No. _____

In The
Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL
TUITION ORGANIZATION, et al.,
Petitioners,

v.

KATHLEEN M. WINN, et al.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

BENJAMIN W. BULL
GARY S. MCCALEB
JEREMY D. TEDESCO
ALLIANCE DEFENSE FUND
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

DAVID A. CORTMAN
Counsel of Record
ALLIANCE DEFENSE FUND
1000 Hurricane Shoals Rd., NE
Suite D-600
Lawrenceville, GA 30043
(770) 339-0774
dcortman@telladf.org

Counsel for Petitioner
Arizona Christian School Tuition Organization

February 18, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Do Respondents lack taxpayer standing because they do not allege, nor can they, that the Arizona Tuition Tax Credit involves the expenditure or appropriation of state funds?

2. Is the Respondents' alleged injury—which is solely based on the theory that Arizona's tax credit reduces the state's revenue—too speculative to confer taxpayer standing, especially when considering that the credit reduces the state's financial burden for providing public education and is likely the catalyst for new sources of state income?

3. Given that the Arizona Supreme Court has authoritatively determined, under state law, that the money donated to tuition granting organizations under Arizona's tax credit is private, not state, money, can the Respondents establish taxpayer standing to challenge the decisions of private taxpayers as to where they donate their private money?

PARTIES TO THE PROCEEDING

Petitioners are Gale Garriott, in his official capacity as Director of the Arizona Department of Revenue, Arizona School Choice Trust, Luis Moscoso, Glenn Dennard, and Arizona Christian School Tuition Organization.

Respondents are Kathleen M. Winn, Maurice Wolfthal, and Lynn Hoffman.

CORPORATE DISCLOSURE STATEMENT

Petitioners Arizona Christian School Tuition Organization and Arizona School Choice Trust do not have parent companies and are not publicly held.

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DECISIONS BELOW

The district court's ruling granting Arizona School Choice Trust's motion to dismiss is reported at 361 F. Supp. 2d 1117 and reprinted in Appendix (App.) at App. 44a-59a. The Ninth Circuit panel opinion is reported at 562 F.3d 1002 and reprinted in App. 1a-43a. The order denying the petitions for rehearing en banc, and the accompanying opinions concurring and dissenting from the order, appear at 586 F.3d 649 and are reprinted in App. 62a-110a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its decision on April 21, 2009. The Ninth Circuit denied the petitions for rehearing en banc on October 21, 2009. On January 15, 2010, Petitioners obtained an extension of time, up and until February 18, 2010, to file petitions for writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

A.R.S. § 43-1089, which is the statute creating the tuition tax credit program at issue in this case, is too lengthy to include herein. Pursuant to Rule 10(1)(f), the full text of this statute is set out in the appendix at App. 112a-115a.

STATEMENT OF THE CASE

A. Factual Background

The facts material to the questions presented are simple and straightforward. In 1997, the Arizona Legislature enacted Ariz. Rev. Stat. § 43-1089, which allows Arizona taxpayers to donate private funds to a "school tuition organization" ("STO") of their choice. § 43-1089(A), App. 112a. The taxpayer may then claim a dollar-for-dollar credit on their state income tax for the amount donated, which is capped at $500 for individual filers and $1000 for married couples filing a joint return. §§ 43-1089(A)(1)-(3), App. 112a.

STOs are private, charitable, tax-exempt corporations. § 43-1089(G)(3), App. 115a. Anyone can form an STO. App. 85a. STOs are mandated by statute to donate a minimum of ninety percent of their income to children who attend private schools. § 43-1089(G)(2)-(3), App. 114a-115a. Any STO may provide scholarships to students to attend any school, and the only limitation is that they cannot provide scholarships to students of only one school. § 43-1089(G)(3), App. 115a. Parents are responsible for deciding which school their child attends, and applying for a scholarship from an appropriate STO. App. 86a.

Under Arizona's tax credit program, the private choices of taxpayers, the STOs, and parents direct tuition funds to students. App. 52a-53a. The taxpayer chooses to donate or not, and if he donates, to which STO. App. 52a. The privately formed, non-profit STOs raise money to award scholarships to schools of their choice. App. 52a-53a. Each parent is responsible for deciding which school his or her child attends, and which STO to apply to for a scholarship. App. 52a.

Finally, the Arizona Supreme Court, in *Kotterman v. Killian*, 972 P.2d 606, 618 (Ariz. 1999), *cert. denied,* 528 U.S. 921 (1999), authoritatively determined, as a matter of state law, that the funds generated by Arizona's tax credit are private money to which the state has no legal claim.

B. Procedural Background

Respondents filed this lawsuit in Arizona Federal District Court on February 15, 2000. The Complaint alleged that Arizona's tuition tax credit violated the Establishment Clause of the United States Constitution both on its face and as applied. App. 118a.[1]

The district court dismissed the Complaint pursuant to the Tax Injunction Act, 28 U.S.C. § 1341. The Ninth Circuit reversed that judgment. *Winn v. Killian*, 307 F.3d 1011 (9th Cir. 2002). This

[1] At oral argument before the Ninth Circuit, the Respondents abandoned their facial challenge. App. 7a n.5.

Court affirmed that decision. *Hibbs v. Winn*, 542 U.S. 88 (2004).

Upon remand, the district court granted intervention to ACSTO, ASCT, and two parents whose children receive tax credit funded scholarships. The intervenors filed motions to dismiss the Complaint, and the State Defendant filed a motion for judgment on the pleadings. Taken together, the various filings argued that the Complaint should be dismissed because the Respondents lacked standing; the Respondents' Complaint failed to state an Establishment Clause claim upon which relief could be granted; and the Respondents' claims were decided by the Arizona Supreme Court in *Kotterman*, and thus barred by res judicata. On March 24, 2004, the district court granted ASCT, et al.'s motion to dismiss, holding that Respondents' Complaint failed to state a claim under the Establishment Clause because the tax credit was a program of true private choice in which money reached religious schools by way of "multiple layers of private choice." App. 52a. The Respondents timely appealed on April 22, 2005.

On April 21, 2009, the Ninth Circuit reversed the district court's dismissal, and remanded the case so the Respondents could pursue their as-applied challenge to Arizona's tax credit program. ACSTO, ASCT, et al., and the State Defendant filed timely petitions for rehearing en banc on May 14, 2009. The Ninth Circuit denied rehearing en banc on October 21, 2009. Judge O'Scannlain, writing for seven other judges, dissented from the denial of rehearing en

banc. Judge O'Scannlain stressed the national significance of the panel's decision, stating that it "casts a pall over comparable educational tax-credit schemes in states across the nation and could derail legislative efforts in four states within our circuit to create similar programs." App. 84a. Judge O'Scannlain concluded that the panel's decision "jeopardize[s] the educational opportunities of hundreds of thousands of children nationwide." App. 84a.

REASONS FOR GRANTING THE WRIT

Petitioner ACSTO concurs with the petitions for certiorari of the State Defendant and of Arizona School Choice Trust, *et al.*, and urges this Court to grant certiorari for the reasons stated therein.

Rather than reiterating the Establishment Clause arguments amply and aptly presented by ASCT and the State, ACSTO submits a separate petition urging the Court to grant certiorari for an additional reason not addressed in the State's or ASCT's petitions: that the Ninth Circuit erred in finding that the Respondent satisfied the requirements of taxpayer standing. The petition should be granted to address this issue, in addition to the Establishment Clause issues raised by the State and ASCT, because the Ninth Circuit's holding regarding the important federal question of taxpayer standing conflicts with decisions of this Court and of the Arizona Supreme Court in several ways.

First, the Ninth Circuit's finding of taxpayer standing conflicts with decisions of this Court holding that to establish taxpayer standing in the context of an Establishment Clause challenge, a plaintiff must allege "the very 'extract[ion] and spend[ing]' of 'tax money' in aid of religion." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 348 (2006) (quoting *Flast v. Cohen,* 392 U.S. 83, 106 (1968)). Respondents do not make any such allegation here, nor could they, since Arizona's tax credit program does not levy a tax or appropriate any money. It simply allows private citizens to donate their money to a charitable organization that grants tuition scholarships. The Ninth Circuit's holding that a taxpayer has standing to bring a federal lawsuit challenging private individuals' decisions on how to donate their own money directly conflicts with this Court's decisions, warranting review and reversal by this Court.

Second, the Ninth Circuit's finding of taxpayer standing conflicts with decisions of this Court stating that Article III standing requires an injury that is actual and concrete, not speculative or conjectural. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Respondents predicate their standing solely on the theory that Arizona's tax credit reduces the state's revenue. The problem with Respondents' theory is that their injury is inherently subjective and speculative. The impact of Arizona's tax credit on Arizona's tax revenue defies calculation. While the tax credit results in millions of dollars flowing to STOs in order to fund scholarships for private education each year, it also saves the

state millions of dollars each year by reducing the state's financial outlays for public education. It also likely creates new sources of tax income. The Ninth Circuit's finding that Respondents have standing marks an unwarranted expansion of Article III standing into the realm of speculative injuries, in direct conflict with decisions of this Court. Review and reversal by this Court is therefore warranted.

Third, the Ninth Circuit's opinion conflicts with this Court's frequent holding that federal courts are bound by authoritative interpretations of state law by a state's highest court. In finding that Respondents have taxpayer standing, the Ninth Circuit disregarded the Arizona Supreme Court's holding in *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) that, under Arizona state law, the funds flowing to school tuition organizations are private monies. Rather than follow this holding, the Ninth Circuit supplanted it with its own view that Arizona's tax credit involves the allocation of state funds. The Ninth Circuit's opinion thus directly conflicts with decisions of the Arizona Supreme Court and this Court, and review and reversal by this Court is warranted.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT REGARDING THE ALLEGATIONS NECESSARY TO CONFER TAXPAYER STANDING.

This Court's decision in *Flast v. Cohen*, 392 U.S. 83 (1968), created an exception in certain types of Establishment Clause cases to the general rule that

"state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers." *DaimlerChrysler Corporation v. Cuno*, 547 U.S. 332, 346 (2007). Recent decisions of this Court have stressed that "the *Flast* exception has a 'narrow application in our precedent,' that only 'slightly lowered' the bar on taxpayer standing, and that must be applied with 'rigor.'" *Hein v. Freedom From Religion Foundation*, 551 U.S. 587, 609 (2007) (citations omitted).

Under *Hein*, *Flast* and *DaimlerChrysler*, to establish standing a taxpayer-plaintiff must show that the state has extracted taxes from them, or has appropriated and spent public monies, to fund a program that allegedly violates the Establishment Clause. For example, in *Hein*, the Court held that the plaintiffs lacked standing to challenge the use of tax money by the Executive Branch of the federal government to pay for religious conferences and speeches. 551 U.S. at 605. The plaintiffs in *Hein* argued for a broad interpretation of *Flast*, stating that *Flast* confers standing where "any 'expenditure of government funds in violation of the Establishment Clause'" is challenged. *Id*. at 603. But this Court rejected this interpretation, instead holding that only "expenditures . . . made pursuant to an express congressional mandate and a specific congressional appropriation" satisfied *Flast*'s standing requirements. *Id*. *Accord DaimlerChrysler*, 547 U.S. at 348 (observing that the taxpayer injury that satisfies standing in Establishment Clause cases is "the very 'extract[ion] and spend[ing]' of 'tax

money' in aid of religion" (quoting *Flast*, 392 U.S. at 106)).

In fact, as far back as 1952, this Court held that a taxpayer challenging a practice under the Establishment Clause must allege "a good-faith pocketbook action" in which there is a "direct dollars-and-cents injury." *Doremus v. Board of Ed. of Borough of Hawthorne*, 342 U.S. 429, 434 (1952). This requires a taxpayer-plaintiff to show "a measurable appropriation or disbursement of [public] funds occasioned solely by the activities complained of." *Id.* The taxpayer-plaintiff in *Doremus* lacked standing because he could not show that any tax funds had been spent on the school's practice of having the Bible read at the beginning of each school day. In rejecting plaintiff's standing, the Court said that he, like Respondents here, was seeking to litigate a "grievance [that] is not a direct dollars-and-cents injury but is a religious difference." *Id.*

Respondents lack taxpayer standing here for the same reason this Court rejected standing in *Hein* and *Doremus*. Nowhere in the Complaint do Respondents allege, nor could they, that taxpayer funds have been extracted from them, or otherwise appropriated, and spent, to implement Arizona's tuition tax credit program.[2] Indeed, the challenged

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[2] In fact, as discussed in § III, *infra*, the Arizona Supreme Court decided in *Kotterman*, 972 P.2d at 618, that the money that flows to STOs as a result of Arizona's tax credit is private, not public, money. This holding, with which the Ninth Circuit's

program does not levy any tax upon the Respondents, nor does it appropriate public funds, to be used to support religious education. Rather, it offers taxpayers the choice of taking a tax credit so they may voluntarily donate their money to support charitable organizations of their choosing. How much money, and to which STOs and students it goes, are decisions made by private taxpayers and parents, not by the legislature.

Put simply, any effect upon Arizona's tax revenues (and Respondents' claims regarding the alleged effect are entirely speculative and thus insufficient to confer standing, *see* § II, *infra*), results solely from individual taxpayers making private, independent choices to avail themselves of tax credits. The legislature has appropriated no sum of money to fund its program, nor taxed the Respondents to support it. Respondents therefore lack taxpayer standing under this Court's precedent, and the Ninth Circuit's finding to the contrary is in conflict with that precedent.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT STATING THAT A SPECULATIVE AND CONJECTURAL INJURY CANNOT CONFER ARTICLE III STANDING.

In their Complaint, Respondents expressly admit that their taxpayer standing argument is not based on the traditional and required "tax and spend"

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decision directly conflicts, forecloses any argument that the tax credit diverts state tax funds to religious schools.

injury. Rather, Respondents predicate their standing argument solely on the theory that Arizona's tax credit program diminishes the State's revenues. App. 126a ("Plaintiffs and other Arizona taxpayers have been and will continue to be irreparably harmed by the diminution of the state general fund through the tax credit program described above"). In addition to conflicting with the requirements of *Hein*, *Flast*, *Doremus*, and *DaimlerChrysler* set out *supra*, the Ninth Circuit's acceptance of Respondents' standing theory also conflicts with this Court's decisions regarding the prerequisites for Article III standing.

Article III requires a taxpayer-plaintiff to demonstrate a "concrete and particularized" injury, that is "actual or imminent," not "conjectural or hypothetical." *DaimlerChrysler*, 547 U.S. at 344. *See also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 480 n.17 (1982) (noting that "any connection between the challenged property transfer and respondents' tax burden is at best speculative and at worst nonexistent"). A mere grievance that the taxpayer "suffers in some indefinite way in common with people generally" is insufficient. *DaimlerChrysler*, 547 U.S. at 344.

The plaintiffs in *DaimlerChrysler* challenged a state tax credit provided to the DaimlerChrysler corporation to induce it to keep a manufacturing plant within the State. *Id.* at 337-38. Like the Respondents here, the plaintiffs in *DaimlerChrysler* based their standing to sue on the alleged reduced State and city revenue that resulted from the tax

credit. *Id.* at 339. The *DaimlerChrysler* plaintiffs' standing argument is indistinguishable from Respondents' argument, as they also claimed that the tax credit "'depletes the funds of the State of Ohio to which the Plaintiffs contribute through their tax payments' and thus 'diminish[es] the total funds available for lawful uses and impos[es] disproportionate burdens on' them." *Id.* at 342-43 (quoting plaintiffs' brief on appeal).

DaimlerChrysler identified two ways in which the plaintiffs claimed "reduced revenue" injury was speculative in nature, and thus insufficient to establish Article III standing. First, it was pure speculation how the challenged tax credit would impact the State treasury. As this Court said, "[I]t is unclear that tax breaks of the sort at issue here do in fact deplete the treasury: The very point of the tax benefits is to spur economic activity, which in turn *increases* government revenues." *Id.* at 344.

The same logic undermines Respondents' "reduced revenue" injury here. Like the tax credit involved in *DaimlerChrysler*, the economic impact of Arizona's tuition tax credit on the State treasury requires too much conjecture and hypothesizing to support Article III standing. Indeed, this Court has recognized that state programs aimed at increasing educational choice by making private school more affordable likely decrease a state's tax burden: "By educating a substantial number of students [private] schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers." *Mueller v. Allen*, 463 U.S. 388, 395 (1983).

In addition to reducing the State's financial burden in providing public education, the tax credits at issue here, like the credits in *DaimlerChrysler*, also likely create other sources of state revenue. For example, Arizona's tax credit likely has increased the number of teaching, administrative, and management positions open at already existing private schools, and also has likely led to the establishment of new private schools in the State. This increase in economic activity correlates to numerous new sources of tax revenues for the State. Put simply, the Respondents' claim that the tax credit diminishes the state treasury is purely speculative and thus is too hypothetical and remote of an "injury" to confer Article III standing.

In finding that Respondents had standing, the Ninth Circuit made the same mistake as Respondents: it only looked at one side of the ledger. The Ninth Circuit stressed that taxpayer donations to STOs had increased significantly since the program's inception, noting that in its first year (1998) Respondents' alleged that taxpayer's claimed $1.8 million in credits while in 2007 the Arizona Department of Revenue reported that taxpayers claimed $54 million in credits. App. 11a-12a n.7. But as *Daimler Chrysler* makes clear, Respondents' "reduced revenue" theory of standing cannot be evaluated by focusing myopically on the credits taken. The other side of the ledger—made up of, *inter alia*, tax savings from reduced public education costs and new sources of tax income created by the program—must also be taken into account.

And, of course, whether tax revenues have actually decreased as a result of the tuition tax credit program is a highly subjective matter, depending largely on how one analyzes the available financial data. For instance, Respondents rely on a Goldwater Institute study of the Arizona tax credit to argue that the credit results in a loss of revenue to the State. Carrie Lukas, *The Arizona Scholarship Tax Credit: Providing Choice for Arizona Taxpayers and Students*, Goldwater Institute Policy Report # 186, Dec. 11, 2003, http://www.goldwaterinstitute.org/article/1204. However, a 2008 study of the program found that "the Private School Tuition Tax Credit saves Arizona taxpayers somewhere from $99.8 to $241.5 million due to students enrolling in private rather than public school," while taxpayer donations amounted to only $55.3 million dollars. Charles M. North, *Estimating the Savings to Arizona Taxpayers of the Private School Tuition Tax Credit*, at 1, http://archive.constantcontact.com/fs035/1011047932616/archive/1102832763902.html. These dueling studies regarding the impact of the tax credit on Arizona's revenue highlight the inherent uncertainty and subjectivity in Respondents' "reduced revenue" standing theory, and it simply cannot confer Article III standing.

DaimlerChrysler provided a second reason why the plaintiffs' alleged injury in that case was "conjectural and hypothetical" which is also applicable here. This Court explained that plaintiffs' alleged injury depended "on how legislators respond to a reduction in revenue, if that is the consequence of the credit." 547 U.S. at 344. The Court expounded:

> Establishing injury requires speculating that elected officials will increase a taxpayer-plaintiff's tax bill to make up a deficit; establishing redressability requires speculating that abolishing the challenged credit will redound to the benefit of the taxpayer because legislators will pass along the supposed increased revenue in the form of tax reductions. Neither sort of speculation suffices to support standing.

Id. (emphasis added). Here, the Plaintiffs have not even alleged that their tax burden has increased as a result of Arizona's tax credit. Even if they did, that allegation would not support standing because their alleged tax increase would be no more than pure speculation regarding the impact of Arizona's tuition tax credit on the State treasury.

Further, as the above quote highlights, Respondents likewise have a problem with the redressability prong of Article III standing. Like the plaintiffs in *DaimlerChrysler*, the Respondents seek to have the tax credit they are challenging enjoined. However, *DaimlerChrysler* points out several reasons why such an injunction would not have provided plaintiffs redress in that case. First, since the "very point of tax benefits is to spur economic activity, which in turn *increases* government revenues," it was not clear that an injunction would remedy the alleged depletion of tax revenue. *Id.* at 344. Second, the Court stated it was pure speculation to assume that abolishing the tax credit

would result in the State passing the supposed increased revenue on to taxpayers in the form of tax reductions. *Id*. The same fatal flaws exist as to Respondents' claim that an injunction against Arizona's tax credit will redress their alleged injury.

III. THE NINTH CIRCUIT'S CONCLUSION THAT THE TAX CREDIT FUNDS ARE PUBLIC FUNDS CONFLICTS WITH DECISIONS OF THE ARIZONA SUPREME COURT AND THIS COURT.

This Court has long held that "state courts are the ultimate expositors of state law" and that federal courts are therefore "bound by their constructions except in extreme circumstances." *Mullaney v. Wilbur,* 421 U.S. 684, 691 (1975). *Accord Cunningham v. California*, 549 U.S. 270, 306 n.8 (2007) ("California Supreme Court's exposition of California law is authoritative and binding on this Court"); *Wainwright v. Goode,* 464 U.S. 78, 84 (1983) (*per curiam*) ("[T]he views of the State's highest court with respect to state law are binding on the federal courts"); *Ring v. Arizona,* 536 U.S. 584, 603 (2002) (recognizing the Arizona Supreme Court's construction of Arizona sentencing law as authoritative).

This line of case law is applicable here because determining whether Respondents can establish taxpayer standing depends on whether the money flowing to the beneficiaries of Arizona's tax credit is private or public money. This is a question of state law on which the Arizona Supreme Court has authoritatively spoken: the funds that flow to STOs

and ultimately to children in the form of tuition scholarships, is private, not public, money. As the *Kotterman* court said:

> [N]o 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."

972 P.2d at 618.

Kotterman involved a challenge to the same tax credit program that is at issue here based on the federal Establishment Clause and the Arizona Constitution's Religion Clauses. The *Kotterman* Court's holding that the money contributed to STOs is private money was central to its holding that the program did not violate either the federal or state constitutions. Further, this holding constitutes an authoritative interpretation of state law regarding the nature of the funds generated by Arizona's tax credit. The Ninth Circuit's opinion directly conflicts with *Kotterman*, and with the rule that a state supreme court's interpretation of state law is binding on federal courts, by supplanting *Kotterman*'s interpretation of Arizona law with its view that Arizona's tax credit "'channel[]s . . . [state] assistance' to private organizations." App. 12a.

Importantly, the *Kotterman* decision rejects each of the Ninth Circuit's findings supporting its contrary view that the money involved here is public money. For example, the Ninth Circuit found that the tax credits allowed under Arizona's program are public money because they are deducted after tax liability has been calculated:

> Tax credits are deducted *after* taxpayers' tax liability has been calculated, thereby giving taxpayers dollar-for-dollar "credits" against their state taxes for sums paid to STOs. Tax credits therefore operate differently from tax deductions; whereas tax deductions allow taxpayers only to reduce their income subject to taxation, tax credits allow individuals to make payments to a third party *in satisfaction of* their assessed tax burden.

App. 11a.

The *Kotterman* court directly addresses and rejects this view:

> For us to agree that a tax credit constitutes public money would require a finding that state ownership springs into existence at the point where taxable income is first determined, if not before. . . . We believe that such a conclusion is both artificial and premature. It is far more reasonable to

> say that funds remain in the taxpayer's ownership *at least* until final calculation of the amount actually owed to the government, and upon which the state has a legal claim.

972 P.2d at 618.

The Ninth Circuit also supported its finding that Arizona's tax credit involves public money by claiming that if the money is not donated to an STO it would otherwise be state revenue. App. 14a ("[T]he state legislature has provided only two ways for this money to be spent: taxpayers will either give the dollar to the state, or that dollar . . . *will* end up in scholarships for private school tuition"). Again, *Kotterman* rejected this line of reasoning:

> Petitioners suggest . . . that because taxpayer money could enter the treasury if it were not excluded by way of the tax credit, the state effectively controls and exerts quasi-ownership over it. This expansive interpretation is fraught with problems. Indeed, under such reasoning all taxpayer income could be viewed as belonging to the state because it is subject to taxation by the legislature.

972 P.2d at 618.

Finally, the Ninth Circuit stated that the tax credit operates "as if the state had given each taxpayer a $500 dollar check that can only be

endorsed over to a STO or returned to the state." App. 13a. The quotes from *Kotterman* above directly contradict this finding. Likewise, *Kotterman* rejected the view that "reducing a taxpayer's liability is the equivalent of spending a certain sum of money." 972 P.2d at 620.

The Ninth Circuit asserts that *Kotterman* "has no bearing on [its] analysis of plaintiffs' standing in federal court" because *Kotterman* dealt with whether the tax credit "constitute[s] an 'appropriation of public money' within the meaning of" Arizona's Religion Clauses. App. 12a n.8. But *Kotterman* is not so limited. Indeed, *Kotterman*'s holding that tax credits constitute private money draws from several Arizona cases unrelated to the State constitution's Religion Clauses. *See Kotterman*, 972 P.2d at 617 (relying upon cases dealing with state employee retirement benefits, payments by university regents, and contracts between state agencies and tribal government). Further, *Kotterman*'s adoption of the view that tax credits are not public money because "funds remain in the taxpayer's ownership *at least* until final calculation of the amount actually owed to the government," *id.* at 618, demonstrates that, under Arizona law, tax credits generally (and the tuition tax credits involved here, specifically) are private, not public, money. Additionally, the Ninth Circuit is simply incorrect that the tax credit funds morph between public and private depending on what legal question is being analyzed. The funds are either public or private under Arizona law, and *Kotterman* authoritatively decided that the tax credit funds are private.

Kotterman is an authoritative interpretation of state law regarding the nature of the funds generated by Arizona's tax credit program and is binding on the federal courts. Further, its holding that these funds are private defeats Respondents' standing to sue. No public money is involved, so Respondents are unable to allege the required injury: the extracting and spending of public tax dollars in aid of religion. *See* § I, *supra*. The Ninth Circuit's holding that Respondents have taxpayer standing is predicated on its holding that the tax credit funds constitute public funds. This holding is in direct conflict with the Arizona Supreme Court's interpretation of state law, and with this Court's precedent stating that federal courts are bound by such determinations.

CONCLUSION

For the foregoing reasons, and for the reasons specified in ASCT and the State Defendant's petitions, Petitioner ACSTO respectfully requests that this Court grant review.

Respectfully submitted,

BENJAMIN W. BULL
GARY S. MCCALEB
JEREMY D. TEDESCO
ALLIANCE DEFENSE FUND
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

DAVID A. CORTMAN
Counsel of Record
ALLIANCE DEFENSE FUND
1000 Hurricane Shoals
Rd, NE, Suite D-600
Lawrenceville, GA 30043
(770) 339-0774
dcortman@telladf.org

February 18, 2010

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATHLEEN M. WINN, an Arizona taxpayer; DIANE WOLFTHAL, an Arizona taxpayer; MAURICE WOLFTHAL, an Arizona taxpayer LYNN HOFFMAN, an Arizona taxpayer,
Plaintiffs-Appellants,

v.

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION; ARIZONA SCHOOL CHOICE TRUST; LUIS MOSCOSO; GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue; GLENN DENNARD,
Defendants-Appellees.

No. 05-15754

D.C. No. CV-00-00287-EHC

OPINION

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Argued and Submitted
January 24, 2008—Pasadena, California

Filed April 21, 2009

Before: Dorothy W. Nelson, Stephen Reinhardt and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Fisher

COUNSEL

Marvin S. Cohen (argued), Sacks Tierney, P.A., Scottsdale, Arizona; Paul Bender, Arizona State University College of Law, Tempe, Arizona; and Isabel M. Humphrey, Three Gateway, Phoenix, Arizona, for the plaintiffs-appellants.

Terry Goddard, Arizona Attorney General, and Paula S. Bickett (argued), Phoenix, Arizona, for the defendants-appellees.

Timothy D. Keller (argued) and Clint Bolick, Institute for Justice, Phoenix, Arizona; and Richard D. Komer, Institute for Justice, Washington, D.C., for intervenors-defendants-appellees Arizona School Choice Trust, Glenn Dennard and Luis Moscoso.

Benjamin W. Bull, Gary S. McCaleb, Jeremy D. Tedesco, Alliance Defense Fund, Scottsdale, Arizona, for intervenor-defendant-appellee Arizona Christian School Tuition Organization.

OPINION

FISHER, Circuit Judge:

Arizona law grants income tax credits restricted to taxpayers who make contributions to nonprofit organizations that award private school scholarships to children. Plaintiffs, certain Arizona taxpayers, allege that some of the organizations funded under this program restrict the availability of their scholarships to religious schools, and that the program in effect deprives parents, the program's aid recipients, of a genuine choice between selecting scholarships to private secular schools or religious ones. We conclude that the plaintiffs' complaint, which at this stage of the litigation we must view in the light most favorable to the plaintiffs, sufficiently alleges that Arizona's tax-credit funded scholarship program lacks religious neutrality and true private choice in making scholarships available to parents. Although scholarship aid is allocated partially through the individual choices of Arizona taxpayers, overall the program in practice "carries with it the *imprimatur* of government endorsement." *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002). We therefore hold, contrary to the district court, that plaintiffs' allegations, if accepted as true, are sufficient to state a claim that Arizona's private school scholarship tax credit program, as applied, violates the Establishment Clause of the United States Constitution.

BACKGROUND

Plaintiffs allege that Arizona's Revised Statute § 43-1089 ("Section 1089"), as applied, violates the Establishment Clause of the First Amendment. Section 1089, first enacted by the Arizona legislature in 1997, gives individual taxpayers a dollar-for-dollar tax credit for contributions to "school tuition organizations" ("STOs").[1] A STO is a private nonprofit organization that allocates at least 90 percent of its funds to tuition grants or scholarships for students enrolled in "a nongovernmental primary or secondary school or a preschool for handicapped students" within the state. Ariz. Rev. Stat. Ann. § 43- 1089(G)(2)-(3) (2005).[2] STOs may not provide scholarships to schools that "discriminate on the basis of race, color, handicap, familial status or national origin," but nothing in the statute precludes STOs from funding scholarships to schools that provide religious instruction or that give admissions preferences on the basis of religious affiliation. *Id*. § 1089(G)(2). Individual taxpayers can claim a tax credit of up to $500 for such contributions and married couples filing jointly can claim a credit of up to $1,000, provided the allowable tax credit does not exceed the taxes otherwise due. *Id*. § 1089(A)- (B). Taxpayers may designate their contribution to a

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[1] A parallel statute, which plaintiffs do not challenge in this action, gives corporations a dollar-for-dollar tax credit for contributions to STOs. *See* Ariz. Rev. Stat. § 43-1183.

[2] Hereinafter, all cites to "Section 1089" refer to Arizona Revised Statute Annotated § 43-1089 (2005). Any differences between this current version of Section 1089 and the version in place as of February 2000, when plaintiffs' complaint was filed, are not significant for the purposes of our analysis.

STO that agrees to provide a scholarship to benefit a particular child, so long as the child is not the taxpayer's own dependent. *Id.* § 1089(E). The tax credit is available to all taxpayers in Arizona, regardless of whether they are parents of school-age children or pay any private school tuition themselves.

Section 1089 requires STOs to provide scholarships or tuition grants to children "to allow them to attend *any* qualified school of their parents' choice," but also states that STOs may not provide scholarships while "limiting availability to only students of one school." *Id.* § 1089(G)(3) (emphasis added). On its face, then, Section 1089 could have been interpreted to require all STOs to provide scholarships to any qualified private school in the state, or to permit STOs to provide scholarships to a limited set of schools, so long as that set was greater than one. In practice, plaintiffs allege, many STOs have opted to limit the schools to which they offer scholarships, and a number of STOs provide scholarships that may be used only at religious schools or schools of a particular denomination. For example, plaintiffs allege that Arizona's three largest STOs, as measured by the amount of contributions reported in 1998, each restricts its scholarships to use at religious schools. The largest of these, the Catholic Tuition Organization of the Diocese of Phoenix, restricts its scholarships to use at Catholic schools in the Phoenix Diocese such as St. Mary's, which advertises its mission as being "to provide a quality Catholic education by developing and sustaining a rich tradition grounded in Gospel

and family values." The second largest STO, the Arizona Christian School Tuition Organization, expressly restricts scholarships to use at "evangelical" Christian Schools. The third largest, Brophy Community Foundation, restricts its scholarships to use at two Catholic schools, one of which advertises its goal to be "instill[ing] a knowledge of the truths of faith, enlightened by the post-Conciliar teachings of the Church," and the other of which promotes itself as offering students "an intimate relationship with God" through "the process of nurturing the soul."

Arizona does not specify scholarship eligibility criteria or dictate how STOs choose the students who receive scholarships, and STO-provided scholarships therefore vary considerably. Although STOs may choose to award scholarships primarily based on financial need, Section 1089 does not require it. The availability of scholarships to particular students and particular schools thus depends on the amount of funding a STO receives, the range of schools to which it offers scholarships and the STO's own scholarship allocation decisions and eligibility criteria. Therefore, plaintiffs allege, because the largest STOs restrict their scholarships to sectarian schools, students who wish to attend non-religious private schools are disadvantaged in terms of the STO-provided scholarships available to them. Thus, plaintiffs argue, the disparities in the availability and amount of scholarships for use at religious and secular schools show that the structure of Section 1089, as applied, favors religious over secular

schools, and thereby violates the Establishment Clause.

Before Section 1089 became operative, the Arizona Supreme Court, based on its construction of the statute, held that it did not on its face violate the Establishment Clause or provisions of the Arizona state constitution. *See Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) (en banc).[3] After the statute took effect, different plaintiffs filed this suit against the Director of Arizona's Department of Revenue in the United States District Court for the District of Arizona.[4] Plaintiffs do not contest the facial validity of Section 1089, but rather assert that it violates the Establishment Clause as applied.[5] The district court dismissed the suit as barred by the Tax Injunction Act. *See Winn v. Killian*, 307 F.3d 1011, 1013 (9th

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[3] Significantly, in rejecting the facial challenge, the Arizona Supreme Court interpreted Section 1089 to require that "[e]very STO must allow its scholarship recipients to 'attend *any* qualified school of their parents' choice,' and may not limit grants to students of only one such institution." *Id.* at 614 (quoting Ariz. Rev. Stat. Ann. § 43-1089(E)(2) (2005) (emphasis added)). "Thus," the Arizona Supreme Court concluded, "schools are no more than indirect recipients of taxpayer contributions, with the final destination of these funds being determined by individual parents." *Id.* Because plaintiffs in this action allege that, in practice, Section 1089 permits STOs to restrict the use of their scholarships to *certain* schools, the structure of the program as applied is notably different from the program's structure as it was considered in *Kotterman*.

[4] Current Director Gale Garriott has since replaced former Director Mark Killian as the named defendant.

[5] Plaintiffs' complaint alleged that Section 1089 is invalid both on its face and as applied, but they have since abandoned their facial challenge.

Cir. 2002). We reversed the dismissal, *see id.* at 1020, and the Supreme Court affirmed our decision. *See Hibbs v. Winn*, 542 U.S. 88, 112 (2004). On remand, the district court allowed two STOs, the Arizona Christian School Tuition Organization ("ACSTO") and Arizona School Choice Trust ("ASCT"), and two parents of ASCT scholarship recipients, Glenn Dennard and Luis Moscoso, to intervene as defendants. ACSTO provides scholarships only to religious schools and the ASCT provides scholarships to any private school of the parents' choice.[6] Defendants again moved to dismiss, contending that plaintiffs lacked standing, that the suit was barred by res judicata and that plaintiffs had failed to state a claim under the Establishment Clause. The district court granted defendants' motion to dismiss for failure to state a claim and plaintiffs appealed. We have jurisdiction under 28 U.S.C. § 1291 and we reverse and remand for further proceedings.

STANDARD OF REVIEW

We review the district court's dismissal for failure to state a claim de novo, "accept[ing] all factual allegations in the complaint as true and construe[ing] the pleadings in the light most

[6] We use the term "defendants" to refer to the Director of Arizona's Department of Revenue and the intervening defendants ACSTO, ASCT, Dennard and Moscoso. We use the term "defendant-intervenors" when referring only to the intervening defendants. At oral argument, plaintiffs stipulated that they challenge only those STOs that restrict scholarships to religious schools, and thus we note that ASCT is not being directly challenged.

favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). We affirm the district court "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Enesco Corp. v. Price/Costco, Inc.*, 146 F.3d 1083, 1085 (9th Cir. 1998) (internal quotation marks omitted). "Standing is a question of law that we review de novo." *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1224 (9th Cir. 2008).

ANALYSIS

I. Taxpayer Standing

[1] Plaintiffs' only allegation of injury from the allegedly unconstitutional operation of Section 1089 arises from their status as Arizona taxpayers. It is well established that individuals do not generally have standing to challenge governmental spending solely because they are taxpayers, because "it is a complete fiction to argue that an unconstitutional federal expenditure causes an individual federal taxpayer any measurable economic harm." *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2559 (2007) (plurality opinion). This rule applies with equal force to taxpayer suits challenging an allegedly unconstitutional state action and those challenging federal action. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342-49 (2006); *Arakaki v. Lingle*, 477 F.3d 1048, 1062-63 (9th Cir. 2007). The Supreme Court, however, has long recognized "a narrow exception to the general constitutional prohibition against taxpayer standing" when a

plaintiff contends that a use of funds violates the Establishment Clause. *Hein*, 127 S. Ct. at 2564; *see Flast v. Cohen*, 392 U.S. 83, 88 (1968). Because plaintiffs have alleged that the state has used its taxing and spending power to advance religion in violation of the Establishment Clause, we hold that they have standing under Article III to challenge the application of Section 1089.

[2] As the Supreme Court recently reaffirmed, the *Flast* exception to the general bar against taxpayer standing is rooted "in the history of the Establishment Clause" and is designed to prevent " 'the specific evils feared by [its drafters] that the taxing and spending power would be used to favor one religion over another or to support religion in general.' " *DaimlerChrysler*, 547 U.S. at 348 (alterations in original) (quoting *Flast*, 392 U.S. at 103). The exception recognizes that the "injury" alleged in Establishment Clause challenges to governmental spending arises not from the effect of the challenged program on the plaintiffs' own tax burdens, but from "the very 'extract[ion] and spend[ing]' of 'tax money' in aid of religion." *Id.* (alterations in original) (quoting *Flast*, 392 U.S. at 106). Therefore, to satisfy the *Flast* test for taxpayer standing, plaintiffs need not show that an injunction against a particular taxing or spending program would cause "lawmakers . . . [to] dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally." *Id.* at 348-49. Instead, they need only show that the program challenged involves "a sufficient nexus between the taxpayer's standing as a taxpayer and the . . . [legislative] exercise of

taxing and spending power." *Bowen v. Kendrick*, 487 U.S. 589, 620 (1988).

[3] Section 1089 gives Arizona taxpayers a tax credit for amounts they donate to STOs, up to the statutory cap of $500 for individuals or $1,000 for married couples filing jointly or the taxpayers' entire state tax liability. *See* Ariz. Rev. Stat. Ann. § 43-1089(A), (C). Tax credits are deducted *after* taxpayers' tax liability has been calculated, thereby giving taxpayers dollar-for-dollar "credits" against their state taxes for sums paid to STOs. Tax credits therefore operate differently from tax deductions; whereas tax deductions allow taxpayers only to reduce their income subject to taxation, tax credits allow individuals to make payments to a third party *in satisfaction of* their assessed tax burden. As the Supreme Court explained, "[i]n effect, § 43-1089 gives Arizona taxpayers an election" to direct a portion of the money they owe the state to either a STO or to the Arizona Department of Revenue. *Hibbs*, 542 U.S. at 95. Accordingly, "[a]s long as donors do not give STOs more than their total tax liability, their . . . contributions are costless." *Id.* Tax credits are therefore a powerful legislative device for directing money to private organizations.[7]

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[7] Section 1089's success is evident from the year-over-year increases in contributions since the program took effect. Plaintiffs allege that taxpayers claimed $1.8 million in credits for contributions to STOs in 1998, when the program was under legal challenge that made it unclear whether donors would receive the credit, and over $5.9 million in 1999. According to data on the Arizona Department of Revenue's public website, these contributions appear to have further increased since the filing of plaintiffs' complaint, with

Defendant-intervenors argue that plaintiffs do not have standing to challenge Section 1089 even under the *Flast* exception, because the money directed by taxpayers to STOs under the tax credit program does not pass through the state treasury and therefore the program cannot be characterized as involving any "expenditure" of public funds.[8] The Supreme Court has recognized, however, that state tax policies such as tax deductions, tax exemptions and tax credits are means of "channeling . . . [state] assistance" to private organizations, which can have "an economic effect comparable to that of aid given directly" to the organization. *Mueller v. Allen*, 463 U.S. 388, 399 (1983). The Court has therefore refused to make artificial distinctions between direct grants to religious organizations and tax programs that confer special benefits on religious organizations, particularly tax credits such as the

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taxpayers claiming credits worth over $54 million in 2007. *See* Arizona Department of Revenue Office of Economic Research & Analysis, Individual Income Tax Credit for Donations to Private School Tuition Organizations, 2007, at 3 (April 1, 2008), *available at http://www.revenue.state.az.us/Research Stats/private_schl_credit_report_2007.pdf* (last visited April 13, 2009).

[8] ACSTO's argument that our reasoning is bound by *Kotterman*'s conclusion that the tax credit does not constitute an "appropriation of public money" within the meaning of the Article II, Section 12 and Article IX, Section 10 of the Arizona constitution, *see* 972 P.2d at 617-21, is meritless. The Arizona Supreme Court's holding has no bearing on our analysis of plaintiffs' standing in federal court, which turns on the requirements derived from Article III of the U.S. Constitution. *Cf. Hein*, 127 S. Ct. at 2562 ("One of the controlling elements in the definition of a case or controversy under Article III is standing.") (internal quotation marks and alterations omitted).

one challenged here. As the Court noted, "for purposes of determining whether such aid has the effect of advancing religion," it makes no difference whether the qualifying individual "receives an actual cash payment . . . [or] is allowed to reduce . . . the sum he would otherwise be obliged to pay over to the state." *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 790-91 (1973). In either case, "the money involved represents a charge made upon the state for the purpose of religious education." *Id.* at 791 (internal quotation marks omitted); *see also Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 236 (1987) (Scalia, J., dissenting) ("Our opinions have long recognized — in First Amendment contexts as elsewhere — the reality that tax exemptions, credits, and deductions are a form of subsidy that is administered through the tax system.") (internal quotation marks omitted). In effect, Section 1089 works the same as if the state had given each taxpayer a $500 check that can only be endorsed over to a STO or returned to the state. Because Section 1089 does not allow taxpayers to keep the money under any circumstance — and because it directs how the money will be spent if it is *not* surrendered to the state — we reject the suggestion that this money is not publicly subsidized simply because it does not pass through the treasury.

Nor does Section 1089 lack "a sufficient nexus between the taxpayer's standing as a taxpayer and the . . . [legislative] exercise of taxing and spending power" just because the Arizona legislature does not transfer money to STOs or religious schools directly.

See Bowen, 487 U.S. at 620. The Arizona legislature promulgated Section 1089 under the power conferred by Article IX of the Arizona constitution, a provision that is equivalent to the U.S. Constitution's taxing and spending clause. *See* Ariz. Const. art. IX, § 3. By giving taxpayers a dollar-for-dollar credit for contributions to STOs and then requiring STOs to "allocate[ ] at least ninety percent of . . . [their] annual revenue for educational scholarships or tuition grants to children," the state legislature has provided only two ways for this money to be spent: taxpayers will either give the dollar to the state, or that dollar (or at least 90 percent of it, after allowable STO administrative expenses) *will* end up in scholarships for private school tuition. *See* Ariz. Rev. Stat. Ann. § 1089(G)(3) (2005).

[4] By structuring the program as a dollar-for-dollar tax credit, the Arizona legislature has effectively created a grant program whereby the state legislature's funding of STOs is mediated through Arizona taxpayers. The Court has recognized that taxpayer standing exists even when a legislature does not directly allocate funds to religious organizations, but instead mediates the funds through another agency. *See Bowen*, 487 U.S. at 618-20. Although the Arizona legislature has chosen an alternative method of allocating the funds that Section 1089 makes available to STOs, the Court clarified in *Bowen* that it was the legislature's exercise of its taxing and spending power, rather than the actions of the agency, that permitted taxpayers to raise an Establishment Clause challenge. *See id.* at 619 ("We do not think . . . that

appellees' claim that . . . [appropriated] funds are being improperly used by individual grantees is any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary [of Health and Human Services]."). Accordingly, under *Bowen*, 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.

[5] Consistent with these principles, the Supreme Court has repeatedly decided Establishment Clause challenges brought by state taxpayers against state tax credit, tax deduction and tax exemption policies, without ever suggesting that such taxpayers lacked Article III standing. *See, e.g.*, *Mueller*, 463 U.S. at 390 (state income tax deduction for school expenses that could be claimed for expenses at religious schools); *Nyquist*, 413 U.S. at 789-90 (hybrid state tax deduction-tax credit program for tuition paid to private schools); *Hunt v. McNair*, 413 U.S. 734, 737-38 (1973) (state tax exemption for state-issued revenue bonds that went in part to religious schools); *Walz v. Tax Comm'n*, 397 U.S. 664, 666 (1970) (state property tax exemption for religious nonprofit organizations). The Supreme Court has also repeatedly decided challenges brought by state taxpayers to indirect aid programs — where the ultimate decision to confer aid rested with a private individual and not the

government — and again never suggested that taxpayers lacked standing. *See, e.g.*, *Zelman*, 536 U.S. at 645 (state tuition grants to parents for public or private schools); *Nyquist*, 413 U.S. at 781 (state tuition grants to parents for private schools). Although we acknowledge that "the [c]ourt's exercise of jurisdiction . . . is not precedent for the existence of jurisdiction," *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 795 (9th Cir. 1999) (en banc) (internal quotation marks omitted; alteration in original), we also note that the Court has rejected the suggestion that its consistent past practice of exercising jurisdiction amounts to "mere 'sub silentio holdings' " that "command no respect," *Hibbs*, 542 U.S. at 94. We therefore hold that plaintiffs have standing as taxpayers to challenge Section 1089 for allegedly violating the Establishment Clause.

II. The Establishment Clause

[6] "The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion."[9] *Zelman*, 536 U.S.

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[9] Defendants argue that plaintiffs' as-applied challenge is barred by "res judicata" in light of *Kotterman*. In *Hibbs v. Winn*, however, the Supreme Court observed that "*Kotterman*, it is undisputed, has no preclusive effect on the instant as-applied challenge to § 43-1089 brought by different plaintiffs." 542 U.S. at 95. Insofar as we are free to call this observation into question, we nonetheless find defendants' argument unpersuasive.

Under the full-faith-and-credit statute, 28 U.S.C. § 1738, "[w]e give to a state-court judgment the same preclusive effect

at 648-49 (citing *Agostini v. Felton*, 521 U.S. 203, 222- 23 (1997)).

A. Secular Purpose

The first prong of this standard requires us to consider whether the statute was "enacted for . . . [a] valid secular purpose." *Id.* at 649. "[A]lthough a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a

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as would be given that judgment under the law of the State in which the judgment was rendered." *Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 688 (9th Cir. 2004) (internal quotation marks omitted). *Kotterman* upheld Section 1089 on a facial challenge before the statute was implemented. Plaintiffs allege that Section 1089 violates the Establishment Clause because STOs have not provided scholarships in a way that is neutral toward religion and that offers parents true private choice; this allegation is predicated on evidence that was not available prior to Section 1089's implementation. Plaintiffs' as-applied challenge thus does not, as defendants argue, implicate Arizona's doctrine of virtual representation. *See El Paso Natural Gas Co. v. State*, 599 P.2d 175, 178 (Ariz. 1979). Arizona law bars cases under res judicata only where "*no additional evidence* is needed to prevail in the second action than that needed in the first." *Phoenix Newspapers, Inc. v. Dep't of Corr.*, 934 P.2d 801, 804 (Ariz. App. 1997) (emphasis added). In determining whether a program's secular purpose is genuine, and whether a program has the primary effect of advancing religion, we may consider additional evidence as to how the program operates in reality. *See, e.g.*, *McCreary County, Ky. v. ACLU*, 545 U.S. 844, 862 (2005) (holding the "implementation of the statute, or comparable official act" are relevant in examining a program's secular purpose (internal quotation marks omitted)). We therefore agree with the Supreme Court that "*Kotterman* . . . has no preclusive effect on the instant as-applied challenge . . . ." *Hibbs*, 542 U.S. at 95.

religious objective." *McCreary County, Ky v. ACLU*, 545 U.S. 844, 864 (2005).

[7] The legislative history of Section 1089 shows that its primary sponsor's concern in introducing the bill was providing equal access to a wide range of schooling options for students of every income level by defraying the costs of educational expenses incurred by parents. *See* Ariz. House of Rep. Comm. on Ways & Means, Minutes of Meeting, Tues. Jan. 21 1997. Plaintiffs do not contest that this purpose, if genuine, is both secular and valid. Plaintiffs argue, however, that Section 1089's design and scope reveal this purpose to be a sham. Specifically, plaintiffs argue that Section 1089's operation shows that the program, which provides aid only to students who attend private schools, was enacted not to give low-income children a meaningful opportunity to attend those schools, but to advance the legislature's religious aims.

[8] Plaintiffs are correct that the nature of a program's operation may, in some instances, reveal its ostensible purpose to be a sham. *See McCreary*, 545 U.S. at 862 (stating that, in some cases, "the government action itself bespoke the purpose" of a program that violated the Establishment Clause) (citing *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223-24 (1963)). As the Court held in *McCreary*, the inquiry whether a program's putative purpose is genuine and "not merely secondary to a religious objective," *id.* at 864, is undertaken from the perspective of "an 'objective observer,' one who takes account of the traditional external signs that

show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." *Id.* at 862 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (internal quotation marks omitted)). Plaintiffs' allegations concerning Section 1089's operation are therefore relevant to whether the program has a genuine secular purpose. As we discussed above, for example, 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. Plaintiffs allege, however, that in practice STOs are permitted to restrict the use of their scholarships to use at certain religious schools. Such allegations, if proved, could belie defendants' claim that Section 1089 was enacted primarily to provide Arizona students with equal access to a wide range of schooling options.

[9] At the same time, we are mindful of the Supreme Court's "reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute." *Mueller*, 463 U.S. at 394-95. The Court has held that programs that direct benefits *exclusively* to private schools, as Section 1089 does, may be "adequately supported by legitimate, nonsectarian interests," including "promoting pluralism and diversity among [the state's] public and nonpublic schools." *Nyquist*, 413 U.S. at 773. The question before us, however, is not whether Section 1089 in fact has a genuine, secular purpose, but whether plaintiffs could prove, on the facts alleged in the complaint, that it does not. Accordingly, we conclude

that plaintiffs' allegations, if accepted as true, leave open the possibility that plaintiffs could reveal the legislature's stated purpose in enacting Section 1089 to be a pretense.

B. Effect

We next consider whether Section 1089 "has the forbidden 'effect' of advancing or inhibiting religion." *Zelman*, 536 U.S. at 649. In "refin[ing] the definition of governmental action that unconstitutionally advances religion," the Supreme Court has "paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence." *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989). Guided by the Court's opinion in *Zelman*, we conclude, for reasons set forth below, that plaintiffs have alleged facts sufficient to state an as-applied Establishment Clause claim under this endorsement test.

Section 1089 is an indirect aid program, under which the state gives tax credits to individuals who contribute to STOs, which in turn use the money to provide private school scholarships. Plaintiffs allege that many of these STOs in fact exist to promote the funding of religious education. If the state of Arizona were to allocate funds directly to these religious STOs, the state would plainly violate the Establishment Clause. *See Bowen*, 487 U.S. at 609-10 (noting that "direct government aid" impermissibly advances religion "if the aid flows to

institutions that are 'pervasively sectarian' "). As defendants correctly argue, however, STOs are private charitable organizations — albeit funded by taxpayer contributions that the state will reimburse through dollar-for-dollar tax credits.[10]

[10] We nevertheless hold that if plaintiffs' allegations are accepted as true, Section 1089 violates the Establishment Clause by delegating to taxpayers a choice that, from the perspective of the program's aid recipients, "deliberately skew[s] incentives toward religious schools." *Zelman*, 536 U.S. at 650; *see id.* at 652 (emphasizing that in the educational assistance programs the Court has upheld, "[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"). In practice, plaintiffs allege, the choice delegated to taxpayers under Section 1089 channels a disproportionate amount of government aid to sectarian STOs, which in turn limit their scholarships to use at religious schools.[11] The scholarship program thus skews aid in

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[10] Plaintiffs do not argue that STOs are state actors, so we do not decide whether the STOs' conduct, in itself, could support an Establishment Clause claim.

[11] This allegation is distinct from plaintiffs' contention that Section 1089's design reveals its putative secular purpose to be a sham. As we shall discuss below, the Supreme Court has frequently held that state policies enacted for a valid secular purpose violate the Establishment Clause when they are not effectively designed to achieve that purpose. *See, e.g.*, *Nyquist*, 413 U.S. at 788 ("In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the

favor of religious schools, requiring 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. Accordingly, Section 1089's delegation to taxpayers operates to deprive these parents, as the program's aid recipients, of " 'genuinely independent and private choices' " to direct the program aid to secular schools. *Id.* at 651 (quoting *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986)). Unlike indirect aid programs the Supreme Court has upheld, Section 1089 is not a "neutral program of private choice," and a reasonable observer could therefore conclude that the aid reaching religious schools under this program "carries with it the *imprimatur* of government endorsement." *Id.* at 655.

Defendants dispute this conclusion on two grounds: First, that as private institutions who do not receive direct government funding, they are no different from other nonprofit, religious institutions that are funded through tax-deductible contributions. Second, that under the program, "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649. We address each of these arguments in turn.

State has taken a step which can only be regarded as one 'advancing' religion.").

1. Aid to Private Institution

Defendants first argue that because STOs do not receive direct government funding, Section 1089 is no different from other programs that accord tax benefits to individuals who contribute to nonprofit, religious institutions. *See, e.g., Hernandez v. Comm'r*, 490 U.S. 680, 695 (1989) (upholding federal tax deduction for contributions to charitable and religious organizations); *see also Walz*, 397 U.S. at 666-67 (upholding state property tax exemption for religious and secular nonprofit organizations). As with any program of government aid, however, whether such programs violate the Establishment Clause depends on whether they have "either . . . the purpose or effect of 'endorsing' religion." *County of Allegheny*, 492 U.S. at 592; *see Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 17 (1989) (plurality opinion) (holding sales tax exemption exclusively available to religious periodicals violated Establishment Clause because it "lack[ed] a secular objective that would justify this preference along with similar benefits for nonreligious publications or groups, and because it effectively endorses religious belief"); *Nyquist*, 413 U.S. at 783 (holding program including grants and tax deductions for private school tuition had valid secular purpose, but violated Establishment Clause because "the effect of the aid [wa]s unmistakably to provide desired financial support for nonpublic, sectarian organizations"). The parallels defendants contend exist between Section 1089 and tax deduction programs that the Supreme Court has held "easily pass[ ] constitutional muster," *Hernandez*, 490 U.S. at 695, are therefore

instructive, but only to the extent they shed light on the secular objectives, if any, that Section 1089 was enacted to promote.

[11] The secular objectives defendants argue Section 1089 promotes differ significantly from those advanced by tax deduction programs the Supreme Court has upheld. The federal system addressed in *Hernandez*, for example, permits tax deductions for "any charitable contribution" to a qualified entity "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition." 26 U.S.C. §§ 170(a), (c)(2)(B); *see also Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983) (observing Congress' system of tax deductions and exemptions provides "subsidy to non profit civic welfare organizations generally"). This system, the Court held, makes deductions available for contributions to an array of religious and secular organizations, and thus has "the primary effect of . . . encouraging gifts to charitable entities, including but not limited to religious organizations." *Hernandez*, 490 U.S. at 696. Section 1089, by contrast, offers narrowly targeted, dollar-for-dollar tax credits designed to fully reimburse contributions to STOs, most of which restrict recipients' choices about how to use their scholarships. Although defendants contend these credits were enacted to provide Arizona schoolchildren equal access to a wide range of schooling options, defendants do not — and could not — suggest the credits are designed to promote donations of individual wealth or charitable giving to

a broad array of institutions.[12] Likewise, defendants do not suggest that Section 1089 has a secular purpose in common with laws granting tax exemptions to a broad range of nonprofit organizations, including churches. *See Walz*, 397 U.S. at 672-75 (holding law granting property tax

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[12] As the Court recognized in *Hernandez*, 490 U.S. at 696, tax deductions promote the secular purpose of encouraging individuals to use their own private wealth to make charitable gifts. By contrast, the one-to-one tax credits offered under Section 1089 encourage individuals to give money to private STOs, but allow them to obtain full reimbursement from the state for their contributions. *See Nyquist*, 413 U.S. at 789 (explaining that "the usual attribute of a tax credit" is that it is "designed to yield a predetermined amount of tax 'forgiveness' in exchange for performing a specific act which the State desires to encourage"). In this respect, the tax credits offered under Section 1089 resemble those that encourage individuals to provide public financing for the Federal Election Commission's Presidential Election Campaign Fund ("PECF") but which do not, by design, encourage private charitable donations to the PECF. *See* 26 U.S.C. §§ 9001-13. As we explained in our prior opinion in this litigation:

> a tax credit differs from a tax deduction in that where a tax deduction is involved, giving money to a religious institution is not, as is the case of a tax credit, a free gift. In the case of a tax credit, the taxes due are reduced by the full amount of the gift. In contrast, when a taxpayer is entitled to a tax deduction, the taxpayer must in most if not all instances still pay a majority of the tax involved: it is only his taxable income that is reduced by the amount of the gift, and, thus, his tax liability is reduced only by a percentage of the gift that is equal to the tax rate applicable to his income bracket.

Winn v. Killian, 307 F.3d at 1015 n.5, *aff'd Hibbs v. Winn*, 542 U.S. 88. The tax credits offered under Section 1089 therefore do not promote the same secular purpose as the tax deductions upheld in *Hernandez*.

exemptions to array of religious and secular nonprofit institutions served to promote "beneficial and stabilizing influences in community life" and minimize "[t]he hazards of churches supporting government"); *see also id.* at 678 (noting the "unbroken practice of according . . . exemption[s] to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside"). Thus, we are not persuaded that Section 1089 conforms with the Establishment Clause simply because it bears some superficial resemblance to programs that do.

2. Private Choice

The Supreme Court has "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). Defendants argue that Section 1089, like other religiously neutral educational assistance programs the Supreme Court has found constitutional, is a "program of true private choice . . . and [is] thus constitutional." *Id.* at 653.

The nature of the choices provided under Section 1089, however, differs significantly in structure from those under educational assistance programs the Court has held to be "programs of true private

choice."[13] *Id.* In each of those programs, the government "provid[ed] assistance directly" to parents or individual students, "who, in turn, direct[ed] the government aid to religious schools wholly as a result of their own genuine and independent private choice." *Id.* at 652. Under the voucher program upheld in *Zelman*, for example, the state distributed tuition aid directly to eligible parents, who were free to use the aid to send their children to any participating public or private school, and those wishing their children to remain enrolled in public school received tutorial aid to accommodate that choice. *Id.* at 645.

Under Section 1089, by contrast, the state does not provide aid directly to parents. Instead the aid is mediated first through taxpayers, and then through private scholarship programs. Under Section 1089, all Arizona taxpayers are eligible for a tuition tax credit, and those whose tax liability is large enough to use the credit may apply it toward a contribution to any STO, regardless of whether that STO provides scholarships exclusively for use at religious schools. In turn, any Arizona parent who wishes to send her child to a private school may apply for a STO scholarship, provided that the child meets the STO's eligibility criteria for the use of that scholarship.

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[13] *See Zelman*, 536 U.S. 639; *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (upholding federal program providing sign-language interpreter to student attending Catholic school); *Witters*, 474 U.S. 481 (upholding state vocational assistance program paying state aid directly to student attending religious college); *Mueller*, 463 U.S. 388 (upholding state tax deduction available to parents for their children's public and private school expenses).

[12] Unlike parents' choices under the program in *Zelman*, or aid recipients' choices under other programs the Court has upheld, parents' choices are constrained by those of the taxpayers exercising the discretion granted by Section 1089. For example, by choosing to give state-reimbursed money to the Catholic Tuition Organization of the Diocese of Phoenix, which plaintiffs allege to be the largest STO, taxpayers can make their portion of the program aid available only to parents who are willing to send their children to Catholic schools. Although anyone may form a new STO devoted to funding scholarships at secular private schools, Section 1089 prohibits taxpayers from earmarking contributions for their own children. Thus, it is taxpayers who decide which STOs to fund and, consequently, who is eligible to receive STO provided scholarships according to the criteria of the designated STO. Defendants acknowledge the differences between parents' choices under Section 1089 and those afforded under indirect aid programs that the Supreme Court has previously upheld. They contend, however, that because Section 1089 offers "genuine and independent choices" to the taxpayers who fund STOs, these differences are irrelevant to whether Section 1089 violates the Establishment Clause. We disagree.

a. Parental choice

The parties do not contest that notwithstanding its structural differences from indirect aid programs the Court has upheld, Section 1089 would satisfy the Establishment Clause if the program made

scholarships available to parents on a religiously neutral basis and gave them a true private choice as to where to utilize the scholarships. Plaintiffs allege, however, this is not how the program works in practice. In *Zelman*, the Court identified several circumstances relevant to whether the indirect aid program at issue, which gave tuition grants to parents to apply toward private and fee-charging public schools, was "a program of true private choice . . . and thus constitutional[:]"

> [T]he . . . program is neutral in all respects toward religion. It is part of a general and multifaceted undertaking . . . to provide educational opportunities to the children of a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion, *i.e.*, any parent of a school-age child who resides in the . . . School District. The program permits the participation of *all* schools within the district, religious or nonreligious. Adjacent public schools also may participate and have a financial incentive to do so. *Program benefits are available to participating families on neutral terms, with no reference to religion.* The only preference stated anywhere in the program is a preference for low-income families, who receive greater assistance and are given priority for admission at participating schools.

> There are *no financial incentives that skew the program toward religious schools.* Such incentives are not present . . . where the aid is *allocated on the basis of neutral, secular criteria* that neither favor nor disfavor religion, and *is made available to both religious and secular beneficiaries on a nondiscriminatory basis.*

Id. at 653-54 (emphasis added) (citations, alterations and internal quotation marks omitted).

y13Under this rubric, Section 1089 falls short. The vast majority of the scholarship money under the program — over 85 percent as of the time of plaintiffs' complaint — is available only for use at religious schools.[14] Because this aid is available only to parents who are willing to send their children to a religious school, the program fails to "confer[ ] educational assistance directly to a broad class of individuals defined without reference to religion." *Id.* at 653. Moreover, because a disproportionate amount

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[14] We recognize the Supreme Court in *Mueller*, 463 U.S. at 401, cautioned that such statistics lack constitutional import when a law is facially neutral. This case is different from *Mueller*, however, because Section 1089 does not allocate scholarship funds based on *parents'* choices of schools, but instead mediates financial aid through *taxpayers'* allocations to scholarship programs of their choice. As a result, a parent seeking scholarship aid does not have a "genuine and independent private choice" under the program because the parent's choices are constrained by those of taxpayers. *Zelman*, 536 U.S. at 652. Facts showing the skewed concentration of funds in sectarian school scholarship programs would therefore support the claim that parents are financially incentivized to choose a religious school.

of the program aid is earmarked for use at religious schools *before* parents receive the aid, Section 1089 is not, from the parents' perspective, "neutral in all respects toward religion" and does not equally "permit[ ] the participation of *all* schools . . . religious or nonreligious" in the program. *Id.* Additionally, because Section 1089 does not make aid equally available to parents "on the basis of neutral, secular criteria that neither favor nor disfavor religion," *id.* (alterations in original) (quoting *Witters*, 474 U.S. at 487-88), the program creates " 'financial incentive[s]' " for parents that " 'ske[w]' the program toward religious schools." *Id.* (quoting *Witters*, 474 U.S. at 487-88); *see Zobrest*, 509 U.S. at 10 (upholding program because it "create[d] no financial incentive for parents to choose a sectarian school"). Thus, parents who wish to place their children in a private secular school, but who could not otherwise afford to do so, are at a disadvantage compared to parents who are willing to accept a scholarship for private religious schooling — either by choice or out of financial necessity. Although parents would, of course, have the option of leaving their children in public school, we reject the suggestion that the mere existence of the public school system guarantees that any scholarship program provides for genuine private choice. For parents wait-listed for scholarships to secular schools,[15] the range of educational choices the STO-

[15] Data in the record, the veracity of which defendants do not challenge, show that in 2004, the Arizona School Choice Trust — the largest of the STOs that provides scholarships to *any* private secular or religious school — reported a waiting list of at least 700 students. If accurate, it would be the kind of

administered scholarship programs offer do not realistically include "obtain[ing] a scholarship and choos[ing] a nonreligious private school." *Zelman*, 536 U.S. at 655. Section 1089, as applied, thereby creates incentives that pressure these parents into accepting one of the scholarships that are readily available under the program for use at a religious school. Therefore, Section 1089, as applied, "fails to provide genuine opportunities for . . . parents to select secular educational options for their school-age children." *Id.*

b. Taxpayer choice

Defendants argue that despite this failure, Section 1089 does not violate the Establishment Clause because it provides a tax credit to all Arizona *taxpayers*, without respect to religion, and gives taxpayers a genuine choice between directing their money to religious or secular STOs. Therefore, as *Zelman* requires, "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Id.* at 649. Plaintiffs do not contest that Section 1089 is neutral with respect to the taxpayers who direct money to STOs, or that any of the program's aid that reaches a STO does so only as a result of the genuine and independent choice of an Arizona taxpayer. *See Mueller*, 463 U.S. at 398-99. Plaintiffs argue,

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information that would further support plaintiffs' allegation that "parents choosing to send their children to non-religious, non-public schools may be unable to locate an STO willing and able to make a tuition grant to a student attending the non-religious school of the parents' choice."

however, that Section 1089 violates the Establishment Clause precisely *because* the individual taxpayers' choices available under the program serve to restrict parents' opportunities to select secular educational options for their school-age children, skewing parents' incentives to send their children to religious schools. As such, the program is not "neutral in all respects toward religion" and, concomitantly, is not a "program of true private choice." *Zelman*, 536 U.S. at 653.

Defendants argue that it is irrelevant, under *Zelman*, whether an indirect aid program offers true private choice to parents, or instead, like Section 1089, offers true private choice to another broadly defined class of individuals. In describing what constitutes "true private choice," however, the Court in *Zelman* frequently emphasized that the choice is one offered, on a neutral basis, to *parents* or *students*, as the beneficiaries of the program's aid. *See, e.g.*, *id.* at 652 ("A program . . . [like those the Court has upheld] permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients."); *id.* at 653 (concluding one of the features of "true private choice" in the Ohio voucher program is that "[p]rogram benefits are available to participating families on neutral terms"); *id.* at 669 (O'Connor, J., concurring) ("Courts are instructed to consider two factors: first, whether the program administers aid in a neutral fashion, without differentiation based on the religious status of beneficiaries or providers of services; second, and more importantly, whether beneficiaries of indirect aid have a genuine choice

among religious and nonreligious organizations when determining the organization to which they will direct that aid."). Defendants contend this emphasis is simply because parental choice was the *only* private choice offered under those programs.

Defendants' argument, however, disregards the Court's analysis of *how* the true private choice described in *Zelman* ensures that government aid flowing to religious institutions does not have "the forbidden 'effect' of advancing . . . religion,' " *id.* at 649, even though the aid would have such an effect under a program of direct funding. *See Bowen*, 487 U.S. at 609-10 (noting "direct government aid" impermissibly advances religion "if the aid flows to institutions that are 'pervasively sectarian' "). The function of true private choice, the Court explained, is to eliminate the perception that the government is endorsing religion through the money that is channeled to sectarian institutions: "The 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*, 536 U.S. at 652. The Court expressly linked its "true private choice" analysis to the "reasonable observer" inquiry as to whether the government is perceived to endorse the religious organizations that benefit from its aid. *See id.* at 655 (holding, with respect to the parental choice the Court was addressing, that "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").

In drawing this link, the Court adopted Justice O'Connor's position in *Mitchell v. Helms*, 530 U.S. 793 (2000), that " '[i]n terms of public perception, a government program of direct aid to religious schools . . . differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools.' " *Zelman*, 536 U.S. at 655 (quoting *Mitchell*, 530 U.S. at 842- 43 (O'Connor, J., concurring in judgment)). Under this framework, the question central to the endorsement inquiry is whether "the reasonable observer would naturally perceive the aid program [in question] as *government* support for the advancement of religion." *Mitchell*, 530 U.S. at 843 (O'Connor, J., concurring in the judgment) (discussing effect of programs providing direct aid to religious schools). "'[T]he reasonable observer in th[is] endorsement inquiry must be deemed aware' of the 'history and context' underlying a challenged program." *Zelman*, 536 U.S. at 655 (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (internal quotation marks omitted)); *see also Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 773 (1995) (O'Connor, J., concurring in part and concurring in judgment) ("[T]he endorsement test necessarily focuses upon the perception of a reasonable, *informed* observer.") (emphasis added). We impute this knowledge to the reasonable observer because "the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from . . .

discomfort," but instead concerns "the political community writ large." *Id.* at 779; *accord Good News Club*, 533 U.S. at 119 (adopting this position); *see also Capitol Square*, 515 U.S. at 779-80 (O'Connor, J., concurring in part and concurring in judgment) ("[T]he applicable observer is similar to the 'reasonable person' in tort law, who is not to be identified with any ordinary individual, who might occasionally do unreasonable things, but is rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.") (internal quotation marks omitted; alteration in original).

[14] Accordingly, to assess whether the taxpayer choice offered under Section 1089 has the same constitutional effect as the parental choice *Zelman* upheld, we must consider the Court's application of the reasonable observer inquiry to the program at issue in that case. Specifically, we must consider the circumstances the Court deemed relevant to *why* a reasonable, informed observer looking at the program upheld in *Zelman* would conclude that "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message" resulting from a program "is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." 536 U.S. at 652. The Court's guidance in earlier cases also sheds light on two circumstances that seemed particularly important to the reasonable observer analysis in *Zelman*.

First, a reasonable, informed observer would consider what role the person making the choice occupies in the structure of the program. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982) (holding statute allowing a church or school to veto a liquor license for establishments in their proximity violated the Establishment Clause); *Zelman*, 536 U.S. at 652. In *Larkin*, the Court determined there was no " 'effective means of guaranteeing' " the veto power delegated to churches over liquor licenses " '[would] be used exclusively for secular, neutral, and nonideological purposes.' " *Id.* at 125 (quoting *Nyquist*, 413 U.S. at 780).[16] "In addition," the Court continued, "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Id.* at 125-26. Of course, the delegation of scholarship funding to individual taxpayers, such as in Section 1089, does less to promote religion than the delegation of zoning authority to churches. *Larkin*'s holding, however, illustrates that when a statute delegates "a power ordinarily vested in agencies of government" to a private party, *see id.* at 122, without reasonable

[16] In *Zelman*, the Court held "*Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion." 536 U.S. at 662. As discussed above, Section 1089 does not "offer aid directly to individual recipients," but rather mediates the aid through taxpayers and STOs. Insofar as Section 1089 is not a "program of true private choice," within the meaning of *Zelman*, the Court's holding in *Nyquist* is relevant to determining whether a reasonable observer would conclude the tax credit program endorses religion.

assurance that the party's choices will advance the secular purposes of the statute, any ensuing "perceived endorsement of a religious message" may be "reasonably attribut[ed]" to the government. *See Zelman*, 536 U.S. at 652.

By contrast, the educational assistance programs addressed in *Zelman* were structured so that parents were permitted to choose how to best use the program aid to assist *their* children. The parents' decisive role in the program gave them 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. Accordingly, by delegating a choice that "ensured that parents were the ones to select a religious school as the best learning environment" for their children, the government did not appear to endorse religion. *Id.* (stating how federal special education program providing sign-language interpreter to student attending Catholic school ensured that "the circuit between government and religion was broken, and the Establishment Clause was not implicated").

Second, a reasonable, informed observer would consider whether the choice delegated under a program has the effect of promoting, or hindering, the program's secular purpose. *See id.* at 655. In *Larkin*, the Court recognized that the statute delegating veto power to churches and schools had the valid secular purpose of "protect[ing] spiritual, cultural, and educational centers from the 'hurly-burly' associated with liquor outlets." 459 U.S. at

123 (internal quotation marks omitted). The Court noted, however, that "these valid secular objectives can be readily accomplished by other means," *id.* at 123-24, and that the veto power conferred by the statute could "be used by churches to promote goals beyond insulating the church from undesirable neighbors," *id.* at 125. The Court concluded that the delegation could "be seen as having a 'primary' and 'principal' effect of advancing religion." *Id.* at 126. Similarly, in *Nyquist*, the Court invalidated a program providing tuition grants and tax credits to parents sending their children to private schools because, although the program had a valid secular purpose, "the effect of the aid [wa]s unmistakably to provide desired financial support for nonpublic, sectarian institutions." 413 U.S. at 783; *see id.* at 788 ("In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one 'advancing' religion."). *Nyquist* illustrates that if an educational assistance program provides individual choice through tax credits, but those tax credits hinder the program's ability to achieve its valid secular goals, a reasonable observer could well conclude that the tax credits are simply masking an Establishment Clause violation. *Cf. Hibbs v. Winn*, 542 U.S. at 93-94 (discussing school desegregation cases invalidating use of tuition grants and tax credits to circumvent *Brown v. Board of Education*, 347 U.S. 483 (1954)); s*ee also Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 690 (1994) (invalidating statute creating school district coextensive with religious community that had valid purpose of providing special education services, but

was unnecessarily tailored to promote sectarian aims); *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) ("[I]t is . . . axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.") (internal quotation marks omitted) (invalidating state program providing textbooks to racially discriminatory private schools).

[15] The choices delegated to parents under *Zelman*, by contrast, may have advanced — and at least did not thwart — the secular purpose of the program, which was to "provid[e] educational assistance to poor children in a demonstrably failing public school system." 536 U.S. at 649. The best educational environment for a particular child within a failed school system may depend on qualitative considerations that could not easily be assessed at a policymaking level. *See, e.g.*, *id.* at 674-75 (O'Connor, J., concurring) (suggesting metrics other than formal academic achievement that may play a role in parents' educational choices in a failed school district). The choice offered under the program may have therefore helped ensure that the program achieved its secular aims by delegating funding decisions to a class of persons — parents — who were better positioned than a state policymaking body to make educational choices for individual students in a failing school system.

[16] Drawing upon these two circumstances — the role the person making the choice occupies in the structure of a program and whether delegating the choice promotes the secular purpose of the program

— we turn to defendants' argument that the individual, *taxpayer* choice provided under Section 1089 necessarily has the same constitutional effect as the parental choice upheld in *Zelman*. Under Section 1089, individual taxpayers may constrain the scholarship options of other parents' children by choosing to direct their statereimbursed contributions to sectarian STOs. Yet unlike parents, whose choices directly affect their children, taxpayers have no structural incentives under Section 1089 to direct their contributions primarily for secular reasons, such as the academic caliber of the schools to which a STO restricts aid, rather than for sectarian reasons, such as the religious mission of a particular STO. Thus, the taxpayers' position in the structure of Section 1089 provides no " 'effective means of guaranteeing' " that taxpayers will refrain from using the program for sectarian purposes. *Larkin*, 459 U.S. at 125 (quoting *Nyquist*, 413 U.S. at 780). Significantly, plaintiffs' allegations suggest the taxpayers' role in the structure of Section 1089, as applied, *encourages* them to use the tax credits to promote sectarian goals, and that taxpayers have in fact used the program aid to this end.

[17] Relatedly, the taxpayer choice provided under Section 1089 does little to advance — indeed, it appears to thwart — the secular purpose of the program, which is to provide equal access to a wide range of schooling options for students of every income level by defraying the costs of educational expenses incurred by parents.[17] Defendants do not

[17] Even if we assumed that taxpayer choice does, in some respect, advance the secular objectives of Section 1089,

suggest taxpayers are better positioned than government administrators to allocate program aid in a manner that will expand schooling options, and plaintiffs' allegations suggest the demand for STO-provided scholarships available for use at secular schools markedly outstrips their supply. This misalignment between parents' interests and taxpayers' desires suggests that by vesting individual taxpayers with funding authority, Section 1089's design works against its purpose of providing Arizona students with *equal* access to a wide range of schooling options. Although Section 1089 leaves individual parents free to create new STOs that cater to their educational preferences, this freedom provides little benefit to parents who do not have the time or capital to get others to support their STO, given that these parents cannot use their tax credits to fund scholarships for their own children.

[18] Accordingly, we conclude that there is a meaningful constitutional distinction between the individual, taxpayer choice provided under Section 1089 and the parental choice upheld in *Zelman*.[18]

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plaintiffs may be able to demonstrate that "these valid secular objectives can be readily accomplished by other means," and therefore that the program nevertheless "could be seen as having a 'primary' and 'principal' effect of advancing religion." *Larkin*, 459 U.S. at 123-24, 126.

[18] In *Green v. Garriott*, ___ P.3d ___, 2009 WL 623346 (Ariz. Ct. App. March 12, 2009), the Arizona Court of Appeals in a 2-1 decision rejected an Establishment Clause challenge to Ariz. Rev. Stat. § 43-1183, which gives dollar-for-dollar tax credits to corporations for contributions to STOs. The *Green* majority did not consider, as we do here, whether any lack of religious neutrality in the actual operation of Section 1183 "carries with it the *imprimatur* of government endorsement,"

Section 1089, as claimed to operate in practice, is not a program of true private choice, immune from further constitutional scrutiny. We therefore hold that plaintiffs have alleged facts upon which a reasonable, informed observer could conclude that Section 1089, as applied, violates the Establishment Clause even though the state does not directly decide whether any particular sectarian organizations will receive program aid.

The district court's order dismissing plaintiffs' complaint is reversed and remanded for further proceedings consistent with this opinion.

REVERSED and REMANDED for further proceedings.

Zelman, 536 U.S. at 655, and we are unpersuaded by the analysis of whether § 1183 is a program of "true private choice" for the reasons we have already discussed at length.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Kathleen M. Winn, an Arizona taxpayer, et al., Plaintiffs, vs. J. Elliot Hibbs, in his official capacity as Director of the Arizona Department of Revenue, et al., Defendants.	No. CIV 00-0287-PHX-EHC **ORDER**

Entered: March 25, 2005

Intervenor-Defendant Arizona Christian School Tuition Organization (ACSTO) filed a Motion to Intervene [Dk. 64], which is unopposed. Defendants Arizona School Choice Trust, Glenn Dennard, and Luis Moscoso (collectively "ASCT") filed a Motion to Dismiss [Dk. 71]. Defendant Hibbs filed a Motion for Judgment on the Pleadings [Dk. 72]. ACSTO filed a Motion to Dismiss [Dk. 73]. Plaintiffs responded to the Motions to Dismiss and Motion for Judgment on the Pleadings.[1] ASCT replied.[2] Defendant Hibbs replied [Dk. 77].

[1] Plaintiffs lodged the Response to these Motions on October 29, 2004, which was not docketed pending the Court's ruling (*infra*) on Plaintiffs' Motion for Leave to Exceed Page Limits [Dk. 74].

Procedural History

This case was filed on February 15, 2000. The Court dismissed for lack of subject matter jurisdiction based on the Tax Injunction Act and principles of comity on February 27, 2001 [Dk. 36]. The Ninth Circuit reversed on both of these grounds and remanded. *Winn v. Killian,* 307 F.3d 1011 (9th Cir. Oct. 3, 2002), *reh'g denied,* 321 F.3d 911 (9th Cir. 2003). The Supreme Court granted certiorari, *Hibbs v. Winn,* 539 U.S. 986, 124 S.Ct. 45, 156 L.Ed.2d 703 (2003), and affirmed, holding that the Tax Injunction Act did not bar Plaintiff's suit. 124 S.Ct. 2276 (2004).

Plaintiffs' Complaint

Plaintiffs challenge the constitutionality of A.R.S. § 43-1089[3] ("Tuition Tax Credit") under the First and Fourteenth Amendments. The Tuition Tax Credit allows Arizona income taxpayers who voluntarily contribute money to a "student tuition organization" (STO) to receive a dollar-for-dollar tax credit up to $500 of their annual tax liability.[4] A.R.S. § 43-1089(A)(1). Thus, Arizona taxpayers who know about the Tuition Tax Credit can effectively choose whether $500 of their tax liability goes to the State

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[2] The reply is file-stamped November 15, 2004, but was placed undocketed on the left side of the file.

[3] The statute was enacted in 1997. Minor amendments which are immaterial to this case have since been made [Dk. 72 at 2]. The Court cites the current version of the statute in this Order.

[4] The tax credit is $625 for married taxpayers filing jointly. A.R.S. § 43-1089(A)(2).

or to an STO. A.R.S. § 43-1089(A). No limit is placed on the number of taxpayers who use the Tuition Tax Credit. *Id.* In addition, the Tax Credit is available to all taxpayers, regardless of whether they have children in school or have incurred any educational expenses. *Id.* Taxpayers may earmark their donations for specific children who are not their dependants. A.R.S. § 43-1089(D).

An STO is a charitable organization exempt from federal taxation under I.R.C. § 501(c)(3). A.R.S. § 43-1089(F)(3). Each STO uses taxpayers' voluntary cash contributions to provide scholarships and tuition grants to students attending the "qualified schools" with which the STO is affiliated. A "qualified school" is, essentially, a private school, defined in the statute as a "nongovernmental primary or secondary school or a preschool for handicapped students that is located in this state, that does not discriminate on the basis of race, color, handicap, familial status or national origin" and that satisfies Arizona's requirements for private schools. A.R.S. § 43-1089(F)(2).

An STO must use at least 90% of the donations received from taxpayers for scholarships or tuition grants to children "to allow them to attend any qualified school of their parents' choice." A.R.S. § 43-1089(F)(3). While this restriction could be read to require each STO to give scholarships to students for use at any private school in the state, the STOs in practice have designated their own list of private schools at which the scholarship money must be

used. However, an STO may not award scholarships to students who are all at the same school. *Id.*[5]

Plaintiffs allege that the largest STOs are religious organizations that restrict their donations to private religious schools which in turn use these funds to promote religious education and worship. In 1998, at least $1.7 million out of $1.8 million (94%) of taxpayer donations to STOs went to STOs that restricted scholarships to students attending religious schools. For example, the three largest STOs, which included ACSTO, received 85% of total STO donations in 1998. Each of these STOs restricted the disbursement of scholarship funds to private religious schools. In 2003, according to the Arizona Department of Revenue, there were 51 STOs. Forty-seven of these STOs which reported their donations received a total of $29.1 million [Dk. 71, Att. 2]. Plaintiffs estimate that at least $22.6 million (78% of the total donations) went to STOs which offered scholarships that could only be used at religious schools [Plaintiffs' Response]; that at least $22.2 million of the total donations (91%) went to students attending religious schools; and that, through 2003, STOs have received $113.3 million that otherwise would have gone to the State. *Id.*

Plaintiffs argue that because most STOs are religious organizations that restrict grants to

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[5] For example, a private school could not set up an affiliated STO serving only that school so that contributing parents could effectively lower each other's tuition by $500. However, two or more schools are permitted to form an STO to achieve this same end.

religious schools, parents who wish to send their children to a non-religious private school may be unable to find an STO that is willing to make a tuition grant to a non-religious private school. Plaintiffs allege that the Tuition Tax Credit as applied allows state revenues to fund education in a religiously preferential manner in violation of the Constitution. Plaintiffs seek preliminary and permanent injunctive relief, a declaratory judgment that § 43-1089, on its face and as applied, violates the First and Fourteenth Amendments, and that STOs which make tuition grants for schools of only one religious denomination must return grants to the State of Arizona general fund.

The Motions to Dismiss and Motion for Judgment on the Pleadings

ASCT raises three arguments in the Motion to Dismiss: first, that Plaintiffs lack taxpayer standing under the Establishment Clause; second, that Plaintiffs fail to state a claim upon which relief can be granted in light of the Supreme Court's decision in *Zelman v. Simmons-Harris,* 536 U.S. 639, 122 S.Ct. 2460 (2002); and third, that Plaintiff's claims were decided by the Arizona Supreme Court in *Kotterman v. Killian,* 193 Ariz. 273, 972 P.2d 606 (1999), and are therefore barred by the doctrine of res judicata [Dk. 71]. Defendant Hibbs, in his Motion for Judgment on the Pleadings, discusses *Zelman* and res judicata [Dk. 72]. ACSTO, in its Motion to Dismiss, discusses standing, res judicata, and the test set forth in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105 (1971) [Dk. 73]. If the Court assumes

that Plaintiffs have standing and that the case is not barred by res judicata, Plaintiffs have failed to state a claim under the Establishment Clause.

Failure to State an Establishment Clause Claim under *Zelman*

Defendants argue that Plaintiffs fail to state a claim upon which relief can be granted in light of the Supreme Court's decision in *Zelman v. Simmons-Harris,* 536 U.S. 639, 122 S.Ct. 2460 (2002). In *Zelman,* the Supreme Court considered Ohio's Pilot Project Scholarship Program ("Cleveland program"), which provided financial assistance to any Ohio School District which was "under a federal court order requiring supervision and operational management of the district by the state superintendent." 536 U.S. at 644, 122 S.Ct. at 2463. The Cleveland City School District was Ohio's only school district in this category. 536 U.S. at 645, 122 S.Ct. at 2463.

The Cleveland program provided tuition aid for students to attend a participating public or private school of their parents' choosing. Students remaining in public schools were eligible for tutorial aid. *Id.* Participating private schools were not permitted to discriminate on the basis of religion. *Id.* Tuition aid was distributed according to financial need. 536 U.S. at 646, 122 S.Ct. at 2464. Over 3,700 students received tuition aid from the Cleveland program, and 96% of these students enrolled in religiously affiliated schools. 536 U.S. at 647, 122 S.Ct. at 2464.

Sixty percent of these students came from families at or below the poverty line. *Id.*

The Supreme Court held that the Establishment Clause "prevents a State from enacting laws that have the purpose or effect of advancing or inhibiting religion." 536 U.S. at 648-49, 122 S.Ct. at 2465 (citation and internal quotation marks omitted). Although the government may not provide aid directly to religious schools, "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," do not violate the Establishment Clause. 536 U.S. at 649, 122 S.Ct. at 2465.

1. *Secular Purpose of the Tuition Tax Credit*

A "plausible secular purpose" for the Tuition Tax Credit "may be discerned from the face of the statute." *Mueller v. Allen,* 463 U.S. 388, 395, 103 S.Ct. 3062, 3067 (1983). The Tuition Tax Credit on its face does not mention religion but is instead part of a secular state policy to maximize parents' choices as to where they send their children to school. *Kotterman,* 193 Ariz. at 278, 972 P.2d at 611. Public school districts in Arizona may not charge tuition and must provide for open enrollment. A.R.S. § 15-816.01(A); *Kotterman,* 193 Ariz. at 283, 972 P.2d at 616. Arizona has established charter schools in order to "provide additional academic choices for parents and pupils." A.R.S. § 15-181 (1994). Charter schools

are public schools that do not charge tuition.[6] Arizona provides another tax credit, approved on the same day as the Tuition Tax Credit, that only benefits public schools. A.R.S. § 43-1089.01. As amended, this tax credit allows any Arizona taxpayer to receive up to a $200 tax credit[7] for fees paid or cash contributions made to public schools for extracurricular activities or character education. *Id.* Finally, Arizona has a permissive home-schooling policy. A.R.S. § 15-802 (authorizing education at home-school); A.R.S. § 15-803 (excepting home-schooled students from mandatory public school attendance); A.R.S. § 15-745 (excepting home-schooled students from testing while they are receiving home school instruction).

2. *Programs of True Private Choice*

The Tuition Tax Credit is a program of "true private choice." *Zelman,* 536 U.S. at 649, 122 S.Ct. at 2465. The benefits of the Tuition Tax Credit are available to a broad spectrum of groups; money which would otherwise go to the State can only go to religious schools after being filtered through multiple layers of private choice; and recipients of STO funds still have financial incentives to attend public schools. Indeed, Arizona has given its schoolchildren a range of educational choices

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[6] Arizona has 348 charter schools in operation. Arizona State Board for Charter Schools, Charter Summary Report, http:// www.asbcs.state.az.us/asbcs/CharterSummary.asp (last visited March 23, 2005).

[7] Married tax payers filing jointly can claim a $250 tax credit. A.R.S. § 43-1089.01(A)(2).

consistent with a program of true private choice. Therefore, the fact that most donations to STOs have ultimately gone to religious schools does not implicate the Establishment Clause.

First, whether the Tuition Tax Credit is made available to a broad spectrum of groups is "an important index of secular effect." *Zelman,* 536 U.S. at 650, 122 S.Ct. at 2466 (citing *Widmar v. Vincent,* 454 U.S. 263, 274, 102 S.Ct. 269, 277 (1981)). Any student in the state, without regard to religion, may apply for and potentially receive an STO scholarship to attend a private school, secular or religious. In fact, the Tuition Tax Credit is available to an even broader spectrum of the public than the Cleveland program in the sense that all Arizona taxpayers, not just parents of students, can use the tax credit to exercise a choice in how their money, which would otherwise be subject to taxes, is spent.

Second, the Tuition Tax Credit provides for multiple layers of private choice such that "government aid [reaches] religious institutions only by way of the deliberate choices of numerous individual recipients." *Zelman,* 536 U.S. at 652, 122 S.Ct. at 2467. In this way, "government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment." 536 U.S. at 652-53, 122 S.Ct. at 2467. The Tuition Tax Credit allows for the private formation of non-profit STOs to raise money for the schools of their choice. Then, taxpayers, if they elect to invoke the tax credit at all, donate to the STO of their choice. Finally, parents choose the school that they want their child to attend

and apply for aid from an STO which grants scholarships to that school. Whereas the Cleveland program disbursed government funds to private schools,[8] the Tuition Tax Credit allows funds which the government would otherwise receive to go to the STOs for disbursement, insulating the funds with an additional layer of private choice not present in *Zelman,* 536 U.S. at 646, 122 S.Ct. at 2464.

Third, the Tuition Tax Credit does not provide taxpayers or students financial incentives which are skewed toward religious schools. *Zelman,* 536 U.S. at 653, 122 S.Ct. at 2468. STOs have no financial incentive to fund religious schools over secular ones. Taxpayers have no financial incentive to support STOs which favor religious schools over STOs that do not; indeed, taxpayers have no financial incentive to support any STO at all to the degree that they may not make donations to their own dependants. Nor do parents of students have any skewed financial incentive to send their child to a religious school. An Arizona student may attend any public school in the state without cost, just as the students in *Zelman* could attend community and magnet schools for free. 536 U.S. at 654, 122 S.Ct. at 2468. In contrast, the average scholarship paid by STOs in 2003 for students to attend private schools was $1,222,[9] a sum unlikely to cover all of the costs of private school attendance [Response, Att. 2 at 2].

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[8] The Ohio statute provided for checks to be made directly to parents who then endorsed the checks over to the chosen school. 536 U.S. at 646, 122 S.Ct. at 2464.

[9] The average scholarship award in 1998 was $452.

In *Zelman,* the Court inquired whether the state was coercing parents into sending their children to religious schools by "evaluating *all* options Ohio provides Cleveland schoolchildren." 536 U.S. at 655-56, 122 S.Ct. at 2469 (emphasis in original). Arizona has provided the requisite "range of educational choices," 536 U.S. at 655, 122 S.Ct. at 2469, to parents through its policy of free public education (including open enrollment and the provision of charter schools), tax credit for donations to public school extracurricular activities and character education, and permissive home-schooling policy. The Tuition Tax Credit expands parents' private school options, both secular and religious.

Where the challenged program was neutral toward religion and preserved true private choice, the *Zelman* court did not attach constitutional significance to the amount of state funds ultimately spent on religious education or the number of scholarship recipients enrolled in religious schools. 536 U.S. at 658, 122 S.Ct. at 2470. In Arizona, many (perhaps most) STOs have chosen to support, sometimes exclusively, religious schools; most taxpayers have chosen to support STOs which favor religious schools; most private schools have chosen to incorporate religion into their educational mission; and most STO scholarship recipients have chosen to attend religious schools. These private choices, and there are literally thousands of them, do not implicate the Establishment Clause. *See* U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion...").

Plaintiffs argue that the fact that STOs may elect to disburse scholarship funds based in part on religious affiliation distinguishes this case from *Zelman*. They point out that ASCT, one of the largest STOs that does not disburse its scholarships with any reference to religion, had a waiting list of over 700 people in the Fall of 2004 [Dk. 71, Exh. 3]. In *Zelman,* the Court found it significant that the benefits of the Cleveland program were "available to all families on neutral terms, without reference to religion." 536 U.S. at 653, 122 S.Ct. at 2468. Here, the fact that most STOs fund only religious schools represents a multitude of private choices not implicating the Establishment clause. The Tax Tuition Credit is neutral on its face and as applied; nothing prevents taxpayers from increasing their contributions to existing STOs which provide scholarships to secular private schools or from forming new STOs themselves for that same purpose. *See* 536 U.S. at 658, 122 S.Ct. at 2470 ("The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.").[10]

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[10] The ACST School Quarterly that Plaintiffs cite reported that "[O]ver 700 students are on ASCT's waiting list for scholarships. But that can change! Thanks to the **limitless potential of the scholarship tax credit program**, we have **the opportunity to receive millions in new tax credit donations annually**, enough to fund thousands of additional scholarships. Past experience suggests that a dollar spent on marketing the tax credit program will return more than ten

Plaintiffs also argue that the Cleveland program is distinguishable from the Tuition Tax Credit because the former provided vouchers for both public and private schools, whereas the latter only provides assistance to private schools. This distinction is not relevant here. First, the State has a policy, of which the Tuition Tax Credit is only a small part, to maximize parents' educational choices for their children, primarily in the public schools.[11] Second, states may provide assistance to private schools without violating the Establishment Clause. In *Mueller v. Allen,* the Supreme Court held that a Minnesota tax deduction for parents' expenses in providing tuition, textbooks and transportation for their children attending elementary or secondary schools, public or private, did not violate the Establishment Clause. 463 U.S. 388, 103 S.Ct. 3062 (1983). The *Mueller* court held that a state may "conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and non-sectarian." 463 U.S. at 395, 103 S.Ct. at 3067.

Third, the Supreme Court's ruling in *Committee For Public Education and Religious Liberty v. Nyquist,* 413 U.S. 756, 93 S.Ct. 2955 (1973), is distinguishable from this case. The *Nyquist* court

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dollars in scholarship tax credit donations" (emphasis in original) [Dk. 71, Exh. 3].

[11] For example, the State appropriated $2.6 billion to the Department of Education in FY 2002-2003, or 43.5% of the total budget. Arizona Department of Education, Annual Financial Report, State Funding for Education, http://www.ade.state.az.us/annualreport/annualreport2003/Summary/StateFundEducation.htm (last visited on March 23, 2005).

held that a New York program conferring a package of benefits exclusively on private schools and parents of private school enrollees violated the Establishment Clause. However, the *Zelman* court held that "*Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion." 536 U.S. at 662, 122 S.Ct. at 2472. The Tuition Tax Credit is a neutral, secular program whose benefits are available to all Arizona taxpayers and students. Furthermore, multiple layers of private choice ensure that the State itself does not aid recipients with regard to their religion.

Finally, Plaintiffs argue that the educational crisis precipitating the Cleveland program distinguishes this case from *Zelman*. Indeed, the Supreme Court recognized that the purpose of the Cleveland program was to "assist poor children in failed schools." 536 U.S. at 655, 122 S.Ct. at 2469. In contrast, Defendants have not argued that Arizona schools are failing or even that the Tuition Tax Credit will primarily benefit the poor. However, Plaintiffs' objections are irrelevant to the constitutional analysis, which only asks whether the program has a valid secular purpose, seeking neither to advance nor inhibit religion. 536 U.S. at 648-649, 122 S.Ct. at 2465; *cf. Am. Jewish Cong. v. Corp. for Nat'l. & Cmty. Serv.,* No. 02 Civ. 1948 (D.C. Cir. Mar. 8, 2005) (holding that discretionary distribution of government funds to AmeriCorps recipients is permissible under the Establishment Clause, which only requires that government distribute funds

neutrally with respect to religion), *rev'g* 323 F.Supp.2d 44 (D. D.C.2004). Arizona's policy of maximizing the choices available to parents is a valid secular purpose; indeed, no useful purpose would be served by making the State wait until its schools were in the same kind of trouble as Cleveland's before implementing a program of true private choice.

Conclusion

The Court, having accepted all allegations in the Complaint as true, finds that Plaintiffs have failed to state a claim under the Establishment Clause.

Accordingly,

IT IS ORDERED GRANTING Intervenor-Defendant Arizona Christian School Tuition Organization's Motion to Intervene [Dk. 64].

IT IS FURTHER ORDERED GRANTING ASCT's Motion to Dismiss [Dk. 71] without prejudice.

IT IS FURTHER ORDERED DENYING AS MOOT Defendant Hibbs' Motion for Judgment on the Pleadings [Dk. 72].

IT IS FURTHER ORDERED DENYING AS MOOT ACSTO's Motion to Dismiss [Dk. 73].

DATED this 24 day of March, 2005.

/s/ Earl H. Carroll
Earl H. Carroll
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KATHLEEN M. WINN, an Arizona taxpayer; DIANE WOLFTHAL, an Arizona taxpayer; MAURICE WOLFTHAL, an Arizona taxpayer; LYNN HOFFMAN, an Arizona taxpayer, Plaintiffs-Appellants, vs. ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION; ARIZONA SCHOOL CHOICE TRUST; LUIS MOSCOSO; GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue; GLENN DENNARD, Defendants-Appellees.	No. 05-15754 D.C. No. CIV 00-00287-EHC District of Arizona, Phoenix ORDER

Entered: November 16, 2009

Before: D.W. NELSON, REINHARDT and FISHER, Circuit Judges.

The motion to stay the mandate, filed October 29, 2009 by appellees Arizona School Choice Trust, et al., and Arizona Christian School Tuition Organization, is granted.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATHLEEN M. WINN, an Arizona taxpayer; DIANE WOLFTHAL, an Arizona taxpayer; MAURICE WOLFTHAL, an Arizona taxpayer LYNN HOFFMAN, an Arizona taxpayer, *Plaintiffs-Appellants,* v. ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION; ARIZONA SCHOOL CHOICE TRUST; LUIS MOSCOSO; GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue; GLENN DENNARD, *Defendants-Appellees.*	No. 05-15754 D.C. No. CV-00-00287 -EHC District of Arizona, Phoenix ORDER

Filed October 21, 2009

Before: Dorothy W. Nelson, Stephen Reinhardt and Raymond C. Fisher, Circuit Judges.

Order;
Concurrence by Judge Pregerson;
Concurrence by Judge D.W. Nelson;

Dissent by Judge O'Scannlain

ORDER

Judges Reinhardt and Fisher voted to reject the petitions for rehearing en banc and Judge Nelson so recommended.

The full court was advised of the petitions for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The three petitions for rehearing en banc, filed May 14, 2009, are **denied.**

PREGERSON, Circuit Judge, concurring:

For the reasons stated by the panel in its concurrence, I also concur in the denial of rehearing en banc.

D.W. NELSON, REINHARDT and FISHER, Circuit Judges, concurring in the denial of rehearing en banc:

A majority of the active judges of our court declined to vote for rehearing of this case en banc. We concur in the court's decision not to go en banc.

The State of Arizona finances private "school tuition organizations" (STOs) by giving dollar-for-dollar tax credits to individuals who contribute to them. On its face, the statute creating this subsidy requires STOs to provide scholarships for students "to attend *any* qualified school of their parents' choice." Ariz. Rev. Stat. Ann. § 43-1089(G)(3) (2005) (emphasis added).[1] As the Arizona Department of Revenue applies the statute, however, the state reimburses contributions to STOs that restrict their scholarships to use at religious schools. Consequently, 85 percent or more of the state financed scholarship money is available only to students whose parents are willing to send them to sectarian institutions.[2] If these facts are proved true,

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[1] All references to "Section 1089" refer to the program as set forth in Arizona Revised Statutes Annotated § 43-1089 (2005), the version of the statute in place when plaintiffs' complaint was filed. Any differences between this and the current version of Section 1089 are not significant for purposes of the analysis.

[2] The dissent sees no constitutional distinction between a tax deduction and a tax credit. *See* Dissent 14721 n.3. We disagree. A tax-credit eligible contribution to an STO costs the taxpayer nothing. *See Winn v. Killian*, 307 F.3d 1011, 1015 n.5 (9th Cir. 2002), *aff'd sub. nom Hibbs v. Winn*, 542 U.S. 88 (2004) ("From a purely financial perspective, . . . a taxpayer is unaffected by his decision as to whether or not to make an STO contribution. The funds that he may contribute will be unavailable to him in any event: they will be used either to make the contribution or to pay the taxes he owes."). Tax deductible contributions, by contrast, impose a cost on the taxpayer. *See id.* ("[W]hen a taxpayer is entitled to a tax deduction, the taxpayer must in most if not all instances still pay a majority of the tax involved[.]"). Whereas a tax deduction would lower the cost of contributions to STOs, a dollar-for-

the Arizona Department of Revenue's execution of the scholarship program (Section 1089) violates the Establishment Clause. In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Court upheld a school voucher program that "provide[d] assistance directly" to parents without regard for religion, and public funds reached religious institutions only as the result of parents' choices about their children's education. *Id.* at 652. Parents received aid whether or not they were willing to enroll their children in sectarian schools, so the program did not exert pressure on parents to choose religious schools. Under the Arizona program, by contrast, taxpayers, rather than parents, direct funds to religious organizations. Access to assistance is restricted on the basis of religion, creating financial incentives that may skew parents' choices toward religious schools. *See id.* at 650. The differences between the Ohio and Arizona programs are constitutionally meaningful.

The dissent from rehearing en banc demonstrates that others may prefer a more expansive reading of *Zelman*. Careful review of the two cases, however, shows why the dissent's argument that "*Winn* cannot be squared with the Supreme Court's mandate in *Zelman*" is not persuasive. Dissent 14719- 20.

I. Background

On its face, Section 1089 appears to provide for

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dollar tax credit reduces that cost to zero, in effect allowing individual taxpayers to directly allocate public funds.

parental choice. The statute says that for an organization to qualify as an STO eligible to receive state-reimbursed contributions the organization must provide scholarships "to children to allow them to attend *any* qualified school *of their parents' choice*." Ariz. Rev. Stat. Ann § 43-1089(G)(3) (emphasis added).[3] If this were how Arizona applied the statute, the Arizona program would be similar to the majority of the tax credit programs currently in operation. Like Section 1089, four of these programs contain provisions directing scholarship organizations to provide scholarships for students to attend *any* qualified school of their parents' choice.[4] These "parental choice" clauses may explain the apparent absence of any Establishment Clause challenges to those programs.

This is not, however, how the Arizona Department of Revenue applies the statute. According to plaintiffs' complaint, Arizona gives tax credits reimbursing individuals who contribute to STOs that expressly restrict their scholarships to use at religious schools. The largest STO, the

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[3] A "qualified school" is defined by statute as "a nongovernmental primary school or secondary school or a preschool for handicapped students that is located in this state, that does not discriminate on the basis of race, color, handicap, familial status or national origin and that satisfies the requirements prescribed by law for private schools in this state." *Id.* § 43- 1089(G)(2).

[4] *See* Fla. Stat. § 220.187(6)(h); Ga. Code Ann. § 20-2A-1(3)(A); Ind. Code § 20-51-3-1(b); Iowa Code § 422.11S(5)(c)(1); R.I. Gen. Laws § 44- 62-2(a). One of the currently operating programs contains no such parental choice provision. *See* 24 Pa. Stat. Ann. § 20-2005-B.

Catholic Tuition Organization of the Diocese of Phoenix, restricts its scholarships to use at Catholic schools in the Phoenix Diocese; the second largest, the Arizona Christian School Tuition Organization provides scholarships only to students attending evangelical Christian schools; and the third largest, Brophy Community Foundation, restricts its scholarships to use at two specific Catholic schools. *See Winn*, 562 F.3d at 1006. As a result of how the Arizona Department of Revenue applies Section 1089, plaintiffs allege, these three religious STOs controlled 85 percent of the total STO donations in 1998, the year before the complaint was filed. *See id.* at 1006. Plaintiffs argue that it is this application of Section 1089 that violates the Establishment Clause.

II. Effect

We turn first to the issue of "whether Section 1089 'has the forbidden "effect" of advancing or inhibiting religion.' " *Winn*, 562 F.3d at 1012 (quoting *Zelman*, 536 U.S. at 649).

A. Parental Choice

The *Winn* panel held that the Arizona Department of Revenue's application of Section 1089 may not provide parents with "true private choice" within the meaning of *Zelman*. *See id.* at 1015-18. With respect to this conclusion, the dissent accuses the panel of rejecting the majority's holding in *Zelman* in favor of Judge Souter's dissent. Not so.

1.

The dissent fails to address the crucial difference between the Ohio voucher program upheld in *Zelman* and the Arizona Department of Revenue's application of Section 1089: with respect to religion, the Ohio program gave parents *equal access* to tuition benefits. *See Zelman*, 536 U.S. at 645. Under the Ohio program, the state provided tuition aid on the basis of financial need, without regard to religion, and eligible parents were free to apply the aid toward any private school, religious or secular, or toward a public school outside the district willing to participate in the program (though none was). If a parent decided to send her child to a private school, the state wrote a check made payable to the parent, which the parent could then endorse over to her chosen school. *See id.* at 646. Crucially, a parent's choice to send her child to a religious school would *neither help nor harm* her chance of receiving tuition aid.

Whether such a program violates the Establishment Clause, the Court held, does not depend on whether the parent receiving tuition aid has a broader array of religious than secular schools to choose from. This is because "[t]he constitutionality of a *neutral* educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school." *Id.* at 658 (emphasis added). The majority in *Zelman* made clear, however, that a "neutral

educational aid program" — or, as the Court also put it, a "program of true private choice" — is one that grants *access* to benefits without regard to religion. *Id.* at 658, 662.

The importance of providing equal access to benefits is emphasized throughout *Zelman*. A common thread running through indirect aid programs the Supreme Court has upheld against Establishment Clause challenges, the *Zelman* Court observed, is that they have been "*neutral* with respect to religion[ ] and provide[d] assistance *directly* to a broad class of citizens." *Id.* at 652 (emphases added); *see also Mueller*, 463 U.S. at 397; *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).[5] Likewise, under the Ohio voucher program, the Court stressed, "[p]rogram *benefits* are available to participating families *on neutral terms*, with no reference to religion." *Zelman*, 536 U.S. at 653 (emphases added).

By contrast, as plaintiffs allege the Arizona Department of Revenue applies the statute, access to Section 1089-funded scholarships is not "available . .

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[5] The program upheld in *Mueller*, *Zelman* explained, provided aid to " '*all* parents' " to pay for certain educational expenses at secular or religious schools. *Zelman*, 536 U.S. at 650 (quoting *Mueller*, 463 U.S. at 397). Under the program in *Witters*, *Zelman* continued, "*recipients* generally were empowered to direct the aid to schools or institutions *of their own choosing*." *Id.* at 651 (emphases added). Likewise, the program upheld in *Zobrest* " 'distribute[d] benefits *neutrally to any child* qualifying as disabled,' " without regard to religion. *Id.* (emphasis added) (quoting *Zobrest*, 509 U.S. at 10).

. on neutral terms, with no reference to religion." Parents who are unwilling to send their child to a religious school may be denied access to program benefits because, as plaintiffs allege, there are not a sufficient number of scholarships available for use at secular schools. Accordingly, these parents are shut out of the program altogether, and at the very least their chances of receiving benefits are harmed by their choice to send their child to a secular school.

This lack of access on a religiously neutral basis explains why Section 1089 as operated by the Arizona Department of Revenue would violate the Establishment Clause. This conclusion is entirely consistent with — and required by — the Court's analysis in *Zelman*. It is true that the majority in *Zelman* rejected Justice Souter's view that the number of religious and secular schools participating in the Ohio voucher program was relevant to its constitutionality. But before the Court addressed Justice Souter's concerns, it first identified several features of the Ohio program that made it one of "true private choice . . . , and thus constitutional." *Id.* Among these features, the tuition aid distributed under the Ohio program created "no 'financial incentives' that 'skew[ed]' the program toward religious schools." *Id.* (alteration omitted) (quoting *Witters*, 474 U.S. at 487-88). The Court recognized that "[s]uch incentives 'are not present where the aid is *allocated* on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is *made available to both religious and secular beneficiaries on a nondiscriminatory basis*.' " *Id.* at 653-54 (emphasis added, alteration and ellipses omitted)

(quoting *Agostini v. Felton*, 521 U.S. 203, 231 (1997)).

The Arizona Department of Revenue permits scholarships funded under Section 1089 *not* to be "made available to both religious and secular beneficiaries on a nondiscriminatory basis." Therefore, *Zelman* requires a closer look at whether the program, as applied, creates "financial incentives that skew the program toward religious schools." *Id.* at 653 (alterations and internal quotation marks omitted). This is why it is relevant that, by allowing tax credits for contributions to discriminatory STOs, the Arizona Department of Revenue has created an overwhelming disparity in the number of scholarships exclusively available for use at religious schools compared to the number available for use at secular schools. *See Winn*, 562 F.3d at 1016-18.

Consistent with Section 1089's parental choice provision, *see* Ariz. Rev. Stat. Ann. § 43-1089 (2005), the Arizona Department of Revenue *could* apply the program to require that STOs make state-funded scholarships "available to both religious and secular beneficiaries on a nondiscriminatory basis." *Zelman*, 536 U.S. at 653-54 (internal quotation marks omitted). If Section 1089 were applied in this neutral manner, data concerning the number of scholarships applied toward religious schools versus secular schools would indeed be irrelevant to the Establishment Clause inquiry as long as the State of Arizona otherwise provided students "a range of [secular] educational choices." *Id.* at 655.

As Section 1089 is currently applied, however, the program allows state-funded scholarships to be restricted to use at religious schools. It is therefore necessary to consider whether, in reality, the program creates incentives for parents to send their children to religious schools in order to gain access to benefits. This conclusion is required by — and, at the very least, consistent with — *Zelman*.[6]

2.

The dissent contends that the Arizona program is valid because the State of Arizona has *other* programs in place that provide secular educational options for those unable to obtain a program scholarship. *See Zelman*, 536 U.S. at 655-56 ("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." (emphases added)). The dissent

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[6] The dissent's hypothetical, about a world in which Section 1089 operates to restrict scholarships to use at secular schools, is premised on the misunderstanding that, under the Free Exercise Clause, governments have an affirmative obligation to fund religious educational options if they decide to make secular options available. *See* Dissent 14725-26. *But see Locke v. Davey*, 540 U.S. 712 (2004) (rejecting Free Exercise challenge to statute providing postsecondary education scholarships but prohibiting use of the scholarships for a degree in devotional theology from a religious institution). Constitutional limitations on support for religion do not precisely mirror limitations on failures to support religion.

fails to recognize *Zelman's* holding that a program of "true private choice" is one in which "[p]rogram benefits are available to participating families on neutral terms, with no reference to religion." *Id.* at 653. A short hypothetical will show why the dissent's reading of *Zelman* is untenable. Consider a program, instituted by a state that provides an array of secular educational options, that offers tax deductions exclusively to parents sending their children to private schools. Each eligible parent receives a tax deduction unrelated to the amount spent on tuition, thus ensuring a windfall to parents who send their children to religious schools, which typically charge lower rates than secular private schools. Assume this hypothetical program has a valid secular purpose. For most potential recipients, however, benefits under the program are, as a practical matter, available only if the recipient chooses to send her child to a relatively low-cost religious school. Thus, the unmistakable effect of the program is to create special incentives to send one's child to a sectarian school.

Under the dissent's reading of *Zelman*, this hypothetical program would easily withstand an Establishment Clause challenge. Anyone can participate in the program. Anyone who participates receives identical tax benefits. Anyone can apply the tax benefits toward a private school of his or her choice. *See* Dissent 14722. Moreover, for those who choose not to participate in the program, the state provides an array of public schooling options. *See id.* at 14732-33.

This program is not a hypothetical; it is the New York tax deduction scheme invalidated in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) — a case that *Zelman* distinguished but declined to overturn.[7] *See Nyquist*, 413 U.S. at 788 ("In its attempt to enhance the opportunities of the poor to choose between public and non-public education, the State has taken a step which can only be regarded as one 'advancing' religion."); *Zelman*, 536 U.S. at 661 (observing that the " 'function' " of the New York program "was '*unmistakably* to provide desired financial support for nonpublic, sectarian institutions' " (quoting *Nyquist*, 413 U.S. at 783 (emphasis added))). *Zelman* explained that *Nyquist* had "expressly reserved judgment with respect to 'a case involving some form of public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted.' " *Id.* (quoting *Nyquist*, 413

[7] The New York program also had provisions offering private school tuition reimbursements, paid directly to the school, for parents who fell below a certain income level and grants to private schools for the maintenance and repair of their facilities. The Court treated each provision of the program as severable and held that each provision separately violated the Establishment Clause. *See Nyquist*, 413 U.S. at 741-45. Nothing in *Zelman* suggests the Court would have upheld the tax deduction provision of the New York program if it had been considered in isolation. *See Zelman*, 536 U.S. at 661 (observing that New York program "gave a package of benefits exclusively to private schools and the parents of private school enrollees" and "provided tax benefits 'unrelated to the amount of money actually expended by any parent on tuition,' ensuring a windfall to parents of children in religious schools" (quoting *Nyquist*, 413 U.S. at 790).

U.S. at 782-83). The Ohio voucher program fit this description. The Arizona Department of Revenue's application of Section 1089 does not.

In *Zelman*, the Court clarified that "*Nyquist* does not govern neutral educational assistance programs that . . . offer aid directly to a broad class of individual recipients defined without regard to religion." *Id.* at 662. According to the dissent, Section 1089 is such a "neutral educational assistance program." By the dissent's logic, however, the New York program invalidated in *Nyquist* would also be such a program. Even more troublesome, a program that provided tax deductions exclusively to parents sending their children to *religious* schools would also constitute a "neutral educational assistance program" as long as the state had other programs in place that provided secular educational options. It is this result, not the outcome in *Winn*, "that simply cannot be reconciled with *Zelman*." Dissent 14724. The Supreme Court elected not to overturn *Nyquist*, and we may not do so on its behalf.

B. Taxpayer Choice

Next, the dissent challenges the panel's conclusion that the choices provided to *taxpayers* under Section 1089 — choices that, plaintiffs allege, restrict *parents*' access to secular educational scholarships — fail to render the program constitutional. *See Winn*, 562 F.3d at 1018-23. Specifically, the dissent contends the panel misapplied *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). A careful

reading of *Winn* shows that the dissent exaggerates the panel's reliance on *Larkin*.

Larkin does not control this case. *See Winn*, 562 F.3d at 1020 (emphasizing that "the delegation of scholarship funding to individual taxpayers, such as in Section 1089, does less to promote religion than the delegation of zoning authority to churches," such as provided under the statute at issue in *Larkin*). Rather, the panel observed that *Larkin*'s holding

> illustrates that when a statute delegates "a power ordinarily vested in agencies of government" to a private party, *see* [*Larkin*, 459 U.S.] at 522, without reasonable assurance that the party's choices will advance the secular purposes of the statute, any ensuing "perceived endorsement of a religious message" may be "reasonably attribut[ed]" to the government.

Winn, 562 F.3d at 1020-21 (second quotation from *Zelman*, 536 U.S. at 652).

Contrary to the dissent's suggestion, *Larkin*'s holding is not limited to cases where the state vests governmental powers in a "pervasively sectarian organization." Dissent 14735. In *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), for example, the Court applied *Larkin* when considering an Establishment Clause challenge to a statute creating a school district coextensive with a religious community. This statute vested power in individual taxpayers, not in a

religious organization, but the Court nonetheless invalidated it. *See id.* at 698 ("The Establishment Clause problem [at issue] is more subtle [than that in *Larkin*], but it resembles the issue raised in *Larkin* to the extent that the earlier case teaches that a State may not delegate its civic authority to a group chosen according to a religious criterion."). Again, *Winn* does not suggest that the choices delegated to taxpayers under the Arizona Department of Revenue's construction of Section 1089 are the constitutional equivalent of the legislative action at issue in *Kiryas Joel*. That case makes clear, however, that the delegation concerns identified in *Larkin* are relevant to whether a reasonable, informed observer would conclude that the choices delegated under Section 1089 have the effect of promoting, or hindering, the program's secular purpose.[8]

The dissent further argues that in terms of constraining parents' access to secular educational options, taxpayers' choices under Section 1089 are no more constitutionally problematic than the choice of public schools not to participate in the Ohio voucher program in *Zelman*. Dissent 14736. This misses the point. Under the Ohio program, it was not the public schools' choices that ensured "the Establishment Clause was not implicated" — it was the *parents'*

[8] The dissent asserts that the "allocation of scholarship funds" is not a traditional governmental function. Dissent 14735 n.20. This framing of the question is unhelpfully narrow. Educational policy is certainly a traditional government function, and the state's decision to reimburse contributions to private scholarship funds is indisputably an educational policy decision.

choices. *Zelman*, 536 U.S. at 652. Each parent had an equal choice under the Ohio program as to whether to apply a tuition voucher toward a private school, and the choice of one parent did not directly alter the array of options available to another parent. Accordingly, under the Ohio program, a parent's choice as to how best to educate her child had no coercive effect on another parent's choice whether to send her child to a secular or religious school. The Ohio program thus provided each eligible parent with a "genuine and *independent* private choice" whether to direct assistance to a religious school. *Id.* (emphasis added). The choices given to parents under the program therefore ensured "the circuit between government and religion was broken." *Id.* Although a public school's decision not to accept a voucher could indeed frustrate the secular purpose of the Ohio program, the Supreme Court did not *rely* on those choices to conclude the program was constitutional.

By contrast, the appellees in *Winn rely* on taxpayers' choices in arguing that the current construction of Section 1089 is valid under the Establishment Clause. The effect of these taxpayer choices, however, may be to *harm* the ability of aspiring scholarship recipients to obtain a scholarship available for use at a secular school. Accordingly, Section 1089 "delegat[es] to taxpayers a choice that, from the perspective of the program's aid recipients, 'deliberately skew[s] incentives toward religious schools.' " *Winn*, 562 F.3d at 1013 (quoting *Zelman*, 536 U.S. at 650)). Such choices are not, in

themselves, sufficient to render an educational aid program valid under the Establishment Clause.

In summary, it was crucial to *Zelman*'s holding that the Ohio program afforded aid *recipients* a "genuine and independent private choice" whether to direct the assistance they received toward a religious school. *Zelman*, 536 U.S. at 652. Although the Arizona Department of Revenue's application of Section 1089 does not afford such choice, *Winn* carefully determined that the choice provided to *taxpayers* is insufficient to ensure "the circuit between government and religion was broken." *Id.* For reasons carefully laid out in the decision, our court was correct to decline en banc review.

III. Secular Purpose

The dissent also faults *Winn* for concluding that Section 1089 may lack a valid secular purpose. *See* 562 F.3d at 1011- 12. This criticism is premature. The question before the panel was "not whether Section 1089 in fact has a genuine, secular purpose, but whether plaintiffs could prove, on the facts alleged in the complaint, that it does not." *Id.* at 1012.

As the dissent states, a "legislature's stated reasons" for enacting a statute "will generally get deference," and must be accepted as true except in "unusual cases where the claim was an apparent sham, or the secular purpose secondary." *Mc- Creary County v. ACLU of Ky.*, 545 U.S. 844, 865 (2005). The inquiry into whether a statute's ostensible

purpose is a sham or secondary to a religious objective, however, must be "undertaken from the perspective of 'an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act.' " *Winn*, 562 F.3d at 1012 (quoting *McCreary*, 545 U.S. at 862. The dissent's position would foreclose such an inquiry.

The dissent surmises that in enacting Section 1089, "[t]he legislature could hardly have had the 'purpose' of endorsing religion when it set up a plan that, *for all it knew*, could have resulted in absolutely no funding for religious entities." Dissent 14739 (emphasis added). The dissent makes this claim without citing any evidence concerning what the legislature *actually* knew about how Section 1089 would likely operate. This is just as well, because no such evidence yet appears in the record. But the dissent suggests it should not *matter* to us whether the legislature knew that Section 1089 would result in disproportionate funding being made available only for use at religious institutions. The Supreme Court has cautioned us, however, against evaluating a program's purpose from the perspective of an "absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show." *McCreary*, 545 U.S. at 866. In short, the dissent appears to call for either a heightened pleading standard for Establishment Clause claims — under which the plaintiff must allege specific facts establishing that the legislature

acted for an invalid purpose — or an approach to evaluating a program's purpose that "would cut context out of the enquiry, to the point of ignoring history." *Id.* at 864.

Regarding evidence of Section 1089's implementation, the dissent contends that because taxpayer contributions to STOs are private conduct, they are irrelevant to whether Section 1089 has a valid secular purpose. Notably, in an as-applied context, at least two circuits have considered private conduct under a government program to be probative of the program's purpose,[9] and *Winn* does not foreclose the possibility that plaintiffs can point to private conduct probative of whether Section 1089 has a secular purpose. More probative, however, is the *government* conduct on the part of the State of Arizona in implementing Section 1089.

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[9] *See Staley v. Harris County, Tex.*, 461 F.3d 504, 513 (5th Cir. 2006); *Bonham v. D.C. Library Admin.*, 989 F.2d 1242, 1244-45 (D.C. Cir. 1993). In *Staley*, the Fifth Circuit considered the community response to a government-sponsored monument of a local citizen carrying a Bible in evaluating whether the monument had a valid secular purpose. *See* 461 F.3d at 513 ("[T]he fact that the monument, with the Bible, stood without complaint [from citizens] for thirty-two years, supports the notion that the original purpose was not objectively seen as predominantly religious."). In *Bonham*, Judge Mikva, reversing the district court's dismissal under Rule 12(b)(6) of a pro se plaintiff's claim that the closing of a public library on Easter Sunday violated the Establishment Clause, observed: "In determining the legislative purpose of a law or government practice, courts generally look to . . . testimony of *parties who participated in the enactment or implementation of the challenged law or practice*, historical context, and the sequence of events leading to the passage of the law or the initiation of the practice." 989 F.2d at 1244-45 (emphasis added).

The Arizona Department of Revenue implements Section 1089 by allowing individuals to claim tax credits for contributions to private STOs. *See Winn*, 562 F.3d at 1009 ("The Supreme Court has recognized . . . that *state tax policies* such as tax deductions, tax exemptions and tax credits are *means of 'channeling . . . [state] assistance*' to private organizations . . . ." (emphasis added, ellipses in original) (quoting *Mueller*, 463 U.S. at 399)). According to plaintiffs' complaint, the Arizona Department of Revenue allows tax credits for contributions to STOs that provide scholarships only to religious schools. Individuals' contributions to STOs that discriminate on the basis of religion are not, of themselves, probative of Section 1089's purpose. The fact that the Arizona Department of Revenue gives tax credits for these contributions, however, could be probative of legislative expectations as to how state assistance under Section 1089 would be directed in practice.

Accordingly, by declining to rehear this case en banc, we appropriately rejected the suggestion that we should turn a blind eye to the history and implementation of Section 1089 simply because the statute is facially neutral.

IV. Conclusion

This case required the panel to apply *Zelman* to an educational aid program that, according to the allegations of plaintiffs' complaint, lets taxpayers choose to make state-reimbursed contributions to private scholarship organizations, but allows the

organizations to restrict access to state-funded scholarships on the basis of religion. *Winn* correctly held that such a program would not, under *Zelman*, provide parents with "genuine and independent private choice," and that the choice given to taxpayers under such a program could not be treated as the constitutional equivalent of the choice given to parents under the Ohio voucher program. Unlike the program in *Zelman*, the program alleged here neither makes scholarships available to parents on a religiously neutral basis nor gives them a true private choice as to where to utilize the scholarships. The panel correctly held that these allegations, if proven true, could establish an Establishment Clause violation. We therefore concur in the denial of rehearing en banc.

O'SCANNLAIN, Circuit Judge, dissenting from the denial of rehearing en banc, joined by KOZINSKI, Chief Judge, KLEINFELD, GOULD, TALLMAN, BYBEE, BEA, and N.R. SMITH, Circuit Judges:

This case involves an Establishment Clause challenge to an Arizona educational tax credit program that provides scholar- ships to students wishing to attend private schools. This case is more notable, however, for what it does not involve: state action advancing religion. The government does not direct any aid to any religious school. Nor does the government encourage, promote, or otherwise incentivize private actors to direct aid to religious schools. Rather, "state aid reaches religious schools solely as a result of the numerous independent

decisions of private individuals." *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002).

Unable to find any forbidden state action, the district court correctly dismissed the case on the pleadings. Sadly, our three-judge panel reversed. *See Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002 (9th Cir. 2009). Because a program of scrupulous "governmental neutrality between religion and religion, and between religion and nonreligion," *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), cannot violate the Establishment Clause, I respectfully dissent from our full court's regrettable denial of rehearing en banc.

I dissent not only because *Winn* cannot be squared with the Supreme Court's mandate in *Zelman*, but also because the panel's holding casts a pall over comparable educational taxcredit schemes in states across the nation and could derail legislative efforts in four states within our circuit to create similar programs.[1] In short, the panel's conclusion invalidates an increasingly popular method for providing school choice, jeopardizing the educational opportunities of hundreds of thousands of children nationwide.[2]

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[1] *See* Fla. Stat. § 220.187; Ga. Code Ann. § 48-7-29.16; Ind. Code § 6- 3.1-30.5; Iowa Code § 422.11S; 24 Pa. Stat. Ann. 20-2005-B; R.I. Gen. Laws § 44-62-2; A.B. 279, 2009-10 Leg., Reg. Sess., § 1 (Ca. 2009); S.B. 342, 61st Leg., Reg. Sess., § 1(3)(b)-(c) (Mont. 2009); S.B. 289, 75th Leg., Reg. Sess., § 6(1) (Nev. 2009); H.B. 2754, 75th Leg., Reg. Sess. (Or. 2009).

[2] Such programs have operated without incident, perhaps because no one has thought to challenge them post-*Zelman*. *Cf., e.g.*, *Bush v. Holmes*, 919 So. 2d 392, 399 (Fla. 2006) (explaining

I

Arizona law ("Section 1089") allows individuals voluntarily to contribute money to private, nonprofit corporations known as "student tuition organizations" ("STOs"). Ariz. Rev. Stat. Ann. § 43-1089(A). Anyone can form an STO, and there are no constraints on a taxpayer's ability to donate to an STO of his choice. Should a taxpayer elect to direct funds to an STO, that contribution is refunded via tax credits of up to $500 for individual taxpayers and up to $1000 for married couples filing jointly.[3] *Id.*

STOs use these funds to provide scholarships and tuition grants to students attending schools within the state. *Id.* § 43- 1089(G). While essentially

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that plaintiffs voluntarily dismissed a challenge to a Florida school choice program after *Zelman*).

[3] The distinction the panel tries to draw between a tax credit and a deduction, *see* 562 F.3d at 1014-15, can have no constitutional significance. Both result in a reduction of the money paid by the taxpayer to the government, with the amount of the reduction going to the designated STO. The only practical difference is that with a deduction the taxpayer must make a co-payment of his own, whereas with a credit there is no copayment. Of course, this favors richer taxpayers over poorer ones, as the former are more able to afford a personal contribution. Moreover, in a progressive tax system, deductions most favor the taxpayers with the greatest income. Not only does the value of the deduction increase with the taxpayer's marginal rate, but so does the amount of government revenue that is diverted at the taxpayer's behest. It is difficult to see why such a regressive regime (deductions) is constitutionally superior to the egalitarian tax credit. *Cf. Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (The Constitution "does not enact Mr. Herbert Spencer's social statics.").

any private school is statutorily eligible to receive scholarship monies,[4] STOs may choose which institutions they will support, so long as they provide funds to more than one school. *Id.*[5] Parents then decide which private school they would like their child to attend, and apply for scholarships from appropriate STOs.

In sum, the state's involvement stops with authorizing the creation of STOs and making tax credits available. After that, the government takes its hands off the wheel. Anyone can create an STO. Anyone can contribute to any STO and receive identical tax benefits. Anyone can apply for any scholarship offered by any STO.

Shortly after Section 1089's enactment, the Arizona Supreme Court held that the statute, on its face, did not violate the Establishment Clause. *See Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999). Taxpayer plaintiffs then brought this federal action, which was dismissed by the district court under the Tax Injunction Act. *See Winn v. Killian*, 307 F.3d

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[4] Schools that "discriminate on the basis of race, color, handicap, familial status or national origin" are ineligible. *Id.* § 43-1089(G)(2).

[5] Like virtually every other tax credit system, *see supra* note 1, the Arizona statute requires STOs to provide scholarships "without limiting availability to only students of one school." Ariz. Rev. Stat. Ann. § 43-- 1089(G)(3). And again, like most other schemes, *see supra* note 1, the statute says STOs should allow children "to attend any qualified school of their parents' choice." *Id.* While hardly the model of clarity, this language has been interpreted to mean STOs satisfy the statue by providing scholarships to at least two schools.

1011, 1013 (9th Cir. 2002). After the suit was reinstated, *see id.* at 1020; *see also Hibbs v. Winn*, 542 U.S. 88 (2004) (affirming our opinion reversing its dismissal), the district court again dismissed the action, this time on federal constitutional grounds, *see Winn v. Hibbs*, 361 F. Supp. 2d 1117 (D. Ariz. 2005).

Plaintiffs appealed. They allege (and no one disputes) that in practice, some STOs make their scholarships available only to students willing to attend religiously affiliated schools. *Winn*, 562 F.3d at 1006. While the majority of STOs do not so limit their scholarships,[6] plaintiffs maintain that those that do receive the overwhelming majority of taxpayer contributions. *See id.* Consequently, they assert that the pool of available scholarship money is diminished for parents wishing to send their children to secular schools. *See id.* Plaintiffs contend that this disparity means Section 1089, as applied, impermissibly favors religion over nonreligion. *See id.*

The three-judge panel agreed and reversed the district court's dismissal, holding that "if plaintiffs' allegations are accepted as true, Section 1089 violates the Establishment Clause." *See id.* at 1013. Concluding that the nature of the tax credit made taxpayer contributions tantamount to government funds, the panel found that Section 1089 potentially violated both the purpose and effects prongs of *Lemon v. Kurtzman*, 403 U.S. 603 (1971). *See id.* at

[6] Twenty-five of the fifty-five existing STOs limit scholarship awards to religious schools.

1011-23. The fact that taxpayers directed the majority of available funds to religious schools, the panel reasoned, deprived parents of a "genuinely independent and private choice[ ]" to send their children to secular private schools. *Id.* at 1013 (internal quotation marks and citation omitted). Accordingly, Section 1089 was not a "neutral program of private choice and a reasonable observer could . . . conclude that the aid reaching religious schools . . . carries with it the *imprimatur* of government endorsement." *Id.* at 1013-14 (internal quotation marks and citation omitted).[7]

II

I have no bone to pick with the manner in which the panel frames the basic constitutional inquiry. We all understand that the Establishment Clause "prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." *Zelman*, 536 U.S. at 648-49. More often than not, the Court determines whether these commands have been violated by asking whether a "reasonable observer," who is "aware of the history and context underlying a challenged program," would conclude that the state has "endorsed"

[7] Make no mistake about the procedural posture of this decision. True, the case will be remanded to the district court. But the panel holds that, "if plaintiffs' allegations are accepted as true, Section 1089 violates the Establishment Clause." *Winn*, 562 F.3d at 1013. So far as I can tell, no one disputes plaintiffs' factual allegations about how the program operates in practice. Thus, the panel leaves the district court with no choice but to declare the program unconstitutional as applied, rendering the remand little more than an empty formality.

religion. *Id.* at 655 (internal quotation marks and citation omitted).

The panel's heavy emphasis on *Zelman* is also warranted. In that case, the Supreme Court upheld an Ohio school voucher program that provided tuition aid to Cleveland families on the basis of need. *Id.* at 644-45. The vouchers were distributed directly to parents, who could choose to use the scholarship money at any participating private, community, magnet, or public school. *Id.* at 645-46. The Court ruled that a "neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals" does not violate the Establishment Clause. *Id.* at 655.

It is in the application of these standards, however, that the three-judge panel lost the forest for the trees. In doing so, it reached a result that simply cannot be reconciled with *Zelman*.[8]

III

The panel is correct that a law may not have the "forbidden 'effect' of advancing . . . religion." *Id.* at 649. What the panel seems to neglect, however, is that "[f]or a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Corp. of the Presiding*

[8] As the panel focused primarily on "effects," rather than "purpose," I address these two *Lemon* prongs out of order.

Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987).[9]

I must confess that I am at a loss to understand how a reasonable observer—one fully informed about all matters related to the program—could conclude that the "*government itself*" has endorsed religion in this case. Multiple layers of private, individual choice separate the state from any religious entanglement: the "*government itself*" is at least four times removed from any aid to religious organizations. First, an individual or group of individuals must choose to create an STO. Second, that STO must then decide to provide scholarships to religious schools. Third, taxpayers have to contribute to the STO in question. Finally, parents need to apply for a scholarship for their student. In every respect and at every level, these are purely private choices, not government policy. Under such circumstances, "government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment." *Zelman*, 536 U.S. at 652-53 (internal quotation marks and citation omitted). Only after passing through choice piled upon choice do government funds reach religious organizations.

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[9] For example, the panel asserts that Arizona parents are presented with a choice that "deliberately skew[s] incentives toward religious schools." *See Winn*, 562 F.3d at 1013 (quoting *Zelman*, 536 U.S. at 650). The actual quotation from *Zelman*, however, includes a key qualifier: it condemns only programs where "the *State* deliberately skewed incentives toward religious schools." 536 U.S. at 650 (emphasis added). Since only state action can violate the Establishment Clause, the panel's omission is telling.

That is not government endorsement: that is government nonchalance.[10]

To illustrate my point, consider the following hypothetical. Assume the exact statutory scheme embodied in Section 1089: anyone can create an STO, anyone can donate to an STO, and STOs can limit their scholarships to particular types of schools. Now imagine that only agnostics decide to create STOs. Imagine further that every STO refuses to provide tuition assistance to religious schools. In short, assume there is absolutely no money available for parents who want to send their children to a religious school. Would the parents be justified in accusing the *government* of depriving their children of school funds? Of course not.

The foregoing example plainly shows that in this case, any "endorsement" of religion arising from the disbursement of state funds to religious entities turns wholly and completely on the independent, uncoerced choices of private individuals. The system

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[10] The panel makes much of the fact that *Zelman* discussed aid flowing "directly" to parents. I submit that the Supreme Court used such terminology for two reasons. First, that was the case before the Court: it had no reason to pontificate on systems involving additional levels of private choice. Second, the language emphasized that the voucher program did not involve constitutionally problematic "direct" aid to religious institutions.

The panel turns this language into a rallying cry to suggest that by filtering aid through multiple levels of private choice—rather than a single level—the state endorses religion. But that makes no sense. How can *increasing* the separation between state and religion result in heightened government endorsement?

Arizona created could just as easily have resulted in a total dearth of funding for religious organizations as opposed to the surfeit allegedly available. This feast or famine is utterly out of the state's hands. It simply cannot be, as the panel claims, that the "scholarship *program* . . . skews aid in favor of religious schools." *Winn*, 562 F.3d at 1013 (emphasis added). The "program" does no such thing: any "skew[ing]" that occurs takes place because of private, not government action. It is axiomatic that such action cannot violate the Establishment Clause.

A

The panel however, believes that under this multi-tiered system, choice is the culprit, not the savior. After all, plaintiffs allege that it is "the choice delegated to taxpayers" which "channels a disproportionate amount of government aid to sectarian STOs [that] limit their scholarships to use at religious schools." *Id.* *Zelman*, the panel maintains, focused on parental choice. *Id.* at 1018. Here, however, that choice is purported impermissibly to be "constrained" by the decisions of taxpayers and STOs. *Id.* at 1016. In other words, the choices of others deprive parents of their own "independent and private choice[ ]." *Id.* at 1013 (internal quotation marks and citation omitted). They might want to send their children to secular private schools, but scholarships are not readily available for that purpose. Moreover, the panel claims the alleged abundance of funds from religious STOs creates an incentive for these parents to enroll their children in religious schools. *Id.* at 1017-18.

The panel therefore holds that Section 1089 "fails to provide genuine opportunities for . . . parents to select secular educational options for their school-age children." *Id.* at 1018 (internal quotation marks and citation omitted).

I admit that the panel's conclusion with respect to the purported lack of parental choice finds support in *Zelman*. The problem is, that support comes from Justice Souter's dissent, not the opinion of the Court. Several aspects of the majority's reasoning in that case make the *Winn* panel's conclusion infirm.

1

By focusing generally on the scope of parental choice, the *Winn* panel, like the *Zelman* dissent, is barking up the wrong tree. The question is not whether a parent's choice is somehow limited or constrained, the question is whether the *government* has somehow limited or constrained the choice.

In *Zelman*, Justice Souter accused the majority of allowing external factors to "influenc[e] choices in a way that aims the money in a religious direction." 536 U.S. at 703 (Souter, J., dissenting). Of the fifty-six private schools that participated in the Cleveland voucher program, he noted, forty-six were religious. *Id.* In his mind, this lack of a "wide array of private nonreligious options" suggested that any "choice" was not genuine. *See id.* at 703-06. Rather, he believed parents' decisionmaking process was skewed by "the fact that too few nonreligious school desks are available and few but religious schools can

afford to accept more than a handful of voucher students." *Id.* at 707. "For the overwhelming number of children in the voucher scheme," he concluded, "the only alternative to the public schools is religious." *Id.* He was not swayed by the fact that these constraints were unrelated to state action: "a Hobson's choice is not a choice, whatever the reason for being Hobsonian." *Id.* In sum, Justice Souter would have struck down the Ohio voucher program because parents' choice was influenced by factors beyond their control.

Obviously, Justice Souter's position did not carry the day. "That 46 of the 56 private schools now participating in the program are religious schools," the majority explained, "does not condemn it as a violation of the Establishment Clause." *Id.* at 655 (majority opinion). For one thing, the Court noted that the imbalance was not a function of government action. *See id.* at 656-57. Moreover, "[t]o attribute constitutional significance" to the availability of secular options, "would lead to the absurd result that a neutral school-choice program might be permissible in . . . some states [with a high concentration of secular schools], but not in other States [where religious schools are plentiful]." *Id.* at 657.[11] To avoid this absurdity, the majority held that "[t]he constitutionality of a neutral educational aid

[11] Earlier, I listed several state programs jeopardized by the panel's holding. *See supra* note 1. Under the panel's reasoning, those schemes could be constitutional if taxpayers decided to provide more funds to secular, rather than religious STOs. An identical program might then be constitutional in one state and unconstitutional in another.

program simply does not turn on whether and why, in a particular area, at a particular time,[12] most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school." *Id.* at 658.[13]

I see no meaningful distinction between the situation in *Zelman* and the facts of this case. Both cases involve alleged "constraints" on access to a scarce secular resource— "nonreligious [private] school desks." In *Zelman*, only ten of the participating schools were secular. *Id.* at 656. Parents were thus "constrained" by third-party decisions to fund religious, rather than secular schools. Here, while thirty out of fifty-five STOs offer scholarships to secular schools, the majority of program funds are allegedly concentrated in religious STOs. Parents are thus "constrained" by the decisions of some STOs to limit their scholarships to religious institutions, and taxpayer choices to direct their funds to those STOs. The key

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[12] The "at a particular time" reference is especially significant. As discussed above, nothing in Section 1089 precludes any Arizona taxpayer, tomorrow, from suddenly deciding to fund exclusively secular STOs. *See supra* pp. 14709-11. The Supreme Court has twice declined to strike down laws on the basis of such moving targets. *See Zelman*, 536 U.S. at 657-58; *Muller v. Allen*, 463 U.S. 388, 401 (1983).

[13] The Court went on to explain that it is "irrelevant . . . to the constitutionality" of a government aid program that "a vast majority of program benefits went to religious schools." *Zelman*, 536 U.S. at 658. The panel distinguishes this point, claiming that the *Zelman* did not involve a situation where parental choice was "constrained." *Winn*, 562 F.3d at 1017 n.14. As demonstrated below, that is simply not the case. *See infra* pp. 14728-31.

point is that in neither *Zelman* nor the case at hand are the purported "constraints" government-induced. There is simply no constitutionally significant distinction between a system where—for reasons unattributable to state action—money is available, but there are a limited number of schools to receive it, and a system where schools may be available, but there is a limited amount of money to spend. Under either scenario, as Justice Souter bemoaned, "[f]or the overwhelming number of children in the [program], the only alternative to the public schools is religious." *Id.* at 707 (Souter, J., dissenting).

I can go on. In *Zelman*, voucher funds could be used at participating public schools in districts adjacent to Cleveland. *Id.* at 645 (majority opinion). However, no such school "elected to participate." *Id.* at 647. Parental choice was therefore "constrained" by the decisions of out-of-district public school administrators. Similarly, Ohio did not require private secular schools to accept vouchers: they chose to do so. *See id.* at 656 n.4. Citing overcrowding or a desire for independence from government funds, these schools could just as easily have decided to opt out of the program. Alternatively, they could have, for whatever reason, decided to close up shop. In either scenario, parents again would be left with a reduced "choice" to send their children to private, secular schools. Did the *Zelman* Court strike down the Ohio program for impermissibly "delegating" such decisions to school administrators? Was parental choice held to be unduly "constrained"? Of course not. Instead, the Court said that the availability of a private secular

education, "in a particular area, at a particular time," was irrelevant to the constitutional inquiry. *See Zelman*, 536 U.S. at 656-60; *supra* pp. 14728.[14]

Ultimately, the panel seems to assume that parents must have the same access to "nonreligious [private] school desks" as they do to religious private school desks. But that was certainly not the case in *Zelman*, and the Ohio voucher program was upheld. Indeed, such result is unattainable in *any* program where the government is neutral with respect to religion and nonreligion. If the government takes the constitutionally required hands-off approach, external factors will define the playing field. Contrary to the panel's conclusion, the constitutional inquiry "simply does not turn" on whatever influence these factors might exert on parents. *Zelman*, 536 U.S. at 658. Again, provided there is "no evidence that the *State* deliberately skewed incentives toward religious schools," there is no Establishment Clause violation. *Id.* at 650 (emphasis added); *see supra* pp. 14723-26. As the Arizona tax credit program is just as much a program of "true private choice" as the

[14] The *Zelman* Court's comment that the "preponderance of religiously affiliated private schools certainly did not arise as a result of the [voucher] program" is also instructive. 536 U.S. at 656-57. The Court stated that the imbalance was "a phenomenon common to many American cities." *Id.* at 657. In other words, the disparity was caused not by government action, but rather by private predilections. The same can be said about the existence of religiously affiliated STOs and the disproportionate share of taxpayer contributions they receive. The concentration of funds in religious entities—and the resulting "constraint" on parental choice—"certainly did not arise as a result of" any state action, but rather as a consequence of private decisions. *See supra* pp. 14724-26.

program in *Zelman*, 536 U.S. at 649, the panel erred in reinstating the constitutional challenge.[15]

2

In rejecting Justice Souter's position, the *Zelman* majority also emphasized that he was asking the wrong question. Rather than focusing narrowly on the challenged voucher program, the majority explained that 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 [voucher]." *Id.* at 655-56. Because the *Winn* panel adopts Justice Souter's overly restrictive approach, rather than assessing "*all* options" available to Arizona students, its result is similarly flawed.[16]

Indeed, the panel overtly limited its parental-choice inquiry to "the range of educational choices the STO-administered scholarship programs offer." *Winn*, 562 F.3d at 1018. It "reject[ed] the suggestion that the mere existence of the public school system guarantees that any scholarship program provides for genuine private choice." *Id.* While the latter statement may be true, it is also something of a non

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[15] For this reason, the *Winn* panel's reliance on *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), is misplaced. *See Zelman*, 536 U.S. at 661-62.

[16] Interestingly, the Supreme Court decided to italicize "*all* options" in *Zelman*, and "*government itself*" in *Amos*. Maybe the justices thought these requirements were important. *Zelman*, 536 U.S. at 655-56; *Amos*, 483 U.S. at 337.

sequitur. No one claims the existence of a public school system grants a state license to ignore the Establishment Clause. The question, as *Zelman* instructs, is whether Arizona is "coercing parents into sending their children to religious schools," a question which must be answered by evaluating "*all* options" Arizona provides its schoolchildren. 536 U.S. at 655-56.

The panel did not even engage in this inquiry. Had it done so, it would have discovered that Section 1089 is but one of a "range of educational choices" available to parents of school-aged children. *Id.* at 655; *see also Kotterman*, 972 P.2d at 611 (noting that the "Arizona Legislature has, in recent years, expanded the options available in public education" and listing some of those options). Arizona's public schools must provide for open enrollment, allowing parents to send their children, tuition-free, to schools of their choice. Ariz. Rev. Stat. Ann. § 15-816.01(A). Tax credits are available for donations to public schools for "extracurricular activities or character education." Ariz. Rev. Stat. Ann. § 43-1089.01. An extensive system of charter schools "provide[s] additional academic choices for parents and pupils." *Id.* § 15-181.[17] Homeschooling is permitted and protected. *Id.* §§ 15-745, 802-03. Indeed, Section 1089 itself offers parents yet another alternative: they can create their own STO and solicit donations for use at secular private schools. These alternative

[17] Out of the 4,000 plus charters schools across the country, 478 are in Arizona. *See* Arizona Charter Schools Association, http://www.azcharters.org/pages/schools-basic-statistics (last visited July 25, 2009).

educational opportunities mirror those the Court took into consideration in *Zelman*. *See* 536 U.S. at 655 ("Cleveland schoolchildren enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school.").[18]

This is no Hobson's choice. Far from "coercing" parents into sending their children to religious schools, Arizona provides a wide variety of secular alternatives. "Any objective observer familiar with the full history and context of [Section 1089] would reasonably view it as one aspect of a broader undertaking . . . ." *Id.* at 655. By shutting its eyes to

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[18] As the district court observed, parents are actually *dis*couraged from sending their children to private religious schools. "An Arizona student may attend any public school without cost . . . . In contrast, the average scholarship paid by STOs in 2003 was $1,222, a sum unlikely to cover all of the costs of private school attendance." *Winn*, 361 F. Supp. 2d at 1121 (citations and footnote omitted); *see also Zelman*, 536 U.S. at 654 ("Families . . . have a financial disincentive to choose a private religious school over other schools. Parents that choose to . . . enroll their children in a private school . . . must copay a portion of the school's tuition. Families that choose a community school, magnet school, or traditional public school pay nothing. [This] clearly dispel[s] the claim that the program creates financial incentives for parents to choose a sectarian school." (internal quotation marks, alterations, and citation omitted)).

the host of options available to Arizona parents, the panel's opinion directly conflicts with *Zelman*.[19]

B

As demonstrated by the foregoing arguments, the Arizona program provides parents with "true private choice." That established, the panel's discussion of taxpayer choice becomes surplusage. Indeed, is its curious focus on "taxpayer choice" an apt analogy at all? I suggest that *Winn*'s reliance on *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), is utterly mistaken.

The thrust of the panel's reasoning is that taxpayer choice is not a valid substitute for the *parental* choice allegedly at the core of *Zelman*. I am not certain, however, that parental choice was as central to the reasoning of *Zelman* as the panel would have it. While that opinion does repeatedly refer to aid "recipients," *see Winn*, 562 F.3d at 1018 (listing citations), at other times, it refers only to private, nongovernmental choice, *see, e.g.*, *Zelman*, 536 U.S. at 649 (describing programs where "government aid reaches religious schools only as a

[19] The concurrence argues that this reading of *Zelman* is inconsistent with *Nyquist*. Concurrence at 14712-13. The Court invalidated the New York tax program at issue in *Nyquist* because its tuition reimbursements were designed " 'explicitly to offer . . . an incentive to parents to send their children to sectarian schools.' " *Zelman*, 536 U.S. at 662 (quoting *Nyquist*, 413 U.S. at 782-83). As I have explained above, the plethora of choices available to Arizona parents demonstrates that Section 1089 has no effect of incentivizing religious schools over sectarian schools.

result of the genuine and independent choices of private individuals"); *id.* at 655 (stating that "no reasonable observer" would find government endorsement where "state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals"). Significantly, *Zelman* seems most concerned about preventing the state from reaching out to "grant special favors that might lead to a religious establishment." *Id.* at 652-53 (internal quotation marks and citation omitted). So long as "favors" are doled out independent of state action, the Establishment Clause—which again, prohibits the "*government itself*" from endorsing religion—is not offended.

I further submit that under the endorsement test, any level of attenuation between government action and aid to religion necessarily reduces the likelihood that a "reasonable observer" will find impermissible government approbation. There can be no doubt that taxpayer choice contributes to that attenuation. Thus, the panel's analysis of whether the choice Section 1089 provides to taxpayers ensures that " 'the circuit between government and religion was broken' " is beside the point. *Winn*, 562 F.3d at 1021 (quoting *Zelman*, 536 U.S. at 652). The self-evident fact is that by "delegating" the choice to taxpayers, the government already broke the circuit.

Nonetheless, the panel contends a reasonable observer would consider two factors when deciding whether a program of individual choice violates the Establishment Clause: the "role the person making

the choice occupies in the structure of the program," *id.* at 1020, and "whether the choice dele- gated . . . has the effect of promoting, or hindering, the program's secular purpose," *id.* at 1021. Regarding the former, the panel determined there was "no 'effective means of guaranteeing' " that taxpayers would exercise their choice " 'exclusively for secular, neutral, and nonideological purposes.' " *Id.* at 1020 (quoting *Larkin*, 459 U.S. at 125). Parents, on the other hand, have "incentives to apply the program's aid based on their children's educational interests instead of on sectarian considerations." *Id.* at 1021. As for the latter, the panel concluded that taxpayers thwarted the secular purpose of the statute insofar as their contributions narrowed the range of available educational alternatives. *Id.* at 1022.

One could see how a reasonable observer in *Larkin* could perceive government endorsement of religion from the "role the [entity] making the choice" played in the scheme. Maybe I am stating the obvious, but a large part of that perception might rest on the fact that in *Larkin*, the state delegated legislative authority—the ability to veto liquor licenses—to *churches*. *See* 459 U.S. at 125. I say again: churches. Under such circumstances it is completely unsurprising that a reasonable observer would conclude that this "joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some." *Id.* at 125-26. To what pervasively sectarian organization has Arizona "delegated" the choice at

issue in this case? The Arizona taxpayer.[20] When perceived endorsement of religion is at issue, state cooperation with churches is a far cry from state cooperation with taxpayers.[21]

Moreover, I disagree with the panel's conclusion that parents are somehow less motivated to promote religious objectives than taxpayers generally. As anyone who has grown up in a religious household will tell you, schooling decisions are as frequently made on the basis of *religious* considerations as they are on purely secular academic grounds. At the very least, sectarian considerations factor into the equation of what is in the child's best interests educationally. Thus, whether it resides with the taxpayer or the parent, once the choice is made available, the state has no "effective means of guaranteeing" that it will be exercised "exclusively for secular, neutral, and nonideological purposes." *Id.* at 125 (internal quotation marks and citation omitted). By contrast with engaging in pseudo-psychological inquires into motivation, under *Zelman*, we need only satisfy ourselves that the

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[20] Additionally, the authority delegated in *Larkin* was absolute veto power in an area of traditional government functioning. 459 U.S. at 125. Here, each individual taxpayer exercises only a modicum of control over the allocation of scholarship funds.

[21] *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), does not support the panel's analysis. In *Larkin*, legislative authority was delegated to churches. In *Kiryas Joel*, the state created a school district such that a particular religious group would have "exclusive control of the political subdivision." 512 U.S. at 698-99. Both actions displayed overt religious bias. "Delegation" to the Arizona taxpayer does not.

choice, whatever it is, is made by a private actor, not by the government.

With respect to taxpayers' ability to "thwart" the secular purpose of the statute, as discussed above, actors in *any* program of true private choice will have this ability. *See supra* pp. 14728-30. In *Zelman*, for example, the purpose of providing a broad range of educational opportunities was "thwarted" by the decisions of neighboring public-school administrators to decline program vouchers. *See supra* pp. 14729-30. The goal could be similarly "thwarted" if secular private school administrators decided to pull out of the program. *See supra* pp. 14729-30—. An inherent reality of true private choice programs cannot condemn Section 1089.

Ultimately, the panel appears to argue that Arizona's scheme is flawed because it essentially delegates to a private entity something the state could not constitutionally achieve by the exercise of its own powers; here, the promotion of religious education. *See Winn*, 562 F.3d at 1020; *see also id.* at 1021 (citing *Norwood v. Harrison*, 413 U.S. 455, 465 (1973)). That may well be true, but as the panel's own citation indicates, for that to be the case, the state must somehow "*induce*, *encourage* or *promote* private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood*, 413 U.S. at 465 (emphases added). At the risk of beating a dead horse, I repeat that the state here has done *nothing* to cajole parents, STOs, or taxpayers into supporting religious education. The state has simply said, if you donate to the STO of your choice,

you get a tax credit. Such action in no way induces, encourages, or promotes private parties to aid religion.[22]

IV

The panel also holds that plaintiffs have alleged facts suggesting Section 1089 was not "enacted for . . . [a] valid secular purpose." *Winn*, 562 F.3d at 1011 (internal quotation marks and citation omitted). The panel reaches this conclusion despite conceding that the statute is facially neutral with respect to religion. *See id.* at 1011-12. Nothing in the legislative history suggests that the driving force behind the bill was anything other than the desire to provide "equal access to a wide range of schooling options for students of every income level." *Id.*; *see also Mueller*, 463 U.S. at 395 ("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."). Nonetheless, the panel maintains that plaintiffs could prove, based on how Section 1089 operates in practice, that this "secular and valid" purpose is a sham. *Winn*, 562 F.3d at 1011-12.

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[22] The concurrence asserts that "[t]he effect of these taxpayer choices . . . may be to *harm* the ability of aspiring scholarship recipients to obtain a scholarship available for use at a secular school." Concurrence at 14716. I fail to see how Section 1089—which permits tax deductions for gifts to both religious and secular scholarship funds—harms a student's ability to obtain a scholarship to a secular school.

From its citation to *McCreary County v. ACLU*, 545 U.S. 844 (2005), the panel seems to argue that the very enactment of Section 1089 "bespoke" a religious purpose. *Winn*, 562 F.3d at 1012. But how can this be so? *McCreary* does say that government action can be so "patently religious" that its nonsecular nature is evident. 545 U.S. at 862. The examples provided, however, are situations where the state mandated Bible study, the teaching of creationism, and prayer in schools. *Id.* at 862-63. Setting up a tax credit program to provide scholarships to children generally is hardly of the same ilk.

To the extent the panel claims that the manner in which Section 1089 has been *implemented* reveals the stated secular purpose to be a sham, their arguments are similarly unpersuasive. First, the Supreme Court has recognized that a "legislature's stated reasons will generally get deference," deference only abandoned in "those unusual cases where the claim was an apparent sham." *Id.* at 864-65. Nothing in the plaintiffs allegations suggest this is one of those "unusual cases," and as setting up a tax credit program is not a "patently religious" act, there is nothing "apparent" about any purported sham. Second, the implementation inquiry centers on actions taken by the *government*. *See id.* at 862 (stating that the inquiry turns on the "traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act") (internal quotation marks and citations omitted); *id.* at 870-74 (questioning the government's newly proffered purposes after it

altered a Ten Commandments display in an attempt to mitigate previously stated sectarian purposes). Here, the alleged impropriety arises from taxpayer, not government action. Third, the panel's holding turns on plaintiff's allegation that "in practice STOs are permitted to restrict the use of their scholarships to use at certain religious schools." *Winn*, 562 F.3d at 1012. But that result is apparent from the statute itself, which is satisfied so long as STOs provide scholarships to two or more schools, *see supra* note 5, a fact plaintiffs themselves recognize in their complaint. That an STO may independently decide to limit its scholarships does not make a religious purpose "apparent."[23]

Ultimately, the crux of the panel's purpose holding turns on matters previously discussed under the effects prong: a nonsecular purpose could be inferred from the fact that, at a given moment, the bulk of scholarship money is available only for use at religious schools. But as detailed above, money flows to religious institutions entirely at the whim of nongovernmental actors: taxpayers or STOs. The legislature could hardly have had the "purpose" of endorsing religion when it set up a plan that, for all it knew, could have resulted in absolutely no funding for religious entities. *See supra* pp. 14723-26. This moving target is irrelevant to the Establishment Clause inquiry. *See supra* pp. 14727-31.

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[23] Additionally, any inquiry into purpose must look at context. *See McCreary*, 545 U.S. at 862, 864, 866. As discussed above, Section 1089 was enacted amidst a broader effort to increase alternative educational opportunities. *See supra* pp. 14730-33; *see also Kotterman*, 972 P.2d at 611.

V

The layer upon layer of private choice built into this program ensures that "the circuit between government and religion [is] broken." *Zelman*, 536 U.S. at 652. Try as it may, the panel cannot complete such circuit. Ultimately, nothing in the panel opinion grapples with the fact that Arizona does nothing to encourage, to promote, or otherwise to incentivize private actors to direct aid to religious schools. Nothing explains how "the *government itself* has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337. Nothing points to any "evidence that the *State* deliberately skewed incentives toward religious schools." *Zelman*, 536 U.S. at 650 (emphasis added). Nothing shows how Section 1089 enables Arizona to "grant special favors that might lead to a religious establishment." *Id.* at 652-53 (internal quotation marks and citation omitted).

But the three-judge panel can hardly be faulted for these omissions: it cannot manufacture what does not exist.[24] What does exist is a tax credit system that relies entirely on private choice. Individuals choose to create an STO. STOs choose to

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[24] *Cf. Compassion in Dying v. Washington*, 85 F.3d 1440, 1446-47 (9th Cir. 1996) (Trott, J., dissenting from denial of rehearing en banc) ("No magician—not David Copperfield, not even Harry Houdini—can produce a rabbit from a hat unless the rabbit is in the hat to begin with. Moreover, if a hat does not contain such an animal, a magician cannot claim that anything he is able to produce from it is in fact a rabbit, no matter how sincere he may be or how great his forensic skills. All of this has something to do with basic physics.").

limit their funds to certain schools. Taxpayers choose to donate. Parents choose to apply for scholarships. In truth, *everyone* in Arizona has a choice—everyone except the government. No *reasonable* observer would think this lengthy chain of choice suggests the government has endorsed religion.

Because the three-judge panel's decision strays from established Supreme Court precedent, and because it jeopardizes the educational opportunities of thousands of children who enjoy the benefits of Section 1089 and related programs across the nation, I must respectfully dissent from our court's regrettable failure to rehear this case en banc.

U.S. CONST. AMEND. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Arizona Revised Statutes Annotated Currentness
Title 43. Taxation of Income
Chapter 10. Individuals
Article 5. Credits

§ 43-1089. Credit for contributions to school tuition organization; definitions

A. A credit is allowed against the taxes imposed by this title for the amount of voluntary cash contributions by the taxpayer or on the taxpayer's behalf pursuant to § 43-401, subsection H during the taxable year to a school tuition organization, but not exceeding:

1. Five hundred dollars in any taxable year for a single individual or a head of household.

2. Eight hundred twenty-five dollars in taxable year 2005 for a married couple filing a joint return.

3. One thousand dollars in taxable year 2006 and any subsequent taxable year for a married couple filing a joint return.

B. A husband and wife who file separate returns for a taxable year in which they could have filed a joint return may each claim only one-half of the tax credit that would have been allowed for a joint return.

C. If the allowable tax credit exceeds the taxes otherwise due under this title on the claimant's income, or if there are no taxes due under this title, the taxpayer may carry the amount of the claim not

used to offset the taxes under this title forward for not more than five consecutive taxable years' income tax liability.

D. The credit allowed by this section is in lieu of any deduction pursuant to section 170 of the internal revenue code and taken for state tax purposes.

E. The tax credit is not allowed if the taxpayer designates the taxpayer's contribution to the school tuition organization for the direct benefit of any dependent of the taxpayer.

F. A school tuition organization that receives a voluntary cash contribution pursuant to subsection A shall report electronically to the department, in a form prescribed by the department, by February 28 of each year the following information:

1. The name, address and contact name of the school tuition organization.

2. The total number of contributions received during the previous calendar year.

3. The total dollar amount of contributions received during the previous calendar year.

4. The total number of children awarded educational scholarships or tuition grants during the previous calendar year.

5. The total dollar amount of educational scholarships and tuition grants awarded during the previous calendar year.

6. For each school to which educational scholarships or tuition grants were awarded:

(a) The name and address of the school.

(b) The number of educational scholarships and tuition grants awarded during the previous calendar year.

(c) The total dollar amount of educational scholarships and tuition grants awarded during the previous calendar year.

G. For the purposes of this section:

1. "Handicapped student" means a student who has any of the following conditions:

(a) Hearing impairment.

(b) Visual impairment.

(c) Developmental delay.

(d) Preschool severe delay.

(e) Speech /language impairment.

2. "Qualified school" means a nongovernmental primary school or secondary school or a preschool for

handicapped students that is located in this state, that does not discriminate on the basis of race, color, handicap, familial status or national origin and that satisfies the requirements prescribed by law for private schools in this state on January 1, 1997.

3. "School tuition organization" means a charitable organization in this state that is exempt from federal taxation under section 501(c)(3) of the internal revenue code and that allocates at least ninety per cent of its annual revenue for educational scholarships or tuition grants to children to allow them to attend any qualified school of their parents' choice. In addition, to qualify as a school tuition organization the charitable organization shall provide educational scholarships or tuition grants to students without limiting availability to only students of one school.

Marvin S. Cohen (No. 000923)
Isabel M. Humphrey (No. 015820)
SACKS TIERNEY P.A.
4250 North Civic Center Blvd., 4th Floor
Scottsdale, Arizona 85251-3900
Telephone: (480) 425-2600

Attorneys for Plaintiffs
AzCLU Cooperating Attorneys

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

KATHLEEN M. WINN, an Arizona taxpayer; DIANE AND MAURICE WOLFTHAL, Arizona taxpayers; and LYNN HOFFMAN, an Arizona taxp Plaintiffs, vs. MARK W. KILLIAN, in his official capacity as Director of the Arizona Department of Revenue, Defendant.	No. CIV 00-0287 PHX EHC COMPLAINT

FILED: February 15, 2000

Plaintiffs, by and through their counsel undersigned, hereby make the following complaint against Defendant:

Parties

1. Plaintiffs, Kathleen M. Winn, Diane and Maurice Wolfthal, and Lynn Hoffinan, are citizens and residents of Arizona, who pay Arizona income taxes on income earned in Arizona.

2. Defendant Mark W. Killian is Director of the Arizona Department of Revenue. Defendant Killian is responsible under state law for the administration of Arizona's income tax laws, including A.R.S. § 43-1089, the constitutionality of which is challenged in this action.

Jurisdiction

3. Plaintiffs allege that A.R.S. § 43-1089, on its face and as administered by Defendant Killian, deprives them of rights guaranteed by the First and Fourteenth Amendments CD to the United States Constitution. Plaintiffs seek relief pursuant to the United States Constitution and 42 U.S.C. § 1983. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a), and venue pursuant to 28 U.S.C. § 1391(b).

Factual Allegations

4. Plaintiffs challenge the constitutionality, on its face and as applied, of A.R.S. § 43-1089, enacted in 1997. A copy of A.R.S. § 43-1089 is attached to this complaint as Exhibit A.

5. A.R.S. § 43-1089 provides for a "tuition tax credit," such that any taxpayer who pays Arizona income taxes may satisfy up to $500 of his, her, or its annual state income tax obligation by paying that amount to a "school tuition organization" ("STO") instead of to the State.

6. Pursuant to A.R.S. § 43-1089, an STO must, in turn, use at least 90% of the payments it receives from taxpayers for tuition grants to children to attend private primary or secondary schools in Arizona.

7. Taxpayers who make payments to any STO in a given tax year receive a 100%, dollar-for-dollar credit on the state income taxes that are due from them for that year, i.e., they may reduce the income tax paid to the State for that year by the entire amount, up to $500 per year, paid to an STO.

8. Taxpayers are not required to have children in school or to have incurred any educational expenses (or any other expenses) in order to claim the 100% tax credit for payments made to STOs.

9. The amounts paid to STOs by taxpayers and claimed by taxpayers as credits toward payment of Arizona income taxes are not contributions oftaxpayer funds to the ST9s, because taxpayers incur no cost in making such payments. The amounts are, instead, contributions of state funds to the STOs, because the amounts paid to STOs reduce state income tax revenues on a dollar-for-dollar basis.

10. A.R.S. § 43-1089 places no limit on the total amount of State funds that may be diverted to STOs each year. If one million Arizona taxpayers utilized the STO credit each year, the amount of State income tax revenues annually diverted to STOs would be $500 million.

11. STOs must make tuition grants of State funds available to students at more than one non-public school. As long as they do so, STOs may (and most do) restrict their grants to students attending religious schools. An STO may, for example, make tuition grants of State funds available only to children attending Catholic schools, only to children attending Lutheran schools, only to children attending Christian schools or only to children attending Jewish schools. STOs may also restrict their grants of State funds only to children of a specific religious denomination, for example, Catholic

children, Lutheran children, Christian children or Jewish children.

12. STOs that restrict their grants to students attending religious schools use state funds solely for the purpose of enabling children to attend religious schools at State expense.

13. A.R.S. § 43-1089 thus authorizes the formation of agencies that have as their sole purpose the distribution of State funds to children of a particular religious denomination or to children attending schools of a particular religious denomination.

14. The money used by STOs for grants to students attending religious schools would otherwise have been paid into the state general fund by the taxpayers making those donations. The diversion of those funds to such STOs therefore reduces the balance of the state general fund on a dollar-for-dollar basis.

15. As of the end of August, 1999, 15 STOs had reported data to the Arizona Department of Revenue regarding funds received and/or tuition grants awarded during calendar year 1998. Of the total of $1,815,799 received from taxpayers by all STOs in 1998, at least $1,708,769, or 94%, went to STOs restricting tuition grants of state funds to students attending religious schools.

16. The largest STO recipient of income tax revenues during the 1998 calendar year was The Catholic Tuition Organization of the Diocese of Phoenix, which received $837,140. The Catholic Tuition Organization restricts its grants to students attending Catholic schools in the Diocese of Phoenix. Eligible schools include, for example, Saint Mary's High School. The advertised mission of Saint Mary's is "to provide a quality Catholic education by developing and sustaining a rich tradition grounded in Gospel and family values ..." Another eligible school is St. Louis the King School, which advertises that "Gospel values and self-discipline skills are infused into the total curriculum." Another eligible school, St. John Vianney School, advertises that Christ "is the unseen but ever present teacher in its classes."

17. The second largest STO recipient of income tax revenues was Arizona Christian School Tuition Organization, which received $538,611. The Arizona Christian School Tuition Organization restricts its grants to students attending "evangelical" Christian schools in Arizona.

18. The third largest STO recipient of income tax revenues was Brophy Community Foundation, which restricted grants to children attending two Catholic schools (Brophy College Preparatory for boys and Xavier College Preparatory for girls) and

which received $163,603. The advertised philosophy of Xavier College Preparatory includes such goals as "instill[ing] a knowledge of the truths of faith, enlightened by the post-Conciliar teachings of the Church." Brophy College Preparatory's advertised mission includes the goal of offering students "an intimate relationship with God" through "the process of nurturing the soul."

19. The three religious STOs described above, which controlled 85% of the total STO donations during 1998, made no scholarship grants at all during that year. Despite the unavailability of that significant pool of funds, 75% of the scholarship funds granted by STOs in 1998 were granted to students attending religious schools, and 79% of the schools receiving scholarships were religious schools.

20. During 1998, the STO making the largest amount of tuition grants was Christian Scholarship of Arizona; the STO making the second largest amount of grants was Northern Arizona Christian School Scholarship; the STO making the third largest amount of grants was Higher Education Lutherans Program.

21. The school receiving the largest amount of STO funded tuition payments during 1998 was the Casas Adobes Baptist School in

Tucson; the school receiving the second largest amount was the Palo Verde Christian School in Tucson; the schools receiving the third and fourth largest amounts were the Son Rise Christian School and the Sedona Christian School. Each o these schools is pervasively sectarian.

22. Upon information and belief, STOs received and granted a much larger amount of income tax revenue for calendar year 1999, due in part to the absence of any constitutional attack on the program for most of the year and to the public's greater familiarity with the program. Upon information and belief, the Catholic Diocese of Phoenix collected more than $4.5 million for its STO during 1999. The Catholic Diocese of Tucson recently announced that it had collected more than $850,000 for its STO during the same time period, and the Brophy Community Foundation announced that its 1999 donations exceeded $640,000.

23. Except for a statutory prohibition on making grants to children attending schools that discriminate on the basis of race, color, handicap, familial status or national origin, STOs may utilize any standards they wish for making tuition grants of State funds to students attending non-public schools, including preferences for students of a particular religious denomination. STOs need not make grants on the basis of

financial need or academic performance. STOs may also make grants to students attending schools that discriminate on the basis of religion and/or sex in accepting students.

24. Religious schools that receive tuition payments made with STO-granted State funds may and do use those payments to support religious instruction and worship. Those schools and the STOs that support them encourage taxpayers to take advantage of the tax credit program in order to further religious education.

25. A.R.S. § 43-1089 does not require or insure that tuition grants of State funds will be available to parents choosing to send their children to non-religious, non-public schools.

26. Because a very large majority (at least 94% in 1998) of STO funds are controlled by religion-specific STOs, parents choosing to send their children to non-religious, non-public schools may be unable to locate an STO willing and able to make a tuition grant to a student attending the non-religious school of the parents' choice. The tax credit scheme is, therefore, not religion-neutral in its operation.

27. Although A.R.S. § 43-1089(D) prohibits a taxpayer from designating his or her donation for the benefit of any dependent of

the taxpayer, the statute does not prohibit two taxpayers from each designating his or her donation for the benefit of the other taxpayer's child, or a taxpayer from designating his or her donation for the benefit of a non-dependent relative (for example, a grandchild).

28. The statute also does not prohibit, for example, two or more religious schools from setting up an STO (like the Brophy Community Foundation, which serves two Catholic schools) and inviting parents to participate in a "contribution exchange," by which each of their children would receive a $500 scholarship paid for by another participating parent. All parents would then be fully reimbursed for their contributions by the State of Arizona.

Allegations of Law

29. By affirmatively authorizing and permitting STOs to use State income-tax revenues to pay tuition for students at religious schools, A.R.S. § 43-1089, on its face and as applied, violates the First and Fourteenth Amendments to the United States Constitution.

30. By affirmatively authorizing and permitting STOs to use State income-tax revenues to make tuition grants to students attending only religious schools or schools of only one.

religious denomination or to students of only one religion, A.R.S. § 43-1089, on its face and as applied, violates the First and Fourteenth Amendments to the United States Constitution.

31. By affirmatively authorizing and permitting STOs to use State income-tax revenues to pay tuition for students at schools that discriminate on the basis of religion in selecting students, § 43-1089, on its face and as applied, violates the First and Fourteenth Amendments to the United States Constitution.

32. As a direct consequence of Defendant Killian's violation of Plaintiffs' constitutional rights, Plaintiffs and other Arizona taxpayers have been and will continue to be irreparably harmed by the diminution of the state general fund through the tax credit program described above.

33. Prior litigation was filed in the Arizona Supreme Court challenging the constitutionality of A.R.S. § 43-1089 (Kotterman v. Killian, 972 P.2d 606, cert. denied, _ S. Ct. _ (1999)). Plaintiffs' Complaint is not barred by res judicata because, among other things, neither Plaintiffs nor the Arizona Civil Liberties Union were parties to or controlled or directed the prior state court litigation, and no challenge was made in that litigation

based on the actual practical effect of the statutory scheme, as the lawsuit was filed prior to the effective date of the statute.

Relief

Wherefore plaintiffs respectfully request:

A. Preliminary and permanent injunctive relief prohibiting defendant from allowing taxpayers to utilize the tax credit authorized by A.R.S. § 43-1089 for payments made to STOs that make tuition grants to children attending religious schools, to children attending schools of only one religious denomination, or to children selected on the basis of their religion;

B. A declaration that A.R.S. § 43-1089, on its face and as applied, violates the First and Fourteenth Amendments to the United States Constitution by affirmatively authorizing STOs to use State income-tax revenues to pay tuition for students .attending religious schools or schools that discriminate on the basis of religion; and

C. An order that Defendant Killian inform all STOs that make tuition grants to children attending religious schools, to children attending schools of only one religious denomination, or to children selected on the basis of their religion, that all funds in their possession as of the date of this Court's

order must be paid into the state general fund.

D. An award of attorneys' fees, expert fees, if any, and other costs, pursuant to 42 U.S.C. § 1988(b) and (c), the private attorney general doctrine, and any other applicable authority or rule of equity.

E. All other relief that this Court deems just and appropriate in the circumstances.

DATED this 15th day of February, 2000.

/s/ Marvin S. Cohen
Marvin S. Cohen
Isabel M. Humphrey
Attorneys for Plaintiffs