistent with the Establishment Clause. 463 U.S. at 394-403. In *Witters* v. *Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Court upheld the use of state vocational rehabilitation assistance for the visually impaired by a student who chose to study at a Christian college. *Id.* at 485-490. In *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1 (1993), the Court found no Establishment Clause violation in a deaf student's use of his state-provided sign-language interpreter at a religious school. *Id.* at 10-14.

Most recently, in *Zelman*, this Court upheld an Ohio program that provided tuition aid for students to attend a participating private school. See 536 U.S. at 644-645. Any private school, whether religious or secular, could

participate in the program. See *ibid*. Consistent with *Mueller*, *Witters*, and *Zobrest*, this Court found the Ohio program lawful because it offered assistance to a broad class of individuals defined without reference to religion; permitted the participation of all schools within the district, religious or nonreligious; and made program benefits available to participating families on neutral terms, with no reference to religion. See *id.* at 653.

By these well-established standards, Section 1089 is a neutral program of private choice and is thus consistent with the Establishment Clause. It offers a government benefit—a tax credit—on a neutral basis without any reference to religion. The taxpayers who receive this benefit do so on the basis of their independent and voluntary contributions to the STO of their choice. The statutory authorization for STOs is likewise entirely neutral. Anyone can form an STO, and each STO makes its own private decision whether to provide scholarships to students of all private schools, or a subset—whether secular or religious. The benefit that religious schools receive through this program is not directed by the State; it is instead the result of several layers of private decisions. See Pet. App. 94a ("In every respect and at every level, these are purely private choices, not government policy."); *Kotterman*, 972 P.2d at 614 ("The decision-making process is completely devoid of state intervention or direction."). "[N]o reasonable observer would think [this] neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement." *Zelman*, 536 U.S. at 655; see Pet. App. 94a.

2. The court of appeals failed to recognize the role individual choice plays in Section 1089

The court of appeals' fundamental error was in failing to recognize that the independent private choices of taxpayers who provide funds to STOs ends the State's involvement and thus the Establishment Clause inquiry. See *Zelman*, 536 U.S. at 652 (where the government's "role ends with the [neutral] disbursement of benefits," any advancement of religion is not attributable to the government); Pet. App. 90a. The scholarship-funding policies of the STOs are constitutionally irrelevant; they are not dictated by the State nor are they policies created by state actors. Instead, they are themselves the results of private decisionmaking. Such policies are no more a concern of the Establishment Clause than are the policies of the churches or myriad religious charities that receive money due to the federal tax deduction for charitable contributions. See *Hernandez* v. *Commissioner*, 490 U.S. 680, 696 (1989) (federal tax deduction for charitable contributions does not violate Establishment Clause because it "is neutral both in design and purpose" and its "primary effect"—"encouraging gifts to charitable entities, including but not limited to religious organizations—is neither to advance nor inhibit religion"); see *Zelman*, 536 U.S. at 666 (O'Connor, J., concurring) (noting that "over 60[%] of household charitable contributions go to religious charities").[9]

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[9] The court of appeals perceived a difference between tax credits and tax deductions. See Pet. App. 26a n.12. While there are clearly "mechanical differences" between the two, they are not "constitutionally significant." *Kotterman*, 972 P.2d at 612. "Though amounts may vary, both credits and deductions ultimately reduce state revenues, are intended to serve policy goals, and clearly act to induce socially ben-

a. The court of appeals repeatedly attempted to distinguish Section 1089 from neutral school assistance programs upheld by this Court on the ground that Arizona does not provide aid directly to parents, but instead provides tax credits to taxpayers for donations to STOs, which in turn provide aid to parents. See *e.g.*, Pet. App. 28a, 29a, 32a n.14, 35a. But there is no logical reason why this Court's well-established recognition that private decisionmaking is insulated from constitutional challenge should be limited only to benefits the government provides to parents. To be sure, the facts of *Zelman* involved choice by parents, but the principle it articulated is not limited to them. Private choices made under a neutral government aid program break the circuit between government and religion. There is no principled basis for following that rule when the private choices are made by parents and not when they are made by taxpayers, especially given the "broad latitude" this Court's decisions have given legislatures "in creating classifications and distinctions in tax statutes." *Mueller*, 463 U.S. at 396 (quoting *Regan*, 461 U.S. at 547).

The court of appeals thought it constitutionally significant that "parents' choices are constrained by those of the taxpayers exercising the discretion granted by

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eficial behavior." *Ibid.* (internal quotation marks and citation omitted). Moreover, the bright line the court of appeals apparently perceived between the economic value of deductions and credits can be dim in practice, given that deductions can provide significant tax savings to high-income taxpayers, Pet. App. 89a n.3, while tax credits can be less than dollar-for-dollar, see, *e.g.*, 72 Pa. Cons. Stat. Ann. § 8705-F(a) (West Supp. 2010) (providing Pennsylvania businesses with a 75% tax credit for contributions to school tuition organizations); 26 U.S.C. 25(A)(c)(1) (providing 20% tax credit for tuition payments pursuant to a Lifetime Learning credit).

Section 1089." Pet. App. 29a; see *id.* at 32a (evaluating neutrality of program "from the parents' perspective"). But *Zelman* held that an aid program is unlawful only if *the government* constrains the choices of parents in order to favor religious education. See 536 U.S. at 650; Pet. App. 97a. It was not relevant in *Zelman* that Cleveland parents' choices were constrained by the private decisions of schools that resulted in "more private religious schools" than secular ones "participat[ing] in the program." 536 U.S. at 656; see *id.* at 707 (Souter, J., dissenting) ("For the overwhelming number of children in the voucher scheme, the only alternative to the public schools is religious."). And it is not relevant here that parents' choices are "constrained" by the contribution choices of taxpayers or the policies of private STOs. See Pet. App. 59a, 100a-102a.

In keeping with its erroneous focus on "constraints" placed on parents, the court of appeals concluded that Section 1089 failed the neutrality test because "the choice delegated to taxpayers under [the statute] channels a disproportionate amount of government aid to sectarian STOs, which in turn limit their scholarships to use at religious schools." Pet. App. 22a. The recipients of the tax credit are free to make contributions to any STO, religious or secular, and the tax credit provision is scrupulously neutral on that question. *Id.* at 57a. The fact that many taxpayers have exercised their private discretion to make contributions to religious STOs is not relevant. "[T]he constitutionality of a neutral choice program does not turn on annual tallies of private decisions made in any given year by thousands of individual aid recipients." *Zelman*, 536 U.S. at 657 n.4. The Court has repeatedly rejected numerical arguments just like the one credited by the court of appeals. See *id.* at 658

(declining to "attach constitutional significance to the fact that 96% of scholarship recipients have enrolled in religious schools"); *Mitchell* v. *Helms*, 530 U.S. 793, 812 n.6 (2000) (opinion of Thomas, J.) ("[T]he proportion of aid benefitting students at religious schools pursuant to a neutral program involving private choices [is] irrelevant to the constitutional inquiry."); *Mueller*, 463 U.S. at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.").

b. The court of appeals also erred by viewing Section 1089 as a "delegation" of government power to the tax credit recipients. Pet. App. 40a. The court read *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 122 (1982), as requiring a finding that this "delegation" was impermissible, absent "reasonable assurance that" the tax credit recipients' "choices will advance the secular purposes of the statute." Pet. App. 40a. The court of appeals misapplied *Larkin*, in which "important governmental power—a licensing veto authority—had been vested in churches." *Lynch*, 465 U.S. at 683. That kind of delegation, the Court held, wrongly "enmeshes churches in the exercise of substantial governmental powers," *Larkin*, 459 U.S. at 126, and creates an impermissible "fusion of governmental and religious functions." *Ibid*.

Unlike the statute at issue in *Larkin*, Section 1089 does not delegate any core government function to a religious institution. Making contributions to private scholarship organizations is not a "power ordinarily vested in agencies of government." *Larkin*, 459 U.S. at 122; see Pet. App. 109a n.20. And the pertinent decision here is made by individual Arizona taxpayers, not

churches or other religious institutions. This Court upheld a similar tax benefit program in *Mueller*, *supra*, without any concerns about delegation. The court of appeals' theory also conflicts with this Court's decision in *Hernandez* v. *Commissioner*, *supra*, which found the federal tax deduction for charitable contributions consistent with the Establishment Clause, 490 U.S. at 696, even though it includes no assurances that those claiming the deduction did not make their charitable contributions with sectarian motives.

c. The court of appeals viewed this case as distinguishable from *Zelman* because the school voucher program at issue there gave parents "incentives to apply the program's aid based on their children's educational interests instead of on sectarian considerations, such as whether to promote the religious mission of a particular school." Pet. App. 40a. The court of appeals provided no citation to support this reading of *Zelman*, and it is not accurate. The program upheld in *Zelman* allowed parents to use a state tuition voucher at any school they wished—secular or religious—and provided *no* incentives or special benefits for choosing a school based on educational rather than religious reasons. Parents were free to use whatever criteria they wanted to in making their choice. See *id.* at 109a.

The court of appeals thought that Arizona's decision to give decentralized taxpayers, rather than "government administrators," discretion to decide which STOs to finance "appears to thwart * * * the secular purpose of the program." Pet. App. 44a. This concern is little more than a policy disagreement, and it flies in the face of the "substantial deference" the courts owed to a state's decision how best to "encourage desirable expenditures for educational purposes." *Mueller*, 463 U.S. at

396. Arizona reasonably concluded that permitting taxpayers to make these decisions would maximize their incentive to make contributions, thus increasing the funds available for scholarships. If that conclusion has resulted in "demand for STO-provided scholarships available for use at secular schools markedly outstrip-[ping] their supply," Pet. App. 44a; but see Arizona Christian Sch. Tuition Org. Br. 57 n.21, that is merely the result of private decisionmaking that is beyond the purview of the Establishment Clause.

d. Finally, the court of appeals erred by failing to examine Section 1089 in the context of Arizona's diverse array of programs that promote educational options. See *Zelman*, 536 U.S. at 655-656 ("The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school."); see also Pet. App. 103a-106a. "The Arizona Legislature has, in recent years, expanded the options available in public education." *Kotterman*, 972 P.2d at 611. The State has established charter schools to "provide additional academic choices for parents and pupils." Ariz. Rev. Stat. Ann. § 15-181.A (2009); see Jewish Tuition Org. Amicus Br. in Support of Cert. 20 (noting that charter schools comprise a quarter of the public schools in Arizona and enroll ten percent of the State's public school population). It also requires all public school districts to have open enrollment policies without charging tuition, thus opening their doors to students from other districts (subject to capacity). Ariz. Rev. Stat. Ann. § 15-816.01.A (2009); Pet. App. 57a. In addition, Arizona provides a $200 tax cred-

it for fees paid to public schools for extracurricular activities and character education. Ariz. Rev. Stat. Ann. § 43-1089.01 (Supp. 2009). Section 1089 thus does not stand in isolation, but instead is emblematic of Arizona's decision to "bring private institutions into the mix of educational alternatives open to the people of [the] state." *Kotterman*, 972 P.2d at 611.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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