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

Petitioner,

v.

KATHLEEN M. WINN, et al.,

Respondents.

**On Writs Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

REPLY BRIEF FOR RESPONDENTS SUPPORTING PETITIONERS

INSTITUTE FOR JUSTICE
TIMOTHY D. KELLER
Counsel of Record
PAUL V. AVELAR
398 S. Mill Avenue
Suite 301
Tempe, AZ 85281
(480) 557-8300
tkeller@ij.org

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
RICHARD D. KOMER
CLARK M. NEILY III
901 N. Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320

*Counsel for Respondents in Support of Petitioners
Glenn Dennard, Luis Moscoso, and
Arizona School Choice Trust*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF FOR RESPONDENTS SUPPORTING PETITIONERS

The constitutional question in this case is whether Arizona's Scholarship Program (the "Scholarship Program"), A.R.S. § 43-1089, is a program of true private choice. When private choices direct the flow of money in an educational aid program, "'no imprimatur of *state* approval' can be deemed to have been conferred on any particular religion, or on religion generally." *Zelman v. Simmons-Harris*, 536 U.S. 639, 650 (2002) (quoting *Mueller v. Allen*, 463 U.S. 388, 399 (1983) (emphasis added)). When educational aid reaches schools only as a result of true private choice—as it does in the Scholarship Program—then the *government* does not skew incentives toward religious schools and "the program [will therefore] survive scrutiny under the Establishment Clause." *Id*.

The Scholarship Program is plainly one in which educational aid reaches schools only through the "genuine and independent choices of private individuals." *Id*. at 649. Any individual can create a School Tuition Organization. Any individual can contribute to any School Tuition Organization and claim the tax credit. And any individual can apply for any scholarship offered by any School Tuition Organization. The state has no involvement beyond "making tax credits available. After that, the government takes its hands off the wheel." *Winn v. Ariz. Christian Sch. Tuition Org.*, 586 F.3d 649, 660 (9th Cir. 2009) (O'Scannlain, J., dissenting from order denying rehearing en banc).

Because the Scholarship Program is one of true private choice, it simply does not implicate the Establishment Clause, which was designed to prevent government endorsement of religion, not limit educational options for parents. *See Zelman*, 536 U.S. at 647, 652. The Ninth Circuit's contrary decision was erroneous and should be reversed.

ARGUMENT

The First Amendment to the U.S. Constitution, as applied to the states through the Fourteenth Amendment, is concerned with whether the Scholarship Program constitutes impermissible *governmental* advancement or endorsement of religion. Programs that permit families to freely and independently use educational aid to attend religious institutions do not offend the Establishment Clause. Therefore, the constitutional question in this case is whether the Scholarship Program is an educational aid program of genuine private choice.

Private choice is the defining characteristic of Arizona's tax credit program. Private individuals choose to set up scholarship organizations. Private individuals freely decide which organizations they donate to. And parents make the choice where to enroll their children. Under these circumstances, "no reasonable observer would think a 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.

The Court's "decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649 (citations omitted). Starting with *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (upholding use of public funds to transport children to religious schools that provide them with religious instruction), the Court has consistently rejected Establishment Clause challenges to indirect educational aid programs that are based on private, individual choice. The Court has not only rejected those challenges but has held that such programs do not even *implicate* the Establishment Clause. *Zelman*, 536 U.S. at 649. Indeed, the Court has "never found a program of true private choice to offend the Establishment Clause." *Id.* at 653.

I. ARIZONA'S SCHOLARSHIP PROGRAM IS A PROGRAM OF GENUINE PRIVATE CHOICE AND THEREFORE DOES NOT IMPLICATE THE ESTABLISHMENT CLAUSE.

The Court has "consistently held that government programs that neutrally provide benefits to a

broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may receive an attenuated financial benefit." *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993). The Scholarship Program allows any Arizona taxpayer to donate to any School Tuition Organization and claim a tax credit. It also allows any parent to apply to any School Tuition Organization for a scholarship to any private school funded by that organization.

Respondent Taxpayers concede that the Scholarship Program is facially neutral with regard to religion. Winn Br. 3. They also concede that it "is neutral with respect to the taxpayers who direct money to [School Tuition Organizations] . . . [meaning that] the program's aid that reaches a [School Tuition Organization] does so only as a result of the genuine and independent choice of an Arizona taxpayer." *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1018 (9th Cir. 2009).

The Scholarship Program offers taxpayers a genuine choice of which School Tuition Organizations they donate to and parents a genuine choice of where to enroll their children. Yet Respondent Taxpayers continue to press their argument that the program violates the Establishment Clause. Their argument hinges on three erroneous premises. First, that School Tuition Organizations are state actors merely because the scholarships they award to families are "subsidized" by the state and because those organizations are subject to regulations designed to prevent

fraud and abuse. Second, that the program skews parents' choices toward religious schools despite genuine private choice. And third, that the same constitutional limitations that apply to direct aid programs also apply to indirect aid programs.

A. School Tuition Organizations Are Not Government Actors.

Respondent Taxpayers' overarching theme is that School Tuition Organizations are creatures of the state, and are established and supervised by the state to administer what Respondents persistently mischaracterize as a "government spending program." Winn Br. 1. But School Tuition Organizations are privately created and privately controlled. They are not government actors. They are private actors. Neither the receipt of government "subsidized" scholarship funds nor being subject to modest government regulation transform these private entities into state actors.

1. School Tuition Organizations Are Privately Created.

School Tuition Organizations are privately created nonprofit organizations permitted by federal law to receive tax-deductible contributions and by state law to receive tax-credit-eligible donations. The government did not create School Tuition Organizations. The first School Tuition Organization to open its doors in Arizona was the Arizona School Choice

Trust, one of the Respondents in Support of Petitioners. The School Choice Trust was privately founded five years before Arizona authorized a tax credit for contributions to such organizations. Ariz. Sch. Choice Trust, *Arizona School Choice Trust was founded for educational opportunity for low-income families*, http://www.asct.org/Founders.shtml (last visited Oct. 13, 2010). Thus, when Arizona enacted the Scholarship Program, it was not creating a new type of charitable work or entity, but rather it was recognizing the valuable work being done by the School Choice Trust in expanding parental options in education to include private schools. This underscores the Legislature's purpose for enacting the Scholarship Program: its legitimate interests in giving parents educational choice. There was no improper religious motivation.

There are a few specific requirements School Tuition Organizations must satisfy in order to receive tax-credit-eligible contributions. A.R.S. § 43-1602(A); Dennard App.[1] 6a-7a; A.R.S. § 43-1603; Dennard App. 9a-11a. These requirements are: (1) the organization is exempt from federal taxation under 26 U.S.C.

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[1] "Dennard App." refers to the Appendix to Brief of Respondents in Support of Petitioners filed by Glenn Dennard, Luis Moscoso, and the Arizona School Choice Trust ("Dennard Br."). Their Appendix refers to A.R.S. § 43-1601, *et seq.*, as A.R.S. § 1501, *et seq*. due to statutory renumbering that took place after the bill's adoption. Memorandum from Holly B. Hunnicutt, Ariz. Leg. Counsel (June 24, 2010), *available at* http://www.azleg.gov/alisPDFs/council/2010%20Renumbering%20memo.pdf.

§ 501(c)(3), A.R.S. § 43-1602(A); Dennard App. 6a-7a; (2) the organization allocate at least 90 percent of its annual revenue for education scholarships, A.R.S. § 43-1603(B)(1); Dennard App. 9a; (3) the organization does not limit its scholarships to students of only one school, A.R.S. § 43-1603(B)(2); Dennard App. 10a; (4) the organization does not award scholarships based solely on donor recommendations, A.R.S. § 43-1603(B)(3); Dennard App. 10a; and (5) the organization does not knowingly allow taxpayers to "swap" donations in an effort to benefit their own children, A.R.S. § 43-1603(B)(4); Dennard App. 10a. These requirements ensure that contributions to School Tuition Organizations benefit the general public and not individual taxpayers.

The Department of Revenue requires any School Tuition Organization desiring to receive tax-credit-eligible donations to certify on a preapproved form that it satisfies these requirements. Ariz. Dept. of Revenue, *A Manual for School Tuition Organizations* 29 Attach. 1 (Aug. 23, 2010), *available at* http://www.azdor.gov/LinkClick.aspx?fileticket=CKcT5ZKMobY%3d&tabid=240. There is no annual recertification requirement. *Id.* at 3. The Department may "decertify" School Tuition Organizations that fail to comply with these requirements, but contributions to decertified organizations would still be eligible for a federal tax deduction so long as the organization remains a federally-recognized 501(c)(3) organization.

That contributions to non-state certified School Tuition Organizations are still federally tax-deductible underscores the fact that, while quantitatively different, other types of tax-reducing mechanisms—such as tax deductions, tax exemptions, and tax credits of less than 100 percent—are qualitatively the same as the tax credit at issue in this case.

The comparative value of a tax benefit to the taxpayer is a function of whether the taxpayer has taxable income and owes taxes, as well as the marginal tax rate on the income. As the marginal tax rate climbs, the quantitative distinction between the effect of 100 percent credits and deductions fades. *See Freedom from Religion Found. v. Geithner*, NO. CIV. 2:09-2894 WBS DAD, 2010 U.S. Dist. LEXIS 50413, at *16-17 (E.D. Cal. May 21, 2010) (finding no "meaningful distinction between tax deductions or exclusions and tax credits" because even though they "do not create dollar-for-dollar reductions in tax liability . . . they reduce tax liability by a percentage directly related to one's income tax bracket.").

Establishment Clause analysis cannot be driven by the percentage of return (100 percent v. 99 percent v. 90 percent v. 50 percent v. 1 percent) on contribution. *See Mueller*, 463 U.S. at 390 (rejecting Establishment Clause challenge to tax deduction for tuition paid to religious private schools); *see also Walz v. Tax Comm'n*, 397 U.S. 664, 680 (1970) (rejecting Establishment Clause challenge to property tax exemption to religious organizations for property used for religious purposes). It is thus irrelevant to the constitutional

analysis whether the benefit is a 100 percent tax credit, a tax deduction, or an exemption.

Finally, Respondent Taxpayers assert that, pursuant to Arizona's recent legislative amendments, contributions to School Tuition Organizations are no longer "charitable donations" because the statute no longer refers to them as "charitable organizations," but rather as "nonprofit organizations." Under § 501(c)(3), "charitable" organizations are but one of a number of nonprofit organizations qualified to receive tax deductible contributions—other types include those organized for "religious," "educational" and "scientific" purposes. 26 U.S.C. § 501(c)(3). Debating whether School Tuition Organizations are best described as "charitable," "educational," or even "religious" organizations is a debate over inconsequential semantics.

2. School Tuition Organizations Operate Independently From Any Government Official.

"[A] State normally can be held responsible for a private decision *only* when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (holding that private nursing homes that received reimbursement from the Medicaid program were not state actors); *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982)

(holding that private schools funded almost entirely by reimbursement payments from the state for providing special education services to publicly placed students were not state actors). In this case, the state does not control any decisions made under the Scholarship Program. The state has nothing to do with the scholarship-granting decisions made by School Tuition Organizations. As the Ninth Circuit explained, "Arizona does not specify scholarship eligibility criteria or dictate how [School Tuition Organizations] choose the students who receive scholarships."[2] *Winn*, 562 F.3d at 1006. And the Respondent Taxpayers *concede* that "[School Tuition Organizations] are free to award scholarships . . . to students chosen by them, according to their standards, from among all the school-age children in Arizona." Winn Br. 46. Such unrestricted freedom is a far cry from coercive state action.

In the clear absence of any overt state effort to advance religion, Respondent Taxpayers essentially urge the Court to find covert action in the fact that the Department of Revenue "allows" School Tuition Organizations to award scholarships only to the

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[2] The recent legislative amendments to the program did add a requirement that School Tuition Organizations "shall consider the financial need of applicants" and prohibits donors from designating particular students as a condition of contributing to a School Tuition Organization, A.R.S. § 43-1603(B)(4), (D)(2); Dennard App. 10a-11a, but that does not alter the fact that scholarship award decisions remain in the hands of School Tuition Organizations.

private schools of their own choosing. But there is nothing suspicious or untoward about this; to the contrary, it is merely implementation of the law as written. It was plainly evident from the text of the original statute—and it is clear from the statute that will go into effect January 1, 2011—that a School Tuition Organization can restrict the total number of private schools to which it awards scholarships, so long as it does not award scholarships to only one school. *Hibbs v. Winn*, 542 U.S. 88, 95 (2004) (explaining that School Tuition Organizations "must designate at least two schools whose students will receive funds"); *Kotterman v. Killian*, 972 P.2d 606, 626 (Ariz. 1999) (Feldman, J., dissenting) ("[A] group of taxpayers who subscribe to a particular religion may form a[ ] [School Tuition Organization] that will support only schools of that religion."). Indeed, Respondent Taxpayers concede that "from the inception" of the program, School Tuition Organizations have been permitted to restrict scholarships only to particular religious schools. Winn Br. 11. There is no state coercion in giving School Tuition Organizations the freedom to award scholarships to particular types of schools.

School Tuition Organizations make private, independent decisions to serve different constituencies and organize themselves along a number of different lines and concerns, including religious, geographic, pedagogical, and economic. The state neither encourages nor discourages any particular type of School Tuition Organization. Rather, the state, in purely

ministerial fashion, simply ensures that each organization satisfies the criteria discussed in section I.A. above—nothing more. This minor regulatory role does not transform School Tuition Organizations' activities into state action. *Blum*, 475 U.S. at 1004-05 ("Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment.") (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164-65 (1978) and *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357 (1974)). The state plays no role in the scholarship-granting decisions of School Tuition Organizations.

3. The Receipt Of Tax-Credit-Eligible Contributions Does Not Transform School Tuition Organizations Into State Actors.

Respondent Taxpayers argue that because contributions to School Tuition Organizations are eligible for a 100 percent tax credit, up to the modest limit of $500 per individual or $1,000 per married couple filing jointly, those contributions are the equivalent of state-income tax revenues and that they should be considered state "expenditures." Winn Br. 6. On one side of the ledger, the Scholarship Program does reduce state revenues. On the other side of the ledger are the savings the state realizes from being relieved of the duty to pay for participating children's educations. *See* Ronald J. Hansen, *Private-school tax credits save $8.3 million*, Arizona Republic, Oct. 20, 2009.

Though the precise dollar amount of savings to the state is a subject of debate, the fact that the program ultimately saves the state money makes it difficult to characterize it as a state spending program.

Even if the Court were to decide that tax-credit-eligible contributions constitute a form of state "expenditures," the fact that the contributions essentially pass through School Tuition Organizations does not transform these private entities into state actors. In *Rendell-Baker v. Kohn*, the Court considered a legal challenge to the employment practices of a private school that received "virtually all of [its] income . . . from government funding." 457 U.S. at 840. Public school districts were contracting with the private school to purchase special education services just as Scholarship Program parents here purchase educational services from private schools. The Court's conclusion in *Rendell-Baker* that the government contracts "[did] not make the . . . [private school's] decisions acts of the State," *id.*, applies here.

It is also important to identify exactly who the Scholarship Program is designed to aid. The Scholarship Program aids school children and their families. It does not aid School Tuition Organizations. Indeed, those organizations are not able to keep the vast majority of the contributed funds. They can keep only a small amount to cover their administrative costs. The Scholarship Program also does not aid taxpayers because their contribution merely reduces their tax liability by the amount contributed, meaning they realize no net financial gain from their contribution.

It is parents and children who receive the money in the form of scholarships. Families, therefore, are the beneficiaries of the Scholarship Program. Families use the scholarships to purchase educational services from private schools and their decisions to do so are not "acts of the state."

The funding for the challenged program flows from the decisions of individual taxpayers, who write checks drawn from their personal bank accounts, to School Tuition Organizations and then to parents—who independently decide where to enroll their children and which School Tuition Organizations to apply to for scholarship funds. Not a single dollar is transferred from the state to any School Tuition Organization. "The availability of scholarships to particular students and particular schools thus depends [not on government decision makers, but] on the amount of funding a [School Tuition Organization] receives [from taxpayer contributions.]" *Winn*, 562 F.3d at 1006. Receipt by School Tuition Organizations of funds from private citizens intended to benefit other private citizens cannot form the basis of a finding that School Tuition Organizations are state actors.

4. Compliance With State Regulations Does Not Transform School Tuition Organizations Into State Actors.

Respondent Taxpayers argue that the recent legislative amendments to the Scholarship Program

alter the very nature of School Tuition Organizations. But, as explained more fully in all of the Replies to the Respondent Taxpayers' Supplemental Brief Regarding a Change in State Law, nothing about the revised structure of the Scholarship Program alters the fact that "individuals voluntarily . . . contribute money" to School Tuition Organizations and that "the state's involvement stops with . . . making tax credits available." *Winn*, 586 F.3d at 659-60 (O'Scannlain, J., dissenting). Each School Tuition Organization's decision to support either religious or secular schools—or both—is in no way influenced by the state. And while the legislative amendments add some modest regulatory oversight, the "mere fact that a business is subject to state regulation does not by itself convert its action into that of the State." *Blum*, 475 U.S. at 1004 (quoting *Jackson*, 419 U.S. at 350).

5. Conclusion

In sum, there is no government involvement with religion whatsoever pursuant to the Scholarship Program. The government does not give money to any School Tuition Organization. No government actor decides which children receive scholarships from School Tuition Organizations. The relationship between the tax benefit to the taxpayer and the decision by parents to send their children to religious schools and apply for scholarships from religiously affiliated School Tuition Organizations is simply too attenuated and too variable over time to constitute government involvement with religion. Therefore, the Scholarship Program does not implicate the Establishment

Clause. *Mueller*, 463 U.S. at 400 ("The historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.").

B. The State Does Not Skew Incentives Toward Religion.

The question at the center of this case is whether "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). As demonstrated in section I.A. above, the answer to that question is no. However, Respondent Taxpayers assert that the answer is yes because of the unrestricted freedom School Tuition Organizations enjoy to award scholarships—including the ability to award scholarships only to families who choose to enroll their children in religiously affiliated schools. Winn Br. 11-14. This argument is not only premised on the unfounded notion that School Tuition Organizations do not offer scholarships to nonreligious schools,[3] but

[3] According to a 2009 Department of Revenue report, the following secular School Tuition Organizations, among others, had ample resources to grant scholarships to nonreligious private schools: Arizona Scholarship Fund ($5,159,220); Institute for a Better Education ($4,803,063); Tuition Organization for Private Schools ($1,474,937); Arizona Private Education

(Continued on following page)

also improperly focuses solely on the Scholarship Program rather than the full array of educational choices Arizona provides to parents.

The question is whether Arizona "is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* options" Arizona "provides [its] schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school." *Zelman*, 536 U.S. at 656. By examining the Scholarship Program in light of the vast array of nonreligious educational options Arizona provides to families, it is abundantly clear that the state is not skewing incentives toward religion.

Respondent Taxpayers ignore the full range of educational choices available to Arizona parents. Instead, they focus on an alleged dearth of available scholarships to attend nonreligious private schools. Putting aside the fact that *many* School Tuition Organizations provide scholarships to nonreligious schools, Arizona offers families one of the broadest arrays of educational choices in the nation. Dennard Br. 39-43. These options include, among others, a

Scholarship Fund ($1,466,020); and the Arizona School Choice Trust ($1,022,823) (one of the Intervenors and Respondents in Support of Petitioners in this case). Ariz. Dept. of Revenue, *Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2009* (Apr. 21, 2010), *available at* http://www.azdor.gov/Portals/0/Reports/private-school-tax-credit-report-2009.pdf.

robust charter school law and open public school enrollment that prohibits school districts from charging parents tuition. A.R.S. § 15-181, *et seq.*; A.R.S. § 15-816.01. In *Zelman*, the Court looked to precisely these types of additional public options in concluding that there was "no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children." *Zelman*, 536 U.S. at 655 (noting that students could "remain in public school as before . . . obtain a scholarship . . . enroll in a community school, or enroll in a magnet school"). And while such a wide array of options "are not necessary" to the constitutionality of indirect programs based on private choice, they do "clearly dispel the claim that the program 'creates . . . financial incentives for parents to choose a sectarian school.'" *Zelman*, 536 U.S. at 654 (quoting *Zobrest*, 509 U.S. at 10).

In seeking to distinguish *Zelman*'s holding, Respondent Taxpayers misconstrue and misrepresent the program upheld in that case. The Cleveland program did not require nonreligious private schools to participate. *Zelman*, 536 U.S. at 645. It was thus entirely plausible that the program in *Zelman* could have resulted in parents not being able to choose nonreligious schools. The program permitted—but did not require—area public schools to participate and, indeed, none chose to do so. *Id.* at 645-47. Of the private schools that chose to participate, 82 percent were religious, with approximately 96 percent of voucher recipients attending religious schools.

Id. And yet, the Court said that merely because "46 of the 56 private schools now participating in the program are religious schools does not condemn it as a violation of the Establishment Clause." *Id.* at 655. Thus, even where no public schools participated and the overwhelming majority of private schools participating in the program were religious, the Court held there were "no 'financial incentives' that 'skew' the program toward religious schools." *Id.* at 653 (quoting *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487-88 (1986)).

The Scholarship Program leaves the decision to contribute to School Tuition Organizations in the hands of taxpayers. It leaves the decision for which schools to award scholarships in the hands of School Tuition Organizations. And it leaves the decision of which private schools to enroll their children in and which School Tuition Organizations to apply to for scholarship funds in the hands of parents. And those parents had a plethora of public schools, including numerous charter schools, to choose from. A program so thoroughly controlled by private choice does not violate the Establishment Clause.

C. The Establishment Clause Does Not Prohibit Individuals From Using Indirect Educational Aid To Obtain A Religious Education.

Respondent Taxpayers assert that before *Zelman*, individuals were not permitted "to use tax-raised funds" at "religious schools to support the *religious*

instructional activities of those schools." Winn Br. 48. That assertion is wrong. In every one of the Court's indirect educational aid cases, the government aid at issue was used to support religious instructional activities, and in each case the educational aid program was upheld. In *Zobrest*, 509 U.S. at 4 n. 1, it was stipulated that "secular education and advancement of religious values or beliefs [we]re inextricably intertwined" in the Catholic school in which petitioner Zobrest's parents enrolled him. And the Court made it clear that the government-funded sign language interpreter, to which petitioner Zobrest was entitled, would transmit the pervasively sectarian content taught in the high school. *Id.* at 13. In *Witters*, 474 U.S. at 482, government aid was given to "a blind person studying at a Christian college and seeking to become a pastor, missionary, or youth director." Naturally, pursuing a degree in vocational ministry involves religious instruction. And, of course, *Mueller*, 463 U.S. 388, involved a tax deduction for tuition at religious schools that imposed no requirement that students must be allowed to opt out of the school's religious instruction. Under the Court's "Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients." *Locke v. Davey*, 540 U.S. 712, 719 (2004). It is thus constitutionally permissible to give families the choice to use educational aid to purchase a religious education.

Respondent Taxpayers base their argument on *Bowen v. Kendrick*, 487 U.S. 589 (1988), which involved government grants to religious institutions for counseling and education services pursuant to a federal program designed to educate adolescents about family life. While aspects of *Bowen* are instructive, particularly as it relates to whether the Scholarship Program is supported by a legitimate government interest, there are nevertheless significant limits to its applicability in this case because it involved a direct—rather than an indirect—aid program.

In *Bowen*, government officials selected which organizations received federal funds. Thus, the Court imposed some limits on exactly how those organizations could use the aid. Here, the government does not choose which School Tuition Organizations receive money or, in turn, to which families the School Tuition Organizations give scholarships. In two post-*Bowen* cases involving direct aid programs, the Court said "the question of whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to government action." *Agostini v. Felton*, 521 U.S. 203, 230 (1997) and *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality opinion). Thus, even in direct aid cases private choice is still determinative. Because there are no decisions made by governmental actors under the Scholarship Program, it would be unreasonable to attribute any

parents' decision to enroll their child in a religious school and obtain a religious education to governmental coercion.

Regardless of the constitutional restrictions imposed on direct governmental aid programs, the Court has never struck down an indirect educational aid program characterized by true private choice merely because families use that aid to obtain a religious education. Respondent Taxpayers offer no compelling arguments for the Court to do so here.

II. ARIZONA'S SCHOLARSHIP PROGRAM SERVES LOW- AND MODERATE-INCOME FAMILIES.

Faced with a dearth of favorable case law, Respondent Taxpayers resort to a form of *ad hominem* argument by citing to a number of articles published by *The Arizona Republic* and *The East Valley Tribune*. Winn Br. 10, 43; Winn Opp'n Br. 9-11. These articles cast aspersions on the Scholarship Program as primarily awarding scholarships to wealthy families. But a recent survey by Dr. Vicki Murray of student-level data obtained directly from School Tuition Organizations demonstrates that the program does a good job of serving low- and moderate-income families. Vicki E. Murray, Ph.D., *An Analysis of Arizona Individual Income Tax-credit Scholarship Recipients' Family Income, 2009-10 School Year*, Program on Education Policy and Governance, Harvard University 10-18 (October 2010), *available at*

http://www.hks.harvard.edu/pepg/PDF/Papers/PEPG10-18_Murray.pdf.

Dr. Murray's analysis assessed *The East Valley Tribune*'s and *The Arizona Republic*'s repeated claim that Arizona's Scholarship Program does not serve low-income families. *Id.* at 2. Those newspapers interviewed officials or cited related statistics from approximately 15 of the 55 School Tuition Organizations operating at the time. *Id.* Yet neither newspaper collected student-level income data to verify that allegation. *Id.* Dr. Murray collected family income and related data directly from School Tuition Organizations for 19,990 students during the 2009-10 school year, which represents nearly 80 percent of all scholarships awarded in 2009. *Id.* at 5-6. Her analysis also compared the family incomes of scholarship recipients to U.S. Census Bureau median family incomes using addresses and zip codes provided by School Tuition Organizations. *Id.* at 6. The results of her analysis show:

- Scholarship recipients' median family income was $55,458—nearly $5,000 lower than the U.S. Census Bureau statewide median annual income of $60,426. It was also nearly $5,000 lower than median incomes in recipients' neighborhoods, as estimated using student addresses and zip codes. *Id.* at 14.

- The annual family income of more than two-thirds (66.8 percent) of scholarship recipients would qualify them for another of Arizona's educational aid

programs, the corporate tax credit scholarship program, eligibility for which is capped at $75,467 for a family of four. *Id.* at 15.

- A higher proportion of scholarship recipients come from families whose incomes qualify them as poor (at or below $20,050 for a family of four) than the U.S. Census Bureau statewide average, 12.8 percent compared to 10.2 percent. *Id.*

Dr. Murray's analysis found no factual basis for the claims that Arizona's Scholarship Program limits access to privileged students from higher-income families. *Id.* at 16. Instead, an overwhelming majority of the individuals receiving scholarships under the Scholarship Program also qualify for Arizona's separate, means-tested and corporately-funded scholarship program. *Id.*

Arizona's Scholarship Program is not just a program of private choice, it is a vital educational aid program that is helping tens of thousands of low- and middle-income families pursue opportunities that would otherwise be foreclosed to them. Nothing in the Constitution imposes a one-size-fits-all approach to public education, nor does it categorically prohibit states from creating programs that emphasize parental choice over centralized control and that include, among various educational options, private religious schools.

CONCLUSION

Respondents' Complaint was properly dismissed because it challenges a program of true private choice that is fully consistent with the Court's Establishment Clause precedent. The Respondents in Support of Petitioners, Glenn Dennard, Luis Moscoso, and the Arizona School Choice Trust, request the Court to reverse the judgment of the Ninth Circuit and remand the case with instructions to enter judgment in favor of Defendants and Defendant-Intervenors.

Respectfully submitted,

INSTITUTE FOR JUSTICE
TIMOTHY D. KELLER
Counsel of Record
PAUL V. AVELAR
398 S. Mill Avenue
Suite 301
Tempe, AZ 85281
(480) 557-8300
tkeller@ij.org

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
RICHARD D. KOMER
CLARK M. NEILY III
901 N. Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320

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