No. 09-991

In The Supreme Court of the United States

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

Petitioner,

vs.

KATHLEEN M. WINN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Arizona Revised Statutes (A.R.S.) Section 43-1089, individuals who contribute money to school tuition organizations (STOs) that provide scholarships to students wishing to attend private schools are entitled to an income tax credit. Respondents alleged that Section 1089's neutral language and the Legislature's stated secular purpose for enacting it were a pretense and that the tuition tax credit program had the primary effect of advancing religion because a majority of taxpayers who contributed to STOs chose to contribute to STOs that awarded scholarships to students attending religious schools. The question presented is the following:

Did the court of appeals err in holding that if most taxpayers who contribute to STOs contribute to STOs that award scholarships to students attending religious schools, Section 1089 has the purpose and effect of advancing religion in violation of the Establishment Clause even though Section 1089 is a neutral program of private choice on its face and the State does nothing to influence the taxpayers or the STOs' choice?

PARTIES TO THE PROCEEDING

Petitioner, who was the Defendant-Appellee below, is Gale Garriott, in his official capacity as Director of the Arizona Department of Revenue. Two STOs, Arizona School Choice Trust (ASCT) and Arizona Christian School Tuition Organization (ACSTO), and two parents of ASCT scholarship recipients, Glenn Dennard and Luis Moscoso, intervened in the district court as Defendants.

Respondents, who were Plaintiffs-Appellants below, are Arizona taxpayers, Kathleen M. Winn, Diane Wolfthal, Maurice Wolfthal, and Lynn Hoffman.

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PETITION FOR WRIT OF CERTIORARI

Gale Garriott, the Director of the Arizona Department of Revenue respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-46a) is reported at 562 F.3d 1002 (9th Cir. 2009). The court of appeals' order and opinions on denial of rehearing en banc (Pet. App. 64a-116a) are reported at 586 F.3d 649 (9th Cir. 2009). The district court's opinion granting Intervenor-Defendant ACST's motion to dismiss (Pet. App. 47a-63a) is reported at 361 F. Supp. 2d 1117 (D. Ariz. 2005).

JURISDICTION

The court of appeals entered judgment on April 21, 2009. The court denied Petitioner's timely petition for rehearing en banc on October 21, 2009. On January 15, 2010, Justice Kennedy extended the time within which to file a petition for writ of certiorari to and including February 18, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Establishment Clause of the First Amendment of the United States Constitution provides in pertinent part that "Congress shall make no law respecting an establishment of religion." Arizona Revised Statute § 43-1089 is reproduced in the appendix to this petition. Pet. App. 117a-120a.

INTRODUCTION

This case warrants this Court's attention because the court of appeals has decided important issues under the Establishment Clause in a way that is directly contrary to this Court's precedents, including *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and *Mueller v. Allen,* 463 U.S. 388 (1983), and its decision conflicts with the Arizona Supreme Court's determination of the identical issues. The case concerns the constitutionality of Section 1089's individual tuition tax credit program, which the Arizona Supreme Court upheld shortly after its enactment in 1997. As a result of the individual tuition tax credit program, thousands of Arizona children have received scholarships to attend private schools. Although the court of appeals remanded the case to the district court, it left the "district court with no choice but to declare the program unconstitutional as applied" because "no one disputes plaintiffs' factual allegations about how the program operates in practice." Pet. App. 92a n.7

(O'Scannlain, J., dissenting from the denial of rehearing en banc). The court's decision thus "jeopardizes the educational opportunities of thousands of children who enjoy the benefits of Section 1089 and related programs across the nation." *Id.* at 115a. This Court should grant certiorari to remove the cloud that the panel's decision has imposed on state tax credit programs that promote school choice and that States and citizens have legitimately presumed were constitutional under *Zelman*.

STATEMENT OF THE CASE

In 1997, the Arizona Legislature enacted the Arizona Tuition Tax Credit. 1997 Ariz. Sess. Laws, ch. 48, § 2 (codified at A.R.S. § 43-1089). Section 1089 has been in effect for thirteen years and is substantially the same now as it was when it was originally enacted for purposes of deciding the validity of Respondents' allegations that it violates the Establishment Clause. Pet. App. 3a-4a. Section 1089 allows taxpayers to reduce their state income tax liability by claiming a credit for the amounts that they have paid to a school tuition organization (STO). Any individual owing $500 or more in Arizona income taxes receives credit against state tax liability by the amount, not to exceed $500, that he or she contributes to an STO. A.R.S. § 43-1089(A)(1). Married couples receive a credit of up to $1,000 for contributions to an STO. A.R.S. § 43-1089(A)(3).

An STO is a charitable organization that is exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code. A.R.S. § 43-1089(G)(3). It must "allocate[ ] at least ninety per cent of its annual revenue for educational scholarships or tuition grants" and it cannot limit its educational scholarships or grants to students of one school. *Id.* Anyone can form an STO. A qualified school is a "nongovernmental primary or secondary school or preschool for handicapped students 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(G)(2).

Shortly after the Legislature enacted Section 1089, eleven Arizona taxpayers brought an action against Petitioner's predecessor directly in the Arizona Supreme Court, claiming that it violated the Establishment Clause and the Arizona Constitution. *Kotterman v. Killian,* 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921, *and cert. denied*, 528 U.S. 810 (1999). The Arizona Supreme Court upheld its constitutionality. *Id.*

In 2000, Respondents, Arizona taxpayers, filed their complaint against the Petitioner's predecessor in federal district court alleging that Section 1089 violated the Establishment Clause on its face and as applied. Appellants' Excerpt of Record filed in No. 05-15754, 1. Respondents alleged that "STOs must make tuition grants of State funds available to students at more than one non-public school" and that "STOs may (and most do) restrict their grants to students

attending religious schools." *Id.* at 3. Respondents alleged that "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." *Id.* at 4.[1] Respondents alleged that Section 1089 violated the First Amendment by authorizing STOs "to make tuition grants to students attending only religious schools or schools of only one religious denomination or to students of only one religion." *Id.* at 6. Respondents requested injunctive relief prohibiting Petitioner "from allowing taxpayers to utilize the tax credit authorized by A.R.S. § 43-1089 for payments

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[1] Under A.R.S. § 43-1089(F), STOs are required to report certain information to the Arizona Department of Revenue, including the total number and total dollar amount of contributions received during the previous calendar year, the total number of children awarded educational scholarships the previous calendar year, and the total dollar amount of and the schools to which the educational scholarships were awarded during the previous calendar year. The Arizona Department of Revenue prepares an annual report summarizing the information that it receives from STOs. *See* http://www.azdor.gov/ReportsResearch/SchoolTaxCredit.aspx#private. Although the Department of Revenue reports do not identify STOs or schools that receive scholarships from STOs as religious or secular, Respondents relied on the 2003 report to assert on appeal that approximately thirty of the fifty-five STOs restricted scholarship awards to religious schools and that STOs that awarded scholarships to students attending religious schools awarded eighty-two percent of the scholarships under Section 1089. Appellants' Opening Brief in No. 05-15754 at 7, 12. Respondents further asserted that religion-specific STOs awarded seventy-nine percent of the Section 1089 scholarships in 2004. *Id.* at 12.

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." *Id.* at 7.

The district court dismissed Respondents' complaint under the Tax Injunction Act for lack of federal subject-matter jurisdiction. *Winn v. Killian*, No. CV-00-00287-EHC (D. Ariz. Feb. 27, 2001). The court of appeals reversed and remanded the case. *Winn v. Killian*, 307 F.3d 1011 (9th Cir. 2002), *reh'g denied,* 321 F.3d 911 (9th Cir. 2003). This Court granted certiorari and affirmed. *Hibbs v. Winn*, 542 U.S. 88 (2004).

On remand, Petitioner moved for judgment on the pleadings based on res judicata and failure to state a claim and Intervenors Arizona School Choice Trust (ASCT) and Arizona Christian School Tuition Organization (ACSTO) moved to dismiss based on standing, res judicata, and failure to state a claim. Pet. App. 52a. The district court granted ASCT's motion to dismiss, finding that the complaint did not state a claim under the Establishment Clause. *Id.* at 62a. The court found that Section 1089 was "part of a secular state policy to maximize parents' choices as to where they send their children to school." *Id.* at 54a (citing *Kotterman*, 972 P.2d at 611). The court also found that because Section 1089 was a "program of 'true private choice,'" it did not implicate the Establishment Clause even though most donations thus far had ultimately gone to religious schools. *Id.* at 55a (quoting *Zelman*, 536 U.S. at 649).

A panel of the court of appeals reversed the district court's dismissal of the complaint, holding that Respondents' allegations were "sufficient to state a claim that Arizona's private school scholarship tax credit program, as applied, violates the Establishment Clause." Pet. App. 3a. Relying on *McCreary County v. ACLU*, 545 U.S. 844 (2005), the court held that Respondents' allegations that Section 1089 permitted STOs to provide scholarships only to students attending religious schools, "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." *Id.* at 20a.

The court also held that Section 1089 had the primary effect of advancing religion. *Id.* at 22a. The court rejected Petitioner and Intervenors' argument that the Section 1089 tax credit is not constitutionally distinct from the tax exemptions and deductions for contributions to religious organizations that the Court has upheld because, unlike deductions that encourage charitable giving, "Section 1089 . . . 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." *Id.* at 25a-26a. The court determined that Section 1089 differed significantly in structure from the educational assistance programs that the Court has held to be programs of true private choice because the State does not provide aid directly to parents under Section 1089 but instead "the aid is mediated first through taxpayers, and then through

private scholarship programs" and the taxpayers' choices to provide a majority of their contributions to religious STOs constrained parental choice. *Id.* at 29a. The court concluded that a reasonable observer would perceive Section 1089 as government support for the advancement of religion because the State delegated to taxpayers "a choice that, from the perspective of the program's aid recipients, 'deliberately skew[s] incentives toward religious schools.'" *Id.* at 82a (quoting *Zelman*, 536 U.S. at 650).

Petitioner and Intervenors moved for rehearing en banc, which was denied. Pet. App. 65a. In addition to the panel, one judge joined the concurrence in the denial of rehearing. *Id.*

A total of eight judges dissented from the denial of rehearing en banc. Pet. App. 87a-116a (O'Scannlain, J., joined by Kozinski, CJ., Kleinfeld, Gould, Tallman, Bybee, Bea, and N.R. Smith, JJ.). They dissented "because *Winn* cannot be squared with the Supreme Court's mandate in *Zelman*" and "the panel's holding casts a pall over comparable educational tax-credit schemes in states across the nation and could derail legislative efforts in four states within [the Ninth] circuit to create similar programs." *Id.* at 88a.

The dissent disagreed with the panel's conclusion that Section 1089 had the effect of advancing religion because no reasonable observer informed about the Section 1089 program could conclude that the *government itself* endorsed religion given the four levels

of "private, individual choice" that separates the State from "any aid to religious organizations." *Id.* at 94a. Because "[t]he system Arizona created could just as easily have resulted in a total dearth of funding for religious organizations as opposed to the surfeit allegedly available," the dissent concluded that "[i]t simply cannot be, as the panel claims, that the 'scholarship *program* . . . skews aid in favor of religious schools.'" *Id.* at 96a (quoting *Winn*, 562 F.3d at 1013 with emphasis).

The dissent also disagreed with the panel's conclusion that *Zelman* supported its decision and instead concluded that the panel's decision actually relied on Justice Souter's dissent in *Zelman*. *Id.* at 97a-106a. The dissent concluded that the panel had erred because it failed to recognize that both *Zelman* and this case involved constraints on access to private, secular options but that this Court did not find parental choice to be unduly constrained. *Id.* at 101a. Instead, the dissent noted that "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." *Id.* (quoting *Zelman*, 536 U.S. at 658). The dissent also found that the panel decision "directly conflicts with *Zelman*" because, in evaluating the constitutionality of the Section 1089 program, it looked only at the choices available within the program and ignored "the host of options available to Arizona parents." *Id.* at 105a-106a.

Finally, the dissent disagreed with the panel's holding that Respondents had alleged facts suggesting

that Section 1089 was not enacted for a valid secular purpose. *Id.* at 111a-112a. The dissent rejected the panel's apparent assertion that *McCreary* supports a finding that "the very enactment of Section 1089 'bespoke' a religious purpose." *Id.* at 112a (quoting *Winn,* 562 F.3d at 1012). And, it discredited the panel's reliance on the manner in which Section 1089 had been implemented to show the stated secular purpose to be a sham. *Id.* The dissent noted that the Respondents' allegation that "'in practice STOs are permitted to restrict the use of their scholarships to use at certain religious schools'" was not a result of faulty implementation; instead, "that result is apparent from the statute itself, which is satisfied so long as STOs provide scholarships to two or more schools . . . , a fact that plaintiffs themselves recognize in their complaint." *Id.* at 113a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that Arizona's thirteen-year-old individual tuition tax credit program violated the Establishment Clause because the State allows taxpayers to choose whether and to which STO they wish to contribute and allows STOs to choose the qualified private schools to which they will award scholarships. This Court's review is warranted because the court of appeals' decision is contrary to *Zelman* and this Court's other private-choice precedents as well as to the decisions of the Arizona Supreme Court and Arizona Court of Appeals. The

decision certainly jeopardizes Arizona's individual tax credit program and Arizona's corporate tax credit programs, which have a similar structure.[2] The court of appeals opinion also casts a constitutional cloud on other States' tuition tax credit programs[3] and may discourage States from adopting such programs.

Although the court of appeals has remanded this case for further proceedings in the district court, this Court should review the issues presented because the court of appeals erroneously decided important Establishment Clause issues that are "'fundamental to the further conduct of the case.'" *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945)). If the district court follows the court of appeals' erroneous constitutional analysis, which it must, it will be required to find that Arizona's tuition tax credit program violates the Establishment Clause because some STOs provide scholarships only to students that

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[2] *See* A.R.S. § 43-1183 (providing an income tax credit to corporations that contribute to STOs that provide private-school scholarships to students in families with incomes that do not exceed 185% of the income limit required to qualify a child for reduced-price lunches under the national school lunch and child nutrition acts); A.R.S. § 43-1184 (providing an income tax credit to corporations that contribute to STOs that provide private-school scholarships to students with disabilities and children in foster care).

[3] *See* Ga. Code Ann. § 20-2A-1; Iowa Code § 422.11S; 72 Pa. Conf. Stat. §§ 8701-F to 8708-F; and R.I. Gen. Laws § 44-62-2.

attend religious schools and it is likely that the majority of the scholarships awarded thus far have gone to children attending religious schools. Thus, given the certainty that on remand, the court will find the tuition tax credit program unconstitutional, many taxpayers may be chilled from contributing to STOs if this Court does not grant certiorari.

I. The Court of Appeals Decided Important Establishment Clause Issues in a Way that Is Irreconcilable with This Court's Precedents.

A. The Court of Appeals' Holding that Respondents Could Prove that the Legislature Had an Impermissible Motive for Enacting Section 1089 Based on Facts that Occurred After Its Enactment Is Contrary to This Court's Precedents.

Although the court of appeals acknowledged that Section 1089's legislative history reflected a secular purpose (Pet. App. 18a), it held that Respondents could prove that the Legislature was hiding its true motive if "in practice STOs are permitted to restrict the use of their scholarships to use at certain religious schools" (Pet. App. 19a). This holding is contrary to the Court's precedent that defers to the States' apparent secular motive in Establishment Clause cases.

1. In evaluating a challenge to a statute under the Establishment Clause, the Court first determines whether the Legislature had a secular purpose for enacting it. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The requirement that "'the legislature manifest a secular purpose and omit all sectarian endorsements from its laws'" is "'precisely tailored to the Establishment Clause's purpose of assuring that Government not intentionally endorse religion or a religious practice.'" *Edwards v. Aguillard*, 482 U.S. 578, 587 (1987) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring in judgment)). Legislative purpose is determined by the statute's language, legislative history, and historical context. *Id.* at 594-95.

In analyzing the legislative purpose for statutes that provide aid to children attending private schools, including religious schools, the Court has consistently recognized the State's secular interest. *See Zelman,* 536 U.S. at 649 (noting that the Ohio voucher program that provided aid for children to attend private schools "was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system"); *Mueller*, 463 U.S. at 395 (Minnesota's statute providing parents with a deduction for private school tuition evidenced "a purpose that is both secular and understandable."); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973) (statute providing aid to private schools and income tax benefits to parents for private school tuition expenses was

supported by "legitimate, nonsectarian state interests," including "preserving a healthy and safe educational environment for all of its schoolchildren," "promoting pluralism and diversity among its public and nonpublic schools," and preventing an already overburdened public school system from suffering if "a significant percentage of children presently attending nonpublic schools should abandon those schools in favor of the public schools"); *Lemon*, 403 U.S. at 613 (finding no reason to question the stated statutory intent "to enhance the quality of the secular education in all schools covered by the compulsory attendance laws").

2. Section 1089 clearly meets *Lemon's* secular-purpose test. The district court appropriately relied on the Arizona Supreme Court's decision upholding Section 1089 to find that it was supported by a valid secular purpose: "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." Pet. App. 54a (citing *Kotterman*, 193 Ariz. at 278, 972 P.2d at 611).

Section 1089's legislative history also supports the district court's finding. In urging enactment of the tuition tax credit, the bill's primary sponsor explained that it allowed a tax credit for contributions to low-income students and that allowing a credit instead of a deduction would enhance STOs' ability to raise funds. Minutes of Hearing Before Ariz. H.R. Comm. on Educ., H.B. 2074, 43rd Leg., 1st Reg. Sess. (Jan.

29, 1997). He also stated that the credit was "an encouragement and incentive for citizens to donate to an organization they believe in" and was consistent with one of the legislators' main concerns that year of "equalizing opportunities for Arizona's children; allowing the children in low-wealth districts to have the same opportunities as those in high-wealth districts." *Id.*

3. The court of appeals acknowledged that Section 1089's legislative history reflected a secular purpose and noted *Mueller's* admonition that federal courts should not attribute unconstitutional motives to the States. Pet. App. 19a-20a. Nevertheless, the court held that Respondents could prove that the Legislature was hiding its true motive if "in practice STOs are permitted to restrict the use of their scholarships to use at certain religious schools." *Id.* at 19a. Contrary to the court's statement, Respondents do not need to prove that STOs are permitted to restrict the use of their scholarships to certain religious schools because Section 1089 on its face allows STOs to restrict scholarships to students attending a minimum of two schools. *See* A.R.S. § 43-1089(G)(3) ("[T]o 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."); *see also* Pet. App. 89a n.5, 113a (O'Scannlain, J., dissenting from the denial of rehearing en banc). Respondents recognized this in their complaint. *Id.* at 670. Indeed, the court of appeals previously interpreted Section 1089 in this

precise way: "An STO is not permitted to dispense all of its scholarships or grants to students attending the same school; the statute [Section 1089] provides that recipients of an STO's funds must be drawn from at least two schools." *Winn v. Killian*, 307 F.3d 1011, 1013 (9th Cir. 2002). Thus, in an effort to salvage Respondents' complaint, the court ignored Section 1089's plain language and construed it differently than any other court that has examined it.[4]

4. Even if there was some validity to the court's statement "that Section 1089 could have been interpreted to require all STOs to provide scholarships to any qualified private school in the state" (Pet. App. 1006), *McCreary County v. ACLU*, 545 U.S. 844 (2005), does not support its finding that the Respondents' allegations about how Section 1089 operates in

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[4] Because the Arizona Supreme Court determined in *Kotterman* that the Legislature had a valid secular purpose for enacting Section 1089, Petitioner argued that Respondents were bound by that determination under the collateral estoppel doctrine. Brief of Appellee Gale Garriott, No. 05-15754, at 4-6. It seems that Respondents and the court attempted to avoid that result by asserting that the *Kotterman* court's determination was based on a construction of the statute that was different from the way that the statute has operated in practice. However, the *Kotterman* court understood that Section 1089's language permitted STOs to limit their scholarships to two or more schools. *See Kotterman*, 972 P.2d at 614 (noting that STOs "may not limit grants to students of only one" qualified school) *see also id.* at 626 (Feldman, J., dissenting) (noting that Section 1089 did "not prevent an STO from directing all of its grant money to a group of schools that restrict enrollment or education to a particular religion or sect").

practice establish that the Legislature primarily had a religious motive for enacting Section 1089. In *McCreary*, the Court noted that it had "found government action motivated by an illegitimate purpose only four times since *Lemon*." 545 U.S. at 859. Each of those cases involved government sponsorship of a particular religious practice, belief, or symbol. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315-16 (2000) (school policy of electing a single student to say a prayer before the school football game); *Edwards v. Aguillard*, 482 U.S. at 587 (requiring schools to teach creation science with evolution); *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (state statute requiring a "moment of silence" at the beginning of the day was enacted for the "sole purpose of expressing the State's endorsement of prayer activities"); *Stone v. Graham*, 449 U.S. 39, 39-40 (1980) (statute requiring the posting of a copy of the Ten Commandments on the wall of each public classroom). Like the four cases in which the Court previously found government action to have been motivated by an illegitimate purpose, *McCreary* involved the government endorsement of a particular religious belief by displaying the Ten Commandments at county courthouses. 545 U.S. at 871-72. The Court held that the counties responsible for the display could not "cast off the [sectarian] objective so unmistakable in earlier displays" by modifying the display and claiming to have a secular purpose after they were sued. *Id.* at 872.

In contrast to the cases in which the Court has found an illegitimate purpose, Section 1089 does not

involve government endorsement of any STO or private school. Instead, Respondents have alleged that the decisions of private individuals have resulted in more scholarships going to students attending religious schools. This does not demonstrate an illegitimate purpose under *McCreary*.

B. The Court of Appeals' Holding that Section 1089 Has the Effect of Advancing Religion Is Contrary to This Court's Precedents.

The court of appeals held that Section 1089 had the primary effect of advancing religion because the State delegated to taxpayers "a choice that, from the perspective of the program's aid recipients, 'deliberately skew[s] incentives toward religious schools.'" Pet. App. at 22a (quoting *Zelman*, 536 U.S. at 650). Although purporting to rely on *Zelman*, the court's holding is directly contrary to *Zelman* and *Mueller*.

1. This Court's decisions "have drawn a consistent distinction between government programs that provided aid directly to religious schools and programs of true private choice, in which government aid reaches religious schools as a result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649 (citations omitted). Although the court of appeals acknowledged that Section 1089 is an "indirect aid program," it held that it was not a "neutral program of private choice" because a majority of taxpayers who contributed to STOs chose to

contribute to STOs that provided scholarships to religious schools, which in turn could constrain parental choice. Pet. App. at 23a. But in reaching this holding, the court created a new definition for a "neutral program of private choice" – one that is inconsistent with this Court's holding in *Zelman* that a program does not lose its neutrality as a result of the genuine and independent choices of private individuals such as taxpayers regardless of the amount of aid that reaches religious schools.

In *Zelman*, the Court rejected the argument that the amount of indirect aid provided to religious schools in a given year either created the imprimatur of government endorsement of religion or indicated that the government program must be favoring religion. *See* 536 U.S. at 654-55 (rejecting the notion that "Cleveland's preponderance of religiously affiliated private schools" indicated that the "program itself must somehow discourage the participation of private nonreligious schools"); *id.* at 656-57 (rejecting the claim of respondents and Justice Souter that the fact that ninety-six percent of the scholarship recipients have enrolled in religious schools proves that parents lack genuine choice 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"); *see also Mueller*, 463 U.S. at 401 (stating that the Court "would be loath to adopt a rule grounding the constitutionally of

a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law").

Any alleged limitations on parental choice as a result of the taxpayers' chosen beneficiaries under Section 1089 in any given year are not constitutionally distinct from the limitations inherent in the program that this Court upheld in *Zelman*. The parents who participated in the *Zelman* voucher program were limited by the schools that chose to participate in the program. *See* 536 U.S. at 647 (noting that forty-six of the fifty-six private schools that participated in the program had a religious affiliation and that no public schools elected to participate); *see also id.* at 703 (Souter, J., dissenting) (criticizing the majority opinion's finding that the voucher program was one of true private choice because given that 96.6% of all voucher recipients went to religiously affiliated schools, "something [was] influencing choice in a way that aim[ed] the money in a religious direction").

Thus, the court of appeals' holding that Section 1089 would be unconstitutional if the majority of taxpayers contributed to STOs that awarded scholarships to students attending religious schools is contrary to this Court's precedents. Instead, as Justice O'Scannlain aptly concluded, Section 1089 does not violate the Establishment Clause because "any 'skew[ing]' that occurs takes place because of private, not government action." Pet. App. 96a (O'Scannlain,

J., dissenting from the denial of the rehearing en banc) (quoting *Winn*, 562 F.3d 1013).

2. The court of appeals' decision also conflicts with *Zelman* because it focuses narrowly on the Section 1089 program in finding that a reasonable observer would believe that parents are encouraged to choose religious schools. Under *Zelman*, the court was required to determine Section 1089's constitutionality in light of its full history and context, which establishes that Section 1089 is part of the Legislature's broader undertaking to increase the educational options available to Arizona parents and students.

In *Zelman*, the Court rejected the respondents' argument that the voucher program failed to "provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children":

> 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.

536 U.S. at 655-56. Because the Cleveland schoolchildren enjoyed a range of educational choices, the Court found no Establishment Clause violation. *Id.* at 655.

Section 1089 is just one of a broad range of educational options that Arizona provides to its schoolchildren. Arizona requires all public schools to establish an open enrollment policy to allow children to attend any public school without paying tuition. A.R.S. § 15-816.01(A). In 1994, Arizona authorized the establishment of charter schools to provide "additional academic choices for parents and pupils." 1994 Ariz. Sess. Laws, 9th Spec. Sess., ch. 2, § 2 (codified at A.R.S. § 15-181(A)). Arizona has 502 charter schools. *See* Arizona Charter Schools Association, http://www.azcharters.org/pages/schools-basic-statistics (last visited February 11, 2010). Arizona provides a tax credit to taxpayers who pay fees or make cash contributions to public schools for extracurricular or character education. A.R.S. § 43-1089.01. Arizona also has a permissive home-schooling policy. A.R.S. §§ 15-802, -803. And, as Judge O'Scannlain correctly noted, "Section 1089 itself offers parents yet another alternative: they can create their own STO and solicit donations for use at secular private schools." Pet. App. 104a (O'Scannlain, J., dissenting from the denial of rehearing en banc).

The court of appeals did not consider the range of educational options available to Arizona schoolchildren in finding that the Section 1089 program could have the effect of favoring religion. Its opinion therefore conflicts with *Zelman*.

3. The court of appeals also erred in characterizing Section 1089 as a delegation of governmental authority to taxpayers and in concluding that the

public would perceive Section 1089 as an endorsement of religion because it allows taxpayers to contribute to any STO including those STOs that provide scholarships only to religious schools. Neither the court's characterization nor its conclusion is supported by this Court's precedents.

a. The court erred in concluding that the credit that Section 1089 allows delegates state authority to taxpayers. Although the court acknowledged that this Court has upheld other "tax benefits to individuals who contribute to nonprofit, religious institutions" (Pet. App. 24), it did not explain why it concluded that Section 1089 was a delegation of governmental authority when other tax benefits were not. The court apparently found Section 1089 to be constitutionally distinct from other tax deductions and exemptions (and thus, to be a delegation of governmental authority) because it "offers narrowly targeted, dollar-for-dollar tax credits designed to fully reimburse contributions to STOs." Pet. App. 25a-26a. But as Judge O'Scannlain observed, the distinction that the court tried to draw has no constitutional significance:

> Both [credits and deductions] 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 copayment 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 scheme (deductions) is constitutionally superior to the egalitarian tax credit.

Pet. App. 89a n.3 (O'Scannlain, J., dissenting from the denial of rehearing en banc). The Arizona Supreme Court also found no constitutional distinction between tax credits and deductions: "Though amounts may vary, both credits and deductions ultimately reduce state revenues, are intended to serve policy goals, and clearly act to induce 'socially beneficial behavior' by taxpayers." *Kotterman*, 972 P.2d at 612 (quoting Elizabeth A. Baergen, Note, *Tuition Tax Deductions and Credits in Light of Mueller v. Allen,* 31 Wayne L. Rev. 157, 173 (1984)).

b. The court erroneously relied on *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), to support its conclusion that the public would perceive Section 1089 to be an endorsement of religion. In *Larkin*, the Court invalidated a Massachusetts statute that gave *churches* the authority to veto a business's application for a liquor license if the business was located within a five-hundred-foot radius because the statute permitted the Church and State to jointly exercise legislative authority. *Id.* at 126. The public may perceive that the State is favoring religion when it

allows churches to veto a liquor license application because the government has thereby provided churches with a right that it has not provided to other institutions and the right that it has provided – denying a permit – is one that the government has traditionally exercised. In contrast, the public would not perceive that Arizona was endorsing religion when it allowed taxpayers a credit for contributing money to any STO – including STOs that provide scholarships only to students attending religious schools – because this country has a long history of providing tax benefits to religious institutions. *See Zelman*, 536 U.S. at 665 (O'Connor, J., concurring) (noting that the amount that Cleveland provided in vouchers to religious schools paled in comparison "to the amount of funds that federal, state, and local governments already provide religious institutions" through well-established tax policies).

The Court should grant certiorari because the court of appeals' decision is directly contrary to this Court's precedents and undermines principles of federalism by failing to defer to the Arizona Legislature and second-guessing the Arizona Supreme Court.

II. The Court of Appeals' Decision Directly Conflicts with Arizona Decisions that Have Upheld the Constitutionality of Section 1089 and a Similar Tax Credit.

The Ninth Circuit's decision is directly contrary to the Arizona Supreme Court's decision in *Kotterman*,

972 P.2d at 616, holding that Section 1089[5] does not violate the Establishment Clause and the Arizona Court of Appeals' decision holding that Arizona's corporate tuition tax credit does not violate the Establishment Clause in *Green v. Garriott*, 212 P.3d 96 (Ariz. App. 2009), *review denied*. The Court should grant review to resolve the conflict between the Ninth Circuit and the Arizona courts.

1. In *Kotterman*, the Arizona Supreme Court held that Section 1089 satisfied *Lemon's* three-pronged test for determining compliance with the Establishment Clause. 972 P.2d at 611-16. The court found that Section 1089 furthered the secular purpose of expanding the educational options available to Arizona schoolchildren and assuring the continued financial health of private schools, which in turn furthered the State's overall educational goals by relieving tax burdens, producing healthy competition for public schools, and making quality education available to all children. *Id.* at 611-12. The court also concluded that Section 1089 did not have the principal effect of furthering religion because 1) the tuition tax credit was "one of an extensive assortment of tax-saving mechanisms available as part of a 'genuine system of tax laws,'" *id.* at 613 (quoting *Mueller*, 463 U.S. 388, 396 n.6); 2) it was available to a very broad class of recipients – all taxpayers who were willing to

[5] Although the Arizona Supreme Court evaluated the original version of Section 1089, the Legislature's minor amendments after its enactment do not affect the constitutional analysis.

contribute to an STO – and was therefore neutral, *id.*; and 3) it provided multiple layers of private choice that were "completely devoid of state intervention or direction" and its assistance to sectarian schools was therefore indirect and attenuated, *id.* at 614.

The Ninth Circuit held that *Kotterman* did not bar this litigation because it involved a facial challenge whereas Respondents' allegations were based "on evidence not available prior to Section 1089's implementation." Pet. App. 17a n.9.[6] But the Ninth Circuit based its summary dismissal of *Kotterman* on its incorrect reading of the Arizona court's interpretation of Section 1089, and it did not attempt to explain the reasons for the significant analytical differences between its decision and *Kotterman*.

The Ninth Circuit's determination that the Legislature's stated purpose could be shown to be a pretense if "in practice STOs are permitted to restrict the use of their scholarships to use at certain religious schools" (Pet. App. 19a), is directly contrary to *Kotterman's* finding that Section 1089 was enacted for a secular purpose. The language of Section 1089 has always specifically provided that an "STO shall provide educational scholarships or tuition grants to students without limiting availability to only students of

[6] Petitioner is not requesting review of the court of appeals' determination that res judicata did not bar Respondents' complaint because it is critical that the Court correct the court's erroneous Establishment Clause analysis, which affects not only Section 1089 but other tax credits.

one school." *Compare* A.R.S. § 43-1089(G)(3) *with* 1997 Ariz. Sess. Laws, ch. 48, § 2. The Arizona Supreme Court was aware of that language because it referred to it twice in its opinion. *Kotterman*, 972 P.2d at 610, 614. The Arizona Supreme Court correctly concluded that the Legislature had a secular purpose for enacting Section 1089 even though it allows STOs to limit scholarships to students attending only religious schools because it provides more educational options to Arizona schoolchildren.

The Ninth Circuit's conclusion that Respondents' allegations demonstrated that Section 1089 had the primary effect of favoring religion is also directly contrary to *Kotterman's* holding that Section 1089 was a neutral program of private choice. In reaching its conclusion, the Ninth Circuit erroneously found that a tax credit is constitutionally distinct from a tax deduction and failed to acknowledge that because Arizona parents and schoolchildren enjoy a wide range of educational options, a reasonable observer of Section 1089 in practice would not perceive that parental choices were skewed toward religious schools.

2. In 2009, the Arizona Court of Appeals held that Arizona's corporate tuition tax credit in A.R.S. § 43-1183 did not violate the Establishment Clause. *Green*, 212 P.3d at 105. Like Section 1089, A.R.S. § 43-1183 establishes a dollar-for-dollar income tax credit for contributions to an STO, which A.R.S. § 43-1183 defines virtually the same as Section 1089

does.[7] The tax credit in A.R.S. § 43-1183 is available to corporations that contribute to STOs that provide scholarships to students whose family income does not exceed a certain specified amount. The court of appeals held that the Legislature had a valid secular purpose for enacting A.R.S. § 43-1183 that included its express purpose of improving education and its apparent purpose of providing greater educational choice to "parents who probably could not otherwise afford to send their children to a private school." *Green*, 212 P.3d at 101. The court also held that A.R.S. § 43-1183 did not have the effect of advancing religion "[g]iven the neutrality of the statute, and the multiple layers of private choice that stand between the legislature's decision to provide a corporate tax credit and the eventual acceptance of scholarship funds by sectarian schools." *Id.* at 104.

The plaintiffs alleged that "religious STOs [were] responsible for distributing more than 70% of the scholarships available through [the corporate tuition tax] program" and argued that Section 43-1183

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[7] Under A.R.S. § 43-1183(R)(2), an STO is a charitable organization in Arizona that meets the following requirements:

> (a) Is exempt from federal taxation under § 501(c)(3) of the internal revenue code and that allocates 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.
>
> (b) Provides educational scholarships or tuition grants to students without limiting availability to only students of one school.

violated the Establishment Clause because it permitted STOs and sectarian schools to award scholarships on a religiously discriminatory basis. *Id.* at 103-04. The court disagreed, noting that *Kotterman* upheld the constitutionality of Section 1089, which contained "the same definition for STOs and qualified schools" and that "any religious discrimination that may take place under § 43-1183 is performed by the qualified schools in admitting their students and by the STOs in administering the scholarship funds – not by the State of Arizona." *Id.* at 104.

The Ninth Circuit apparently recognized the conflict between its decision and *Green* but found *Green's* analysis unpersuasive. Pet. App. 45a n.18. This Court should grant certiorari to resolve the conflict between the Arizona courts and the Ninth Circuit.

The Court's review is warranted because without it, thousands of Arizona schoolchildren stand to lose the benefit of scholarship money from Section 1089 and similar tax credit programs in Arizona. The Court should also grant review to remove the constitutional cloud that the Ninth Circuit has cast on existing tuition tax credit programs in other States[8]

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[8] *See* Ga. Code Ann. § 20-2A-1; Iowa Code § 422.11S; 72 Pa. Conf. Stat. §§ 8701-F to 8708-F; and R.I. Gen. Laws § 44-62-2.

and legislative efforts to introduce tuition tax credit programs in other States.[9]

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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[9] *See* Pet. App. 88a n.1 (O'Scannlain, J., dissenting from denial of rehearing en banc) (listing legislative efforts to adopt tuition tax credit programs in four States in the Ninth Circuit).

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