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

PETITIONER'S REPLY BRIEF ON THE MERITS

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I. School Tuition Organizations' Actions Are Not Attributable to the State.

The court of appeals held that Section 1089's private-school-tuition-tax-credit program had the purpose and effect of advancing religion because the State allowed taxpayers to donate to STOs that limit scholarships to religious schools and this would constrain parents' ability to choose a secular private school. Garriott Pet. App. 20a, 22a. In reaching this holding, the court of appeals characterized Section 1089 as "an indirect aid program" and STOs as "private charitable organizations." *Id.* at 21a. Respondents have abandoned their argument that Section 1089 has an improper religious purpose, Resp. Br. 50-51, and do not urge the Court to adopt the lower court's reasoning concerning Section 1089's effect. Instead, Respondents' latest argument depends entirely on whether STOs' decisions that they will provide scholarships only to religious schools are attributable to the State for Establishment Clause purposes: "The controlling issue in the case is whether the program should be treated as a private charitable program, as petitioners contend, or as a government spending program subject to the restrictions of the Establishment Clause." Resp. Br. at 1.[1] Respondents' argument

[1] Respondents' argument is different from their argument in the court of appeals. *See* Garriott Pet. App. 22a n.10 (the court of appeals noted that "Plaintiffs do not argue that STOs are state actors"). Respondents' argument is now based on the argument that STOs are state actors. Resp. Br. at 27 ("STOs are not charities. . . . They disburse . . . state income-tax revenues to

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fails because the STOs' actions that Respondents challenge are not attributable to the State.

This Court has rarely held that "actions of private entities can . . . be regarded as governmental action for constitutional purposes." *Lebron v. Nat'l R.R. Passenger Corp.,* 513 U.S. 374, 378 (1995). Even if the State extensively regulates a private entity, the entity's action will not be attributable to the State unless "there is a 'sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.'" *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974)). Normally, the State "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." *Id.* The required nexus may also "be present if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the

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further the state's policy of promoting parental school-choice."). This Court will not ordinarily consider issues that were not raised in or considered by the court of appeals. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Respondents may believe that their new argument is justified because the legislature amended Section 1089 in 2010 after the court of appeals issued its opinion. But the 2010 amendment does not change the provision of Section 1089 that Respondents challenge (Garriott Br. at 4, 10-11), and, as will be discussed *infra*, the amendments do not make STOs state actors.

State.'" *Id.* at 1005 (quoting *Jackson*, 419 U.S. at 353).

Respondents acknowledge that they would not have a valid claim if STOs were private charitable organizations. Resp. Br. at 22, 25-26. However, Respondents argue that the STOs' actions should be attributable to the State because they receive state money, they serve a state purpose, and the State extensively regulates them to ensure compliance with state statutory requirements. Resp. Br. at 25-27. But precisely the same could be said of other section 501(c)(3) organizations that receive contributions from donors who receive a tax deduction, tax credit, or both to further the government's interest in encouraging organizations that serve desirable public purposes and that are regulated to ensure that they actually serve those purposes.[2] Because the State does not encourage or coerce the STO actions that Respondents challenge – *i.e.*, providing scholarships only to religious schools – and the STOs do not exercise powers that are traditionally the State's exclusive prerogative, the STOs' actions, like the actions of other section 501(c)(3) organizations, are not attributable to the State.

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[2] Nonprofit organizations that are organized and operated exclusively for certain purposes, including religious, charitable, scientific, literary, and educational, are entitled to a corporate tax exemption under 26 U.S.C. § 501(c)(3), and individuals who contribute to these organizations are entitled to a deduction under 26 U.S.C. § 170.

Respondents apparently distinguish STOs from other section 501(c)(3) organizations by incorrectly asserting that STOs are funded by state money. Resp. Br. at 27.[3] As the Arizona Supreme Court explained in *Kotterman v. Killian*, 972 P.2d 606, 618 (Ariz. 1999), the money contributed to STOs is not public money because it never enters the State's control. The court rejected the petitioners' contention that the State "effectively controls and exerts quasi-ownership" over taxpayer money that "*could* enter the treasury if it were not excluded by way of a tax credit":

> [U]nder such reasoning all taxpayer income could be viewed as belonging to the state because it is subject to taxation by the legislature. . . .
>
> Equally problematic is the fact that petitioners' contention directly contradicts decades-long acceptance of tax deductions for charitable contributions, including donations made directly to churches, religiously-affiliated schools and institutions. If credits constitute public funds, then so must other established tax policy equivalents like deductions and exemptions. Indeed, it seems to us

[3] Respondents also incorrectly assert that taxpayers cannot and do not contribute to STOs in amounts that exceed the available tax credit amount and that therefore STOs are funded entirely by state money. Resp. Br. at 27. Respondents do not allege this in their complaint, and nothing in the 2010 amendment to Section 1089 precludes STOs from receiving contributions from individuals who do not take a tax credit for the entire amount of their contribution.

> that unless a constitutionally significant difference between credits and deductions can be demonstrated, petitioners' argument must fail.

Id. Like the petitioners in *Kotterman*, Respondents have not provided any authority that supports their argument that there is a distinction between credits and deductions that would justify treating contributions entitled to a tax credit as state money but not treating the benefit received from a tax deduction as state money.

Respondents argue that there is a difference between credits and deductions because taxpayers do not contribute their own money when they receive a dollar-for-dollar tax credit for their contribution. Under Respondents' reasoning, the portion of a contribution that results in the payment of a lower tax because of a tax deduction and the amount saved as the result of an exemption would also be considered state money. But the Court has never held that the money that the government has not collected as a result of tax deductions or tax exemptions is government money. *Cf. Hernandez v. Commissioner*, 490 U.S. 680, 696 (1989) (holding that charitable deductions for contributions to religious organizations did not violate the Establishment Clause); *Walz v. Tax Comm'n*, 490 U.S. 664, 673 (1970) (upholding a tax exemption for property used exclusively for religious

purposes). The difference between tax credits and tax deductions is one of degree and not substance.[4]

Contrary to Respondents' argument, taxpayers who contribute to STOs do make voluntary contributions. Resp. Br. at 27. They are required to pay taxes but the State does not require them to contribute to STOs. All tax benefits, including "exemptions, exclusions, deductions, and credits" are "designed to encourage certain kinds of activity or to aid taxpayers in certain categories." Ariz. Dep't of Revenue, *The Revenue Impact of Arizona's Tax Expenditures FY 2008/2009*, at 1 (Nov. 16, 2009, Preliminary) (hereinafter *Tax Expenditure Report FY 2008/2009*).[5] Under Arizona law, taxpayers may pay either the amount of their income-tax liability or reduce that amount by choosing to receive a credit for contributing to a large variety of organizations. *See id.* at 45-48 (listing twenty-eight different tax credits, including the private-school-tuition-organization credit). Arizona taxpayers may

[4] Indeed, because tax deductions primarily benefit high-income taxpayers, thereby enabling them to have a disproportionate impact on which charitable organizations receive contributions and on the amount of contributions that they receive, many tax scholars favor tax-relief mechanisms such as tax credits over tax deductions. Ilan Benshalom, *The Dual Subsidy Theory of Charitable Deductions*, 84 Ind. L.J. 1047, 1057-58 & n.39 (2009); *see also* Brian H. Jenn, *The Case for Tax Credits*, 61 Tax. Law. 549, 556 (2008) (noting that tax deductions are inequitable because "the deduction is worth more to the higher-income taxpayer than the lower-income taxpayer").

[5] This report is available at http://azdor.gov/ReportsResearch/TaxExpenditures.aspx.

also take a deduction for contributions to section 501(c)(3) organizations other than STOs[6] and the Arizona Department of Revenue estimated the value of the deductions that they took in 2005 for contributions to section 501(c)(3) organizations to be approximately $141 million.[7] Ariz. Dep't of Revenue, *The Revenue Impact of Arizona's Tax Expenditures FY 2006/2007*, at 58 (Sept. 2010) (hereinafter *Tax Expenditures Report FY 2006/2007*).[8] But whether a taxpayer receives a credit or a deduction for her donation, the decision to contribute remains voluntary.

Even if the private contributions to STOs could be characterized as state money, the STOs' decisions to provide scholarships only to religious schools could not be characterized as state action because private individuals make those decisions without any state influence or coercion. This Court has held that the decisions of private entities that receive virtually all of their funding from the State are not attributable to the State unless the State coerces or strongly encourages the challenged decision. *See Rendall-Baker v. Kohn*, 457 U.S. 830, 840-42 (1982) (teachers'

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[6] Arizona taxpayers can take a state tax deduction for their contributions to STOs if they have not received a credit for the amounts contributed. *See* A.R.S. § 43-1089(E) (2010) (Garriott Br. App. 6).

[7] The estimated value of the deductions for tax years after 2005 are not yet available. *Id.*

[8] This report is available at http://azdor.gov/ReportsResearch/TaxExpenditures.aspx.

discharges from a private school were not attributable to the State even though virtually all of the school's income was derived from government funding because the decisions to discharge the teachers "were not compelled or even influenced by any state regulation"); *Blum*, 457 U.S. at 1011 (rejecting nursing home residents' due process claims against state officials even though the State subsidized the nursing homes' operating and capital costs by paying the medical expenses of more than ninety percent of the nursing homes' patients because the State was not responsible for the nursing homes' decisions to discharge patients).

Respondents also argue that STOs are not private charitable organizations because they "serve the state's purpose of enhancing school-choice opportunities for Arizona parents." Resp. Br. at 26.[9] But this

[9] Respondents attach significance to the change from describing an STO as a "charitable organization" in A.R.S. § 43-1089(G)(3) (2009) (Garriott Pet. App. 120a) to describing an STO as a "nonprofit organization" in A.R.S. § 43-1602(A) (2010) (Garriot Br. App. 9). This change is insignificant because the legislature continues to require STOs to be exempt from federal taxation under 26 U.S.C. § 501(c)(3). *Compare* A.R.S. § 43-1089(G)(3) (2009) *with* A.R.S. § 43-1602(A) (2010). Qualifying purposes under section 501(c)(3) include religious, charitable, scientific, literary, and educational purposes. 26 U.S.C. § 501(c)(3). However, all of those purposes are considered "charitable purposes." *See Bob Jones Univ. v. United States,* 461 U.S. 574, 586 (1983) (Congress intended that the entitlement to a tax exemption under section 501(c)(3) "depends on meeting certain common law standards of charity – namely, that an institution seeking tax-exempt status must serve a public purpose and not

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Court has not held that a private entity's actions are attributable to the State even when the entity receives virtually all of its funding from the State and performs a public function. In *Rendall-Baker*, the Court observed that there was no doubt that "education of maladjusted high school students is a public function" and that the legislature had intended to pay for the services, but held that the private school that performed this public function was not a state actor because this function had not been "'traditionally the *exclusive* prerogative of the State.'" 457 U.S. at 842 (quoting *Jackson*, 419 U.S. at 353). Respondents have not demonstrated that providing scholarships to students attending private schools is traditionally the State's exclusive prerogative. To the contrary, this function has traditionally been performed by private organizations. *See* Br. Amici Curiae of United States Conference of Catholic Bishops, et al., in Support of Petitioners at 13.

Respondents also argue that STOs are state actors because the 2010 amendment to Section 1089 increased the State's regulatory authority over STOs. Resp. Br. at 21-22, 29. The 2010 amendment does subject STOs to increased state supervision and does require them to include more information in their

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be contrary to established public policy"); *see also Tax Expenditures Report FY 2006/2007* at 58 (describing deductions that "were allowed for contributions to religious, charitable, educational, scientific or literary organizations" as the "[c]haritable [c]ontribution [d]eduction").

annual reports to the Department of Revenue. *See* Resp. Br. at 10-11 & App. 4-17. But the increased regulation and reporting requirements further the legislative goal of making STOs more accountable and transparent.[10] *See* Garriott's Reply to Resp. Supp. Br. at 4-8 (explaining that the amendment's purpose was to increase accountability and transparency and describing how the amendment furthered that goal). The 2010 amendment does not change the fundamental characteristics of STOs that make them private organizations that the State regulates rather than state agencies. Under the 2010 amendment, private individuals continue to form STOs as section 501(c)(3) organizations that determine to whom and under what standards they will award scholarships to designated private schools. The additional state regulation that the amendment imposes on STOs is "no different than, and in many instances less demanding than, the requirements already imposed on STOs as 501(c)(3) nonprofit corporations at both the state and federal level." Pet. Arizona Christian School Tuition Organization's (ACSTO's) Reply to Resp. Supp. Br. at 5-8 (discussing federal and state requirements imposed on section 501(c)(3) organizations and other nonprofit organizations).

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[10] It is ironic that Respondents complained vehemently about the STOs not being sufficiently regulated until the legislature responded to the criticism by amending Section 1089, Resp. Br. in Opp. at 8-12, but now object to the increased regulation.

Even extensive state regulation of a business "does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." *Jackson*, 419 U.S. at 350. In *Jackson*, the Court held that a private utility's termination of a customer's electricity was not state action because there was not a sufficiently close nexus between the State and the decision to terminate: "Respondent's exercise of choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." *Id.* at 457 (footnote omitted). Here, the decision of some STOs to provide scholarships only to religious schools cannot be attributed to Arizona because it does not regulate those choices.

Finally, without specifically arguing it, Respondents suggest that Arizona's relationship to the STOs is comparable to the government's relationship to a government-created and -controlled corporation such as Amtrak. Resp. Br. at 58 n.12 (citing *Lebron*, 513 U.S. at 378, 397). In *Lebron*, the Court held that Amtrak was part of the government for First Amendment purposes because the government "create[d] the corporation by a special law, for furtherance of governmental objectives, and retain[ed] for itself permanent authority to appoint a majority of the directors of that corporation." 513 U.S. at 400. Of course, STOs are nothing like Amtrak – not because there are more than fifty of them – but because Arizona does not create them and does not control their operation either by holding an ownership

interest in them or by appointing the members of their boards of directors.

II. Respondents' Standing Analysis Is Faulty Because They Incorrectly Characterize Section 1089 as a Government Spending Program.

Respondents' argument that they have standing under *Flast v. Cohen*, 392 U.S. 83 (1968), fails to the extent that they rely on their characterization of Section 1089 as a direct government spending program that is like the program in *Bowen v. Kendrick*, 487 U.S. 589 (1988). *See* Resp. Br. at 40-42.[11] Both *Flast* and *Bowen* involved governmental grants that were provided directly to religious organizations. *See Flast*, 392 U.S. at 86-87, 91 n.3 (federal taxpayers challenged a congressional enactment that required federal officials to provide federal funds to the State to provide services and resources to educationally deprived students in private schools, including religious schools); *Bowen,* 487 U.S. at 597 (federal taxpayers challenged the Adolescent Family Life Act, which provided federal funds to a number of grantees with institutional ties to religious denominations). In contrast to the grant programs in *Flast* and *Bowen*,

[11] Although Petitioner Garriott did not address standing in his opening merits brief, he addresses it briefly in this reply because Respondents for the first time base their standing argument on their mischaracterization of Section 1089 as a direct government spending program.

Section 1089 does not disburse government funds and does not direct the transfer of government money to religious institutions. It instead provides a tax benefit to private individuals who voluntarily donate money to the STO of their own choosing.[12]

Respondents also place substantial reliance on this Court's decisions that addressed taxpayer Establishment Clause challenges to tax benefit plans without addressing standing, such as *Mueller v. Allen*, 463 U.S. 388 (1983), and *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), and on the Court's failure to raise standing in *Hibbs v. Winn*, 542 U.S. 88 (2004). Resp. Br. at 32-35.[13] But the Court is not bound by these cases

[12] Respondents also err in equating the harm from a tax benefit to the harm from a direct grant by relying on the Arizona Department of Revenue's estimate of the revenue lost as a result of the private-school-tuition-organization credit. *See* Resp. Br. at 32 (citing *Tax Expenditures Report FY 2008/2009*, at 48). The Department of Revenue acknowledges that the total value is "only a general guide and should not be used in isolation from the rest of the expenditure amounts," *Tax Expenditure Report FY 2008/2009*, at 1, and makes no attempt to determine if the State saves money because it does not pay for the education of private school students. As this Court has noted, it is not clear whether tax breaks deplete the treasury. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006) ("The very point of the tax benefits is to spur economic activity, which in turn *increases* government revenues.").

[13] Respondents incorrectly assert that the United States did not mention standing in its amicus brief in *Hibbs*. Resp. Br. at 15, 33. The United States noted that "[w]hether the challenge to the state credit in this case falls within the scope of those decisions [*Flast* and *Valley Forge Christian College v. Americans*

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because it did not address standing in them. *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."); *see also Flast*, 392 U.S. at 92 n.5 (noting that the Court had accepted jurisdiction in taxpayer suits without passing directly on the standing question in at least three cases prior to deciding that the taxpayers did not have standing in *Frothington v. Mellon*, 262 U.S. 447 (1923)). Now that the standing issue is squarely before the Court, it should consider whether direct governmental expenditures are different from indirect tax benefits for purposes of taxpayer standing as well as for purposes of determining the merits of Establishment Clause challenges. *See Walz*, 397 U.S. at 690 (Brennan, J., concurring) (noting that tax exemptions and general subsidies provide economic assistance in "fundamentally different ways" because "[a] subsidy involves the direct transfer of public money to the subsidized enterprise and uses resources exacted from taxpayers as a whole" but "[a]n exemption . . . involves no such transfer").

United for Separation of Church & State, Inc., 454 U.S. 464 (1982)], or otherwise satisfies the Article III standing requirement (see *Doremus v. Board of Education*, 342 U.S. 429, 434-435 (1952)), was not raised or addressed below." Br. for the United States as Amicus Curiae Supporting Petitioner at 3 n.1, *Hibbs v. Winn*, 542 U.S. 88 (2004) (No. 02-1809).

III. Section 1089 Does Not Violate the Establishment Clause.

Respondents base their argument that Arizona's program violates the Establishment Clause on their distorted characterization of the holding in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and their mischaracterization of Section 1089 as a direct aid program. Their argument also ignores *Hernandez v. Commissioner*, 490 U.S. 680 (1989), and *Walz*, which are clearly relevant because they, like this case, address whether tax benefits violate the Establishment Clause. This Court should reject Respondents' argument because it is contrary to the Court's precedents.

A. Section 1089 Does Not Violate the Principles that *Zelman* Established.

Respondents argue that Section 1089 violates *Zelman*'s principles because it is not neutral with respect to religion and it does not provide parents with true private choice. Resp. Br. at 50-52. Respondents' argument fails because it is based on their mischaracterization of STOs as state actors and it ignores the public school options available to Arizona parents and the constraints on parental choice in *Zelman*.

Respondents argue that under *Zelman*, "'the circuit between government and religion [is] broken, and the Establishment Clause [is] not implicated'" only when the government provides aid to parents on a religiously neutral basis. Resp. Br. at 49 (quoting *Zelman*, 536 U.S. at 652). But *Zelman*'s core principle

is that there is no Establishment Clause violation when "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." 536 U.S. at 649. Such private choices break "the circuit between government and religion." *Id.* at 652.

Under Section 1089, government aid reaches religious schools as a result of private individuals' genuine and independent choices – the choices of individuals who establish STOs, the choices of individuals who contribute to STOs, and the choices of parents who seek STO scholarships. Although the private choices that broke the circuit in *Zelman* were the parents' choices of the schools at which to use the vouchers, nothing in *Zelman* suggested that the only permissible circuit breaker in an indirect government aid program is parental choice. Section 1089 is a program of true private choice under *Zelman* because more private choices break the circuit between the State and any aid that flows to religion under it than under the *Zelman* program and the State does not influence any of those private choices in favor of religion.

Respondents argue that Section 1089 is not neutral with respect to religion because "more than half of its scholarships are awarded to parents and children on the basis of their religion." Resp. Br. at 51.[14] Respondents thus equate the individual

[14] This assertion demonstrates a shift in Respondents' argument, and it is not supported by Respondents' complaint or

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taxpayer choices about which STOs to support and the individual STO decisions concerning which schools to support by providing scholarships with state action. But taxpayers' decisions to contribute to STOs and STOs' decisions to support religious schools are fully private choices for Establishment Clause analysis purposes. And *Zelman* does not provide authority for attributing private choices to the State. Instead, the Court concluded that "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Zelman*, 538 U.S. at 652.

In *Zelman*, the private actions of those individuals who chose to operate and support private schools and chose to participate in the voucher program constrained the choices of families who were deciding whether to use the vouchers at religious or secular schools. The *Zelman* plaintiffs and Justice Souter's dissent objected to the Cleveland voucher program because eighty-two percent of the private schools participating in the program were religious. 536 U.S.

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any other fact in the record. Respondents' complaint alleges that STOs that provide scholarships only to religious schools awarded a majority of the scholarships in the program's first year of operation and that STOs "may restrict their grants of State funds only to children of a specific religious denomination." ACSTO's Pet. App. 119a, 122a. There is no basis for Respondents' assumption herein that a majority of religious STOs and private schools discriminate based on religion.

at 703 (Souter, J., dissenting) (stating that forty-six of the fifty-six private schools in the district were religious). The Court refused to attribute constitutional significance to this figure because the preponderance of religiously affiliated private schools in Cleveland did not arise as a result of the program and because attributing constitutional significance to it would have had "the absurd result" of making "a neutral school-choice program . . . permissible in some parts of Ohio, . . . where a lower percentage of private schools are religious schools." *Id.* at 657; *see also Mueller*, 463 U.S. at 401 (noting that the Court would not "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" because such an approach would not provide certainty and would be impossible to administer). The preponderance of religiously affiliated private schools in Arizona, like the preponderance of such schools in *Zelman*, did not arise because of the challenged program. *Compare Kotterman*, 972 P.2d at 626 (Feldman, J., dissenting) (noting that at least seventy-two of Arizona's private schools were religious before Section 1089 went into effect) *with* Vicki Murray, Goldwater Inst. Report No. 199, *Survey of Arizona Private Schools: Tuition, Testing and Curricula*, at 1 (2005) (noting that seventy-five percent of the private schools that participated in the survey in 2004 were religious).[15]

[15] The percentage of religiously affiliated private schools in Arizona is not significantly different from the percentage of

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Moreover, Respondents' disdain for Section 1089's structure, which allows taxpayers and STOs to choose how money that is contributed as a result of the tax credit is ultimately distributed, is contrary to *Zelman*'s principles concerning private choice. For example, Justice Souter objected to the Cleveland program because religious schools allegedly had an advantage due to, among other things, "donations of the faithful." 536 U.S. at 705 n.15 (Souter, J., dissenting). The Court rejected the notion that the religious schools had an advantage, pointing out that nonreligious schools can receive the same assistance if people want to give it to them. *Id.* at 658 n.4 (noting "that nonreligious private schools operating in Cleveland also seek and receive substantial third-party contributions" and that "several *nonreligious* schools have been created" since the voucher program began). Section 1089 provides exactly the same incentive to taxpayers who favor private secular schools as it does to those who favor private religious schools. Taxpayers who want to contribute to private secular schools can form STOs limited to that purpose, contribute to them, and receive tax credits. Nothing in the program's terms or structure discourages them from doing so.

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religiously affiliated private schools nationwide. U.S. Dep't of Educ., *Private School Universe Survey: 2007-2008*, at 2 (2009) (*available at* http://nces.ed.gov/pubs2009/2009313.pdf) (stating that 67.9% of private schools, enrolling 80.6% of private school students, had a religious orientation or purpose).

Respondents also argue that Section 1089 is contrary to *Zelman* because parents do not have a "'genuine and independent' choice about where to use scholarships." Resp. Br. 52 (quoting *Zelman*, 536 U.S. at 649). But Respondents steadfastly ignore the Court's admonition that the Establishment Clause question of whether a state program is favoring religion "must be answered by evaluating *all* the options [that a State] provides [its] schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school." *Zelman*, 536 U.S. at 655-56. As Petitioners explained, Arizona provides a host of secular educational options to Arizona students. *See* Garriott Br. at 36-39; ASCTO Br. at 56-57; *see also* Resp. (Arizona School Choice Trust, et al.) Br. in Support of Petitioners at 39-43.

Respondents complain that Section 1089 helps only a very small group of students. Resp. Br. at 46-47. But they fail to acknowledge that the vast majority of Arizona parents choose to send their children to public schools because the public schools are free and provide a variety of options from which to choose. Apparently, Respondents do not suggest that Arizona is coercing or influencing anyone to choose a religious school over a secular one; instead, they are not comfortable with any indirect aid – which they mischaracterize as direct aid – going to religious STOs. But such a principle is inconsistent with the Court's precedents. And Respondents do not explain how eliminating the tax credit will enhance parental choice.

Respondents also fail to address *Hernandez* and *Walz*. In *Hernandez*, 490 U.S. at 696, this Court

upheld the deduction for contributions to charitable entities, including religious organizations, provided by 26 U.S.C. § 170. The Court found that the deduction did not have the primary effect of advancing or inhibiting religion. *Id.* In *Walz*, 397 U.S. at 673, this Court held that New York's property tax exemption for nonprofit organizations, including churches, did not violate the Establishment Clause. Respondents acknowledge that the tax credit here is like the deduction in *Mueller* and the tax exemption in *Walz* when they urge the Court to find that they have standing. Resp. Br. at 35. But Respondents do not explain why allowing deductions for contributions to religious organizations and exemptions for religious organizations themselves does not convert the amount of the tax benefit in question into state funds for Establishment Clause purposes, but allowing credits for contributions to religious organizations does convert the amount of the credit into state funds for the same purposes. As discussed above, there is no constitutional basis for the distinction.[16]

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[16] Amici Curiae criticize Section 1089 because no credit is available to offset the tuition that students must pay if they wish to transfer to a different public school district. Br. of Amici Curiae National School Boards Association, et al., in Support of Respondents at 17-18 & n.5. Because Arizona school districts do not charge tuition to students who are Arizona residents but live outside their districts, A.R.S. § 15-816.01, there is no need for a credit for payment of public school tuition. And Arizona provides a tax credit for contributions to public schools to pay for expenses related to extracurricular activities or character-education programs. A.R.S. § 43-1089.01.

B. Section 1089 Is Not a Direct Aid Program.

Respondents argue that Section 1089, as applied, is unconstitutional under *Bowen v. Kendrick*, 487 U.S. 589 (1988). Resp. Br. at 56-57. Section 1089 is not unconstitutional under *Bowen* because neither the State nor any state official directs state funds to religious organizations under Section 1089.

Bowen involved an Establishment Clause challenge to the direct aid program that Congress mandated in the Adolescent Family Life Act (AFLA). 487 U.S. at 593 ("[T]he AFLA is essentially a scheme for providing grants to public or nonprofit private organizations or agencies for services and research in the area of premarital adolescent sexual relations and pregnancy.") (internal quotation marks omitted). A statute mandating direct aid has the effect of advancing religion on its face when "the statute directs government aid to pervasively sectarian institutions." *Id.* at 610. Although the Court found that the AFLA was not unconstitutional on its face because it did not direct federal funds to pervasively sectarian religious institutions, it held that the AFLA could be unconstitutional, as applied, if the Secretary of Human and Health Services approved federal grants to pervasively sectarian religious institutions. *Id.* at 621-22.

As this Court explained in *Zelman*, its "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." 536 U.S. at 649 (internal citations omitted). Because taxpayers who contribute to STOs are not the State, but are private individuals exercising private choice, and STOs are private organizations that are also exercising private choice, Section 1089 is a program of true private choice and not a direct aid program.[17]

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[17] Although the court of appeals erroneously found that parents might believe that Section 1089 favored religion, it correctly found that *Bowen* did not apply because Section 1089 is "an indirect aid program" and "STOs are private charitable organizations." Garriott Pet. App. 21a.

CONCLUSION

For the foregoing reasons and those stated in Petitioner's opening brief, this Court should reverse the court of appeals' decision.

Respectfully submitted,

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